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International Year in Review: Developments in International Criminal Law

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rather have seen new debates in the Security Council as to this sort of situation. Since Iraq was only under an obligation to accept those resolutions, with great respect to the coalition leadership, they had the right to withdraw with all of their material. They were not in a position of surrendering.

The question of the withdrawal also raises the problem of proportionality. We saw a limited amount of what I would call collateral damage during the actual operation, and at the time of the withdrawal. Since Iraq did not surrender, it could be argued that a withdrawal might indicate that they were merely changing their lines to reform for further attack. The attacks near the end—I think it was Mr. Bush's statement that "they were bombed back to a pre-industrial age"—worries me intensely. We need to reexamine some of the problems of attacks on military objectives when the destruction of even a legitimate objective will have such a long-range, collateral effect on the civilian population.

My last two points are about the Kurds. I think we have to be very careful in how we look at the Kurdish problem. For one thing it is not new. The massacre of the Kurds has taken place in many countries, such as Turkey, Iran and Iraq, and we have all kept very quiet. What we are now seeing, with both the Kurds and the Shiites, may be more in the nature of a civil war or a rebellion. I think we have to be very careful how we bandy the word "genocide" around. Even though the people being suppressed are of a particular ethnic group, it may not be genocide. Are they being suppressed because they are an ethnic group, or because they are trying to disrupt Iraq?

My last point relates to the future. I do not know whether a Cold War gets colder or whether it gets warmer when it relaxes, but we are going through a time where we may see the United Nations returning, perhaps with the revival of the military staff committee, to the purposes for which it was originally established. I do not see it as a New World Order; rather I think we are seeing a revival of the "Old World Order" in its proper function. What is worrying me comes out of the truce and the present situation of the occupation of parts of Iraq without any UN authorization. The interpretation that I see being placed upon Resolution 688 and the truce resolutions goes beyond the purpose of those resolutions. We may see a new interpretation of Article 2, para. 7 of the UN Charter with regard to nonintervention in domestic affairs growing out of this. But it requires a new approach and we may need new amendments and de facto revisions of the Charter.

What I feel we are seeing at present is a development whereby what should be the law of the United Nations is being considered to be *lex Americana* and I hate to see the possibility that *lex Americana* becomes a *pax Americana* for the whole world to conform to. I would be very unhappy if out of the mess that has occurred in the Gulf and the revival of the United Nations, we see the United States taking on the imperialist role that Britain took on in the heyday of *pax Britannica*.

REMARKS BY CHRISTOPHER L. BLAKESLEY*

It a pleasure to be here even if it is on such short notice. My subject is international criminal law. I will emphasize a few things that I found interesting, and I hope that they trigger some interest for further consideration.

I noticed yesterday in the *Washington Post*, and Professor Green mentioned it as well, that the Senate has told the Executive Branch to consider the application or the development of a war crimes trial for Saddam Hussein and possibly other

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individuals as well. The executive departments are to collect evidence in a manner similar to what was suggested in the Security Council on that same subject. An office in the State Department has been designated to make the study to see whether an international tribunal should be established or whether United States courts should sit to judge those war crimes. It is a very interesting proposition. I also note that at a recent meeting in Luxembourg of the heads of state of the Council of Europe, they adopted a proposal by President Mitterrand suggesting that a war crimes trial ought to take place. So there is quite a bit of movement in this area.

Another problem in the news is what actually happens to people in this arena and whether or not reality dissipates the rule of law. I guess you could even get deeper than that and ask the question whether there is a rule of law at all? Amnesty International has noted the international reactions to what goes on in Kuwait toward suspected collaborators with Iraq, a lot of whom are Palestinians, and the allegations of torture and other things perpetrated by that regime, or people within that area, toward those persons.

Another problem that I see in this arena is the tendency for politicians and others to use words such as "international law," the "rule of law," and concepts like that as rhetorical devices to promote their own interests. We end up denigrating the rule of law, if there is such a thing.

Those of you who were in the session yesterday will remember that I mentioned a couple of interesting items that have occurred in Europe in the last year in relation to international criminal law. For example in Germany, and in most of the European nations, they have been expanding their extraterritorial jurisdiction as long as there is, in German terms, a meaningful connection, or meaningful touch point with Germany (sinnvoller Anknüpfungspunkt). For example, Germany will claim prescriptive jurisdiction over conduct having such a connection to Germany no matter who commits it and no matter where it is committed. Some of the meaningful touch points include national domestic interests and international interests.

In their penal code, some of the items that are included in those meaningful touch points are the dissemination of pornography as a crime of universal jurisdiction from Germany's point of view; passive personality, which we are used to thinking of where a German national is in fact injured by the conduct; protective principles, including any harmful conduct that relates to atomic energy, such as radiation escape; the use of certain prohibited weapons; and other items. Jurisdiction has expanded significantly through the broader application of the universality principle.

Another thing that is quite interesting in the opposite regard over in Europe is the *Soering* case decided by the European Court of Human Rights in 1989. *Soering* was an individual charged with murder in the United States who was eventually arrested in Britain on the basis of an extradition request; he was eventually found extraditable and extradited to the United States. The European Court, however, noted that it was a violation or could be a violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms if he were extradited to the United States where he might suffer the death penalty or face the suffering of living on death row for a long period of time (the death row syndrome). He was eventually extradited upon the promise of the attorney general in Virginia that he would not be convicted of a crime which might involve being sentenced to the death penalty.

What is more interesting is how this case has impacted in Europe. For example,

it was recognized that the state receiving the request for extradition has the responsibility to ensure that the human rights of the fugitive are going to be protected in the requesting state. Therefore, it was Great Britain's responsibility, if Soering were to be extradited, to ensure that his human rights would be protected in the United States.

With that in mind, the German Constitutional Court has held that the decisions of the European Court are persuasive authority for its interpretation of not only international human rights law but its own domestic law. You know that German Basic Law incorporates international human rights law into German domestic law. Every code article relating to the penal law, including extradition, is to be read in a manner that broadly protects human rights. So this is going to have a long-term impact on the German approach to domestic criminal law.

It strengthens the trend in Germany to do just that. Additionally, and paradoxically, there is a tendency now in Germany to do away with some prohibitions on extradition, such as double criminality and the political offense exception. The thinking is to replace these prohibitions with direct and explicit human rights clauses in extradition treaties and, when an extradition occurs, to read into those treaties specific human rights protections, which presumably would include the protection of a fair trial, etc.

The interesting thing about that is its effect in the United States. I have been a strong antagonist to the destruction of the political offense exception because often it functions as a repository for human rights protections. A direct application of civil liberty and human rights protections might persuade me that the political offense exception is an inefficient and obsolete means. The tendency on the Continent has been to do two things: one, expand jurisdiction; two, accommodate the protection of human rights in relation to that expansion.

Let me change directions and talk about another item; the prospect of an international criminal court. I have mentioned the suggestion that a so-called war crimes tribunal be established. There has been a movement for a long time to establish an international criminal tribunal with broader jurisdiction than war crimes. M. Cherif Bassiouni has suggested that there be created a tribunal of universal jurisdiction, indeed, one that in its convention would include an international criminal code. It would incorporate, in his idea, basically all conduct that has been found, or has been argued to be, criminal in the highjacking, genocide and apartheid conventions. All the conventions that articulate activity as being criminal would be incorporated into a code that would then have specific elements that could be proved or disproved in a criminal law sense; elements that would meet at least due process arguments that they are not too vague. This is one of the problems of the current approach to international criminal law, and I use as an example the lack of an international definition of terrorism.

If we do not have a definition of terrorism how can we go about prosecuting people for the crime? What is to be the standard of proof? How do you go about doing it? If you do it locally on the basis of a highjacking treaty that has elements in the domestic code, that would be acceptable. If you prosecute somebody for murder, that has elements in the domestic code, that would also be appropriate. If you extradite on the basis of universal jurisdiction because terrorism is so-called in the international arena, that would be acceptable as long as there were specific elements to be proved. But the tendency at least rhetorically is to claim the need to prosecute individuals upon a vague notion of conduct for which it is difficult to establish the specific elements. The establishment of an international criminal code would resolve at least that problem.

In fact there exists a history for the creation of an international tribunal. In 1989, it was proposed by the General Assembly to consider the development of an international criminal tribunal relating specifically, and only to, drug trafficking. Then, in 1990, the International Law Commission, if I remember correctly, made a proposal that the jurisdiction of that tribunal expand beyond just drug trafficking and include crimes against the peace and security of humanity.

Last summer Bassiouni triggered a meeting of experts in Sicily to consider some proposed drafts of statutes for an international criminal tribunal. In that meeting there were individuals from many nations who met and actually hammered out a proposal. They then revised the drafts that had been submitted and agreed that the final draft ought to be submitted to the United Nations before the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held this past summer in Havana.

It was submitted in Havana last August and although the UN delegates supported the proposal, they did not come down with any formal recommendation. I understand that the French and the British lobbied against it, for what reasons I don't know; but it appears they lobbied against it even though both had voted favorably for an international criminal tribunal in the United Nations under the auspices of the prior UN General Assembly resolutions.

I guess I should mention a couple of individuals who are interested in promoting the adoption of an international criminal tribunal. The prime minister of Trinidad-Tobago and the president of Colombia have been prominent in wanting to support such a tribunal, which I suppose would take pressure off their domestic systems to allow a different institution to assist them. There is opposition to it, as well. There are some substantive theoretical problems with such a tribunal. Let me discuss a couple of problems that I foresee requiring attention before such a tribunal will be adopted. How would the investigation take place? At what point would the right to counsel attach? What sort of trial would take place? Would it be an adversarial type of trial? How would the individual be represented? When would representation be triggered? How would evidence be gathered? Who would gather that evidence? What sort of standards would be used for the presentation of evidence? Would there be a jury trial? Would there be an appeal and where could one appeal? What would be the relationship between this tribunal and its prosecutors? The Havana code, at least, did include some mechanism for investigations of the kind made by a European investigative judge. It also attempted to address the procedural due-process issues.

These very serious questions need to be considered in order to accommodate human rights. I suppose there are ways that these things could be solved. I do not know whether these problems were behind the British and French objections to the draft when the proposal was in Havana last year. The prospect of working out the intricacies of an International Criminal Tribunal is very interesting. The exercise is worth study and development.

REMARKS BY THOMAS A. BUERGENTHAL*

My assignment is to report to you on recent developments in the Conference on Security and Co-operation in Europe (CSCE) as they relate to human rights or, more properly, to human dimension issues. (The term "human dimension" was introduced into the CSCE lexicon in 1989 by the Vienna Follow-up Conference,

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