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FACULTY COMMENT

Assassinating Saddam: A Post-War View From International Law

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As the Gulf crisis turned into the Gulf War, Americans looked with renewed interest to quick-fix solutions. Predictably, one of the most popular solutions centered on assassination of the offending figure, Iraq's Saddam Hussein. Whether or not such high-level political killing would have been in the overall best interests of the United States or its allies is certainly a vital question, but one I will now leave for others. The question to be considered here asks only if such an assassination would have been permissible under international law.

Understood as tyrannicide (killing a tyrant) *within* a country, assassination has often been accepted as lawful. Support for such a form of assassination can be found in Aristotle's *Politics*, Plutarch's *Lives*, and Cicero's *De Officiis*. According to Cicero:

> There 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 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.[1]

The 18th Century Swiss scholar, Emmerich Vattel, in his *The Law of Nations*, recalls "the essential object of civil society" is to "work in concert for the common good of all." Hence, he inquires:

> Could the society make use of its authority to deliver irrevocably itself and all its members to the discretion of a cruel tyrant? Surely not, since it would lose all rights of its own if it undertook to oppress any part of the citizens. When, therefore, it confers the supreme and abso-

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1. CICERO, DE OFFICIIS (*cited in* THE TERRORISM READER 16 (W. Laqueur ed. 1978)).

> lute power of government without express reserve, there is necessarily an implied reserve that the sovereign will use that power for the welfare of the people and not for their destruction. If he makes himself the scourge of the State, he disgraces himself; he becomes no better than a public enemy, against whom the Nation can and should defend itself. And, if he has carried his tyranny to the extreme, why should the life itself, of so cruel and faithless an enemy, be spared?[2]

Even before Vattel, the English poet, John Milton accepted the argument of tyrannicide in justifying the execution of Charles I. According to Milton's *Tenure of Kings and Magistrates*, "[t]yrannicide, that is the killing of a tyrant, is not only lawful, but also laudable."[3] Of course, as a practical matter, the criteria that can clearly distinguish tyrannical from non-tyrannical rule are very difficult to identify. When John Wilkes Booth leaped onto the stage at Ford Theater after assassinating President Lincoln, he shouted: "Sic semper tyrannis." Thus always to tyrants!

Without appropriate criteria of differentiation, judgments concerning tyrannicide are inevitably personal and subjective. The hero of Albert Camus' *The Just Assassins*, Ivan Kaliayev, a fictional adaptation of the assassin of the Grand Duke Sergei, says that he threw bombs, not at humanity, but at tyranny. How shall he be judged? Seneca is reputed to have said that no offering can be more agreeable to God than the blood of a tyrant. But, who is to determine authoritatively that a particular leader is indeed a tyrant? Dante confined the murderers of Julius Caesar to the very depths of hell, but the Renaissance rescued them and the Enlightenment even made them heroes. In the 16th century, tyrannicide became a primary issue in the writings of the Monarchomachs, a school of mainly French Protestant writers. The best-known of their pamphlets was *Vindiciae contra Tyrannos*, published in 1579 under the pen name of Junius Brutus.[4]

The most well-known British works on tyrannicide are George Buchanan's *De Jure Regni Apud Scotos*, published in London in 1579, and Saxby's *Killing No Murder*, which appeared in 1657. Juan de Mariana, in *The King and the Education of the King*, says:

> [B]oth the philosophers and theologians agree, that the prince who seizes the state with force and arms, and with no legal right, no public, civic approval, may be killed by anyone and deprived of his life and position. Since he is a public enemy and, afflicts his fatherland with every evil, since truly, and in a proper sense, he is clothed with the title and character of tyrant, he may be removed by any means and gotten rid of by as much violence as he used in seizing his power.[5]

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2. E. VATTEL, THE LAW OF NATIONS 18 (1844) (*cited in* BOOK I, C. Fenwick trans., Carnegie Institution of Washington, at 24, (1916)).

3. J. MILTON, TENURE OF KINGS AND MAGISTRATES (1648).

4. The pen name, Junius Brutus, was probably Duplessis Mornay, a political advisor to the King of Navarre.

5. J. DE MARIANA, THE KING AND THE EDUCATION OF THE KING (1699).

In the 19th century, a principle of granting asylum to those whose crimes were "political" was established in Europe and in Latin America. This principle is known as the political offense exception to extradition. A specific exemption from the protection of the political offense exception — in effect, an exception to the exception — was made for the assassins of heads of state and for attempted regicides. At the 1937 Convention for the Prevention and Repression of Terrorism, the murder of a head of state, or of any family member of a head of state, was formally designated as a criminal act of terrorism.[6]

The so-called "attentat"[7] clause, which resulted from an attempt on

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6. For current conventions in force concerning terrorism, see Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, *reprinted in* 13 I.L.M. 43 (1974) (entered into force for the United States, Feb. 20, 1977); Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95; Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 (entered into force for the United States, Dec. 4, 1969); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), Sept. 23, 1971, 24 U.S.T. 564 (entered into force for the United States on Jan. 26, 1973); International Convention Against the Taking of Hostages, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 46) at 245, U.N. Doc. A/3446 (1979) (entered into force for the United States, Dec. 7, 1984); European Convention on the Suppression of Terrorism of Jan. 27, 1977, Europ. T.S. 90. On December 9, 1985, the U.N. General Assembly unanimously adopted a resolution condemning all acts of terrorism as "criminal." Never before had the General Assembly adopted such a comprehensive resolution on this question. Yet, the issue of particular acts that actually constitute terrorism was left largely unaddressed, except for acts such as hijacking, hostage-taking, and attacks on internationally protected persons that were criminalized by previous custom and conventions. *See* United Nations Resolution on Terrorism, G.A.Res. 40/61, 40 U.N. GAOR Supp. (No. 53) at 301, U.N. Doc. A/4053 (1985).

7. The "attentat" clause, included in many treaties, provides that the killing of the head of a foreign government or a member of his family is not to be considered a political offense. Some treaties extend the exclusion to any murder or to attempts on any life. Here, the political offense exception to extradition is excluded wherever any killing has taken place. In the absence of an attentat clause in a particular treaty, a state may refuse to extradite persons requested by another state on the grounds that the crime in question was political.

According to the European Convention on Extradition, Dec. 13, 1957, Europ. T.S. 24, 359 U.N.T.S. 273, ¶ 3, "The taking or attempted taking of the life of a Head of State or a member of his family shall not be deemed to be a political offense for the purposes of this Convention."

Most extradition treaties deny extradition of persons accused or convicted of relative political offenses (i.e., offenses involving one or several common crimes connected with a political act). Assassination is an example of such an offense. The courts of particular states solve the problem of applicability of nonextradition of political criminals by ascertaining the degree of connection between the common crime and the political act. Whether or not the degree of connection required for the act is to be regarded as political, and thus nonextraditable, depends entirely upon the particular test adopted by each individual state.

There are three fundamental tests here: (1) the "incidence test" of Anglo-American law, which requires that the crime be part of, or incidental to, a political revolt or disturbance (although Anglo-American decisions involving East European refugees have indicated that extradition will be denied even in the absence of a political revolt or disturbance when the

the life of French Emperor Napoleon III, and later widened in response to the assassination of President James Garfield in the U.S., limited the political offense exception in international law to preserve social order. Murder of a head of state or members of the head of state's family was thus designated as a common crime, and this designation has been incorporated into article 3 of the 1957 European Convention on Extradition. Yet, we are always reminded of the fundamental and ancient right to tyrannicide, especially in the post-Holocaust/post-Nuremberg world order. It follows that one could argue persuasively under international law that the right to tyrannicide is still overriding and that the specific prohibitions in international treaties are not always binding.

From the standpoint of international law, assassination can become an international crime (possibly an instance of terrorism) when it is carried out against a state official, by a national of the same state and within the territory of the state, only where the assassin flees to another state and requests for extradition are issued. If, however, the assassination is carried out by a national of another state, whether the location of the killing is the territory of the victim, the territory of the perpetrator, or some other state altogether, it is immediately a matter of international law. Although such an assassination is almost always a crime under international law, it could conceivably be an instance of a very limited right of "humanitarian intervention." For this to be the case, it would be necessary, *inter alia*, that the victim was guilty of egregious crimes against human rights, that these crimes were generally recognized and widely-documented, and that no other means existed to support the restoration of basic human rights.

To this point we have been dealing with assassination as tyrannicide (i.e., with the killing of a head of state or high official by a national of the same state). We have seen that support for such forms of assassination can be found in certain established traditions in political philosophy but that there is virtually no support in the prevailing international law of extradition. Although some treaties are vague enough that such assassination might be interpreted as a political offense, and therefore not subject to extradition requests, others subscribe to the attentat principle which provides a specific exception to the exception — cases which involve the assassination of heads of state or their families.

Another possible line of support for assassination as tyrannicide can

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possibility of political persecution can reasonably be demonstrated), (2) the "political objective test" of French law, which requires that the crime be directed against the political organization or structure of the state; and (3) the "political motivation test" of Swiss law, which requires that the crime be assessed in light of the predominant surrounding circumstances and especially the motivations of the offender.

A number of treaties in force stipulate that, for purposes of extradition, political offenses shall not include crimes against humanity, certain crimes of war identified in the 1949 Geneva Conventions and comparable violations of the laws of war not already provided for in these conventions.

be extrapolated from the current international law of human rights.[8] Despite the existence of a well-developed and precisely codified regime of human rights protections, victims of human rights abuse in particular states have little, if any, redress under international law. Indeed, in the absence of an effective centralized enforcement capability, international law relies upon insurgency[9] and humanitarian intervention[10] as the ultimate guarantors of essential human rights. It follows that where humani-

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8. *See* Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953); Convention Relating to the Status of Refugees and Stateless Persons, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954). This Convention should be read in conjunction with the Protocol Relating to the Status of Refugees, adopted by the General Assembly on Dec. 16, 1966, and entered into force Oct. 4, 1967. *See also* 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 for the United States, July 7, 1976); Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res 1514 (XV), 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 194 (entered into force Jan. 3, 1976), *reprinted in* 5 I.L.M. 352 (1966); International Convention on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, G.A.Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967) (entered into force Mar. 23, 1976), *reprinted in* 6 I.L.M. 368 (1967); 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) (entered into force July 18, 1978), *reprinted in* 9 I.L.M. 673 (1970). The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights (together with its Optional Protocol of 1976), and the International Covenant on Economic, Social and Cultural Rights — known collectively as the International Bill of Rights — serve as the touchstone for the normative protection of human rights.

9. International law makes clear that not all forms of insurgency are impermissible (i.e., terroristic). Although the U.N. General Assembly and specially constituted U.N. committees have repeatedly condemned acts of international terrorism, they exempt those activities that derive from "the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations." This exemption, from the 1973 General Assembly Report of the Ad Hoc Committee on International Terrorism, is corroborated by Article 7 of the General Assembly's 1974 Definition of Aggression. In this connection, see *Report of the Ad Hoc Committee on International Terrorism*, 28 U.N. GAOR Supp. (No. 28) at 355, U.N. Doc. A/9028 (1973); Resolution on the Definition of Aggression, Dec. 14, 1974, G.A.Res. 3314 (XXIX), 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1975) *reprinted in* 13 I.L.M. 710 (1974). Article 7 refers to the Oct. 24, 1970, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States. G.A.Res. 2625 (XXV), 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1971), *reprinted in* 9 I.L.M. 1292 (1970). For a comprehensive and authoritative inventory of sources of international law concerning the right to use force on behalf of self-determination, see Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments, E/CN.4/Sub.2/404/Rev.1 (1981).

10. *See generally* F.TESON, HUMANITARIAN INTERVENTION (1988); Nanda, *Humanitarian Military Intervention*, 23 WORLDVIEW, Oct. 1980, at 23.

tarian intervention cannot be reasonably expected, individuals within states have only themselves to provide for proper enforcement of their codified human rights.

What about "humanitarian intervention" and assassination? Can agents of one state legally assassinate officials of other states under the rules of humanitarian intervention? Or is such assassination always a *per se* violation of international law?

To a certain extent, the answers to these questions depend upon the absence or presence of a condition of belligerency (war) between the states involved.[11] In the absence of this condition, assassination of political figures in another state may represent a crime of aggression or terrorism. Regarding aggression, Article 1 of the 1974 U.N. Resolution on the Definition of Aggression defines this crime, 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."[12] In view of the binding rule of nonintervention codified in the Charter that would normally be violated by transnational assassination, such killing would generally qualify as aggression. Moreover, assuming that transnational assassination constitutes an example of "armed force," the criminalization, as aggression, of such activity may also be extrapolated from article 2 of the Definition of Aggression: "The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* 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 . . . ."[13]

Let us now turn to the status of transnational assassination under international law when a condition of war exists between the states in-

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11. Under international law, the question of whether or not a state of war actually exists between states is somewhat ambiguous. Traditionally, it was held that a formal declaration of war was a necessary condition before "formal" war could be said to exist. Hugo Grotius, for example, divided wars into declared wars, which were legal, and undeclared wars, which were not. (*See* GROTIUS, THE LAW OF WAR AND PEACE, BK. III, ch. iii, V and XI). By the beginning of the twentieth century, the position that war obtains legitimacy only after a conclusive declaration of war by one of the parties was codified by Hague Convention III. More precisely, this convention stipulated that hostilities must not commence without "previous and explicit warning" in the form of a declaration of war or an ultimatum. (*See* Hague Convention III Relative to the Opening of Hostilities, 1907, 3 NRGT, 3 series, 437, article 1.) Currently, of course, declaration of war may be tantamount to declarations of international criminality (because of the criminalization of aggression by authoritative international law), and it could be a jurisprudential absurdity to tie a state of war to formal declarations of belligerency. It follows that a state of war may exist without formal declarations, but only if there is an armed conflict between two or more states and/or at least one of these states considers itself at war.

12. *Resolution on the Definition of Aggression*, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1975), *reprinted in* 13 I.L.M. 710 (1974).

13. *Id.*

volved. According to article 23(b) of the regulations annexed to the fourth Hague Convention 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."[14] The U.S. Army Field Manual has incorporated this prohibition authoritatively linking Hague article 23(b) to assassination at 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.' "[15]

From the point of the convergence between international and U.S. municipal law,[16] the Hague Convention IV is a treaty of the United States that has received the advice and consent of the Senate and is, therefore, the "supreme law of the land" under article 6 of the Constitution (the "Supremacy Clause"). Indeed, even if Congress were to enact a statute that expressly repealed the rule found at Hague Regulation article 23(b), that would not permit U.S. officials to legalize assassinations. This is because, among other things, the Nuremberg Tribunal (1945) expressly ruled that the obligations codified at the Hague Regulations had entered into customary international law as of 1939.[17]

It appears, then, impossible for any state to legalize assassination, and the leaders of any recalcitrant state would seem to be subject to prosecution (as *hostes humani generis*, "common enemies of mankind") in

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14. The Hague Convention IV, Oct. 18, 1907, art. 23(b), 36 Stat. 2199, T.S. No. 536, *reprinted in* 2 AM. J. INT'L L. 43 (1908).

15. U.S. ARMY FIELD MANUAL 27-10, ¶ 31.

16. There are many sources that point to the convergence of national and international law. According to article 6 of the Constitution, "All treaties made . . . under the authority of the United States shall be the supreme law of the land . . . ." Although article 6 refers exclusively to treaties, the process of *incorporation* has also been extended by several decisions of the Supreme Court to international law in general. As this means that all of the international rules against assassination are now the law of the United States, any attempt to "modify" prohibitions against assassination would also appear to be in violation of American municipal law.

Those who would ask for a broader "right" of assassination should also be reminded that the president of the United States has taken an oath required by article 2, section 1, clause 7 of the Constitution "to preserve, protect and defend the Constitution of the United States." Article 6 and pertinent Supreme Court decisions signal that the President is sworn to uphold the international law prohibitions concerning assassination. Similarly, article 2, section 3 requires the President to "take care that the laws be faithfully executed," a charge that normally extends to respect for the lives of public officials in other states, even those we may find objectionable.

17. *See* Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95 (I), U.N. Doc. A/236 (1946), at 1144. From the point of view of the United States, the Nuremberg obligations are, in a sense, doubly binding. This is the case because these obligations represent not only current normative obligations of international law, but also the higher law obligations engendered by the American political tradition. By its codification of the principle that fundamental human rights are not an internal question for each State, but an imperious postulate of the international community, the Nuremberg obligations represent a point of perfect convergence between the law of nations and the jurisprudential/ethical foundations of the American Republic.

any state that claimed appropriate jurisdiction.[18] Significantly, U.S. law recognizes and reinforces these obligations under international law. According to paragraph 498 of *The U.S. Army Field Manual*, any person, whether a member of the armed forces or a civilian, who commits an act that constitutes a crime under international law, is responsible for the crime and is liable to punishment.[19] Paragraph 501 of the same manual, based upon the well-known judgment of Japanese General Yamashita, stipulates that any U.S. government official who had actual knowledge, or should have had knowledge, that troops or other persons under his control were compliant in war crimes and failed to take necessary steps to protect the laws of war was himself guilty of a war crime.[20] Finally, paragraph 510 denies the defense of "act of state" to such alleged criminals by providing that, though a person who committed an act constituting an international crime may have acted as head of state or as a responsible government official, he is not relieved, thereby, from responsibility for that act.[21]

These facts notwithstanding, there are circumstances 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 are those involving genocide and related crimes against humanity.[22] If, after all, the assassination of a

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18. The principle of universal jurisdiction is founded upon the presumption of solidarity between States in the fight against crime. It is mentioned in: CORPUS JURIS CIVILIS II 265 (1932); GROTIUS, DE JURE BELLI AC PACIS I, ch. 20; VATTEL, LE DROIT DES GENS I 101 (1844). 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 Aug. 12, 1949: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Oct. 21, 1950, 75 U.N.T.S. 31, 6 U.S.T. 3114, T.I.A.S. No. 3362; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked in Armed Forces at Sea, Oct. 21, 1950, 75 U.N.T.S. 85, 6 U.S.T. 3217, T.I.A.S. No. 3363; Geneva Convention Relative to the Treatment of Prisoners of War, Oct. 21, 1950, 75 U.N.T.S. 135, 6 U.S.T. 3316, T.I.A.S. No. 3364; Geneva Convention Relative to the Protection of Civilians in Time of War, Oct. 21, 1950, 75 U.N.T.S. 287, 6 U.S.T. 3516, T.I.A.S. No. 3365. This treaty unambiguously imposes upon the High Contracting Parties the obligation to punish certain grave breaches of their rules, regardless of where the infraction was committed or the nationality of the authors of the crimes. *See* Convention No. 1, art. 49; Convention No. 2, art. 50; Convention No. 3, art. 129; Convention No. 4, art. 146. In further support of universality for certain international crimes, see II M.C. BASSIOUNI, INTERNATIONAL EXTRADITION IN U.S. LAW AND PRACTICE, ch. 6 (1983). *See also* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, (Tent. Draft No. 5, 1984); 18 U.S.C. § III 6(c) (1982).

19. U.S. ARMY FIELD MANUAL 27-10, *supra* note 15, ¶ 498.

20. *Id.* ¶ 501.

21. *Id.* ¶ 510.

22. *See* Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). The Convention was submitted to the Senate by President Harry S. Truman in June 1949. The Convention languished in that body until Feb. 19, 1986, when 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,

Hitler or a Pol Pot could save thousands or even millions of innocent people from torture and murder, it would be a far greater crime not to attempt such an assassination than to actually carry it out.

What about Saddam? Our *real* objection to Saddam Hussein had little or nothing to do with his brutal pre-war reign of terror in Iraq. When Saddam first destroyed large numbers of Kurds and other allegedly dissident Iraqis, there was barely a murmur in Washington. Indeed, the Bush administration and certain members of Congress *deliberately* overlooked these monstrous violations of human rights in the presumed interests of an American *Realpolitik*.

Why, precisely, might we have sought to rid the world of this particular tyrant? Since "humanitarian intervention" did not apply, what grounds for assassination, if any, might have existed under international law?[23] To answer this question authoritatively, we should return to the explicitly stated pre-war goals of the United States in dealing with Iraq's aggression. As outlined by Secretary of State Baker before the Senate Foreign Relations Committee, they were:

> FIRST, the immediate, complete, and unconditional withdrawal of all Iraqi forces from Kuwait as mandated in U.N. Security Council Resolution 660;
>
> SECOND, the restoration of Kuwait's legitimate government;
>
> THIRD, the protection of the lives of American citizens held hostage by Iraq, both in Iraq and in Kuwait; and
>
> FOURTH, a commitment to the security and stability of the Persian gulf.[24]

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and signed by President Reagan on Nov. 4, 1988. This legislation amends the Criminal Code of the United States 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. This follows the practice of implementing legislation already well-established with respect to other categories of crimes under international law.

23. Ironically, the United Nations, which is responsible for most of the post-Nuremberg codification of the international law of human rights, has sometimes been associated with increased *limits* on the doctrine of humanitarian intervention. These limits, of course, flow from the greatly reduced justification for the use of force in the Charter's system of international law, especially the broad prohibition contained in article 2(4). Yet, while it cannot be denied that humanitarian intervention might be used as a pretext for naked aggression, it is also incontestable that a "too-literal" interpretation of 2(4) would summarily destroy the entire corpus of normative protection for human rights — a corpus that is coequal with "peace" as the central objective of the Charter. Moreover, in view of the important nexus between peace and human rights, a nexus in which the former is very much dependent upon widespread respect for human dignity, a "too-literal" interpretation of 2(4) might well impair the prospects for long-term security. It must be widely understood that the Charter does not prohibit all uses of force and that certain uses are clearly permissible in pursuit of basic human rights. Notwithstanding, its attempt to bring greater centralization to legal processes in world politics, the Charter system has not impaired the long-standing right of individual States to act on behalf of the international legal order. In the continuing absence of effective central authoritative processes for decision and enforcement, the legal community of humankind must continue to allow, indeed must continue to *require* humanitarian intervention by individual States.

These goals were, without doubt, entirely legitimate and well-grounded in the expectations of international law. At the same time, the U.N. Charter provides a variety of institutional *collective* remedies that might have ensured Baghdad's compliance, including of course, the large-scale military operations that were ultimately used. And even if the U.S. and its unprecedented coalition of allies had decided to resort to "self-help" remedies outside the bounds of the United Nations, we could, under certain conditions, have done so lawfully through appropriate measures of "self-defense" (i.e., *without* resorting to assassination).

In the final analysis, there is only one scenario wherein the U.S.-ordered assassination of Saddam Hussein *could* have been consistent with international law. This is the case in which Saddam's recognized and documented crimes against Kuwait could not have been punished and corrected by U.N. action or by U.S.-led measures of "collective self-defense." In such a case, where the only alternative to assassination would have been to leave the aggressor undisturbed in Kuwait, a compelling brief for killing the Baghdad tyrant might have been based on the following "general principle of law recognized by civilized nations:"[25] *Nullum crimen sine poena*; "no crime without a punishment." Although it would normally be unjust to deal with Saddam by assassination, it would be even more unjust to let his wrongs go unpunished.[26]

Of course, in making this argument, the egregious nature of Saddam Hussein's wrongs would have been critical to justifying assassination. Moreover, recalling the common argument that assassinating Hitler or Pol Pot would have been law-enforcing rather than law-violating, the brief must also have been based on the expectation that leaving Saddam alive would almost certainly have resulted in additional crimes against peace (aggression) and crimes against humanity. Needless to say, logi-

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Committee, 101st Cong., 2d. Sess., (Oct. 17, 1990).

25. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38, 59 Stat. 1031, T.S. No. 993, *reprinted in* 39 AM. J. INT'L L. 190 (1945).

26. Such a "general principle of law" would have the character of a peremptory or *jus cogens* norm under international law. According to article 53 of the Vienna Convention on the Law of Treaties, ". . . 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. According to article 53 of the Vienna Convention, "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." 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." *See* Vienna Convention on the Law of Treaties, May 22, 1969, *opened for signature*, May 23, 1969; 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).

cally, there is no possible way in which such expectations could have been defended "beyond a reasonable doubt," but we now know that they would certainly have been right on the mark.

Even if a compelling jurisprudential argument could have been made for assassinating Saddam Hussein, it is by no means clear that such an action would have in any way been useful. It follows that international law must always be an essential component of any decision on such controversial remedies, but that it must also be balanced with appropriate tactical and strategic considerations.