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WAR CRIMES

THE NUREMBERG PRINCIPLES AND THE GULF WAR

BENJAMIN B. FERENCZ*

I. INTRODUCTION

On December 11, 1946, the first General Assembly of the United Nations passed three successive resolutions designed to prevent a recurrence of some of the atrocious crimes that had been committed during World War II. These resolutions demonstrated the international community’s respect for what have become known as the Nuremberg principles. The first resolution, 94 (I),1 designated a U.N. committee to study the progressive development and codification of international law. The second resolution, 95 (I),2 unanimously affirmed “the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal.”3 The third resolution, 96 (I),4 condemned

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2 G.A. Res. 95 (I), U.N. GAOR, 1st Sess., Resolutions, at 188, U.N. Doc. A/64/Add. 1 (1946), reprinted in 2 FERENCZ, INT’L CRIMINAL COURT, supra note 1, at 127. In 95 (I), reference was made to the trial of major war criminals before the International Military Tribunal created pursuant to a Charter drawn up by the four major victorious powers in London in August 1945 and to a similar Charter for the trial of war criminals in the Far East in January 1946. Id.
3 Id.
genocide as an international crime, "for the commission of which principals and accomplices—whether private individuals, public officials or statesmen . . . are punishable." What has happened to those resolutions during the intervening years, and what relevance do they have for the Gulf War of 1991?

By way of background and refresher, let us briefly review the Nuremberg principles to see what action has been taken in the United Nations—or elsewhere—to develop and codify international criminal law, and what impact these principles have had on the behavior of states and national leaders. The war in the Gulf can then be appraised in light of the historical legal record to see what lessons may be learned if we are to have a more peaceful world order.

II. The Nuremberg Principles Reviewed

The origins of the Charter for the International Military Tribunal ("IMT") and the basis for its codification of emerging norms of international criminal law have been set forth in meticulous detail elsewhere and need not be repeated here. It is important to understand that neither the IMT Charter nor the Tribunal was something newly created out of whole cloth by a vengeful world. Quite the contrary; the widespread desire simply to execute Nazi leaders had to be suppressed—primarily by the United States—in order to give those accused a fair trial under law. The Charter articulated norms that had been emerging over a long period of time and that were supported by a substantial body of treaties, pacts, conventions, declarations, and international understandings outlawing the actions therein condemned.

The Charter, which was adhered to by nineteen other nations, listed three broad categories of crimes that were subject to criminal punishment. It also laid down certain principles that were to bind the court and established procedures to govern the trial.

(1946), reprinted in 2 Ferencz, Int'l Criminal Court, supra note 1, at 127-28.

6 Id. at 128.

6 See, e.g., 1-2 Ferencz, Int'l Criminal Court, supra note 1.

7 1 Ferencz, Int'l Criminal Court, supra note 1, at 66-68.

8 See id. at 1-65 (examining development of war norms prior to IMT Charter).

9 Charter of the International Military Tribunal art. 6, reprinted in 1 Ferencz, Int'l Criminal Court, supra note 1, at 457-58.

10 Id. arts. 7-13.

11 Id. arts. 14-30.
Crimes subject to the Tribunal’s jurisdiction were:

1. Crimes Against Peace: planning, preparation, initiation, or waging of a war of aggression;
2. War Crimes: violations of the laws or customs of war; and
3. Crimes Against Humanity: murder, extermination, enslavement, deportation committed against any civilian population, as well as certain persecutions on racial, political, or religious grounds.\(^\text{12}\)

The Crime Against Peace, commonly referred to as aggression or aggressive war, articulated the evolving legal norms which found earlier expression in such widely accepted treaties as the 1928 Kellogg-Briand Pact for the General Renunciation of War.\(^\text{13}\) Declaring a war crime to be a criminal offense was nothing new: the Hague Conventions and many agreements and codes for the conduct of war had made the commission of atrocities a punishable military crime.\(^\text{14}\)

What distinguished a Crime Against Humanity from an ordinary felony or war crime was its magnitude: the offensiveness of the Crime Against Humanity was so great that it shocked the conscience of, and thereby constituted a crime against, all humanity, rather than merely against the citizens of an offended state. What was new, however, was that the law, following the needs of a changing world, had reached a point where national leaders would be held accountable for such massive violations of human rights—even if committed against their own citizens.\(^\text{15}\)

In addition to listing three categories of crimes, the Charter laid down certain principles to govern the court: (1) leaders, organizers, instigators, and accomplices of a common plan or conspiracy to commit any of the three categories of crimes would be held

\(^{12}\) Id. art. 6.

\(^{13}\) Central Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 93-94 L.N.T.S. 57. The Kellogg-Briand Pact, dedicated to the resolution of conflict by peaceful means, was ratified by more than 50 nations, including the United States, Germany, France, Great Britain, and Japan.


criminally responsible; (2) the official position of a defendant—even if a head of state—would not free him of responsibility or mitigate punishment; (3) acting under superior orders could be considered in mitigation only if, in the opinion of the court, justice so required; and (4) in the interests of justice, the Tribunal was authorized to try a person in absentia.\(^6\)

After reviewing its jurisdictional basis, legal principles, and procedures, the Tribunal concluded that the Charter was not an arbitrary exercise of power but rather the expression of international law existing at that time, thus merely codifying prevailing norms. Recognizing aggression as the supreme international crime, and one which high-ranking accused must have known was wrong, the Tribunal determined that it would be unjust to allow them to escape liability just because no one had previously been convicted of that offense. The Charter's provisions condemning atrocities and other war crimes and reaffirming that superior orders would not free an individual from responsibility were found to conform with the prevailing law of all civilized nations.\(^7\)

To be sure, nothing quite like the IMT had ever existed, but it was the logical and promised culmination of previous war crimes proceedings and unsuccessful attempts to try the Kaiser and German war criminals after World War I. Justice Robert H. Jackson, on leave from the Supreme Court of the United States, was the principal architect of the Charter and served as Chief Prosecutor for the United States. In his opening statement, Justice Jackson gave assurances that the fundamental purpose of the trial was to advance the cause of law and justice—“one of the most significant tributes that Power has ever paid to Reason . . . . The record on which we judge these defendants today,” he said, “is the record on which history will judge us tomorrow.”\(^8\)

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16 Charter of the International Military Tribunal arts. 6-8, 12, reprinted in 1 Ferencz, Int'l Criminal Court, supra note 1, at 457-58; see also Benjamin B. Ferencz, Crimes Against Humanity, in 8 Encyclopedia of Public International Law 107-09 (1985) (distinguishing crimes against humanity from war crimes and felonies and discussing current problems in implementation of sanctions).

17 Trial of the Major War Criminals Before the International Military Tribunal (Nov. 1945-Oct. 1946) [hereinafter IMT Judgment], extracts reprinted in 1 Ferencz, Int'l Criminal Court, supra note 1, at 469-86; see also Nazi Conspiracy and Aggression, Opinion and Judgment (U.S. Gov't Printing Office 1947).

18 Robert H. Jackson, The Case Against the Nazi War Criminals 3, 7 (1946); see also Whitney R. Harris, Justice Jackson at Nuremberg, 20 Int'l Law. 867, 867-96 (1996) (reviewing contributions by Justice Jackson and associates at Nuremberg to international law of crime).
Surely, it would have been preferable to have a tribunal composed solely of representatives of neutral nations, but World War II was so widespread that no nation was truly neutral. The fairness of the proceedings was assured by opening the courtroom to the public, by relying extensively on documentary evidence from captured German archives, and by guaranteeing every accused an absolutely fair trial. The principles and procedures developed at Nuremberg were reaffirmed and usually hailed as a great landmark in the evolution of international criminal law at other war crimes trials, notably the IMT trial at Tokyo in 1946 and the subsequent proceedings at Nuremberg and elsewhere.

A principle of law—perhaps the most important—illustrated by the Nuremberg trials, although not listed among the standard Nuremberg principles, is that those in power should punish only those who have been found guilty of crimes beyond a reasonable doubt after a fair trial in which the accused were presumed innocent. It is a principle well worth remembering when nations go to war and seek to establish peace.

III. THE DEVELOPMENT AND CODIFICATION OF INTERNATIONAL LAW

The idea that law should be clarified or codified did not begin at Nuremberg. It goes back to ancient times. One need only recall such well known decrees as the Code of Menes, three thousand years before the birth of Christ, the codes of Hammurabi, Draco, Solon, Moses, Justinian, and similar sages who have gained renown as law-givers. The concept of international law as we know it today, however, is fairly new. Indeed, Jeremy Bentham has been credited with being the first to use the expression “international law” just over 200 years ago.

The fear and suffering generated by war have inspired the formulation of international norms intended to control violent international behavior, as illustrated by the Hague Conventions of 1899

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19 See Benjamin B. Ferencz, Nuremberg Trial Procedure and the Rights of the Accused, 34 J. CRIM. L. & CRIMINOLOGY 144, 144-52 (1948).
and 1907. Following the tragedy of World War I, which cost the lives of at least twenty million people, the international community was shocked into renewed efforts to curb violence between nations. The 1919 Covenant of the League of Nations—like the later Charter of the United Nations—created an international organization designed to maintain the peace by "obligations not to resort to war," by "the firm establishment of the understandings of international law," and "by the maintenance of justice."22

The League appointed a Committee of Experts for the Progressive Codification of International Law, the forerunner of the present International Law Commission ("ILC"). The Committee's effectiveness, however, was severely limited by the diversity of the various states' interests and by the unwillingness of states to accept restraints on their perceived sovereign rights or interests. Moreover, many states were not ready to accept the binding jurisdiction of any international court—least of all in criminal matters that might jeopardize their own leaders. Nonetheless, during the many intervening years, some progress has been made in many noncontentious areas of common concern, such as in defining consular and diplomatic relations and in the law of treaties.23

It would not be unfair to conclude that the ILC works at a pace which would make a snail with a crutch look like a speed demon. This melancholy conclusion reflects the political reality that nations simply are not ready to agree upon fixed codes or rules of conduct that may inhibit their behavior in matters which they regard as affecting their honor or vital interests. Many nations would rather go to war than accept outside decision. Professor Georg Schwarzenberger of London, noting the failure of nations to respect and advance the law of the Nuremberg and Tokyo trials, said that "the Powers involved in the nuclear nexus have resigned themselves, if necessary, to forsake civilization and accept the con-

22 League of Nations Covenant art.1, reprinted in 1 BENJAMIN B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION—THE SEARCH FOR WORLD PEACE 61 (1975) [hereinafter FERENCZ, AGGRESSION].

23 See LEAGUE OF NATIONS, COMMITTEE OF EXPERTS FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW 1925-1928 (Shabtai Rosenne ed., 1972) (minutes of Committee's first four sessions and documents containing principal reports in years 1926-1928); see also SHABTAI ROSENNE, PRACTICES AND METHODS OF INTERNATIONAL LAW 71-82 (1984). The work of the ILC, including summary records of the meetings, is reported in its annual Yearbook and in its Reports to the General Assembly. See generally B. G. RAMCHARAN, THE INTERNATIONAL LAW COMMISSION: ITS APPROACH TO THE CODIFICATION AND DEVELOPMENT OF INTERNATIONAL LAW 147-51 (1977); IAN SINCLAIR, THE INTERNATIONAL LAW COMMISSION 87-91 (1987).
sequences of mechanized and depersonalized warfare or, in other words, mid-twentieth century barbarism in its most destructive form."

Of course, nations are not prepared to admit that they are barbarians, nor are their lawyers ready to concede their inability to reach agreements on vital issues of life and death that affect the peace and security of humankind. In an effort to show progress or to end the debate, ostensible agreements—which are not agreements at all—are accepted. To reach a consensus, party nations adopt language so artfully contrived and ambiguous that each nation may plausibly argue for the validity of its own interpretation and the invalidity of its adversary's. Professor Julius Stone appropriately described this reality as "conflict through consensus."

The point may be illustrated by noting what nations have done to define and prohibit some of the international crimes condemned at Nuremberg and allegedly committed during the Gulf War. It took the nations of the world more than fifty years to agree upon a definition of aggression. The definition was adopted by the U.N. General Assembly on December 14, 1974 without putting it to a vote. The adopted definition was intended to guide the Security Council which, all agreed, was the sole judge of whether aggression had occurred. Despite its adoption by the General Assembly, the definition has proved to be ineffective. Even assuming that the Security Council had been willing to be guided by this definition, its many loopholes and ambiguous clauses did not really offer much guidance.

One such ambiguity was the failure to address the distinction between aggression and self-defense, thereby practically guaranteeing that all future wars of aggression would be fought only "in self-defense." The ineffectiveness was further compounded by the re-

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26 See 1-2 Ferencz, Aggression, supra note 22 (documenting attempts to define aggression).
28 Id. at 711.
quirement in the consensus definition that “all relevant circumstances” (whatever that means) must be taken into account. Also, because only a war of aggression was a crime and because only the state itself could determine if it was at war, a unilateral declaration that the state was not engaged in war but rather in a simple “police action” might exculpate it from criminal liability. In addition, the consensus definition provided that the use of force in pursuit of such justified goals as self-determination or freedom from alien domination could not qualify as a crime of aggression, and that those “under colonial or racist regimes or other forms of alien domination” could use any force, or receive any assistance, to obtain their liberation without being subject to criminal liability. Thus, despite its symbolic value as an expression of humanity’s aspiration for a more peaceful world, the consensus definition of aggression ironically invited aggression by groups or nations that could find shelter behind its exculpatory clauses.

Some countries and groups, such as the Palestine Liberation Organization, are convinced—no doubt sincerely—that their particular goals are so justified that they may employ any means to achieve them—even violence—and that those who thwart their attainment are the real criminals. It has become a cliché that “one man’s terrorist is another’s freedom fighter.” These differences in perception have not yet been resolved. As a result, the declared consensus “agreements” on what constitutes the crime of aggression are more deceptive than real.

Similar ambiguities and lack of specificity can be noted in other legal instruments that ostensibly outlaw other grave international crimes. For instance, the U.N. Conventions prohibiting crimes against diplomats, terrorism, and hostage-taking all contain almost identical phrases used to justify acts ordinarily considered to be outrageous criminal deeds.

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39 Id. at 711-12.
40 Id.
41 These goals include self-determination, economic justice, and freedom from alien occupation.
43 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni & Ved P. Nanda eds., 1973); M. Cherif Bassiouni, INTERNATIONAL CRIMINAL LAW, A DRAFT INTERNATIONAL CRIMINAL CODE (1980); 2 FERENZ, INT’L CRIMINAL COURT, supra note 1, at 547-637; see also United Nations Sixth Committee Draft Resolution on Terrorism, Doc. A/C.6/46/
The international community has paid the price for such indecision and deviousness. Little wonder that international crimes have continued and will continue to plague the world until they are unequivocally and universally condemned and subjected to effective international law enforcement. But that will require a significantly improved international order—a subject beyond the scope of this Article.44

The failure of the international community to develop binding norms of international criminal law is most glaringly illustrated by the unsuccessful efforts, thus far, to draft an acceptable Code of Crimes Against the Peace and Security of Mankind based on the Nuremberg principles—a mandate issued by the United Nations over forty-five years ago!35 Nor has there been any significant progress toward the establishment of an International Criminal Tribunal to punish such offenses. Although special committees of the United Nations began to work on such a tribunal over forty years ago, no such court exists anywhere in the world today.38 Recently, however, perhaps as a consequence of the Gulf war, terrorism, and drug-trafficking, the ILC and the Sixth (Legal) Committee of the United Nations have recorded some encouraging progress toward the enactment of a code of crimes.37 The first reading of a draft code of crimes has been completed. In addition to the crimes enumerated at Nuremberg, the Commission, no doubt influenced by events in the Gulf, added “wilful and severe damage to the environment.”38

Despite the Nuremberg precedents, it cannot be denied that international crime has been booming ever since. Nations have


38 See generally 1-2 FERENCZ, INT’L CRIMINAL COURT, supra note 1 (collecting documents concerning efforts to define international aggression and to establish international criminal court).


38 See ILC Reports, supra note 37, Doc. A/46/405.
been accused of aggression in Korea, Czechoslovakia, Hungary, Vietnam, Cambodia, Afghanistan, Iran, Iraq, Grenada, Nicaragua, Cuba, Panama, the Middle East, Africa, the Mediterranean, and other parts of the globe. Predictably, it was always the “other side” that was the lawbreaker attacking the innocent party defending itself or its allies. Although millions of innocent people were killed in such conflicts, consolation was sought in the fact that the nuclear super-powers refrained from blowing up the whole world.

The wars which have flourished everywhere since World War II have been accompanied by grave breaches of the laws of war, including the illegal use of poison gas. Genocide has been alleged against Idi Amin of Uganda and Pol Pot of Kampuchea. Other crimes against humanity, including apartheid, terrorism, the slaughter of religious and ethnic minorities, drug-trafficking, and deliberate and massive environmental degradation, have also gone untried and unpunished—to the shame of the international legal community!

The existence of a cold war between ideological rivals, who evaluated these events with different eyes and reached opposite conclusions (often for domestic or political reasons), coupled with the reserved right of the superpowers to veto any U.N. action, has been an important contributing cause to this sorry state of international law. Incalculable suffering and human misery have been the price paid by innocent people everywhere for the refusal of the world’s leaders to honor and expand the principles of Nuremberg.

Failure to respond effectively to aggression and other international crimes encourages more aggression and increased criminality. The inability of the world community to prevent such crimes in the past helped pave the way to the war in the Gulf and to the violations of international law that accompanied it.

IV. THE GULF WAR

On August 2, 1990, the armed forces of Iraq launched a massive, surprise military attack against its peaceful Arab neighbor, the sovereign state of Kuwait. A statement from the White House deplored “this blatant use of military aggression” and announced that the United States—together with Kuwait—was calling an emergency session of the U.N. Security Council. At 4:45 a.m. the

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same day, the Security Council convened. The Ambassador of Iraq explained that his government had been requested to intervene by a new Free Provisional Government of Kuwait and that Iraqi forces would be withdrawn as soon as order had been restored, which he hoped would "take no more than a few days." He denounced the "flagrant intervention" by the United States, which he took as evidence of collusion between the American government and the previous government of Kuwait.

Within seventy-five minutes, the Council unanimously passed Resolution 660, condemning the invasion and demanding that Iraq withdraw immediately and unconditionally. Four days later, when Iraq failed to comply, the Council, invoking chapter VII of the U.N. Charter, unanimously ordered all states to impose strict economic sanctions against Iraq and not to recognize any puppet regime. A few days later, United States Ambassador Pickering announced that at the request of Saudi Arabia, the United States and other nations were sending military forces into the area "to deter further Iraqi aggression."

When a defiant Iraq announced "a comprehensive and eternal merger with Kuwait," the Security Council responded with Resolution 662, which declared the annexation null and void. When Iraq refused to allow foreign nationals to leave, thereby holding them hostage, Resolution 664 demanded their immediate release. Ambassador Pickering denounced what he called "this malign conspiracy of aggression and prevarication" and declared that Iraq's President Saddam Hussein and his regime would bear full responsibility for their deeds.
Kuwait complained that "Iraqi occupation forces were savagely intensifying their inhumane practices against innocent civilians in Kuwait," killing people in the streets, burning homes, and committing other atrocities such as murder, rape, plunder, and torture—all of which were later detailed in submissions, reports, and videotapes presented to the Council.\textsuperscript{48} Planned and premeditated looting, pillaging, and plundering of Kuwait by Iraqi forces took place on a massive scale, the enormity of which only became apparent later.\textsuperscript{49} In addition to setting some 700 oil wells on fire, several millions of gallons of oil were deliberately flooded into the Arab gulf in what the Kuwaitis were later to describe as "the most extensive pollution of the marine environment in history."\textsuperscript{50}

Despite eleven resolutions tightening the sanctions—an unprecedented demonstration of unity among the Permanent Members—and diplomatic efforts by several states, Iraq remained self-righteous and defiant. The Council invited states to collect and submit evidence of grave breaches by Iraq and to prepare claims for restitution to their injured nationals and corporations.\textsuperscript{51}

Sir David Hanny of Great Britain reminded the Council that under article 147 of the Fourth Geneva Convention, the Iraqi actions in Kuwait since August 2, 1990 were grave breaches and international crimes that came under the criminal jurisdiction of all parties to the Conventions.\textsuperscript{52} France demanded that Iraq comply with its legal obligations.\textsuperscript{53} The French representative, Mr. Dumas, later reminded the Council that the use of chemical and biological weapons was a breach of the 1925 Geneva Protocol to which Iraq was a signatory and that all those who violated those laws would "similarly be held personally responsible."\textsuperscript{54} Foreign Minister Hurd of the United Kingdom also referred to "personal responsibility."\textsuperscript{55} Mr. Al-Shali of the United Arab Emirates warned of the tyranny of the individual, stating: "No Arab can feel anything but shame at the practices and conduct of the Iraqi regime, which has stabbed in the heart every Arab value, moral principle and

\textsuperscript{53} Id.
\textsuperscript{55} Id.
Meanwhile, the United States, asserting an inherent right to come to the defense of threatened allies, continued its military build-up in Saudi Arabia, where it assembled more than 500,000 troops armed with the latest and most lethal military equipment ever devised. This army was joined by largely symbolic forces from other nations.

On November 29, 1990, the Security Council held a historic meeting and, after extensive debate, passed Resolution 678, which authorized member states to use “all necessary means to uphold and implement [R]esolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area” if Iraq failed to comply by January 15, 1991. The term “all necessary means” was nowhere defined, nor was it clear what controls, if any, might be exercised by the Council. The reference to restoring peace in the area seemed to be a declaratory flourish of no significance because it was barely mentioned in the debate; its significance in expanding the area of conflict was to emerge only later.

What happened thereafter is well known, having been recorded on television and reported in great depth everywhere. In short, hostilities began on January 16, 1991 with thousands of coalition air sorties and missiles striking military targets in Iraq.

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57 U.N. SCOR, 46th Sess., 2963d mtg., U.N. Doc. S/2963 (1990). It was the United States' turn to be in the Chair, and Secretary of State James Baker presided. Thirteen other Council members were represented by their Foreign Ministers, attesting to the significance of the assemblage. Mr. Baker called upon nations to “meet the threat to international peace created by Saddam Hussein's aggression.” Id. Foreign Minister Shevardnadze of the Soviet Union warned that failing to reverse the aggression would mean even greater hardship for the world . . . Our common future is threatened . . . We are serving [the Iraqi leaders] with a special warning about their personal responsibility for the fate of foreign nationals in Iraq. Endangering their lives will be regarded as a crime against humanity, with all the consequences that entails.
Id.
58 S.C. Res. 678, U.N. SCOR, 46th Sess., Supp. No. 2, at 97, U.N. Doc. A/46/2 (1990). Cuba and Yemen voted against Resolution 678. China abstained, which later gave rise to the argument that since the Charter, in article 27(3), required “the concurring votes of the permanent members,” China's failure to cast a concurring vote rendered the resolution invalid. This objection ignored the fact that the Council had decided in many prior cases that the Charter was not to be taken literally and that failure to vote was a procedural matter which the Council was authorized to interpret as not negating the binding nature of a resolution. See 2 U.N. Repertory of Practice of U.N. Organs art. 27(3), U.N. Sales No. 1955.V.2 (1955).
When some captured American flyers were displayed on Iraqi television, the State Department reminded Iraq that mistreatment of prisoners was a war crime, and France warned that “persons guilty of such breaches will have to answer for them, whatever their level of responsibility.”

At four o’clock in the morning of February 4, 1991, the United States Central Command in Saudi Arabia led a coalition of forces from thirty countries, including the U.K., Kuwait, Egypt, and Syria, in a massive ground, naval, and air offensive with the declared intention to eject Iraqi forces from Kuwait. They were joined by air forces from Italy, Canada, the United Arab Emirates, Bahrain, and Quatar striking key strategic targets. In a display of military firepower and prowess never before witnessed, Iraqi forces were pulverized; but not before Iraq managed to set about 700 oil wells on fire, divert millions of gallons of oil into the Persian Gulf, and repeatedly bombard neutral Israel with a shower of explosive missiles. After 100 hours of ground war, the Iraqi army was in complete rout, fleeing for their lives back to Iraq as “the largest single American military offensive since World War II” was brought to a halt.

Saddam Hussein didn’t see things quite that way. He saw the war as a record of honor in “an epic struggle between right and wrong . . . [,] between the oppressed poor and the unjust and opportunistic rich . . . [, and] between injustice, deception and treachery on the one hand and fairness, justice, honesty and loyalty on the other.” Vowing to fight on even after the retreat from Kuwait, he declared: “Victory is sweet with the help of God.” Saddam’s views were, no doubt, shared by his many supporters in Iraq and other parts of the Arab world, who viewed themselves as the victims of American, and Israeli, aggression. President Bush

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62 Id.
called Saddam’s speech “an outrage.”

On February 28, 1991, Iraq notified the United Nations that it would comply with all of the Security Council resolutions, including Resolution 660. The United States vowed to stay in Iraq until Baghdad complied with these resolutions, and held out the possibility of war crimes trials for Iraqi officers who took part in atrocities. A senior administration official suggested that Mr. Bush would probably not pursue charges against Saddam himself, a fact that Mr. Bush confirmed at a press conference the next day. This may not have encouraged Saddam to commit more crimes but it certainly could not have discouraged him either.

Terms for a formal cease-fire still had to be agreed upon. Resolution 687, passed by the Security Council on April 3, 1991, demanded that Iraq recognize the agreed borders with Kuwait, destroy all its chemical and bacteriological weapons as well as all nuclear weapons materials, and accept on-site inspection. It was also required to renounce all acts of terrorism.

Shortly after the Allied rout of Iraqi forces in Kuwait, Kurdish guerrillas as well as Shiite Muslims in southern Iraq—encouraged to do so by the United States—rose in revolt against Saddam. Using the residue of his army, now estimated at some 200,000 men, and deploying a large force of tanks and gunship helicopters that the Western allies had failed to destroy, Saddam turned his wrath against the rebels within his own country. The massacres of Shiites and Kurds were ruthless. It was reported that about a million women, children, and old people fled in terror toward Turkey and Iran, seeking safety from chemical bombs and strafing by vengeful Iraqi soldiers taking out their frustration and fury on their own anti-Saddam compatriots.

American troops were by then on their way home and the Bush administration hesitated to intervene in what was now described in Washington as Iraq’s “internal affair.” But public outcry

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63 Andrew Rosenthal, War in the Gulf: The President; Allied Units Surge Through Kuwait; Troops Confront Elite Force in Iraq; Bush Spurns Hussein’s Pullout Move; Surrender Demand, N.Y. TIMES, Feb. 27, 1991, at A1.


against these massive violations of human rights was so great that
Bush, who had compared Saddam to Hitler, was unable to stand
on the sidelines while Iraq murdered its Kurdish and Shiite minor-
ities. A group of Iraqi intellectuals who had acquired American
citizenship called upon President Bush to use U.S. troops that
were still in occupied southern areas of Iraq to prevent the minori-
ties from being butchered. They also called for the trial of Saddam
Hussein by an international tribunal for crimes against humanity
in Iraq and Kuwait.

At the United Nations, Iraq's repression of the Kurds—as well
as the Sunni and Shiite Moslems—was roundly condemned. The
French representative put it best: "Violations of human rights such
as those now being observed become a matter of international in-
terest when they take on such proportions that they assume the
dimension of a crime against humanity. That is indeed what is
happening in Iraq." United States Ambassador Pickering noted
that it was not the intention of the Council to interfere in the in-
ternal affairs of any country; President Bush authorized blankets
and other relief supplies to be air-dropped to the suffering civil-
ians. The Soviet representative, not inclined to argue with the
United States, agreed that interference in internal affairs was im-
permissible but noted that nations should not remain indifferent.
He urged humanitarian assistance. The brutal repression of civil-
ian populations was condemned by many Council

In Security Council Resolution 688, members of the Council
stated that they were "[g]ravely concerned" and "[d]eeply dis-

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67 Prominent attorney Floyd Abrams, and Diane Orentlicher, Trustees of the Interna-
tional League for Human Rights, in a letter to The New York Times published on April 14,
1991, decried President Bush's "policy of craven passivity in the face of massive atrocities in
Iraq." They recalled that Nuremberg established that a government's gross violations of its
own citizens rights is far more than an internal affair. We Can Help Kurds Without Send-
ing Troops; Not Internal Affairs, N.Y. Times, Apr. 14, 1991, § 4, at 18 (letter to Editor).
68 Clifford Krauss, After the War; Baker Aide Talks with Iraqi Dissidents in U.S.,
70 Id. President Bush seems to have had mixed feelings. At a news conference on April
16, 1991, he was asked, "Mrs. Bush suggested that Saddam Hussein be tried for war crimes
and hanged. Do you agree?" The President replied,

I seldom differ with my wife, and I don't know that I would differ with her here . . .
. . . [D]o I think he's guilty of war crimes, the environmental terror, the rape and
pillage of Kuwait, what he's done to his own people? I would think there'd be
plenty of grounds under which he would be prosecuted for war crimes.
After the War; Excerpts from Bush's News Conference Today at the White House, N.Y.
turbed by the magnitude of the human suffering involved,” and then went on to demand that Iraq stop the oppression and allow humanitarian organizations to help the victims. United States Secretary of State Baker, who visited the scene of nearly a million terrorized refugees fleeing to barren hills for their lives while being strafed and bombarded with napalm by Iraqi planes, referred to Iraq’s oppression of the Kurds as “a tragic crime,” but he added that it was “up to the international community as a whole to do something about it.” U.N. experts cited the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, pursuant to which member countries undertook to prevent and punish genocide as a crime under international law.

Despite the many public declarations in support of trials, no one initiated the necessary measures to bring the responsible parties to account in a court of law. Those who had the power to act chose not or dared not to turn to the Nuremberg principles and the enforcement of international law. It was sadly ironic that a great military victory won by brave young people fighting in distant lands would be followed by a great human rights disaster and a lack of legal courage by their political leaders back home to vindicate the violated rights.

It should not have been too surprising when Iraq failed to comply with U.N. resolutions demanding access to Iraq’s chemical, biological, and nuclear weapons facilities. Security Council complaints of Iraqi deception were met with bland denials. U.N. inspection teams uncovered proof of Iraq’s duplicity despite Iraqi attempts to conceal the truth. Iraq’s perfidy was revealed and condemned by the Council. Despite U.N. protests, Saddam Hussein, who evaded punishment for the invasion of Iran and the use of poison gas against Kurds and Iran in the 1980-1990 war, continued to thumb his nose at the world body with personal impunity.

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72 Thomas L. Friedman, After the War; Baker Sees and Hears Kurds’ Pain in a Brief Visit at Turkish Border, N.Y. TIMES, Apr. 9, 1991, at A1, A12.
73 Alan Riding, After the War; Europeans Urging Enclave for Kurds in Northern Iraq, N.Y. TIMES, Apr. 9, 1991, at A1.
V. AN INTERNATIONAL TRIBUNAL TO DEAL WITH GULF WAR CRIMES

The powerful nations of the world were well aware of the possible legal recourse against Saddam Hussein. The Nuremberg precedent was there for all to see. The Nuremberg principles had been recognized as binding international criminal law. If a new international tribunal was needed to try those who flouted the laws of the world, there was no real difficulty in creating such a court.  

Many international legal societies have for years been advocating the creation of an International Criminal Court. The American Bar Association as well as several members of the United States Congress have come out publicly in favor of an international penal tribunal to deal with terrorists or other international criminals. Many professors of International Law have advocated the establishment of an international criminal tribunal. A colloquium of legal experts, convened at New York University Law

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76 See 1-2 Ferencz, Int'l Criminal Court, supra note 1; Toward a Feasible International Criminal Court (Julius Stone & Robert K. Woetzel eds., 1970), reviewed by Benjamin B. Ferencz, 66 Am. J. Int'l L. 213 (1972). The Foundation for an International Criminal Court, headed by the late Professor Robert Woetzel, convened a conference at Talloires, France in May 1991. Members of the ILC, other U.N. officials, and Prime Minister A.N.R. Robinson of Trinidad and Tobago, who had been the prime mover in putting the issue back on the U.N. agenda, attended. It took them only a few days to produce drafts of a code of crimes and statutes for an interim as well as a permanent international criminal court (unpublished).

77 Professor M. Cherif Bassiouni of De Paul University, as President of the International Association of Penal Law and the International Institute of Higher Studies in Criminal Sciences (ISISCI) of Siracusa, Italy, has been in the recent forefront of some of these efforts. The Institute submitted a Draft Statute for an International Criminal Tribunal to the Eighth U.N. Congress on the Prevention of Crime, which met in Havana from August 27 to September 7, 1990. U.N. Doc. A/CONF. 144/NG0 ISISCI. The World Federalist Association of Washington D.C. has also been a strong advocate of an International Criminal Court and published a comprehensive report prepared by Doctor Bryan F. MacPherson at the end of 1991.


79 Professors Anthony D'Amato of Northwestern University, Ved P. Nanda of the University of Denver, and Christopher Blakesley of Louisiana State University, have also been among those in the forefront supporting such a tribunal. Professor Blakesley drafted statutes for a regional criminal court. Professor Louis R. Beres of Purdue University has specifically called upon the United States to take the lead in preparing international legal machinery for the prosecution of Iraqi crimes during the Gulf War. Louis R. Beres, The United States Should Take the Lead in Preparing International Legal Machinery for Prosecution of Iraqi Crimes, 31 Va. J. Int'l L. 381, 381-89 (1991).
School on March 27, 1991, also favored a war crimes trial under U.N. auspices.\textsuperscript{80}

Former Nuremberg prosecutors and other staff members, who gathered at a reunion in Washington, D.C. on March 23, 1991, concluded with a resolution calling upon the United Nations, the United States, and its coalition partners to "take all appropriate action to investigate, indict, prosecute, and punish those Iraqi nationals who have planned and prosecuted an Aggressive War against Kuwait or committed War Crimes or Crimes Against Humanity . . . in violation of the Nuremberg Principles. . . ."\textsuperscript{81}

Diplomats, as usual, were much more diplomatic; if they said anything at all, it was rather vague and indirect. Many made reference to aggression, but only the German Foreign Minister Hans-Dietrich Genscher spoke out loud and clear. Referring to the persecution and threatened genocide by Iraq against the Kurdish people, he said, "We call for an international court of justice of the United Nations where crimes against humanity, crimes against peace, genocide, war crimes and environmental criminality can be prosecuted and punished."\textsuperscript{82} Nuremberg had apparently made a big impression on the German leader.

But no nation—none—moved to put the item on the U.N. agenda! Without such action, the United Nations was unable to move. The subject was left to the plodding of the ILC, where the creation of a code of international crimes moves forward ever so slowly and the hopes for an international court to punish the most atrocious of all international crimes remain a distant dream.

VI. CONCLUSION

Fundamentally, the failure of nations to build on the Nuremberg precedents has been due to an absence of will on the part of decision makers. This is not to suggest that a problem cannot be found for every solution or that the road to general acceptance and

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enforcement of the law laid down at Nuremberg will be a quick or easy one. In the long run, it will depend upon the power of the people to understand what is required and to persuade those who now control their destiny to take the necessary action.

As long as the Soviet Union and the United States were engaged in a cold war, there was no hope that any significant progress could be made. The Soviet Union adamantly refused to accept the jurisdiction of any international tribunal as a derogation of its national sovereignty. That changed with the advent of Mikhail Gorbachev's glasnost and perestroika and with this former Soviet leader's call for a more secure world including binding jurisdiction of the International Court of Justice and "a universal legal order which will ensure the primacy of international law in politics."

A significant manifestation of the change was the ability of the two former superpower rivals to agree upon action to repel the aggression of Iraq in Kuwait. For the first time, the Security Council was able to carry out its enforcement obligations as originally intended in the U.N. Charter. Leading statesmen have been calling for a "New World Order" in which the rule of law and not the law of the jungle will govern the conduct of nations. There is thus basis for renewed hope that constructive change will take place.

One of the essential components of any legal order is a court to determine the merits of both charges and defenses. A self-appointed sheriff or posse to mete out instant justice can be very dangerous. In the absence of an independent, impartial, and fair tribunal, there is only "wild-west" in place of law and order. Those who believe in the rule of law and are law-abiding should have nothing to fear, and those who are guilty should alter their conduct or be held accountable.

Yet, even after the aggressions, genocide, and atrocities of World War II, there were those who argued against international trials. They feared that the court would become a podium for propaganda and that the allies themselves—or some of

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them—might be accused of having committed similar crimes. Since
the days of the Magna Carta, sovereigns had been on notice that
they too were obliged to respect the law or face the consequences.
It was the United States that insisted, to its everlasting credit,
upon a trial and the rule of law as the governing principle between
nations.

To be sure, Saddam Hussein and his Governing Council might
argue that Iraq’s occupation of Kuwait was justified: the borders
had been fixed by an imperialist power; Kuwait had provoked Iraq
by unfairly rigging oil prices; Arabs were being exploited by Gulf
states concerned only with their own wealth; Iraq was fighting
Israel and Zionism to liberate Palestinians; others go untried for
similar actions; U.S. bombing, which killed 300,000 Iraqis and de-
stroyed their entire infrastructure, exceeded the bounds of propor-
tionality and military necessity and went beyond the limits author-
ized by U.N. resolutions; and so forth. Such arguments were
heard at the United Nations before the Security Council decided,
in effect, that the attack on a friendly Arab state was an act of
criminal aggression meriting sanctions by the entire international
community.

Of course, international laws, if they are to have meaning,
must be clear and must be respected universally. It is not enough
merely to pay lip service to the principles and precedents of Nu-
remberg. The ideals therein enshrined must become a living reality
in a peaceful world. Hypocrisy must give way to sincerity. Politics
must yield to principle. Lawlessness must be controlled by law.
Until that happens, innocent people everywhere will continue to
live and die in fear.

Let us recall the concluding statement of Justice Robert Jack-
son to the International Military Tribunal at Nuremberg: “If you
were to say of these men that they are not guilty, it would be as

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66 Former United States Attorney General Ramsey Clark drafted an “Initial Com-
plaint” against George Bush and other U.S. leaders, dated May 9, 1991, which was submit-
ted to the Legal Division of the United Nations. At about the same time, Professor Ved
Nanda of the University of Denver College of Law, together with Luis Kutner, Chairman of
the World Habeas Corpus Commission for International Due Process of Law, submitted an
indictment against Saddam Hussein and his advisors. Both drafts relied on the Nuremberg
principles. Because they lacked any official standing, no U.N. action could be based on
States). “We call upon the international community through this forum and through the
other regional and international organizations to condemn that criminal act, investigate it
and hold its perpetrators fully responsible.” Id. at 38.
true to say that there has been no war, there are no slain, there has been no crime." 87

87 19 Trial of the Major War Criminals Before the International Military Tribunal 432 (1948).