

PROSECUTING IRAQI CRIMES UNDER INTERNATIONAL LAW: AN AMERICAN CONSTITUTIONAL IMPERATIVE

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The argument of this essay has taken on a note of irony since the conclusion of the UN-authorized Gulf War. This argument points toward a special responsibility of the United States to prosecute Iraqi crimes committed against international law — a responsibility based upon this country's Constitutional expectations and upon antecedent expectations of natural law — but this argument now comes face-to-face with: (1) U.S. unwillingness to offer anything more than the most marginal forms of humanitarian assistance to still-endangered Kurdish and Shiite populations within Iraq; and (2) increasing evidence that, at least since 1982, the United States helped build the Iraqi war machine.¹ Yet another irony of the ongoing disregard for Iraqi crimes is the global community's declared willingness to proceed with tribunals in former Yugoslavia.² Our Constitu-

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1. The Reagan administration allegedly allowed Saudi Arabia to secretly provide U.S.-made bombs to Iraq in 1986. Murray Waas & Douglas Frantz, *Saudi Arms Link to Iraq Allowed*, L.A. TIMES, April 18, 1992, at A1. Citing classified and unclassified documents, the administration gave tacit approval to transfers from the mid-1980s until 1991 without notifying Congress as required by the Arms Export Control Act. *Id.* See also Anthony Lewis, *Who Fed This Caesar?*, N.Y. TIMES, March 15, 1992, at E17 (disclosing far more extensive U.S. assistance to Iraq). For documentation of U.S. indifference to genocide and genocide-like crimes by Iraq against Kurdish populations, see STAFF OF SENATE COMM. ON FOREIGN RELATIONS, CIVIL WAR IN IRAQ, S. REP. NO. 27, 102nd Cong., 2d Sess. 28 (1991); *Mass Killings in Iraq: Hearings Before the Senate Comm. on Foreign Relations*, 102nd Cong., 2d Sess. (1992) (statement by Claiborne Pell, Chairman, Committee on Foreign Affairs).

2. On February 22, 1993, the United Nations Security Council voted unanimously to set up an international tribunal to prosecute individuals who committed war crimes in former Yugoslavia. Anthony Goodman, *U.N. Decides to*

tional obligations have been flagrantly disregarded in the matter of Iraqi crimes of war, crimes against peace and crimes against humanity; the American imperative to further inhibit and prosecute these crimes is now altogether overriding.

In the aftermath of the Gulf War, it is up to the United States to take the initiative in prosecuting Iraqi crimes under international law. Such prosecution would represent an appropriate extension of our constitutional Bill of Rights to non-U.S. nationals who were victims of the Baghdad regime. Significantly, the Bill of Rights — together with the Declaration of Independence and the balance of the Constitution — codify a social contract that sets limits on the power of *any* government. As justice, which is based on natural law, binds all human society, the privileges and immunities described by the Bill of Rights cannot be reserved only to Americans.

At the end of World War II, an authoritative agreement was signed by the victorious allied powers that opened the way for prosecution of major Nazi war criminals. Known as the London Charter of August 8, 1945, it set the stage for precedent-making legal proceedings before a special military tribunal at Nuremberg. Today, as the world still recoils in horror at the evidence of major Iraqi crimes under international law — including crimes of war, crimes against peace, crimes against humanity and crimes against the environment³ — it is time for

Set Up Yugoslav War Crimes Tribunal, Reuters, Feb. 22, 1993, available in LEXIS, World Library, Allwld File. This will be the first such tribunal since the Nuremberg tribunal was set up in 1945 to try former Nazi leaders. *Id.* The Bosnian government has begun its own trials of war criminals. Two Serb soldiers, Borislav Herak and Sretko Damjanovic, went on trial March 12, 1993 for war crimes including genocide, murder, rape and looting. Kurt Schork, *War Crimes Trial Opens in Sarajevo*, Reuters, March 12, 1993, available in LEXIS, World Library, Allwld File. While the author does not wish to minimize the importance or appropriateness of these tribunals, he contends that war crimes committed by the Iraqi military deserve the same scrutiny.

3. 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, art. 53, T.I.A.S. No. 3365, 75 U.N.T.S. 287. See Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, T.I.A.S. No. 9614, 16 I.L.M. 88 (1977). Saddam Hussein's "ecoterrorist" actions also violated a number of other pertinent instruments pertain to marine pollution. See International Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954, T.I.A.S. No. 4900, 327 U.N.T.S. 3; Internation-

another London-type charter and possibly for a Nuremberg-style trial.

Should Saddam Hussein and the surviving members of his Revolutionary Council continue to escape prosecution, justice would be defiled and international law would be left weak and tragically undermined. Between August 2, 1990, the date of Iraq's aggression against Kuwait, and October 29, 1990, the Security Council adopted ten resolutions explicitly condemning the Baghdad regime for multiple crimes of the gravest possible nature.⁴ These *crimen contra omnes*, crimes so terrible that they mandate universal enforcement, jurisdiction and responsibility, would cry out for legal prosecution even if there had been no authorizing resolutions by the UN Security Council. This is because the prohibition of the now documented barbarous activities of Iraq against Kuwaiti and other nationals in Kuwait, against coalition prisoners of war in Iraq and Kuwait and against noncombatant populations in Israel and Saudi Arabia is known as a "peremptory" rule of international law — an absolutely binding rule allowing no form of derogation whatsoever. 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."⁵ Even a treaty that might seek to criminalize forms

al Convention on Civil Liability for Oil Pollution Damage, Nov. 19, 1969, 973 U.N.T.S. 3, 9 I.L.M. 45; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Dec. 18, 1971, 1110 U.N.T.S. 57, 11 I.L.M. 284; Convention for the Prevention of Marine Pollution from Land Based Sources, June 4, 1974, 13 I.L.M. 352; Convention on Civil Liability for Oil Pollution Damage Resulting from the Exploration and Exploitation of the Seabed Mineral Resources, Apr. 30, 1978, reprinted in IGNACIO ARROYO, *INTERNATIONAL MARITIME CONVENTIONS* 556 (1991). For an overview of the problems involved in enforcing sanctions against environmental warfare, see Florentino P. Feliciano, *Marine Pollution and Spoliation of Natural Resources as War Measures: A Note on Some International Law Problems in the Gulf War*, 14 HOUS. J. INT'L L. 483 (1992).

4. See James A. Baker, *Why America Is in the Gulf*, Address Before the L.A. World Affairs Council (Oct. 29, 1990), in DEP'T ST. DISPATCH, Nov. 5, 1990, at 235.

5. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 8 I.L.M. 679.

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."⁶ 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."⁷

Significantly, the ten Security Council resolutions were issued *before* the most serious Iraqi crimes were uncovered. What does this imply? Our current system of international law 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,"⁸ derive from the very ancient principle: *nullum crimen sine poena* (no crime without a punishment). This is not to say, however, that the corollary principles of *nullum crimen sine lege* (not crime without a law) and *nulla poena sine lege* (no punishment without a law) should be rejected. The doctrine of *nullum crimen sine poena* can be abused where the definition of "crime" is left to ad hoc judgments of the public authority, i.e., where punishment is based upon effectively retroactive declarations of penal laws and/or where it is based upon a legal order wherein normative ambiguity makes it impossible to know in advance what conduct is criminal. But such abuse could not be an issue in the prosecution of pertinent Iraqi crimes, as the definitions of crimes of war, crimes against peace, crimes against humanity and crimes against the environment — the categories of criminal conduct that would form the indictment against Saddam Hussein and his Revolutionary Council — are already fixed, clear and established. Therefore, the principle of *nullum crimen sine poena*, and its corollaries, apply with particular clarity and urgency to the crimes of Saddam Hussein and his henchmen. Application of the corollary would then allow application of the mode and measurement of punishment identified by Immanuel

6. *Id.*

7. *Id.* art. 64.

8. ALESSANDRO PASSERIN D'ENTREVES, *NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* 110 (London, Hutchinson University Library 1951) (citing *THE TIMES* (Oct. 1, 1946)).

Kant, a classical supporter of "retributive justice," as follows: "This is the Right of Retaliation (*jus talionis*), and properly understood, it is the only Principle which in regulating a Public Court . . . can definitely assign both the quality and quantity of a just penalty."⁹

From the point of view of the United States, the Nuremberg obligations to bring major Iraqi criminals to trial are, in a sense, doubly binding. This is because these obligations represent not only current obligations under international law,¹⁰ but

9. IMMANUEL T. KANT, *PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE ON THE SCIENCE OF RIGHT* 196 (W. Hastie trans., 1974). On the retributive view, see generally 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: A PHILOSOPHICAL INTRODUCTION* 38-65 (1987); ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 363-97 (1981); JOHN KLEINIG, *PUNISHMENT AND DESERT* (Martinus Nijhoff ed., 1973); D.J. GALLIGAN, *The Return to Retribution in Penal Theory*, in *CRIME, PROOF AND PUNISHMENT: ESSAYS IN MEMORY OF SIR RUPERT CROSS* 154-57 (C. Tapper ed., 1981); IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* 67-110 (1989); TEN HONDERICH, *PUNISHMENT: THE SUPPOSED JUSTIFICATIONS* 22-51 (1969); GEORGE WHITECROSS PATON, *A TEXTBOOK OF JURISPRUDENCE* 320-26 (David P. Derham ed., 3rd ed. 1964); HEINRICH OPPENHEIMER, *THE RATIONALE OF PUNISHMENT* (Patterson Smith ed., 1975); MARY MARGARET MACKENZIE, *PLATO ON PUNISHMENT* 21-33 (1981); MARVIN HENBERG, *RETRIBUTION: EVIL FOR EVIL IN ETHICS, LAW AND LITERATURE* (1990).

10. In this connection, all states are also bound to cooperate in the apprehension and punishment of such criminals. See *Resolution on Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes against Humanity*, G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (1973). See, e.g., G.A. Res. 2840, U.N. GAOR, 26th Sess., Supp. No. 29, at 88, U.N. Doc. A/8429 (1971). See also G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (1973); G.A. Res. 96, U.N. Doc. A/64, at 188 (1946) (affirming that a refusal "to cooperate in the arrest, extradition, trial and punishment" of such persons is contrary to the United Nations Charter "and to generally recognized norms of international law."); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 1, 6 U.S.T. 3516, 75 U.N.T.S. 287 (discussing the responsibility of states toward Geneva law in particular and addressing the obligation of all signatories "to respect and to ensure respect" for the Conventions "in all circumstances."). Common article 146 of the Geneva Civilian Convention recognizes that "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed . . . grave breaches . . ." *Id.* art. 146, 75 U.N.T.S. at 386. See also Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73, G.A. Res. 2391, 23 U.N. GAOR, Supp. No. 18, U.N. Doc. A/7218 (1968).

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

The principle of a higher law is not just "any principle." It is one of the enduring and canonic principles in the history of the United States, resting on the acceptance of certain notions of right and justice that prevail because of their own obvious merit. Such notions, as the celebrated Blackstone declared in his COMMENTARIES ON THE LAWS OF ENGLAND, 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."¹¹

For Blackstone, writing in the Fourth Book ("Of Public Wrongs") of his Commentaries on the Laws of England, it was essential to transform these "eternal, immutable laws" into a lucid and systematic statement, one that could actually be used to operationalize abstract expectations.¹² As a starting point for understanding the common law, the Commentaries reveal that international law — or what Blackstone refers to as the "law of nations" — is "deducible" from natural law and therefore binding upon individual states.¹³ In this connection, each state is called upon "to aid and enforce the law of nations, as a part of the common law: by inflicting an adequate punishment upon offenses against that universal law. . . ."¹⁴ Here, the reference to international law as "a part of the common law" pertains directly to the argument at hand, i.e., that prosecution of Iraqi crimes is a distinct American Constitutional imperative.

When Thomas Jefferson set to work to draft the Declaration he drew freely upon Aristotle, Cicero, Grotius, Vattel, Pufendorf, Burlamaqui and John Locke's SECOND TREATISE OF GOVERNMENT.¹⁵ Asserting the right of revolution whenever government

11. 2 WILLIAM BLACKSTONE, COMMENTARIES *40.

12. 4 WILLIAM BLACKSTONE, COMMENTARIES, cp. 1.

13. 4 WILLIAM BLACKSTONE, COMMENTARIES *66-67.

14. 4 WILLIAM BLACKSTONE, COMMENTARIES *73.

15. JOHN LOCKE, TWO TREATISES OF GOVERNMENT (London, J.M. Dent & Sons, Ltd. 1955).

becomes destructive of "certain unalienable rights," the Declaration of Independence posits a natural order in a world whose laws are external to all human will and which are discoverable through human reason. Although, by the eighteenth century, scholars viewed God as having withdrawn from immediate contact with humankind and had transformed God instead into the 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. Therefore, both Locke and Jefferson deified nature and denatured God.

The law of nature (*ius naturale*), which forms the basis of the law of nations (*ius gentium*) or international law, always corresponds to that which is "good and equitable" (*bonum et aequum*). Stemming most conspicuously from the Decalogue and the Covenant Code of Israel, which are embedded in the American heritage and consciousness, the law of nature does not depend for its validity upon the will of God. This daring assertion, long associated with Grotius, had already been offered by the Schoolmen, though not by Aquinas directly. According to the Spanish Jesuit Francisco Suárez, in his 1612 treatise *ON THE LAWS (DE LEGIBUS AC DEO LEGISLATORE)*, many take the view that natural law does not depend upon the will of "any superior" and therefore, that command cannot be the essence of law:

These authors seem therefore logically to admit that natural law does not proceed from God as a law-giver, for it is not dependent on God's will, nor does God manifest Himself in it as a sovereign commanding or forbidding.¹⁶

Moreover, continues Suárez (in an argument that was taken up later by Grotius, a Protestant who rejected the extreme Calvinist view of the absolute sovereignty of God):

Even though God did not exist, or did not make use of His reason, or did not judge rightly of things, if there is in man such a dictate of right reason to guide him,

16. FRANCISCO SUÁREZ, *DE LEGIBUS, AC DEO LEGISLATORE* (1612), reprinted in 20 *THE CLASSICS OF INTERNATIONAL LAW* bk. II, at 189-90 (James B. Scott ed. & Gwladys L. Williams et al. trans., 1983).

it would have had the same nature of law as it now has.¹⁷

What, exactly, was this law of nature? It was, as Jefferson learned from Locke, the law of reason. According to Locke:

The state of nature has a law to govern it, which obliges every one: and *reason, which is that law*, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions¹⁸

In transgressing the law of Nature, the offender declares himself to live by another rule than that of *reason and common equity, which is that measure God has set to the actions of men*¹⁹

A criminal, who having renounced *reason, the common rule and measure God hath given to mankind*, hath, by the unjust violence and slaughter he hath committed on one, declared war against all mankind.²⁰

Because reason is the only sure guide to what God has given to humankind, reason is the only foundation of true law. This Lockean and Jeffersonian idea of a transcendent or higher law is expressed not only in the Declaration of Independence but also in the Bill of Rights. The Ninth Amendment, in stipulating that "the enumeration of certain rights in this Constitution shall not prejudice other rights not so enumerated,"²¹ reflects the belief in a law superior to the will of human governance. And this belief runs continuously from ancient times to the present moment.

The fragments of Heraclitus attest the antiquity of the idea of a higher law: "For all human laws are nourished by one, which is divine. For it governs as far as it will, and is sufficient for all, and more than enough."²² Such Heraclitean ideas,

17. *Id.* at 190.

18. LOCKE, *supra* note 15, at 119 (bk. II, ch. 2, para. 6) (emphasis added).

19. *Id.* at 120 (bk. II, ch. 2, para. 8) (emphasis added).

20. *Id.* at 122 (bk. II, ch. 2, para. 11) (emphasis added).

21. U.S. CONST. amend. IX.

22. M. MARCOVICH, HERACLITUS 91 (1967) (citing fragment number 23).

Editor's Note: Not all translators agree on this number. Some scholars cite this passage to Fragment number 2 or 114.

offered somewhere around 500 B.C. and entering into later Stoic philosophy, described one universal and rational law.

In 442 B.C., Sophocles elucidated the idea of true law as an act of discovery, challenging the superiority of human rule-making in *ANTIGONE*.²³ Exploring the essential conflict between claims of the state and of the individual conscience, this drama has since been taken to represent the incontestable supremacy of a higher law over man-made law. Later, in the nineteenth century, Thoreau, noting that men live with "too passive a regard for the moral laws," cited *ANTIGONE* as a stirring example of civil disobedience.²⁴

Building upon Plato's theory of ideas, which sought to elevate "nature" from the sphere of contingent facts to the realm of immutable archetypes or forms, Aristotle advanced in his *ETHICS* the concept of "natural justice."²⁵ He argued that a law that is not just is not law.²⁶ This position, of course, is in stark contrast to the opinion of the Sophists, who believed that justice is never more than an expression of supremacy and that it is what Thrasymachus calls, in Plato's *REPUBLIC*, "the interest of the stronger."²⁷

The Stoics, whose legal philosophy arose on the threshold of the Greek and Roman worlds, regarded nature itself as the supreme legislator in the moral order. Applying Platonic and Aristotelian thought to the emerging cosmopolis, they defined this order as one where humankind, through its divinely granted capacity to reason, can commune directly with the gods. And since this definition required an expansion of Plato's and Aristotle's developing notions of universalism, the Stoics articulated a division between *lex aeterna*, *ius naturale* and *ius humanum*. *Lex aeterna* is the law of reason of the cosmos, the *logos* which rules the universe. As an emanation of cosmic reason, human reason rules the lives of men. It follows that natural law partakes of eternal law, though it has a more limited range of application. Unlike the more elitist conception of Plato and, to a certain extent, even Aristotle, the Stoic idea of an

23. SOPHOCLES, *ANTIGONE* l. 450.

24. See HENRY DAVID THOREAU, *Civil Disobedience*, in *WORKS OF HENRY DAVID THOREAU* 415, 443-47 (Lily Owens ed., 1981).

25. ARISTOTLE, *ETHICS* bk. V, ch. 7.

26. *Id.* at bk. V, ch. 1.

27. PLATO, *The Republic*, in *THE BEST KNOWN WORKS OF PLATO* 11 (B. Jowett trans. 1942).

innate right reason presumed no divisions between peoples. Rather, in linking all persons with the cosmic order, the Stoic idea established the essential foundations of true universality.

Cicero, in *DE RE PUBLICA*, defined the state as a "coming together of a considerable number of men who are united by a common agreement about law and rights and by the desire to participate in mutual advantages."²⁸ This definition sheds light on the problems surrounding positivist jurisprudence, a legal philosophy that values a state's edicts as intrinsically just and obligatory. In a famous passage of *DE RE PUBLICA*, Cicero sets forth the classic statement on natural law:

True law is right reason, harmonious with nature, diffused among all, constant, eternal; a law which calls to duty by its commands and restrains from evil by its prohibitions It is a sacred obligation not to attempt to legislate in contradiction to this law; nor may it be derogated from nor abrogated. Indeed, by neither the Senate nor the people can we be released from this law; nor does it require any but oneself to be its expositor or interpreter. Nor is it one law at Rome and another at Athens; one now and another at a late time; but one eternal and unchangeable law binding all nations through all time.²⁹

But what is to be done when positive law is at variance with true law? The Romans had a remedy. They incorporated in this statute a contingency clause that man-made law could never abrogate obligations that are sacred. On several occasions, Cicero and others invoked this clause, or *jus*, against one statute or another. In this way, the written law of the moment, never more than an artifact of the civic community, remained subject to right reason.

Later, St. Augustine reaffirmed that temporal law must conform to the unchangeable eternal law, which he defined as "the reason or will of God (*ratio divina vel voluntas Dei*)." Aquinas continued this tradition of denying the status of law to prescriptions that are unjust (*lex iniusta non est lex*). "Human law," he wrote in the *SUMMAE*, "has the quality of law only insofar as it proceeds according to right reason; and in this

28. CICERO, XVI *DE RE PUBLICA DE LEGIBUS* bk. I, para. XXV.

29. *Id.* at bk. III, para. XXII.

respect it is clear that it derives from the eternal law. Insofar as it deviates from reason it is called an unjust law, and has the quality not of law, but of violence."³⁰

The concept of a higher law was widely integrated into medieval jurisprudential thought. According to John of Salisbury's *POLICRATICUS*, "there are certain precepts [of the law] which have perpetual necessity, having the force of law among all nations and which absolutely cannot be broken."³¹ Recognizing the idea that all political authority must be intrinsically limited, John noted that a prince "may not lawfully have any will of his own apart from that which the law or equity enjoins, or the calculation of the common interest requires."³² Natural law, then, exists to frustrate political injustice.

In the seventeenth and eighteenth centuries, the natural law doctrine was reaffirmed and secularized by Grotius. Reviving the Ciceronian idea of natural law and its underlying optimism about human nature, Grotius must be credited with liberating this idea from any remaining dependence on ecclesiastical or Papal interpretation.³³ Building upon the prior speculations of the Dominican Francisco de Vitoria, who had proclaimed a natural community of humankind and the universal validity of human rights, Grotius fashioned a bridge from the Christian *oecumene* of the Middle Ages to a new interstate society. In this connection, he strengthened the idea of a universally valid natural law transcending in obligation all human law, including the law of the sovereign state.³⁴

Unlike Machiavelli and Hobbes, therefore, Grotius did not reduce law to the will of the prince or of the state. Rather, while recognizing such will as a constitutive element in the international legal order, he understood that the binding quality of human edicts must be derived from the overriding totality of

30. SAINT THOMAS AQUINAS, *THE SUMMA THEOLOGICA* quest. 93, art. 3, reply obj. 2, reprinted in 20 GREAT BOOKS OF THE WESTERN WORLD 218 (Robert M. Hutchins ed. & Fathers of the Dominican Province trans., 1952)

31. JOHN OF SALISBURY, *POLICRATICUS* bk. IV, ch. 7.

32. *Id.* at bk. IV, ch. 2.

33. HUGO GROTIUS, *DE JURE BELLI AC PACIS* (THE LAW OF WAR AND PEACE) bk. 1, ch. I.

34. *Id.*

natural imperatives. Hence, he proceeded to reject *raison d'état* as a just cause for war.³⁵

This brings us directly to the conveyance of natural law ideas into American political theory, a transmittal — as we have already learned — that was preeminently the work of Locke's SECOND TREATISE ON CIVIL GOVERNMENT (1690). The codified American "duty" to revolt when governments commit "a long train of abuses and usurpations" flows from Locke's notion that civil authority can never extend beyond the securing of humankind's natural rights. Significantly, the motto that Jefferson chose for his seal was "Rebellion to Tyrants Is Obedience to God."

The English Bill of Rights, together with the Magna Carta of 1215 and the Petition of Right of 1628, represent three great documents of British constitutional liberty and the subsequent international law of human rights. The Magna Carta marks an important first step toward constitutional privilege and the subjection of kings to parliamentary will.³⁶ The Petition of Right, in the fashion of the American Declaration of Independence, begins with a long recital of grievances arising from royal abuse.³⁷ Like the Petition of Right, the Bill of Rights (1689) suggests, by its form, the American Declaration of Independence.³⁸ Moreover, certain clauses of the Bill of Rights of 1689 strongly resemble provisions of the American Bill of Rights of 1791.

The Declaration of the Rights of Man and the Citizen (1789), which preceded and became a part of the French constitutions of 1791, 1793 and 1795, is more sweeping than the

35. *Id.* at bk. 2, chs. XXI-XXIII.

36. An account of the original versions of the Charter, and of later editions and commentaries, appears in WILLIAM SHARP MCKECHNIE, *MAGNA CARTA*, pt. V (2nd ed., 1914). The final version, dated June 15, 1215, is reprinted in ARTHUR E. SUTHERLAND, *CONSTITUTIONALISM IN AMERICA* 17-32 (1st ed., 1965).

37. For the text of the Petition of Right, see ARTHUR E. SUTHERLAND, *CONSTITUTIONALISM IN AMERICA* 68-71 (1st ed. Blaisdell Pub. Co. 1965). Mentioning the Magna Carta, the Petition of Right condemns forced loans (identifying unlawful imprisonments made in the course of such exactions), complains of failure to discharge men from unjust imprisonment on *habeas corpus*, and — *inter alia* — opposes billeting of soldiers among the people against their will and courts martial against civilians who join with soldiers in misconduct (while others escape punishment for civilian offenses on the pretext, by royal officers, that they "were triable only by court-martial law.") *Id.*

38. *Id.* at 91-97.

American Bill of Rights.³⁹ Its substance, as in the cases of the earlier-discussed compacts and documents, may be taken as a source of the current human rights regime. Article 1 proclaims that men are equal in rights. Article 2 defines as fundamental the human rights of liberty, property, security and resistance to oppression. Article 3, which declares that "The basis of all sovereignty lies, essentially, in the Nation," rejects the royal doctrine that France was merely the personal property of its kings. Perhaps the broadest statement of human rights is contained in Article 4, which declares that, "Liberty is the capacity to do anything that does no harm to others. Hence, the only limitations on the individual's exercise of his natural rights are those which ensure the enjoyment of these same rights to all other individuals. These limits can be established only by legislation."

This theory of a higher law which is found, *inter alia*, in the Bill of Rights, is based on clarity, self-evidence and coherence. Its validity cannot be shaken by the presumed imperatives of geopolitics. To ignore the Bill of Rights in the wake of egregious international crimes would be illogical and self-contradictory because it would nullify the immutable and universal law of nature from which the first ten amendments derive.

To act against the principles of the Bill of Rights, therefore, is to act against the permanent jurisprudential foundations of the United States, foundations grounded in natural law. No exhortations of "prudence" can or should require us, as Americans, to set aside these principles. As noted by the Swiss scholar Emmerich de Vattel in the 1758 edition of *THE LAW OF NATIONS*, "No agreement can bind, or even authorize, a man to violate the natural law."⁴⁰

As we have seen, U.S. responsibility to act on behalf of Nuremberg obligations derives not only from the expectations of international law, but also from the higher-law foundations of American municipal law. In the strict jurisprudential sense, of course, the higher-law foundations of United States municipal

39. For the text of The Declaration of the Rights of Man and the Citizen, see *HUMAN RIGHTS SOURCEBOOK* 744-45 (Albert P. Blaustein et al. eds., Paragon House Publishers 1987).

40. *MONSIEUR DE VATTEL, LE DROIT DES GENS (THE LAW OF NATIONS)* bk. I, ch. IV, § 54.

law are not a distinct alternative to international legal norms, but rather an authoritative source of international law. According to Article 38(c) of the Statute of the International Court of Justice, international law derives, in part, from "the general principles of law recognized by civilized nations."⁴¹ Significantly, this means nothing less than the U.S. Bill of Rights represents an authoritative source of international legal norms. Indeed, contemporary international law displays an even more explicit debt to our Bill of Rights by identifying an "international bill of rights" as the cornerstone of a binding worldwide human rights regime.⁴² It follows that any initiative from Washington to prosecute Iraqi crimes committed during and after the recent Gulf War would represent essential support both for international law directly and for our own constitutional Bill of Rights. With this in mind, U.S. and allied coalition personnel should seek immediately to gain custody of those Iraqis believed responsible for the most serious *crimen contra omnes* and to begin preparations for authoritative criminal trials.

But *where* should the trials be held? Nuremberg had been widely expected to be a 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. The International Court of Justice does, however, have jurisdiction over disputes concerning the interpretation and application of a number of specialized human rights conventions.⁴³ In exercis-

41. Statute of the International Court of Justice, Oct. 24, 1945, 59 Stat. 1055, T.S. No. 993.

42. This regime is comprised of: Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/810 (1948); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967); International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967); and Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1967).

43. Such jurisdiction is accorded by Article 9 of the Genocide Convention; the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Sept. 7, 1956, art. 10, 3 U.S.T. 3201, 266 U.N.T.S. 40; Convention on the Political Rights of Women, July 7,

ing its jurisdiction, 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,⁴⁴ these accessions are watered down by many attached reservations.

One obvious jurisdictional solution, of course, would be to parallel Nuremberg — that is, to establish a specially-constituted *ad hoc* tribunal within the defeated country's territory (probably at Baghdad). Such a tribunal could be established under Articles 22 and 29 of the United Nations Charter, which authorize creation of subsidiary organs. Another acceptable (and far more likely) possibility would be to undertake such proceedings within the country that had been Iraq's principal victim — Kuwait. In Kuwait, the court could be coalition-wide, as it would be within Iraq, or it could be (depending upon the desired range of indictments) fully Kuwaiti. Legal precedent and justification for all of these possibilities can be found, among other sources, in the Convention on the Prevention and Punishment of the Crime of Genocide.⁴⁵ Article VI of this Convention provides that trials for its violation be conducted "by a compe-

1954, 27 U.S.T. 1909, 193 U.N.T.S. 135; Convention Relating to the Status of Refugees, July 28, 1951, art. 38, 19 U.S.T. 6259, 189 U.N.T.S. 137; Convention on the Reduction of Statelessness, Aug. 30, 1961, art. 14, 989 U.N.T.S. 175.

44. Statute of the International Court of Justice, June 26, 1945, art. 38, para. 2, 59 Stat. 1055, T.S. No. 993.

45. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277, 280 [hereinafter Genocide Convention]. 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 wartime 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." Genocide Convention, *supra*, art. I, U.N.T.S. at 280.

tent tribunal of the State in the territory of which the act was committed, or by any such international penal tribunal as may have jurisdiction." 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.⁴⁶

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. First, in Equatorial Guinea, the tyrant Macis had been slaughtering his subjects and pillaging his country for a number of years. Macis 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. Second, in Kampuchea, when the Khmer Rouge were overthrown by the Vietnamese, the succes-

46. See, e.g., 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, 213 U.N.T.S. 221, Europ. T.S. No. 5 (entered into force Sept. 3, 1953); Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force April 22, 1954) (This Convention should be read in conjunction with the Protocol Relating to the Status of Refugees, December 16, 1966, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force October 4, 1967).); Convention on the Political Rights of Women, July 7, 1954, 27 U.S.T. 1909, 193 U.N.T.S. 135 (entered into force for the United States July 7, 1976); Declaration on the Granting of Independence to Colonial Countries and Peoples, Dec. 14, 1960, G.A. Res. 1514, 15 U.N. GAOR, Supp. No. 16, at 66, U.N. Doc. A/4684 (1961); International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature March 7, 1966, 5 I.L.M. 352, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); International Covenant on Economic, Social and Cultural Rights, opened for signature, Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1967), 6 I.L.M. 360 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); International Covenant on Civil and Political Rights, opened for signature, Dec. 19, 1966, G.A. Res. 2200, U.N. GAOR, Supp. No. 16, at 52, U.N.Doc. A/6316 (1967), 6 I.L.M. 368; American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (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), 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.

sor government instituted criminal proceedings against the former prime minister, Pol Pot, and the deputy prime minister on charges of genocide. The accused were found guilty of the crime, in absentia, by a people's revolutionary tribunal.

From a strictly jurisprudential point of view, crimes of war, crimes against peace and crimes against humanity⁴⁷ are offenses against humankind over which there is universal jurisdiction and a universal obligation to prosecute.⁴⁸ But it is the United

47. Crimes of War, Crimes Against Peace and Crimes Against Humanity are defined in CHARTER OF THE INT'L MILITARY TRIBUNAL art. 6(a)-(c) (1945), in U.S. DEPT OF STATE, Pub. No. 3080, INTERNATIONAL CONFERENCE ON MILITARY TRIALS 423 (1949), as follows:

(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave 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: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crimes within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

48. 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 (THE CIVIL LAW); 2 HUGO GROTIUS, DE JURE BELLI AC PACIS (THE LAW OF WAR AND PEACE) 205-34; and 1 MONSIEUR DE VATTTEL, LE DROIT DES GENS (THE LAW OF NATIONS) 100-09. The case for universal jurisdiction (which is strengthened wherever extradition is difficult or impossible to obtain) is also built into the four Geneva Conventions of August 12, 1949, which unambiguously impose upon the High Contracting Parties the obligation to punish certain grave breaches of their rules, regardless of where the infraction was committed or the nationality of the authors of the crimes. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War art. 49, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea art. 50, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 49, 6 U.S.T. 3114, 75 U.N.T.S. 31. In further support of universality for certain international crimes,

States, for many complementary reasons, that should now take the lead in prosecution of major Iraqi criminals. These reasons include the special U.S. role in military operations supporting the pertinent Security Council resolutions, 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.

The Genocide Convention itself does not stipulate universal jurisdiction. However, a recent decision in a United States court supports the principle of universal jurisdiction in matters concerning genocide. Ruling for the extradition to Israel of accused Nazi war criminal John Demjanjuk, a 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, "When 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 nations or against humanity and that the prosecuting nation is acting for all nations."⁴⁹

As noted in *Demjanjuk v. Petrovsky*, "[t]he law of the United States includes international law,"⁵⁰ and "international law recognizes a 'universal jurisdiction' over certain offenses."⁵¹ 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 itself acknowledged that the participating powers "have done together what any one of them might have done singly."

The recollection in *Demjanjuk* that U.S. law includes international law — a recollection with early roots in Blackstone — restates the U.S. Supreme Court's words in *The*

see 2 M.C. BASSIUNI, INTERNATIONAL EXTRADITION IN U.S. LAW AND PRACTICE ch. 6 (1983). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §§402-404, 443 (1986).

49. See *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582-83 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986).

50. *Id.* at 582.

51. *Id.*

Paquete Habana, the principal case concerning the incorporation of international law into this country's domestic law:

International 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.⁵²

Of course, where there does exist a treaty in force, the principle of customary international law known as *pacta sunt servanda* — that every treaty is binding upon the parties and must be respected in good faith — is codified at Article 26 of the Vienna Convention of the Law of Treaties. Article 26 states: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."⁵³

In exercising its special responsibilities under international and municipal law concerning prosecution of egregious Iraqi crimes, including post-war crimes against the Kurds,⁵⁴ the United States already has the competence to prosecute in its own federal district courts.⁵⁵ In addition, since its founding, the United States has reserved the right to enforce international law within its own courts.⁵⁶ Over the years, United States

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

53. U.N. Doc. A/CONF 39/27 (1969).

54. 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 most 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." See Tony Horwitz, *Forgotten Rebels: After Heeding Calls To Turn On Saddam, Shiites Feel Betrayed*, WALL ST. J., Dec. 26, 1991, at A5.

55. See 10 U.S.C. §§818, 821 (1988) (forming part of an extraterritorial statutory scheme); 18 U.S.C. §3231 (1988); U.S. CONST. art. 10, §8, cl. 10.

56. U.S. CONST. art. I, §8, cl. 10 confers on Congress the power "to define

federal courts have rarely invoked the "law of nations," and then only in such cases where the acts in question had already been proscribed by treaties or conventions.⁵⁷

It follows from all this that the legal machinery for bringing Saddam Hussein and his fellow criminals to justice is already well-established under international and United States law and that what is needed immediately is the political will to make this machinery work. A manifestation of such will may be forcible abduction. 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.⁵⁸ 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.⁵⁹

and punish piracies and felonies committed on the high seas, and offenses against the law of nations." Pursuant to this Constitutional prerogative, the first Congress, in 1789, passed the Alien Tort Statute. This statute authorized United States Federal Courts to hear those civil claims by aliens alleging acts committed "in violation of the law of nations or a treaty of the United States" when the alleged wrongdoers can be found in the United States.

57. In 1979, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), a case seeking damages for foreign acts of torture, was filed in the federal courts. In a complaint filed jointly with his daughter, Dolly, Dr. Joel Filartiga, a well-known Paraguayan physician and artist and an opponent of President Alfredo Stroessner's genocidal regime, alleged that members of that regime's police force had tortured and murdered his son, Joelito. On June 30, 1980, the Court of Appeals for the Second Circuit found that because an international consensus condemning torture has crystallized, torture violates the "law of nations" for purposes of the Alien Tort Statute. United States Courts, therefore, have jurisdiction under the statute to hear civil suits by the victims of foreign torture, if the alleged international outlaws are found in the United States. See Alien Tort Claims Act, 28 U.S.C. §1350 (1988). The statute was originally enacted as Judiciary Act of 1789, 1 Stat. 73, 77 (1845).

58. See John Walcott & Andy Pasztor, *Reagan Ruling to Let CIA Kidnap Terrorists Overseas Is Disclosed*, WALL ST. J., Feb. 20, 1987, at 1. The procedures were contained in a secret presidential directive to the CIA. James Vicine, *Reagan Authorized CIA to Kidnap Suspected Terrorists*, Reuters, Feb. 20, 1987, available in LEXIS, Allwld Library, Reuter File.

59. See 18 U.S.C. §1203 (1988).

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 United States 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.⁶⁰

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 limited. In *The Schooner Exchange v. M'Faddon*,⁶¹ Chief Justice Marshall of the United States Supreme Court went even further, arguing for "the exemption of the person of the sovereign from arrest or detention within a foreign territory."⁶² 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 Act⁶³ prohibit the U.S. military from undertaking domestic law enforcement. According to several authoritative memoranda, this prohibition does not apply outside the United States.⁶⁴ It would appear, therefore, that the United States *has* authority under its own and international law to gain custody of Saddam Hussein and his Revolutionary Council 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

60. See 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).

61. 11 U.S. 116 (1812).

62. *Id.* at 136.

63. See 18 U.S.C. §1385 (1988).

64. 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* 59-75 (1991).

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. If President Clinton, preferably in concert with other coalition partners, can now build upon the important precedents and expectations of Nuremberg, his efforts would represent a fitting and distinguished conclusion to the Gulf War.

CONCLUSION

In his 1990 book entitled *THE AGE OF RIGHTS*, the distinguished scholar Louis Henkin explores human rights as “the idea of our time.”⁶⁵ Acknowledging that this idea has received universal acceptance, at least in principle, Henkin inquires, among other things, about American responses to the idea of rights in other countries. As we might expect, his inquiry identifies substantial failures by the United States to support international human rights norms, failures generated by perceived commitments to ideological claims and geopolitical requirements.

As we have seen, these failures represent violations of the international law that forms a part of the domestic law of the United States and of our very own Constitution and Declaration of Independence, both of which are drawn from universally binding principles of natural law. It follows that American foreign policy has often been carried out against “the idea of our time” and in defiance of our best traditions and most peremptory expectations. Not surprisingly, therefore, Saddam Hussein’s regime in Baghdad was able — before, during and after the Gulf War — to commit outrageous crimes without serious fear of prosecution.

Although “endowed by their Creator with certain unalienable Rights,” the recent and ongoing victims of Iraqi crimes have suffered as profoundly as if this were not an Age of Rights but an Age of Atrocity. For its part, the United States, joined in an ironic complicity with a regime that Washington both nurtured and opposed, has only one decent and law-enforcing option remaining: to seize what little opportunity is left to prosecute Iraqi crimes under international law. Failing such

65. LOUIS HENKIN, *THE AGE OF RIGHTS* ix (1990).

seizure, this country would be left barren of its essential principles and obligations while yet another instance of Nuremberg-category crimes would be left unstopped and unpunished.

