

SADDAM HUSSEIN AS HOSTES HUMANI GENERIS? SHOULD THE U.S. INTERVENE?

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INTRODUCTION

This article discusses several jurisdictional principles which may assist the United States in its efforts to acquire jurisdiction in certain situations that are declared, by the United States, egregious enough to warrant intervention. The United States has long used the "effects doctrine"¹ to assert extraterritorial jurisdiction. This article concentrates on developing and employing the Hostes Humani Generis Theory,² and its past and possible future use. The central focus is to determine whether the possibility exists that the United States may use the theory in an effort to acquire physical jurisdiction over Saddam Hussein.

A survey, though not comprehensive, of U.S. activity and approach to justice under the auspices of the Hostes Humani Generis Theory or parallel theories and the tools used to effect its edicts is also developed.³ The lack of proper fora to pursue international disputes, the need for and efforts to develop a supranational tribunal,⁴ and international reaction, lack of support and defiance to this activity,⁵ are also critiqued. Finally, a conclusion is drawn that highlights U.S. aggressive use of the Hostes Humani Generis Theory in the extraterritorial context and the continued overt lack of support from the international community. Several suggestions are detailed to curb continued use of the United States' extraterritorial jurisdiction under the theory of Hostes Humani Generis or other parallel approaches⁶

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1. The "effects" doctrine allows the U.S. to assume extraterritorial jurisdiction to regulate U.S. commerce. See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 354-55 (1909), explaining that the "intended effects test is a legitimate basis of jurisdiction when defendant's conduct abroad is intended to result in substantial, direct, and foreseeable effects on U.S. domestic or foreign commerce). See *United States v. Aluminum Co. of America*, 148 F.2d 416, 416 (2d Cir. 1945) (*Alcoa*) (explaining that the intended effects test is a legitimate basis of jurisdiction to regulate economic conduct abroad when the defendant intends market effects inside U.S.).

2. See *infra* notes 7-39 and accompanying text, *passim*.

3. See *infra* notes 30-148 and accompanying text.

4. See *infra* notes 149-202 and accompanying text.

5. See *infra* notes 203-263 and accompanying text.

6. See *infra* notes 263-276 and accompanying text.

THE HOSTES HUMANI GENERIS THEORY

Hostes Humani Generis⁷ ("HHG") is defined as an "enem[y] of the human race." The phrase Hostes Humani Generis refers to a theory prominent in the late 18th and early 19th century law of nations. Its essence was that certain acts specified as universally reprehensible would make the perpetrator liable to capture and trial wherever he went. The principal, though by no means the only, application of Hostes Humani Generis was to pirates.⁸ Piracy was included not simply because it usually occurred on the high seas, and outside the territorial jurisdiction of any sovereign, but because of its internationally recognized nature as a heinous threat to the common safety. The doctrine was not limited to pirates exclusively, however, because it applied also to land-based offenders whose culpable acts earned them recognition as enemies of civilization everywhere.⁹ "Pirates were merely a type, albeit a pervasive one, of universal offender."¹⁰ "Although the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories, we ought to except from this rule those villains, who, by the nature and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race. Poisoners, assassins, and incendiaries by profession may be exterminated wherever they are seized; for they attack and injure all nations, by trampling under foot the foundation of their common safety. Thus pirates are sent to the gibbet by the first into whose hands they fall"¹¹ The United States has long invoked the practice of assuming jurisdiction over piracy on the high seas, that is out of the jurisdiction of any particular state. The United States tried one such pirate for piratical acts upon the high seas against persons who were subjects of Spain.¹² The U.S. position was, and still is, not to allow such actors to evade justice. Today, this position extends far beyond piratical acts.

Early in its history, the United States also tried to influence international law – law of nations – when it attempted to abolish the slave trade and, thus, declared the act piracy.¹³ A Spanish ship was seized by an American revenue cutter and coerced into an U.S. port and ultimately

7. BLACKS LAW DICTIONARY 664 (5th ed. 1979).

8. Jeffrey M. Blum and Ralph G. Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala* 22 HARV. INT'L L. J. 53 (1981) citing *United States v. Klintock*, 18 U.S. (5 Wheat) 144 (1820).

9. *Id.*, quoting E. DE Vattel, *THE LAW OF NATIONS*, 232-233 (5th ed. 1849).

10. *Id.*

11. *Id.* at fn. 36, quoting E. DE Vattel, *THE LAW OF NATIONS* 232-233 (5th ed. 1849).

12. *United States v. Palmer*, 16 U.S. 610, 611 (1818) (Established that the U.S. has jurisdiction when the act, murder or robbery, would be punishable in the U.S.).

13. Slave Trade Act, ch. 22, 2 Stat. 426 § 7 (1807).

into a U.S. court.¹⁴ Although the United States was also engaged in slavery at this time,¹⁵ it nevertheless resisted claims for restitution upon the ground that the persons in question were not by law (U.S. law) to be considered slaves, but free. The United States asserted that U.S. laws were proper and not the laws of Spain. The United States argued that its national policy dictated this result.¹⁶ "The acts of Congress provide that, however brought here [slaves to America], they shall be set free, and sent back to their native land."¹⁷ The United States also asserted that it would assume jurisdiction over such instances where pirates were brought before its courts regardless of how the pirates were brought to U.S. shores, and further that the action constituted a pledge to all nations engaged in the slave trade activity that the United States was committed, even if jurisdiction was not clear, to asserting its long arm jurisdiction.¹⁸ This pledge continues because the United States extends jurisdiction extraterritorially by using its articulation of what actions "effect" the United States.¹⁹

The United States went as far as it could, nationally, to abolish the slave trade. Articulations of what the law should be and U.S. vigor in this area was highly criticized,²⁰ and some of the sentiments about double standards still ring true today, a façade of "false legalism."²¹

"The common denominator of Hostes Humani Generis seems to have been the magnitude of the threat posed by the acts, coupled with the universality of condemnation of the acts. The effect of the doctrine was to hold individuals liable, both civilly and criminally, for violations. When wrongdoers violated the law of nations their liability followed them everywhere. It was unimportant whether their acts had any connection with the forum state, as all nations had a duty to enforce international law. There was no doubt that United States courts, for example, were competent to try foreign nationals who committed acts of universal

14. *The Antelope*, 23 U.S. 66, 106 (1825).

15. U.S. CONST. amend. XIII (The U.S. did not emancipate the slaves until 1865).

16. *The Antelope*, 23 U.S. at 71.

17. *Id.* at 71.

18. *Id.* at 72. See Slave Trade Act, *supra* note 13, at § 7 (made no distinction as to the national character of ships even if found outside U.S. waters the ship was automatically forfeited).

19. See *supra* note 1.

20. *Id.* at 86. ("For more than twenty years this traffic was protected by your constitution, exempted from the whole force of your legislative power, its fruits yet lay at the foundation of that compact. The principle, by which you continue to enjoy them, is protected by that constitution, forms a basis of your representatives, is infused into your laws, and mingles itself with all the sources of authority. Relieve yourself of these absurdities, before you assume the right of sitting in judgment on the morality of other nations. But this you can not do").

21. *Yamashita v. Styler*, 327 U.S. 1, 30 (1946).

culpability outside the United States."²² Even though the doctrine declined in use when nations adopted the notion that international law only applied to nations' conduct,²³ the United States has maintained and pursued the notion that U.S. courts not only have the power to, ordinarily, but also the obligation to decide "cases and controversies."²⁴ Additionally, the U.S. Congress has the power to define and punish . . . offenses against the Laws of Nations.²⁵ Therefore, the U.S. continues to extend jurisdiction, in a myriad of circumstances, when it determines that an act poses threats, which should be construed as "universally culpable"; thus, U.S. courts have the obligation to decide the issue even if the acts occurred outside the United States.

The universality principle²⁶ is very similar to the *Hostes Humani Generis* Theory. According to the universality principle, "a state may exercise jurisdiction with respect to certain specific universally condemned crimes, principally piracy, wherever and by whomever committed, without regard to the connection of the conduct with that state."²⁷ In some instances the crime is so universally condemned that the perpetrator is an enemy of all people; therefore, the nation with custody can try and punish him.²⁸ The problems with classifying an individual or administration as "HHG" are the lack of an adequate definition and international acceptance of what constitutes an "enemy" and ambiguity as to when the behavior warrants applying the label or, ultimately, pursuing jurisdiction.

Acts of aggression are rapidly coming into focus in the international area. By the standard of contemporary international law, terrorists are [also] known as *Hostes Humani Generis*, common enemies of humankind.²⁹ The United States has included torture³⁰ as an activity that violates universally accepted norms of international law of human rights, regardless of the nationality of the torturer, and, thus whenever an al-

22. *Supra* note 8, at 61.

23. *Id.*

24. U.S. CONST. art. III, § 2, cl. 1.

25. *Id.* at art. I, § 8, cl. 10.

26. S. HOUSTON LAY AND HOWARD J. TAUBENFELD, *THE LAW RELATING TO THE ACTIVITIES OF MAN IN SPACE* (1970) (Discussing traditionally accepted forms of jurisdiction, universality, territoriality, protective, etc.).

27. *Id.*

28. *Matter of Extradition of Demjanjuk*, 612 F. Supp. 544 (N.D. Ohio 1985).

29. Louis Rene Beres, *Assassination of Terrorists May Be Law-Enforcing - A Brief According to International Law* (visited June 29, 1998) <http://www.freeman.io.com/m_online/nov97/beres2.htm>.

30. United Nations Declaration on The Protection of All Persons From Being Subjected to Torture, General Assembly Resolution 3452, U.N. GAOR Supp. No. 34, 91 U.N. Doc. A/1034 (1975).

leged torturer is found and served with process by an alien who is in the United States, U.S. federal courts have jurisdiction.³¹

Accordingly, citizens of Paraguay were allowed to sue a Paraguayan citizen in U.S. courts for wrongfully causing the death of their son, allegedly by the use of torture. The plaintiffs claimed that this act was done in retaliation for the father's political views.³² The U.S. court assumed jurisdiction even after the defendant's Paraguayan counsel vehemently averred that Paraguayan law provided a full and adequate civil remedy for the alleged wrong.³³

U.S. courts also have jurisdiction to try aliens for conspiracy to smuggle drugs into the United States.³⁴ The Courts have interpreted this to mean that the defendant does not have to ever have been in the United States. For example, an alien was charged with conspiracy to import drugs into the United States and the Court assumed jurisdiction over the matter.³⁵

Terrorism has been defined as the substitute application of violence or threatened violence intended to sow panic in a society to weaken or even overthrow the incumbents and to bring about political change.³⁶ It shades into 'guerrilla warfare.'³⁷ "In its long history terrorism has appeared in many guises; today society faces not one terrorism but many terrorisms."³⁸ These types of activities are recognized as crimes against humanity: murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions of political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the coun-

31. Alien Tort Statute, 28 U.S.C.A. § 1350 (1948) (The statute allows aliens to sue in U.S. courts for torts, including torture, committed in other sovereigns' territories).

32. *Filariga v. Pena-Irala*, 630 F.2d 876, 877 (2d Cir. 1980).

33. *Id.* at 877.

34. 21 U.S.C. § 960 (1981).

35. *Marin v United States*, 352 F.2d 174 (5th Cir. 1965). See *Rocha v. United States*, 288 F.2d 545, *cert. den.* 366 U.S. 948 (U.S. court used the protection principle to assert jurisdiction over a crime committed by an alien while abroad a ship. Highlighted extraterritorial effects of U.S. law).

36. Walter Laquer, *Postmodern Terrorism*, FOREIGN AFF., Sept.-Oct. 1996, at 25 (Discussing modern examples of terrorist activity).

37. Tom Wells, *Why We Would Do Well to Ape Mao's Guerrilla Tactics*, MARKETING, April 17, 1997, at 18 (The word 'guerrilla' derives from the Spanish term for 'little soldier' - usually uses fire and maneuver tactics to harry the enemy. According to Mao Zedong, among other things, it "oppose[s] fixed battle lines and positional warfare and favour[s] fluid battle lines and mobile warfare.").

38. See *supra* note 36 at 25.

try where perpetrated.³⁹ The United States defines what types of behavior must be prosecuted and proceeds accordingly; these definitions are analogous to "HHG."

A great deal of controversy regarding the long arm of U.S. jurisdiction arose as a result of the court martial, by U.S. military court, of General Yamashita,⁴⁰ after the cessation of the war. Here the United States construed an ambiguity—whether the charge against the petitioner stated a recognized violation of the law of war and whether the U.S. court was the proper forum—in the light most favorable to the United States. Therefore, after concluding in the affirmative, the United States used this construction, and rushed to prosecute Yamashita after his writ of habeas corpus was denied.⁴¹ The court was not only criticized for denying Yamashita his due process rights but was also criticized that popular passion or frenzy of the moment influenced its decision. Yamashita was the leader of an army that had been totally destroyed by the United States. Many casualties and violent acts of war took place. He voluntarily surrendered. At that point he was entitled to all the proper procedures of a fair trial and to be free from charges of legally unrecognized crimes that would serve only to permit his accusers to satisfy their desires of revenge. The trial was also held in an area where the United States had complete control; he was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence, and summarily sentenced to be hanged.⁴²

In Yamashita's situation, the United States seemingly viewed the alleged atrocities as acts against humanity; therefore, Yamashita was an "enemy to mankind." Justice Murphy warned the Court that "the high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implication of the procedure sanctioned [by the Court] today. But even more significant will be the hatred and ill-will growing out of . . . this unprecedented procedure."⁴³ That warning continues to have merit today.

39. See Charter of the International Military Tribunal, Aug. 8, 1945, 59 at. 1546, 1547, 82 U.N.T.S. 279. The United Nations General Assembly in a resolution proposed by the U.S. unanimously affirmed the principles of international law recognized in the Nuremberg Charter and Judgment. U.N GAOR, 95 at 188, UN Doc. A/64/Add.1 (1946).

40. *Yamashita v. Styler*, 327 U.S. 1 (1946) (Commanding General of the Imperial Japanese Army and Military Governor of the Philippines was tried and convicted for a violation of the law of war; he was classified as an enemy belligerent for failing to prevent certain acts; he was not charged with any acts).

41. *Id.* at 26, 30-31.

42. *Id.* at 27-28.

43. *Id.* at 28 (Justice Murphy dissenting).

Further, in an effort to bolster and justify its case for extraterritorially expanding its reach, the U.S. Government and the media often use terms to vilify the offender.⁴⁴ For example, President Bush referred to Noriega, Panama's head of state, as a "drug trafficker" who should get a fair trial. Dan Rather, on the CBS Evening News, called the General "scum" and "a thug." Peter Jennings on ABC's World News Tonight called Noriega an "odious creature."⁴⁵ Noriega was later prosecuted in U.S. court for his activities.⁴⁶ Saddam is perhaps the closest analogy to Noriega. For example, Saddam, the central focus of this article, has been called a menace, among other things.⁴⁷ Saddam has been compared to Hitler and also called a war lover.⁴⁸ "Like a vampire, the war lover feeds on the blood of the living."⁴⁹ President Bush even said that Saddam was "worse than Hitler."⁵⁰

Yugoslavia's President Slobadan Milosevic was referred to as "an international pariah."⁵¹ The classifying continues: Iran, Libya, North Korea, Cuba, and especially Iraq are often referred to as "The World's Six Rogue States."⁵² Iran and Iraq are not only considered rogues but also "Pariah States."⁵³ Washington has also classified Iran "as one of the chief threats to global security."⁵⁴

When Saddam threatened to burn Israel, the U.S. publicly called Iraq's human rights practices "abysmal."⁵⁵ As a result of this aggression, "some [U.S.] officials wanted to do more [than threaten] and proposed putting Iraq back on the terrorist list."⁵⁶ Americans are openly

44. PAT M. HOLT, *SECRET INTELLIGENCE AND PUBLIC POLICY - A DILEMMA OF DEMOCRACY* 172 (The media is important because, "In simplest terms the government wants the news presented in a way that reflects credit on the government. To this end the government tries mightily to influence, if it cannot control, what flows through the channel that the media provide between the government and the public, because this is what shapes public attitude toward government. In the fashionable phrase of the 1990s, the government seeks to put a spin on the news. The media view these efforts as directed toward distortion and concealment, they consequently believe it is their job, even their responsibility, to disclose these efforts.)

45. Richard Fricker, *Dealing With The Maximum Leader*, J.A.B.A. Apr. 1990, at 54, 56 .

46. *Noriega v. United States*, 118 S.Ct. 1389, 140 L.Ed.2d 648 (1998).

47. Steven J. Thomma, *U.S. Finding Its Roar Lack Bite in Recent Foreign Upheavals*, HOUSTON CHRON., May 22, 1998, at 36 A.

48. JOHN E. STOESENGER, *WHY NATIONS GO TO WAR* 182 (6th ed. 1993).

49. *Id.* at 182.

50. J.F.O. McAllister, *The Lessons of Iraq*, TIME, Nov. 1992, at 57.

51. *Kosovo's Cauldron Bubbles On*, THE ECONOMIST, June 20-26, 1998, at 57.

52. Lawrence F. Korb, *Our Overstuffed Armed Forces*, FOREIGN AFF., Nov.-Dec. 1995, at 22, 25 .

53. Jeffrey E. Garten, *Business and Foreign Policy*, FOREIGN AFF., MAY-JUNE 1997, at 67.

54. Graham E. Fuller and Ian O. Lesser, *Persian Gulf Myths*, FOREIGN AFF., Mar.-June 1997, at 47.

55. See McAllister, *supra* note 50, at 57.

56. See McAllister *supra* note 50, at 58

discussing the possibility of not only threatening to treat Saddam as "an enemy to mankind" (*Hostes Humani Generis*) and in the traditional sense bring him to justice but are also discussing assassination. In certain circumstances political assassination is a moral act. If the attempt on Hitler's life in July 1944 had succeeded, the world would have been spared oceans of blood and tears. And if Saddam Hussein had been removed before 1990, two wars might have been averted. Hitler was Nazi Germany, and *Saddam still is Iraq today*. As long as he survives in power, civilization is in danger.⁵⁷ "The Iraqi leader isn't going away. That means assassination may be Clinton's best option."⁵⁸ "Relaxing the moral norm against it [assassination] is a regrettable but justifiable price to pay when confronted with someone like Saddam who is unique in his capacity to inflict evil on his own people and the rest of the world. It's one of the extremely rare circumstances where killing can be a *humanitarian* act that saves far more lives than it risks."⁵⁹ Former CIA director, Robert Gates, said that assassination is a "non-option [only] because Saddam is so elusive and well protected."⁶⁰ A targeted air strike against the homes or bunkers where Saddam is most likely to be found has also been strongly suggested.⁶¹ "If we can kill Saddam we should."⁶² The United States is also concerned about other activities that are against "humanity," and often takes measures to suppress them.

Terrorism and tyranny are often grouped together. Terrorist acts around the world are of great interest and concern to the United States. This is not only because the U.S. economic, ideological, military, technological, and cultural primacy are overwhelming,⁶³ but also because the United States often intervenes with threats and other methods to effectuate compliance to combat many international problems that are actually crimes against humanity: terrorism, tyrants, human rights violations, and its general concern about deterring aggression, especially in the area of controlling weapons of mass destruction. The United States, therefore, "need[s] to check the capabilities of terrorist groups and states that support terrorism."⁶⁴ The United States must pre-empt this activity by denying them funds, arms or safe havens and deal with it forcefully to

57. JOHN G. STOESENGER, *WHY NATIONS GO TO WAR* 205 (6th ed. 1993).

58. George Stephanopoulos, *We Should Kill Saddam*, *NEWSWEEK*, Dec. 1, 1997, at 34.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Samuel Huntington, *The Erosion of American National Interest*, *FOREIGN AFF.*, Sept.-Oct. 1997, at 42.

64. R. JAMES WOOLSEY, *THE FUTURE OF INTELLIGENCE ON THE GLOBAL FRONTIER* 3 (1993).

protect itself, its allies, and friends.⁶⁵ "Terrorism can be permitted to have no role to play whatever on our new global frontier. None."⁶⁶

Tyranny is the exercise of power beyond right, nobody can have a right to: and this is making use of the power any one has in his hands, not for the good of those who are under it, but for his own private, separate advantage.⁶⁷

Wherever law ends, tyranny begins, if the law be transgressed to another's harm; and whosoever in authority exceeds the power given him by the law, and makes use of the force he had under his command to compass that upon the subject which the law allows not, ceases in that to be a Magistrate, and acting without authority may be opposed, as any other man who by force invades the right of another.⁶⁸

Some of Saddam's conduct may border on tyranny – by jeopardizing the international community, he has transgressed many.

The U.S. zeal to influence democracy, suppress tyrants, and create open markets is evinced by its assistance to ease Ferdinand Marcos of the Philippines into exile⁶⁹; the backing of the contra guerrillas in Nicaragua,⁷⁰ and the assistance to Cambodia in 1993 with its first free, fair, and comprehensive elections.⁷¹ Also, "in July 1994 the United States successfully persuaded the UN Security Council to authorize all necessary means" to remove the coup leaders [from Haiti] and restore Aristide to the Presidency. This was a landmark: for the first time the United Nations had called for international action to restore a democratically elected leader.⁷² Of course, this was due to U.S. influence and persuasion, but most of all it was due to the United States' dogged commitment to implement its version of democracy, the rule of law, and to continue its efforts to secure harmony and world peace by aggressively pursuing terrorists and tyrants wherever they are found. The use of Weapons of Mass Destruction⁷³ (WMD) is also an area of grave concern for the United States. Sovereigns as well as fringe groups are potential dangers. The United States is committed to disarming any group or nation possessing weapons of mass destruction – as the threat to use weap-

65. *Id.*

66. *Id.*

67. JOHN LOCKE, *TREATISE CONCERNING CIVIL GOVERNMENT* 71 (Josian Tucker ed., 1967).

68. *Id.*

69. Strobe Talbott, *Democracy And The National Interest*, FOREIGN AFF., Nov.-Dec. 1996, at 53.

70. *Id.*

71. *Id.*

72. *Id.*

73. Weapons of Mass Destruction (WMD) include but are not limited to nuclear, biological, and chemical. See Betts *infra* note 74.

ons of mass destruction heightens, the U.S. will doubtless take more preemptive defense measures that will target potential groups and breeding grounds, whether inside the United States or in Iran or Iraq.⁷⁴ When conflicts threaten U.S. interest, or when they are fueled by nations or factions that seek to obtain weapons of mass destruction, or that employ terrorist tactics, then we must understand and be prepared to deal with them.⁷⁵ "Today there are twenty-five countries – many hostile to our interests – that are developing nuclear, biological, and chemical weapons. More than two-dozen countries alone have research programs underway on chemical weapons, and Libya, Iran, and Iraq have stockpiled them."⁷⁶

Many sources of contention exist not only with WMD but other aggressive acts. This activity may lead the United States to aggressively pursue Saddam under the Hostes Humani Generis Theory. Based on his wide range of activities, Saddam may become the example to the world if the U.S. decides to classify him and ultimately pursue him under the auspices of the "HHG" theory. Ultimately, this decision may be expedited if acts of aggression and terrorism are traced to sources that are aligned with Saddam.⁷⁷ For example, the U.S. adopted the Antiterrorism Act⁷⁸ to deter terrorism both nationally and internationally.⁷⁹

A. United States' Approach to Justice

The U.S. has acted [often] as if the emergence anywhere in the hemisphere of a government it deems Marxist so threatens the sovereignty of this nation or its allies [or smaller more vulnerable nations] as

74. Richard K. Betts, *The New Threat of Mass Destruction*, FOREIGN AFF., Jan.-Feb. 1998, at 26, 38.

75. See WOOLSEY, *supra* note 64, at 1-3.

76. *Id.*

77. See also Alan Cooperman, *Terror Strikes Again*, U.S. NEWS AND WORLD REPORT, Aug. 17-24, 1998, at 10 (Recent terrorist attacks on U.S. embassies prompt new fears and a vow, by the U.S., of retribution. Terrorist attacks on U.S. embassies in Kenya and Tanzania are suspected as having Arab connections. Today, a Saudi millionaire Osama Bin Ladin, is suspected of financing terror around the world. Brian Jenkins, a terrorism expert said "we deal with universes of like-minded fanatics from which emerge ad hoc conspiracies, or whose members provide the soldiers for a terrorist leader." The U.S. has attempted to apprehend Bin Laden but requesting help assistance from the Afghanistan people, but to no avail. Bin Laden issued a fatwa, religious ruling, "to kill the Americans and their allies.").

78. Antiterrorism And Effective Death Penalty Act, 104 Pub. No. 132, 10 Stat. 1214 (1996)

79. *Id.* at § 702 (Acts of Terrorism Transcending National Boundaries – whoever, involving conduct transcending national boundaries . . . a) kills, kidnaps, maims, commits and assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the U.S. or b) creates a substantial risk of serious bodily injury to any other person by destroying within the U.S. or by attempting or conspiring to destroy or damage any structure, conveyance, or real or personal property . . . Further, there is Extraterritorial Federal Jurisdiction).

to justify measures to abort or overthrow the offending regime.⁸⁰ Much of the time, this decision is a unilateral one.⁸¹

U.S. law has an aggressive extraterritorial reach in the area of trade, "as in attempts to penalize foreign companies for violating U.S. trade sanctions."⁸² If a foreign suspect need to be brought to justice the United States has, at times, resorted to force. Using forcible means to bring international criminals to justice is not a novel one in international law, especially when dealing with situations where the offender is perceived as a threat to humankind (Hostes Humani Generis). Terrorists "are Hostes Humani Generis, common enemies to mankind"⁸³ "Men who are by profession poisons or incendiaries may be exterminated wherever they are caught, for they direct their disastrous attacks against all nations by destroying the foundation of common safety."⁸⁴

For many years, the United States has routinely used speculative means, kidnapping or forcibly abducting, to bring defendants to justice. For example, Drug Enforcement Agents kidnapped a Mexican citizen who was suspected of killing an American special agent.⁸⁵ This act was committed even though the United States has an extradition treaty with Mexico.⁸⁶ These practices continue even after earlier warning "that illegal restraints are unauthorized and unjustified and unjustified by any foreign policy. . .and that commonly accepted judicial standards are to be recognized and enforced."⁸⁷

Perhaps more vivid, the situation with former Panamanian leader Manuel Noriega epitomizes the United States' aggressive approach when it perceives that a nation or person is somehow threatening the United States' interpretation of how certain events should develop and the desired outcome. In December 1989, President Bush deployed military troops to Panama and proclaimed that "General Manuel Noriega had declared a state of war with the United States and publicly threatened the lives of Americans in Panama."⁸⁸ Even those who advo-

80. Tom. J. Farer, *U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activist: Panama: Beyond The Charter Paradigm*, 84 AM. J. INT'L L. 503 (1990).

81. *Id.* at 508.

82. Charles Lane, *Changing Iran-Germany's New Ostpolitik*, FOREIGN AFF., NOV.-DEC. 1995, at 77.

83. See Beres *supra* note 29, at 2.

84. *Id.*, quoting Nuremberg Tribunal 1945 (discussing the limited right to assassination).

85. *United States v. Alvarez-Machain*, 112 S.Ct. 2188 (1992) (U.S. agents, with the help of Mexican nationals, forcibly abducted the doctor, and he was tried in U.S. court).

86. *Treaty of Extradition*, May 4, 1978, 31 U.S.T. 5059.

87. *Yamashita*, 327 U.S. at 30 (Murphy, J., dissenting).

88. Ved P. Nanda, *U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists?: The Validity of United States Intervention in Panama Under International Law*, 84 AM. J.

cate the validity and viability [of humanitarian] intervention can justify only a limited and temporary unilateral necessity and proportionality in the use of force as required under customary international law. Additionally, such unilateral action is ultimately subject to community review. Thus, notwithstanding the lack of agreement on the proper interpretation of Article 51 of the UN Charter, while rescue operations of one's nationals might be considered permissible, the United States' invasion of Panama does not satisfy the minimum required standards.⁸⁹

Even though the incidents are serious, the question remains – whether they warrant the launching of a full-scale invasion, of a size not seen since the Vietnam War? The conclusion is inescapable [to U.S. critics] that the United States has failed to provide sufficient evidence to prove that the “necessity prerequisite” was met.⁹⁰ Restoration of democracy, supposedly, was another reason the United States intervened in Panama. Noriega's strong-arm tactic to gain power, the roar of opposition by the Panamanian people, and ultimately Noriega's nullification of the U.S. supported election of an opposition party as Panama's President⁹¹ were all critical cogs in the U.S. decision to use force. The United States interpreted Noriega's behavior as quite egregious; nevertheless, “no international legal instrument permits intervention to maintain or impose a democratic form of government in another state.”⁹² President Bush further justified intervention because the invasion was delayed until after Endara, the new President, was sworn in. Therefore, he believed that the invasion was legitimate because Endara, the puppet, immediately asked the United States for aid in restoring democracy to Panama.⁹³ And the United States acquiesced.

The use of force as a deterrent to certain behavior is not wise. “If democratic forces are well developed in the target state, they will likely prevail without foreign assistance; if they are underdeveloped or nonexistent, a period of foreign-dominated “tutelage” is likely to follow, which is contrary to the concept of self-determination.”⁹⁴ Even though there was no direct threat that the Panama Canal was in jeopardy,⁹⁵ the United States proceeded to invade Panama. Although Noriega was

INT'L L. 494 (1990) quoting Statement by The President (Dec 20, 1989) (Office of the Press Secretary, the White House).

89. See Nanda, *supra* note 88, at 495.

90. See Nanda, *supra* note 88, at 496.

91. See Nanda, *supra* note 88, at 498.

92. See Nanda, *supra* note 88, at 498.

93. See Fricker, *supra* note 45, at 54.

94. *Id.*, citing Berry, *The Conflict Between United States Intervention And Promoting Democracy in the Third World*, 60 TEMPLE L.Q. 1015 (1987).

95. *Id.* at 501.

never, officially, declared as an Hostes Humani Generis, the evidenced established that he was treated as such. This action may open the door to pursue Saddam. Additionally, Noriega's indictment and subsequent arrest "reflects the long-standing U.S. practice of asserting extraterritorial legislative jurisdiction under the "effects" doctrine, or arguably under the "protective principle,"⁹⁶ or even more so the Hostes Humani Generis theory.

No State. . . has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.⁹⁷

The United States often ignores this directive and also the international preference for multilateral intervention. This international preference stems from several factors: "multilateral efforts may provide a check on interventions by a single state to pursue its own ends (political, military, economic, etc.) rather than merely correcting the international outrage that may have justified the intervention. . . [and] to assure that the incident that justifies the intervention is indeed viewed by the international community as of sufficient magnitude to warrant intervention."⁹⁸ Multilateral support does not automatically mean that the desired results are met. But, the results are often counterproductive when a state acts unilaterally.

For example, after the United States intervened in Panama, its desired results were not realized. Supporters of Guillermo Endara, Panama's President, "are turning against him. Labor unrest is on the rise, and a feeling exist that the United States is replacing Noriega as the real power."⁹⁹ Nevertheless, the Noriega approach may also be used to pursue Saddam. The United States has pursued prosecution in situations that were not distinctly demarcated as falling within U.S. jurisdiction.

Perhaps the most notable commander detained by U.S. forces was Yamashita,¹⁰⁰ who was actually executed for war crimes committed during the Japanese occupation of the Philippines. Yamashita's case was heard before the United States Supreme Court on a writ of habeas corpus. The Court upheld the verdict and sentence, but not unani-

96. *Id.*

97. Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361.

98. See Nanda, *supra* note 88, at 502.

99. Alima Guerrero, *Year-Old Democracy in Panama Insecure Despite U.S. Backing, The Commercial Appeal*, MEMPHIS ASSOC. PRESS, Dec. 20, 1990, at A4.

100. *Yamashita v. Styler*, 327 U.S. 1 (1947). See *supra* notes 40-43.

mously.¹⁰¹ More recently, but in the same long-arm style, the United States government captured Fawaz Yunis,^{102a} a citizen of Lebanon, after he and several of his comrades hijacked a Royal Jordanian Airlines Aircraft in Beirut and attempted to have the plane flown to Tunis. This action further illustrates how the United States intervenes based on certain types of activity that it determines too egregious to escape adjudication. At the time he was apprehended, "Yunis was not, of course, the most important terrorist on the United States' wanted list"¹⁰³; his acts were interpreted by the United States, not only as a threat to the United States but also as a threat to humanity (*Hostes Humani Generis*). U.S. interest in the flight was perhaps minimal because, of fifty-sixty passengers, only three were Americans, all of whom survived.¹⁰⁴ Here again, U.S. agents working in Cyprus obtained local help to lure Yunis from Lebanon to Cyprus where, in route in international waters, DEA and FBI agents arrested him.¹⁰⁵ Considering the extremely low number of Americans on the flight, was the United States, out of its obligation to "try cases and controversies,"¹⁰⁶ left with no alternative but to pursue Yunis? An increase in these types of incidents, leads one to ask "whether or not it is correct that some of the constraints of the U.S. Constitution can shed like an overcoat when officers of the United States pass the frontiers of the Republic. . . [and] whether the Constitution prohibits action abroad by U.S. officers to seize suspects and bring them by force to the United States for prosecution"?¹⁰⁷

Right or wrong, these questions, doubtless, have an affirmative answer. To illustrate, in *United States v. Alvarez-Machain*,¹⁰⁸ the Supreme Court exercised its traditional power of treaty interpretation to adjudicate the abduction of a Mexican national by executive authority for the purpose of criminal prosecution in the United States.¹⁰⁹ Parties enlisted by the DEA, forcibly abducted Alvarez-Machain from his medical of-

101. See Fricker, *supra* note 45, at 56.

102. *United States v. Yunis*, 681 F.Supp. 909 (D.D.C. 1988).

103. Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution And International Law, Continued*, 84 AM. J. INT'L L. 444, (1990) (discussing U.S. tactics and other instances of capturing terrorist and other perceived criminals).

104. *Id.*

105. *Id.*

106. See *supra* note 24.

107. See Lowenfeld, *supra* note 103, at 460 (explaining developments in *Ker v. Illinois*, 119 U.S. 436 (1886), where defendant was forcibly arrested in Peru, prior to demands on that government to surrender the suspect).

108. *United States v. Alvarez-Machain*, 112 S.Ct. 2188 (1992).

109. David Ring, Notes and Comments, *United States v. Alvarez-Machain: Literalism, Expediency And The "New World Order,"* 15 WHITTIER L. REV. 495 (1994) (discussing the Court's decision and whether its integrity was compromised and the Court's lawless exercise of power).

face in Guadalajara and transported him by private plane to El Paso, where DEA officials were waiting to take him into custody.¹¹⁰ The circumstances surrounding the abduction are very similar to the U.S. activity in *Yunis*, clandestine and extremely contrary to the norms of international law. To some Americans, Saddam's activities are more egregious than the acts of Alvarez-Machain or Yunis. Therefore, the United States may argue that his activities are imminent threats to the American people and their allies.

The Second and Ninth Circuits have recognized such an exception to the Ker-Frisbie Rule that a defendant himself is not suppressible as a fruit of an unlawful arrest.¹¹¹ These courts reasoned that if the governmental conduct is so beyond the scope of the law as to shock the conscience, then the court would lack jurisdiction over these defendants.¹¹² *Alvarez-Machain* was neither an isolated occurrence nor is the evolving United States policy regarding extradition treaties directed exclusively to Mexico. The United States has clearly departed from the common understanding of civilized nations as to the function and scope of extradition treaties. In effect, the Executive Branch seeks the right to disavow treaty obligations on an ad hoc basis — the Government has tired of the niceties of extradition. This position does not derive from any rule of law, but from the vagaries of assumed exigency.¹¹³ This same type of exception based on exigency may also soon be applied to Saddam in order to assume jurisdiction over him.

This same approach is also becoming more apparent in all aspects of acquiring jurisdiction over international suspects. If certain exigent circumstances exist, in a *Hostes Humani Generis* situation, for instance, then the United States may also forgo the niceties of multilateral cooperation and unilaterally pursue that particular defendant. "By kidnapping Alvarez-Machain, the United States Government provided Mexico with a small reminder of the arrogant and unbridled exercise of American power."¹¹⁴ This show of strength was not only a reminder to Mexico but also a reminder to the entire world, and perhaps ominously to Saddam, that the United States is a major power. And more importantly, that it

110. See Ring, *supra* note 109, at 497.

111. See Nanda, *supra* note 88.

112. See Ring, *supra* note 109, at 497 citing *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 65-66 (2d Cir. 1975), *cert. denied*, 421 U.S. 1001 (1975); *United States v. Lovato*, 520 F.2d 1270, 1271 (9th Cir. 1975) (*per curiam*), *cert. denied*, 423 U.S. 985 (1975), *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

113. See Ring, *supra* note 109, at 416.

114. See Ring, *supra* note 109, at 530.

has the power to carry out its edicts because ultimately "the foundation of jurisdiction is physical power,"¹¹⁵ and that it always will be.

Without a doubt, "[i]t should not be mistaken that the use of abductions as a means of attaining jurisdiction over a criminal defendant is a dangerous dance that should be conducted only in light of the most careful reflection and planning. Abducting an unsuspecting criminal to stand trial in the United States violates all notions of decency and fair play inherent in the American judicial process."¹¹⁶ Such abductions usually will violate some inner sense of justice and many people may automatically assume that principles of comity suggest that the United States will condone the abduction of Americans to stand trial in foreign courts.¹¹⁷ This cannot be acceptable to the United States because of its long history of protecting its nationals, and its general suspicion about justice abroad¹¹⁸

Until a global peace can somehow be worked out among all the nations of the world, we will constantly have a world divided.¹¹⁹ This division, apparently, does not bother the United States because it finds justification in its activities, and the United States doubtless would never actually acquiesce to the abduction of Americans. Thus, "kidnapping by authority of the United States of America. . . [should] shock the conscience of the nation. . . the distinctions between kidnapping with or without torture are understood to be unconvincing, in fact and in law; and that the United States would look at the uneven practice of other states not as a justification for indecent action, but as a challenge to develop – by example and by treaty – a rule worthy to be called international law."¹²⁰

The United States has often resorted to covert activity to apprehend U.S. declared "wanted defendants." Unilateral activity to apprehend persons indicted for war crimes (PIFWC)¹²¹ has also been added to the list of recent U.S. activity. For example, "a U.S. special operations task force has been conducting one of the broadest covert operations since

115. McDonald v. Mabee, 243 U.S. 90, 91 (1917) (J. Holmes).

116. Arthur Shin, Note And Comment, *On The Borders of Law Enforcement—The Use of Extraterritorial Abductions As A Means of Attaining Jurisdiction Over The International Criminal*, 17 WHITTIER L. REV. 327, 397 (1995) citing ETHAN A. NADELMAN, COPS ACROSS BORDERS, THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 426-36 (PA State Univ. Press 1993).

117. See Shin, *supra* note 116, at 392.

118. See *infra* note 234.

119. *Id.*

120. See Lowenfeld, *supra* note 103, at 493

121. Richard J. Newman, *Hunting War Criminals*, U.S. NEWS AND WORLD REP., July 6, 1998 at 45.

the Vietnam War, gathering intelligence on PIFWCs and helping to seize them in a series of raids."¹²² The US-dominated task force continue to track PIFWCs and gather information on other wanted individuals, such as Radovan Karadjic, the former Bosnian Serb President, was charged with the responsibility for the murder of thousands, was recently tracked.¹²³

The United States probably has the ability, militarily, to carry out its threats against offending nations or, as defined by the United States, "liberty opponents."¹²⁴ This is true because the United States spends at least three times what others spend on national defense.¹²⁵ "America's global ability to offer threats or protection will [probably] remain unique for years."¹²⁶ If not through military might then through economic might, sanctions. The United States has engaged in kidnapping, abduction, prosecuting criminals, and threats of military force. Saddam Hussein has had a number of sanctions as well as military force aimed in his direction.

On January 12, 1991, the U.S. Congress passed a resolution to allow war, if necessary, between the U.S. against Saddam. In Operation Desert Storm, 250,000 troops were sent to Kuwait in an attempt to actually curb Saddam's aggression against Kuwait.¹²⁷ Even though this war was not quite a unilateral engagement but more of a coalition of UN forces,¹²⁸ the United States took a very active role in the strategic planning and also implored the Israelis and committed thousands of American troops to the cause.¹²⁹ In the United States, the war was seen as an American war. After the cease-fire, President Bush exclaimed, "By God we've kicked the Vietnam syndrome once and for all."¹³⁰ This zeal to pursue its objectives has been employed in several ways.

B. Tools Used by the U.S. to Carry Out Its Edicts

To bring about unilateral compliance, the United States often resorts to threats of sanctions or actual sanctions or threats of military force or actual military force. "The U.S. has slapped economic sanc-

122. *Id.* See also STEPHEN E. AMBROSE, *RISE TO GLOBALISM - AMERICAN FOREIGN POLICY SINCE 1938* 140-147 (5th ed. 1988) (discussing U.S. financial and military involvement in the Vietnam).

123. *Id.*

124. Huntington, *supra* note 63, at 42

125. Korb, *supra* note 52, at 23.

126. Michael Elliott, *America Is Back*, NEWSWEEK, Oct. 9, 1995, at 44.

127. JOHN G. STOESSINGER, *WHY NATIONS GO TO WAR* 197-98 (6th ed. 1993).

128. *Id.*

129. *Id.* at 199-200.

130. *Id.* at 202.

tions on other countries about 120 times in the past 80 years.”¹³¹ Sanctions “offer a way of doing something short of actually using military force, about troublesome issues from human-rights . . . to drift-net fishing on the high seas.”¹³²

The United States also uses “Most Favored Nation”¹³³ status to manipulate “liberty opponents” into conforming to U.S. expectations. “MFN” treatment is an obligation to treat that state, its nationals or goods, no less favorably than any other state, its nationals or goods.”¹³⁴

The United States has tried to impose its own cold war mentality and habits onto the international scene by using bluffs and counter-bluffs,¹³⁵ to gain advantages. To bring about compliance, the United States often deploys its military as a show of force to the offender. The U.S. Sixth Fleet was deployed during the late 60’s to the Mediterranean after Israel seized the Golan Heights, Jordan, the West Bank, and Jerusalem.¹³⁶ Also, during the Cuban missile crisis, the United States put forth a strong showing of its military might.¹³⁷ In 1962, Washington was convinced that the Soviet Union was placing or about to place nuclear-capable missiles in Cuba.¹³⁸ As a result, Congress passed a resolution that the United States was going “to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States.”¹³⁹ The CIA stepped up reconnaissance of the island and began a special daily report on activities in Cuba.¹⁴⁰ This action was done even though no missiles were actually found in Cuba.¹⁴¹

In the 1980’s, the United States supported, with military aid, the so-called “freedom fighters” or “contras” during the conflict in El Salvador. The United States justified the support because, according to U.S. standards, the U.S. intended to prevent a brutal military takeover of the

131. Thomas Omestad, *Addicted To Sanctions*, U.S. NEWS AND WORLD REP., June 15, 1998, at 30.

132. *Id.*

133. General Agreement on Tariffs And Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 (signatories are automatically given MFN status).

134. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 801(1) (1987).

135. STEPHEN E. AMBROSE, *RISE TO GLOBALISM – AMERICAN FOREIGN POLICY SINCE 1938* 267 (5th rev. ed. 1988).

136. *Id.* at 223.

137. Pat M. Holt, *Secret Intelligence And Public Policy – A Dilemma of Democracy* 1, 100 (CQ Press 1995).

138. *Id.*

139. *Id.*, citing Pub. L. No. 87-733, 76 Stat. 697, Oct. 3, 1962.

140. See Holt, *supra* note 137, at 100.

141. *Id.*

country by a totalitarian minority.¹⁴² This is the only conclusion the United States could have drawn because action had to be taken against "liberty's opponent." Pursuing "liberty's opponents" by restoring democracy is a major aspect of U.S. policy. As far as sanctions against Iraq are concerned "it now appears that, for at least as long as Saddam is in power, the people of Iraq may never get parole from the economic sanctions,"¹⁴³ imposed on them by the United States. Saddam's aggressive acts may lend credibility to U.S. arguments articulating reasons why Saddam should be classified as Hostes Humani Generis.¹⁴⁴ At present, "the administration strongly believes that Saddam must be kept in his cage with strict economic sanctions, and that he must be militarily whacked when he acts up."¹⁴⁵

To carry out its edicts, the United States frequently uses sanctions. Since 1993, the United States has imposed unilateral sanctions or threatened legislation that would allow it to do so, sixty times on thirty-five countries that represent over forty percent of the world's population.¹⁴⁶ Unfortunately for the United States,

The policy of unilateral U.S. sanctions against Iran [and Iraq] has been ineffectual, and the attempt to coerce others into following America's lead has been a mistake. Extraterritorial bullying has generated needless friction between the United States and its chief allies and threatened the international free trade order that America has promoted for so many decades. To repair the damages and avoid further self-inflicted wounds, the United States should sit down with the Europeans, the Japanese, and its Gulf allies and hash out what each other's interests are, what policies make sense in trying to protect those interests, and how policy disagreements should be handled. Only such high-level consultation can yield multilateral policies toward Iran [and other nations that are classified by the U.S. as "liberty's opponents"] that stand a good chance of achieving their goals and being sustainable over the long term.¹⁴⁷

More recently, after the bombing of U.S. embassies in Africa, "dozens of American cruise missiles struck targets in Afghanistan and the Sudan." According to President Clinton, this was an act of self-defense

142. *Id.* at 330-31.

143. *Who's in Charge Here?* NEWSWEEK, Dec 1997, at 30-31.

144. See Lewis, *infra* note 256 (Iraq stated that it would not cooperate with UN inspectors seeking to check its weapons of mass destruction.)

145. *Who's in Charge Here?* NEWSWEEK, Dec. 1, 1997, at 30-31.

146. Charles William Maynes, *The Perils of (and for) An Imperial America*, FOREIGN POL'Y, Summer 1998, at 36, 44.

147. Zbigniew Brzezinski, et al., *Differentiated Containment: Policies Toward Iran and Iraq*, FOREIGN AFF., May-June, 1997, at 20, 28.

against imminent terrorist plots and of retribution for the bombing. "Let our action today send this message loud and clear," Mr. Clinton said, "There are no expendable American targets. There will be no sanctuary for terrorist."¹⁴⁸

Many of the arguments concerning U.S. activity may be justifiable and should carry great weight in an international dialogue concerning the multilateral or even better the supranational approach to solving international disputes. The U.S. has not only acted unilaterally on many occasions, but also has the attitude that it *must* protect humanity. Nevertheless, terrorist attacks against Americans can only exacerbate the issue, and most people will agree that the United States has a duty to protect its nationals. Does the lack of a supranational forum justify this unilateral activity?

LACK OF PROPER INTERNATIONAL FORA TO PURSUE INTERNATIONAL DISPUTES

The exposure of the individual to direct prosecution for the commission of war crimes under international law is now well established by the various trials held principally after the Second World War.¹⁴⁹ Nevertheless, no permanent international court exists to address certain types of activity. As a result, "the question has been raised from time to time in the ensuing years as to whether a permanent international criminal court should be established with jurisdiction to try not only war crimes but such other criminal [and civil] acts as international law may identify?"¹⁵⁰ International sentiment and need mandate establishment of such a tribunal. Especially in light of the United States perceived aggression in prosecuting international criminals.¹⁵¹ And also, the situation that may exist in the very near future is that the U.S. will be forced, by Saddam's actions, to pursue Saddam under the "HHG" theory.

Prior to the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ), international disputes were usually solved through the arbitration process.

The process of arbitration was carried forward, in the nineteenth century, from the arbitral commissions established under the Jay Treaty of 1794 through a series of British-American Claims Commissions, dealing with claims arising out of the War of Independence, the War of

148. James Bennet, *U.S. Cruise Missiles*, N. Y. TIMES, Aug. 21, 1998, at A1.

149. ELIHU LAUTERPACHT, ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE 73 (1991).

150. *Id.*

151. See *supra* notes 45, 85, 100, and 102.

1812 and the Civil War; by numerous bilateral arbitrations dealing with boundary disputes and territorial claims; by a string of ad hoc arbitrations on other matters, including claims arising out of the treatment of aliens; by a number of other commissions adjudicating groups of claims between the United States on the one hand and, on the other, respectively Britain, Mexico, Peru, Spain, France and also between Britain, Peru, Venezuela, and so on.¹⁵²

A. *International Court of Justice*

The International Court of Justice ("ICJ"), established by the United Nations charter, is the principal judicial organ of the United Nations. Each member of the UN undertakes to comply with the decisions of the ICJ in any case to which it is a party. International adjudication in the 1990's is basically a consensual type of process. For example, "the ICJ has no jurisdiction unless the parties have specifically agreed thereto either through treaty or by accepting the Optional Clause in appropriate terms. A state party to a dispute with another state may submit that dispute to the International Court of Justice for adjudication and the Court has jurisdiction over that dispute, if the parties: a) have, by a special agreement (compromis) or otherwise, agreed to bring and dispute before the Court; or b) are bound by an agreement providing for the submission to the Court of a category of disputes that includes the disputes in question; or c) have made declarations under Article 36(2) of the Statute of the Court accepting the jurisdiction of the Court generally or in respect of a category of legal disputes that includes the dispute in question."¹⁵³

Every other tribunal, whether specially created or institutional, is likewise dependent upon the consent of the parties.¹⁵⁴ For example, the United States excepted to the Court's jurisdiction in *Iran v. United States*.¹⁵⁵ Twelve years earlier, the United States also attempted to re-

152. See LAUTERPACHT, *supra* note 149, at 14.

153. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 903, 362 (1987) See ICJ, art. 93, 94 *et. seq.* (The U.S. accepted the ICJ's jurisdiction but excluded several areas: a. disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence of, which may be concluded in the future; b. disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America, and c. disputes arising under a multilateral treaty, unless 1) all parties to the treaty affected by the decision are also parties to the case before the Court, or 2) the United States of America specially agrees to jurisdiction.)

154. *Id.* at 23.

155. The Aerial Incident of 3 July 1998 (*Iran v. U.S.*), 1996 I.C.J. 9, (the case was later settled between the parties).

move itself from the ICJ's jurisdiction in a dispute with Nicaragua.¹⁵⁶ Nicaragua complained of U.S. involvement in its war. These are only a few examples of the drawbacks the Court faces.

There is no effective forum available to prosecute criminals, internationally.¹⁵⁷ Political rifts between nations make prosecuting criminals in the international setting almost impossible.¹⁵⁸ "What may violate the laws of the United States may not necessarily violate the laws of another nation, such that the other nation would likely object to prosecuting its own nationals in the interests of foreign comity."¹⁵⁹ These objections "will be compounded, however, when it comes to securing agreements on the type of court that is to be established in particular on its composition and procedure, as well as on the types of punishment that it will be able to inflict in the event of conviction."¹⁶⁰ In desiring to establish such a court, many questions are brought to the forefront: "what will the establishment of such a jurisdiction achieve; will it make the world a more law-abiding place; will it significantly add to the existing system of national enforcement of the criminal?"¹⁶¹ Even if these questions can not be answered with a simple "yes," the international community must attempt to establish such a forum and the U.S. must commit to it. Humanity deserves it – especially in light of possibly using the *Hostes Humani Generis* Theory unilaterally and especially if the United States intends to adopt the theory and make it an integral part of its jurisdictional law, another expansion of its extraterritorial jurisdiction. In other words, if the United States makes it part of its national law, analogous to the "effects doctrine" or the Alien Tort Act, other concerns about its unilateral activity are bound to surface.

156. *Nicaragua v. United States*, Preliminary I.C.J. Ruling on Nicaraguan Request, May 10, 1984, DEP'T ST. BULL., June, 1994, at 78-80.

157. This was and still may be true, prior to the establishment of the very recent International Criminal Court (ICC). See Rome Statute – International Criminal Court, adopted by the UN Diplomatic Conf. Plenipotentiaries, 17 July 1998. A/CONF.183/9 (This Court is untested; its members may mirror the UN membership, and the Statute is open for signatures until 12/31/2000 (Art 125); thus, this paper neither projects the possible future effectiveness of the Court nor does it suggest that the Court is the proper forum to solve international disputes – it has no jurisdiction over civil matters. UN Secretary-General (Annan stated that "it is my fervent hope that by then a large majority of United Nations Member States will have signed and ratified it, so that the Court will have unquestioned authority and the widest possible jurisdiction." www.un.org/icc/pressrel/rom23.htm). Even though the Court has jurisdiction over the following crimes: a) The crime of genocide; b) crimes against humanity; c) War crimes; and d) The crime of aggression (Art. 5); limitations exists; its jurisdiction has limits. See *infra* note 276.

158. Shin, *supra* note 116, at 388.

159. *Id.*

160. See LAUTERPACHT, *supra* note 149, at 74.

161. *Id.* at 74-75.

B. United Nations

The United Nations is another organization, though not a court, which was originally created to help nation-states facilitate the peaceful resolution of international disputes.¹⁶² Its purpose is to 1) maintain international peace and security, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law; 2) to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of people, and to take other appropriate measures to strengthen universal peace; and, 3) to be a center for harmonizing the actions of nations in the attainment of these common ends.¹⁶³

The current argument is that its members should cede "absolute and exclusive sovereignty" and give the U.N. additional authority.¹⁶⁴ Unfortunately, the UN is not all-inclusive and a broad assortment of new actors (nations) are appearing on the world scene.¹⁶⁵ The UN was designed to be both the world organization and the organization of its member states, responding both to global concerns and to the needs of member states and their people. As if in training for precisely this moment, the UN has in its fifty years gained enormous experience in contending with the problems that both trends have spawned.¹⁶⁶

Even though the UN has and continues to play a key role in international issues, its scope and effectiveness are extremely limited. The UN is not equipped to fully operate as a supranational organization because, "regional arrangements, non-governmental organizations, parliamentarians, transnational business, academic and policy research institutions, the media - all are taking on greater global roles. Their collective impact on world events now surpasses that of traditional international structures. As civil strife and social disarray undermine the authority of the state, these networks of new actors also erode it."¹⁶⁷

The UN has spent nearly four years negotiating the development of a permanent international criminal court to try war crimes, genocide, and

162. Jessie Helms, *Saving The U.N.*, FOREIGN AFF., Sept.-Oct. 1996, at 86, 89.

163. *Supra* note 157.

164. *See* Helms, *supra* note 162, at 3

165. Boutros Boutros-Ghali, *Global Leadership After The Cold War*, FOREIGN AFF., Sept.-Oct. 1996, at 86, 89.

166. *Id.* at 87

167. *Id.* at 89.

crimes against humanity,¹⁶⁸ (or “HHG” types). Even though backers of a strong court support jurisdiction over internal as well as external conflicts, others are concerned about the extent of the court’s jurisdiction, which crimes to include, and the court’s relationship with the UN Security Council.¹⁶⁹ Possible questions arise relating directly to the United Nation’s ability to contain Saddam Hussein: Should not the United Nations be empowered now, however, to take action against a war lover who murders his own people? Saddam’s atrocities had major global repercussions: a flood tide of refugees, an obsession with nuclear weapons, and ecological terrorism on an unprecedented scale. Has the time not come at last for the United Nations to weigh the sacred principles of national sovereignty against untold human suffering?”¹⁷⁰

At this point, the UN cannot handle the demands of the growing international community. Nevertheless, “[c]ivilization must defend itself against the war lover [Saddam]. This is a formidable task since it may be impossible to recognize and repeal the Saddam’s of the world, in an effort to repel absolute evil when it first appears.”¹⁷¹ Nevertheless, the United States continues to take a hard stand on aggressive activity that tend to affect the United States and world peace. The United States cannot continue to serve in this role – an international tribunal with arbitration, adjudication, and enforcement powers is needed.

C. The World Trade Organization

The World Trade Organization¹⁷² “shall provide the common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments. . . [it] shall provide the forum of negotiating among its members concerning multilateral trade relations. . . [and] a forum for further negotiations among its members concerning multilateral trade relations.” The WTO also administers rules and procedures governing the settle-

168. *The U.N. and War Crimes – How Strong A Court*, THE ECONOMIST, June 13, 1998, at 46.

169. *Id.*

170. STROESSINGER, *supra* note 127, at 206.

171. *Id.*

172. World Trade Organization (hereinafter WTO), General Agreement on Tariffs And Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, April 15, 1994, 33 L.L.M. 1125, 1140 (1994), available in 1994 WL 761491 (G.A.T.T.). See Uruguay Round Agreements Act, Pub. L. No 103-465, 108 Stat. 4809 (1994) (The major focus of the WTO is trade. According to the Ministerial Decisions and Declarations of 4/15/94, the Ministers “affirmed[ed] that the establishment of the WTO ushers in a new era of global economic cooperation, reflecting the widespread desire to operate in a fairer and more open multilateral trading system for the benefit and welfare of their people.”

ment of disputes; administer trade policy review mechanism. Even with the existence of the WTO, foreign leaders question the United States' withdrawal of support for the multilateral trading system.¹⁷³

The United States has been accused of not embracing the WTO by its action to avoid bringing its trade disputes to the body. The accusers further assert that the U.S. is trying to solve its problems through bilateral agreements at best or unilateral fiat at worst.¹⁷⁴ This attitude is probably due to U.S. belief that many of the trade barriers with Japan [and others], lack of antitrust protection, collusion between suppliers and manufacturers, and suffocating regulations are not yet within the WTO's competence.¹⁷⁵ It has been suggested that: 1) we cannot rely on one source to ensure compliance in international matters and disputes, considering that U.S. intelligence agencies affect trends in the global economy and the economic policies of key nations more effectively than the World Trade Organization;¹⁷⁶ and, 2) countries "use their intelligence services for industrial espionage against American companies, providing the information they steal to their own industrial firms as they seek unfair advantage. . . [and] by various devices, they exert extraordinary pressure, financial and otherwise, to help their own firms win contracts away from American businesses – contracts that they cannot otherwise obtain in fair competition."¹⁷⁷ It has also been questioned whether the World Trade Organization's lack of efficiency lead to unilateral activity because of violations of the rules of the games in international trade.

Many feel that this "substitution of the law of the jungle for established international rules. . . encourages unbridled mercantilism, protectionism, and heightened political tension between countries, weakening global trade."¹⁷⁸ The WTO's view is to achieve greater coherence in global economic policy making;¹⁷⁹ even if all the criticism is true, the unfortunate aspects of the WTO is that many years are required to de-

173. Jeffrey E. Garten, *Is America Abandoning Multilateral Trading?* FOREIGN AFF., NOV.-DEC. 1995, at 50.

174. See Garten *supra* note 173. See Ann Swardson, *U.S. Turtle Law in Conflict With World Trade Group*, Hous. CHRON., Aug. 24, 1998, at 6D (In the five years since the United States supported the creation of the World Trade Organization to resolve international trade disputes, the long-standing question always has been: Will the U.S. comply if a big decision goes against it? The question arose in 1996, when the European Union filed a complaint with the Geneva-based trade regulatory body over the Helms-Burton Act, which prohibits other countries from doing certain kinds of business with Cuba. The U.S. said openly that it would not change the law even if the trade body overruled it.

175. See Garten, *supra* note 173.

176. See Woolsey, *supra* note 75, at 4

177. *Id.*

178. *Id.* at 50.

179. WTO art. III, § 5.

velop adequate laws on such barriers. Not only are the new organization's hands full with traditional problems, but many of the problems are deeply rooted in the history, culture, and institutions of their societies, and the wide variations among countries make multilateral liberalization extremely difficult.¹⁸⁰

D. War Crimes Tribunal for the Former Yugoslavia

The War Crimes Tribunal was established under Chapter VII of the Charter of the United Nations.¹⁸¹ The Tribunal was established for the sole purpose of prosecuting persons responsible for violating international and humanitarian laws in Yugoslavia after 1991. This Tribunal was borne out of great international concern for reports of mass killings, massive and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing," especially in Bosnia and Herzegovina. Like the United States in many of its decisions, the UN determined that the situation was a threat to international peace and security.

Even though the international community supports the Tribunal, out of 74 indictments only a few are in custody or have actually been tried. Of these five or so in custody, none are top political or military leaders who gave key orders for the rapes, torture, executions, etc.¹⁸² The Tribunal for the Former Yugoslavia has encountered great difficulties because of its lack of police power, ability to effectuate arrests, inability to properly investigate, and the lack of enforcement mechanisms.¹⁸³ Its inability to properly investigate led to the withdrawal of charges against four Bosnian Croat suspects who were on its official "wanted" list. The decision was taken from "lack of evidence."¹⁸⁴

Another serious drawback for the Yugoslavian Tribunal, according to Louise Arbour, Chief Prosecutor, is that, "Bosnia and particularly Croatia had been unwilling to assist¹⁸⁵ the Tribunal in arresting and providing information about suspects wanted for war crimes. In many

180. See Garten, *supra* note 173, at 55.

181. U.N. SCOR 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

182. Theodor Meron, *Answering For War Crimes - Lessons From The Balkans*, 76 FOREIGN AFF. 2, 3 (1997).

183. *Id.* at 8.

184. *War Crimes Tribunal Withdraws Charges Against Four*, AGENCE FRANCE-PRESS, Dec. 19, 1997, available in 1997 WL 13457719.

185. *Belgrade Kept Rejecting Surrender of War Crimes Suspects*, AGENCE FR-PRESS, Feb. 13, 1998, available in 1998 WL 2221757, Yugoslav Authorities Rejected a Call by The Chief UN War Crimes Prosecutor to Extradite War Crimes Suspects For Trial in The Hague.

cases, governments that are supposed to cooperate with the Tribunal have instead taken the side of the accused."¹⁸⁶

Nevertheless, "we must not give up in despair."¹⁸⁷ A concerted effort by the major powers and the developing powers is the only way to combat the growing problem of resolving international conflict, civil, criminal, or humanitarian issues.

E. The Need for and Efforts to Develop a Supranational Tribunal with Judicial and Enforcement Capability

Several countries have recently shown their strength by detonating nuclear weapons.¹⁸⁸ Some of the U.S. bravado may come because of past accomplishments. Remember that, "the United States defeated Nazism, contained the Soviet empire, and lifted Europe and Japan from the ashes. . . ."¹⁸⁹

As globalization increases, the need to revitalize international law and promote its progressive expansion has taken on even greater urgency. Ideology and power politics have in recent decades dealt serious blows to international law. As more and more problems of order and justice are experienced transnationally, the international community must recognize that the pursuit of more effective international law and legal institutions is one of the most compelling challenges it faces.¹⁹⁰

To that end, even though the ICJ, UN, WTO, and the War Crimes Tribunal for the Former Yugoslavia are not equipped to arbitrate complex international issues. The international community is actively discussing the possibility of some type of international world court. In March more than 100 countries' delegates met at the UN in New York. Their task was to draft a treaty designed to establish a court. The court would have jurisdiction over war crimes, genocide, and crimes against humanity.¹⁹¹ Crimes against humanity should at least encompass Hostes Humani Generis types. Most countries seem to favor such a court, which would have judicial and enforcement powers. Nevertheless, legitimate concerns are inevitable when 180 countries come together to reach an agreement. Four of the five permanent members of the UN Security Council, notably the United States and France, are reluctant to give the

186. *War Crimes Prosecutor Calls Yugoslav Nations Uncooperative*, DOW JONES INT'L NEWS SERV., May 24, 1998.

187. *Id.*

188. *See infra* notes 209-211.

189. Joshua Muravchik, *Affording Foreign Policy-The Problem is not Wallet, But Will*, FOREIGN AFF. Mar.-Apr. 1996, at 8.

190. *See Boutros, supra* note 165, at 89.

191. *International, All Gum, No Teeth?* THE ECONOMIST, Mar. 14, 1998, at 50.

court the powers and independence that its advocates insist it needs to have the needed credibility. American negotiators wanted the court to investigate only cases referred to it by the Security Council.¹⁹² This generated some fear that the court would become "a political tool of the great powers."¹⁹³ This result would neither address the concerns of the emerging countries nor would it address the needs of the "great powers" and the international community as a whole. The March meeting was one of the precursors to the newly established International Criminal Court.¹⁹⁴

Hostes Humani Generis types are probably implicitly included in the crimes against humanity language, which has been included as one of the crimes that should be under the court's jurisdiction. The international community strongly agrees that those indicted for war crimes in the former Yugoslavia should be brought to justice.¹⁹⁵ Most of the activities are directly against humanity insofar as they actually threaten the international community's balance.

Continued international dialogue is a great sign that nations are interested in a multinational solution to the growing problems of globalization, which unfortunately brings about an increase in international disputes. Thus, continued unilateral interference always breeds a lack of trust and thwarts needed dialogue and action in this critical area. The U.S. Information Agency polled Croats, to inquire as to the most pressing issue facing their country. Croats, Muslims, and Serbs alike consistently ranked bringing war criminals to justice near the very bottom. Only about six percent of any faction member thought it was important.¹⁹⁶ "It would seem that the whole business is much more important to Washington."¹⁹⁷

These responses are instructive because they allow the United States and others to reflect on the impact that multilateral decisions have on consensus building. Even when nations come together to map out solutions to international problems, difficulties exist. Therefore, the United States should always make legitimate attempts to gain international support when it has to make decisions that may have broad range implications. This is especially true when prosecuting international

192. *Id.*

193. *Id.*

194. See *supra* note 157. See also Establishment of an International Criminal Court, G.A. Res. 51/207, Dec. 17, 1996, available in 36 I.L.M. 510 (1997) (deciding that a diplomatic conference of plenipotentiaries shall be held in 1998 with a view to finalizing and adopting a convention on the establishment of Int'l. Crim. Court).

195. Charles G. Boyd, *Making Bosnia Work*, FOREIGN AFF., Jan.-Feb 1998, at 42, 49.

196. *Id.*

197. *Id.* at 51.

criminals with questionable contacts within the United States, and when the decisions to pursue the issues are employed without assistance from the criminal's home country. The ICC should restrict U.S. aggression in this complicated area, but a diplomatic approach is necessary to solve the continuing problem that emerging nations and nations that, in the past, have exhibited aggressive behavior are often left outside the United Nations' umbrella.

In the area of trade and open markets, the question has been asked whether "it would . . . make sense to create a small, international group of wise men that would present recommendations to the group of seven ("G7") and the WTO on the next steps to strengthen the multilateral trading system"?¹⁹⁸ Even if the question were expanded to include *all* disputes affecting the international community, especially criminal prosecution, the entity would require nearly unbridled powers coupled with the authority to enforce. Its job would be to interpret the law and to say what the law is.¹⁹⁹ This same concept would have to be extended to a supranational judicial entity, which would have a duty to interpret and enforce. Many thought the "New World Order," where international institutions, led by the United Nations, would bring about peace with active support from the world's major powers where centralized rule-making authority, a hierarchy of institutions, and universal membership are all required.²⁰⁰ "That world order is a chimera. The United Nations cannot function effectively independent of the major powers that compose it, nor will those nations cede their power and sovereignty to an international institution. Efforts to expand supranational authority, whether by the UN secretary-general's office, the European Commission, or the World Trade Organization (WTO), have consistently produced a backlash among member states."²⁰¹

If the WTO is ineffective as a trade regulatory body, can it manage a supranational tribunal? Nevertheless, if harmony is truly wanted, the major and minor powers must enter into serious dialogue and assess existing organizations to determine if either can work as a catalyst to develop an "inclusive" world tribunal not a tribunal to merely mirror the UN. This tribunal must not only have a commitment from the international community, but must also include emerging, and perhaps aggres-

198. *Id.*

199. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (the U.S. Supreme Court established, early in U.S. judicial history, emphatically that it was the province and the duty of the judicial department to say what the law is).

200. Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.-Oct. 1997, at 183.

201. See Garten, *supra* note 53, at 61.

sive nations, as well. Only when this happens, can an organization dedicated to justice and world harmony achieve success in this very static international community.

IV. INTERNATIONAL DEFIANCE AND LACK OF SUPPORT FOR PAST U.S. AGGRESSION AND INTERVENTION

The U.S. has accepted the role of international peacekeeper, but not without adverse reactions. The legal traditions of most civil law countries, as well as some common law countries, regard the non-extradition of their citizens as an important principle deeply ingrained in their legal tradition. They justify the principle because they view the state's role as an obligation to protect its citizens and maintain a lack of confidence in the fairness of foreign judicial proceedings, the many disadvantages defendants have when they try to defend themselves in a foreign court.²⁰²

Specifically, India believed the United States has, in the past, unfairly singled it out from Pakistan and Israel, two other key Nuclear Nonproliferation Treaty non-signatory states.²⁰³ Throughout the 80's, at the height of Pakistan's nuclear weapons project, the United States pursued a policy of strategic alliance and military largess without which Pakistan's success in developing nuclear weapons would have been highly unlikely.²⁰⁴ Thus, India recently ignored United States' wishes and set off three underground nuclear explosions. Ignoring loud protests and threats of economic sanctions, it set off two more two days later.²⁰⁵ Les Gelb, President of the Council on Foreign Relations, said that India knew that the global reactions would be based on the accepted premise that powerful weapons should be strictly controlled.²⁰⁶ When nations are "willing to pay a high price for their national honor," says Gelb, "it is almost impossible to prevent them doing so." "*There are places, we now know, where Washington's writ does not run.*"²⁰⁷ The United States could get no countries besides Canada and Japan to agree to impose economic sanctions on India.²⁰⁸

Even though Saddam may be in imminent danger of the United States labeling him, officially, as *Hostes Humani Generis*, and possibly

202. See Shin, *supra* note 116, at 439.

203. Deepa Ollapally and Raja Ramanna, *U.S.-India Tensions Misconceptions on Nuclear Proliferation*, FOREIGN AFF., Jan.-Feb. 1995, at 13.

204. *Id.* at 16.

205. Steven Thomma, *U.S. Finding Its Roar Lacks Bite in Recent Foreign Upheavals*, HOUS. CHRON., May 15, 1995, at 36A.

206. Michael Elliot, *Out of Pandora's Box*, NEWSWEEK, June 8, 1998, at 21.

207. *Id.* (emphasis added).

208. See Thomma, *supra* note 205, at 36A.

taking aggressive action to physically contain him, he nevertheless closed off presidential palaces to United Nations weapons inspectors last October. The United States threatened military action, but it never won broad support from allies or even Middle East countries that might be threatened by Iraq.²⁰⁹ More recently, "Iraq sa[fi]d] it would hold up oil sales if the UN did not approve a new oil-for-food program due to start on June 4th."²¹⁰ American allies have sanctions fatigue and, therefore, rarely back U.S. penalties anymore.²¹¹ The United States may determine that another unilateral act, even if within another sovereign, may be the only way to stop Saddam.²¹²

Sanctions are credited with actually hampering Saddam's efforts to develop nuclear, chemical, and biological weapons; nevertheless, to be effective, sanctions must have broad international support, and they must target specific vulnerabilities.²¹³ This support is becoming more and more difficult for the United States to obtain. This difficulty, warranted or not, has been expressed by other nations advocating lifting sanctions against Iraq. Specifically, "Baghdad looks forward with growing confidence to a crucial Security Council meeting next October, when Russia, France, and China are expected to continue their push for easing sanctions imposed on Iraq."²¹⁴ One positive sign, perhaps, is that the United States withdrew one of its aircraft carriers from the Iraqi region, which had been there since the face-off with Saddam last November. The U.S. owned land-based warplanes have also been reduced to about two-hundred.²¹⁵ With U.S. forces thinning out, Saddam may think that he can defy UN inspectors and not risk military retaliation.²¹⁶ During the early stages of the Iraq crisis, nations overtly supported Iraq. After the total U.S. embargo against Iraq, French Foreign Minister Alain Juppe stated that "we do not believe in unilateral embargoes."²¹⁷ The United States' continued aggressive involvement in Iraqi matters is continually met with criticism. On February 4, 1998, Russian Federation President, Bo-

209. See Thomas, *supra* note 205, at 36A. .

210. *Iraq And The U.N. Chronology of a Crisis*, THE HERALD, June 16, 1998, at 2.

211. Thomas Omestad, *Addicted To Sanctions*, U.S. NEWS AND WORLD REP., June 15, 1998, at 30.

212. See *supra* notes 85-93.

213. *Id.*

214. Joseph Contreras and Russell Watson, *Saddam's Old Tricks*, NEWSWEEK, June 15, 1998, at 35.

215. *Id.*

216. *Id.*

217. Russell Watson, Karen Breslau, and John Barry, *So Who Needs Allies?* NEWSWEEK, May 15, 1995, at 36.

ris Yeltsin, stated that "Bill Clinton's actions in the [UN Arms Inspections] crisis could lead to world war."²¹⁸

Hostility toward U.S. actions has been expressed on many fronts, not only is the middle easterners complaining but also other countries as well, including allies. Early on, some Panamanians accepted U.S. actions against Noriega, a one-time ally, as rough but benign justice to deal with a stubborn despot, and protection for democracy and U.S. interests in Panama.²¹⁹ "The combined cost paid by the Panamanian people for their liberation is increasingly viewed in Panama City as unacceptable."²²⁰

The U.S. Congress has also been far from enthusiastic about U.S. behavior in the area of extraterritorial arrests and abductions, even though media headlines bombard Americans everyday about the "War on Drugs" and the "War on Terrorism."²²¹ For example, Congress adopted an amendment to the Foreign Assistance Act,²²² which prohibits U.S. officers or employees from engaging in direct arrests in any foreign country.²²³

The United States' view is that "refusing to exercise jurisdiction is far more drastic a step than excluding evidence produced by the illegal arrest; it completely deprives the state of the opportunity to present its case. This view reflects the notion that due process is limited to the guarantee of a fair trial, but that interstate or international abductions are not misconduct sufficiently egregious to justify releasing the defendant."²²⁴ This interpretation supports the U.S. position to exercise jurisdiction, even in attenuated circumstances where contacts are minimal.

After Dr. Alvarez-Machain's abduction, an uproar took place in the governments of Central and South America.²²⁵ The governments of many Central and South American nations called for the expulsion of American ambassadors. After the Supreme Court's decision in the case, Mexico suspended the right of U.S. agents to conduct business in Mex-

218. *Iraq And the U.N. Chronology of A Crisis*, THE HERALD, June 16, 1998, at 2.

219. Tim Coone, *U.S. Invasion Brings Panama Slim Dividends*, FINANCIAL TIMES (London), Dec. 20, 1990, at 6.

220. *Id.*

221. See Lowenfeld, *supra* note 103, at 477. See also Richard J. Newman, *America Fights Back*, U.S. NEWS & WORLD REP., Aug. 31 1998, at 38 (discussing the impact after two U.S. embassies in Africa were bombed, the resulting U.S. action, Operation Infinite Reach - amounting to one of the most decisive attacks against suspected terrorists in years).

222. Foreign Assistance Act, 22 U.S.C. § 2291(c) (1961).

223. See Lowenfeld, *supra* note 103, at 477(discussing. 481c, the amendment to the FAA of 1961).

224. See Lowenfeld, *supra* note 103, at 468, *citing* case comment, *United States v. Toscanino*, 88 HARVARD L. REV. 813, 816 (1975).

225. See *supra* notes 85-87 and accompanying text.

ico.²²⁶ This inconsistent U.S. policy is definitely a source of contention. Both U.S. intervention, by using its courts, and its reaction to certain international activity are inconsistent. "The Gulf rulers. . . are acutely aware of the American double standard that lets Israel defy the UN and arm itself with nuclear weapons, but is ready to bomb Iraq for hanging on to drums of anthrax or nerve gas."²²⁷

Even though some of the gulf countries look for trade with Iraq, they will do almost nothing to weaken relations with the United States.²²⁸ Even so, that reality does not necessarily conclude the matter. In the last ten years, the United States and Europe have paid scant regard to the Subcontinent. The Balkans, Russia and China have loomed much larger in the councils of the rich. This disregard was probably a mistake, considering that India and Pakistan are not just proud nations, but ones with intense rivalry and well known nuclear programs.²²⁹ India's recent defiance in detonating a nuclear weapon²³⁰ is an example of the extent that smaller, perhaps mostly non-aggressive, nations may go to either protect themselves or try to receive recognition as legitimate components of the international community. India's defiance shows that India and the rest should not have been treated this way.²³¹ The major task is to undo that error. If the world's major powers commit to including smaller nations in the development of entities that touch and concern them, it can be done. The people in this region are not stupid; they do not want a nuclear war – they want a measure of respect to their legitimate concerns about security and international disputes. They deserve and should receive consideration.²³²

The United States' inconsistent policy, especially with China, is further evinced by the various approaches that its agencies have adopted, which leads to very mixed messages. The Office of the U.S. Trade Representative threatens sanctions over market access and intellectual property rights, the Department of Commerce zealously increases investments in China; while the Department of State thrashes China for

226. See Shin, *supra* note 116, at 391, quoting Kristin B. Weissman, Comment, *Extraterritorial Abductions: The Endangerment of Future Peace*, 27 U.C. DAVIS L. REV. 488-89 (1994).

227. As *Iraq's Clock Ticks On*, THE ECONOMIST, Feb 7, 1998, at 47. See Frank McCoy, *A World of Opinions About U.S. Strikes*, U.S. NEWS & WORLD REP., Aug. 31, 1998, at 52, (After the U.S. bombed Afghanistan, a common theme in the Islamic world "was that the attack violated the sovereignty of Sudan and Afghanistan – and demonstrated Washington's willingness to kill innocent civilians).

228. *Id.*

229. See Elliot, *supra* note 126, at 21.

230. See *supra* note 205.

231. See Elliot, *supra* note 126, at 21.

232. *Id.*

human rights violations and nuclear proliferation, and the Department of Defense works hard to develop military-to-military ties. The Chinese continue to search, in vain, for an underlying rationale to explain these chameleon type shifts and conflicting efforts.²³³ Even though China contends that the U.S. policy is not clear, this contention has not totally stayed off harsh threats and sometimes sanctions. Even in the face of U.S. threats, China fails to adhere to U.S. demands. Specially, it "rebuff[ed] American demands on human rights,²³⁴ but nevertheless it garnered support. "In almost every instance the G-7 countries have not supported American's threats and has made Washington's claim that it is acting on behalf of widely accepted international norms ring[s] hollow."²³⁵ Clinton's May 1994 decision not to link China's most favored nation trade status renewal to human rights demands reversed months of espousing the opposite view,²³⁶ and highlights U.S. inconsistency.

Not only has this inconsistency alienated China but the view that Chinese political leaders are unfit, and the suspected desire to exclude China from the WTO have also fostered resentment toward the United States.²³⁷ The U.S. approach to China is, supposedly, predicated on the conviction that continued economic and cultural engagement is the best way to induce democratization.²³⁸

The need to obtain international support in the area of intervention under the *Hostes Humani Generis* Theory is critical. The *Hostes Humani Generis* Theory or other similar tools that are used to expand jurisdiction extraterritorially will not gain acceptance when employed unilaterally. President Clinton's plea to U.S. partners for assistance in Bosnia was succinctly articulated and is instructive if the United States plans to adopt its concept of what constitutes behavior that is egregious enough to label one, even a head of State, an *Hostes Humani Generis*. Clinton stated that "if peace is achieved NATO must help secure it. . . America must take part. Only NATO-proven, strong, effective. . . can give the Bosnian people the. . . space they need to begin to reconcile and rebuild. NATO [is] the anchor of America's and Europe's

233. Kenneth Lieberthal, *A New China Strategy*, FOREIGN AFF., Nov.-Dec. 1995, at 35.

234. Huntington, *supra* note 63, at 42.

235. See Lieberthal, *supra* note 233, at 35.

236. See Lieberthal, *supra* note 233, at 44.

237. See Lieberthal, *supra* note 233, at 42, 45.

238. Strobe Talbott, *Democracy And the National Interest*, FOREIGN AFF., Nov.-Dec. 1996, at 57.

common security.”²³⁹ These statements in reality, perhaps unconsciously, exclude many nations.

Nevertheless, this same passionate plea for assistance from U.S. allies should also be employed to develop an international tribunal to oversee international disputes. The President also said that “our values, interests and security are at stake.”²⁴⁰ This is true because aggressive acts jeopardize U.S. security. Fringe groups, international terrorist, and legitimate nations are, justified or not, impelled to take action when they perceived that the United States has acted outside the scope of its jurisdiction by invading sovereigns.²⁴¹ Internationally, countries and especially the European countries are very frustrated about the United States’ approach to justice because the resounding view is that “it is hypocritical of the United States to condemn Germany and others for trading with Iran while America itself eagerly trades with China.”²⁴² Even China experiences this hypocrisy because the U.S. policy with China is extremely inconsistent.

The Arab nations were incensed by U.S. actions against Iraq. Islamic fundamentalist movements universally supported Iraq rather than the Western-backed Kuwaitis and Saudis. Even the Ayatollah Ali Khamenei put Iran-Iraq differences on the back burner and called for a holy war against the West²⁴³: “The struggle against American aggression, greed, plans and policies will be counted as jihad, and anybody who is killed on that path is a martyr.” “This is a war,” King Hussein of Jordan argued, against all Arabs and Muslims and not against Iraq alone.”²⁴⁴ Muslims also articulated the West’s double standard. Where civilizations clash, a double standard inevitably exists, and people apply one standard to their kindred-countries and a different one to others.²⁴⁵ Lack of support for the U.S. attack on Iraq after good faith talks had failed was also articulated by Jimmy Carter, former U.S. President, when he said that “there were never any good faith talks, as a matter of fact, and we attacked Iraq without them.”²⁴⁶

239. President Clinton, *Why Bosnia Matters to America*, NEWSWEEK, Nov. 13, 1995, at 55.

240. *Id.*

241. See Frank McCoy, *A World of Opinions About U.S. Strikes*, U.S. NEWS & WORLD REP., Aug. 31, 1998, at 52 (quoting reactions the U.S. bombing of Sudan and Afghanistan).

242. Charles Lane, *Germany’s New Ostpolitik*, FOREIGN AFF., Nov.-Dec. 1995, at 77, 78.

243. Samuel Huntington, *The Clash of Civilizations?* FOREIGN AFF., Summer 1993, at 35, 36.

244. *Id.*

245. *Id.* at 36.

246. Douglas Brinkley, *Jimmy Carter’s Modest Quest For Global Peace*, FOREIGN AFF., Nov.-Dec. 1995, at 90.

"The British House of Lords recently rebuked the U.S. Supreme Court for its decision to uphold the kidnapping of a Mexican doctor by U.S. officials determined to bring him to trial in the U.S."²⁴⁷ Also, in 1994, the tiny country of Singapore defied intense American pressure and caned an American teenager for violating the laws of Singapore.²⁴⁸ The United States tried to convince the Singaporean government to have leniency on the individual. This is a strange reaction to another sovereign's jurisdiction in light of U.S. abduction and other intervention practices. Poland had defied American request not to proceed in buying arms from Iran. Jordan has resisted American pressure to break off commercial links with Iraq.²⁴⁹

Iran, like Iraq, has also been bombarded with U.S. sanctions. Iran defied the U.S. supported UN arms embargo and supplied men and weapons to Bosnia.²⁵⁰ These sanctions "have not appreciably worsened any of the ills [in Iran] whatever their adverse effects, they have not been strong enough to induce a noticeable change in Tehran's behavior."²⁵¹ The International Court of Justice, last December, voted fourteen-to-two to reject Washington's plea for dismissal and to hear Tehran's case against the United States for deliberate destruction of three Iranian offshore platforms in the Persian Gulf in 1987.²⁵²

U.S. restraint is the first step in developing a national, and ultimately an international, policy that can be embraced by the international community. "American foreign policy is becoming a foreign policy of particularism increasingly devoted to the promotion abroad of highly specific commercial and ethnic interests."²⁵³ Thus, the alternative to particularism is not promulgation of a "grand design," "coherent strategy," for a "foreign policy vision." It is a policy of restraint and reconstitution aimed at limiting the diversion of American resources to the service of particularistic sub-national, transnational, and non-national interests. The national interest is national restraint and that appears to be the only national interest the American people are willing to support at this time in their history. Hence, instead of formulating unrealistic schemes for grand endeavors abroad, the foreign policy elite might well devote their energies to designing plans for lowering American involve-

247. Anne-Marie Slaughter, *The Real World Order*, FOREIGN AFF., Sept.-Oct. 1997, at 18.

248. See Huntington, *supra* note 243, at 42.

249. *Id.* at 43.

250. Huntington, *supra* note 250, at 48.

251. Jahangir Amuzegar, *Adjusting to Sanctions*, FOREIGN AFF., May-June 1997, at 33.

252. *Id.* at 35.

253. See Huntington, *supra* note 250, at 48.

ment in the world in ways that will safeguard future national [and international] interest²⁵⁴

The pique of other nations with America's preemptive arrogance results from U.S. demands to have its way in one international form after another; its actions to imperiously impose trade sanctions that violate international understanding, to presumptuously demand national legal protection for its citizens, diplomats, and soldiers who are subject to criminal prosecution, while insisting other states forego that right; and to unilaterally dictate its view on UN reforms or the selection of a new secretary general. The United States has been able to get away with these tactics; the patience of others is shortening. The difficulty the United States had in rounding up support, even from its allies, in the recent confrontation with Iraq and Saddam Hussein evinces this pique.²⁵⁵

Fortunately, the United States' demands on Iraq continue to have some credence. "After a defiant out-burst from Baghdad. . .the Security Council voted unanimously to renew economic sanctions against Iraq, and the U.S. Representative to the UN warned that the sanctions may never be lifted." Specifically, United States Ambassador to the United Nations, Bill Richardson, said, "[s]anctions may stay on in perpetuity."²⁵⁶ Iraq stated that it would not cooperate with UN inspectors seeking to eliminate its weapons of mass destruction until the Security Council starts lifting the trade embargo.²⁵⁷ Additionally, prior to the last event Russia, France, and China had joined to convince the Security Council to ease restrictions on Iraq.²⁵⁸ This appeal will continue to be unpersuasive, as to the U.S. vote, after recent test conducted at the U.S. army lab on warhead fragments excavated in Iraq in March found traces of poison VX gas.²⁵⁹

Nevertheless, to garner international support, we must consider

The most inadequately examined issue in American politics [which] is precisely whether or not post-Cold War conditions offer us a chance to change the rules of the international game [?]

254. *Id.* at 48.

255. Charles William Maynes, *The Perils of (And For) An Imperial America*, 36 FOREIGN POL'Y 44 (1998).

256. Paul Lewis, *UN Council Renews Sanctions After Iraq Expresses Defiance*, N.Y. TIMES, Aug. 24, 1998, at A8.

257. *Id.*

258. Bruce B. Auster, *Proofs of Iraq's VX Gas Warheads*, U.S. NEWS & WORLD REP., July 6, 1998, at 50.

259. *Id.*

Certainly, there is no hope of changing the rules of the game if we ourselves pursue a policy of world hegemony. Such a policy, whether formally announced or increasingly evident, will drive others to resist our control, at first unsuccessfully but ultimately with effect. A policy of world hegemony in other words, will guarantee that in time America will become outnumbered and overpowered. If that happens, we will once and for all have lost the present opportunity to attempt to change the rules of the game among the great powers.²⁶⁰

There are those, the United States included, who believe a semblance of international justice can be achieved only where there is a balance among relative equals. In this environment, national arrogance must be tempered, national aspirations limited, and attempts at hegemony, either benevolent or malevolent, checked. A more evenly balanced world, they assume, with the United States cut down a peg or two [or three or four] would be freer, fairer, and safer.²⁶¹ Iraq has voiced a desire to reconcile; even though, the United States is adamant about not easing the economic pressure. "Many high-ranking American officials keep speaking about Iraq as being a threat to American interests and to the region. We would like to assure these officials, and through them the American people, that Iraq is eager to live in peace with its neighbors and the world. But Iraq will not submit to intimidation, bullying and coercion. Peace will come only through dialogue based on mutual respect for the principles of independence, sovereignty and the observance of international law."²⁶²

V. CONCLUSION

"In facing the ongoing reintegration of international relations, the United States Government has spoken of a 'New World Order,' premised on respect for international law."²⁶³ Comparative Law²⁶⁴ is helpful in the understanding of foreign peoples; it thereby assists in the

260. See Maynes, *supra* note 255, at 46.

261. Robert Kagan, *The Benevolent Empire*, FOREIGN POL'Y, Summer 1998, at 24, 30.

262. Nizar Hamdoon, *A Black Cat in a Dark Room*, N.Y. TIMES, Aug. 20, 1998, at A23, (Hamdoon is Iraq's permanent Representative to the United Nations). *But see, infra* note 231. After the U.S. bombed Sudan and Afghanistan, the Chinese Foreign Minister condemned U.S. action, saying "that the embassy bombing should have been dealt with through international law. Also, Jia Qingguo, a politics professor at Beijing University, complained about what he sees as a double standard. "The United States uses military force overseas and international opinion is soft. But China uses military force domestically, and people criticize it for being too tough," he said. America, he added, acts on the principle of "an eye for an eye, a tooth for a tooth."

263. See Ring, *supra* note 109, at 530

264. RENE DAVID AND JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 8 (3d ed. 1985).

creation of a healthy context for the development of international relations.²⁶⁵ "Global changes have undoubtedly complicated the conceiving and conducting of U.S. foreign policy."²⁶⁶ Nevertheless, as a nation we must recognize that "there are new players, new capabilities, and new alignments – but, as yet, no new rules."²⁶⁷ Predictability is absolutely mandatory if allies are going to count on us or if foes are to think before challenging American interests. Policymakers need bearings by which to judge international events. Without them, policy is apt to be steered by popular emotions, daily headlines or, increasingly, the latest televised image. But what is the solution if an all-embracing doctrine is not available and particularism is unwise? The answer lies in a foreign policy that is clear about ends – American's purposes, priorities, relationships, and approach to the world. Thankfully, the potential for fashioning and applying such a structure does exist.²⁶⁸

A new aspect of foreign relations is arguably emerging from a discrete forum of imperialism based on the extraterritorial application of the U.S. law.²⁶⁹ Ultimately, "[a]s the global order rapidly evolves, the United States must redefine its role in the international community."²⁷⁰ "The role suggested by. . . recent decisions. . . belittles American ideals of justice and respect for the rule of law. For the sake of those ideals, for the sake of judicial integrity, and for the sake of international law [and relations], it is imperative that the administration of the United States find no further need to call upon the courts to validate lawless Government actions on foreign soil."²⁷¹ "Champions of a global rule of law have most frequently envisioned one rule for all, a unified legal system topped by a world court."²⁷² Until this happens, the United States should endeavor to use restraint and avoid backlash from the international community. "In the areas of free trade, the 'grand bargain' has been suggested. WTO members should consolidate their regional arrangements into a global commitment: the high-income mature econo-

265. *Id.*

266. Richard N. Haas, *Paradigm Lost-From Containment to Confusion*, FOREIGN AFF., Jan.-Feb. 1995, at 43.

267. *Id.* at 43.

268. *Id.* at 45.

269. See Ring, *supra* note 109, at 530, citing V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 AM. J. INT'L L. 257 (1980).

270. *Id.* at 535.

271. *Id.* at 535.

272. See Anne-Marie Slaughter, *supra* note 247, at 189.

mies of North America and Western Europe would merge in a real partnership with the rapidly growing, lower-income countries."²⁷³

This "grand bargain" approach should also be used to continue to develop and strengthen an International Tribunal, e.g., the ICC, because conflicts often involve complex and sensitive issues that are not clearly within the cognizance of a particular sovereign or court. The concern that "regional arrangements could develop into hostile blocs"²⁷⁴ is very similar to hostility against the United States for extending jurisdiction or intervening in attenuated circumstances.²⁷⁵ To ease these legitimate concerns a truly international tribunal or "unified legal system" with judicial, arbitral, and enforcement capabilities is imperative to a global community.²⁷⁶ This is especially true because the United States has taken on the role of the World's helper in a wide range of situations, which affect nations' domestic as well as international policies. President Clinton recently articulated this and said that "We [the U.S.] will help all people of all faiths in all parts of the world who want to live free from fear and violence. We will persist and we will prevail."²⁷⁷ Saddam probably should heed this warning, especially in light of the recent bombings of U.S. embassies and the U.S. strikes in Sudan and Afghanistan as a result of the aggression.

273. C. Fred Bergstein, *Globalizing Free Trade*, FOREIGN AFF., May-June 1996, at 105, 110.

274. *Id.* at 120.

275. Frank McCoy, *A World of Opinions About U.S. Strikes*, U.S. NEWS & WORLD REP., Aug. 31, 1998, at 52, (After the U.S. bombed Afghanistan and Sudan, a common theme in the Islamic world was "that the attacks violated the nations' sovereignty - and demonstrated Washington's willingness to kill innocent civilians.

276. The newly established ICC's jurisdiction extends to persons, but "persons" refers to nationals of signatories. Rome Statute of the International Criminal Court, Art. I. See Art. 12, Preconditions to The Exercise of Jurisdiction (A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Art. 5. . .); Jurisdiction Ratione Temporis, Art. 11 (showing limitations to the Court's jurisdiction, which also may lead the U.S. to act unilaterally if the Court refuses to expand its jurisdiction).

277. President William J. Clinton, National Address (Aug. 20, 1998).