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War Crimes in the Persian Gulf

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I. Introduction

Events since the cessation of the hostilities during the Gulf Crisis have demonstrated conclusively the mistake that was made in not allowing the forces of the Coalition of Nations, operating in the Persian Gulf in 1990-1991, to occupy Iraq in its entirety. The Iraqi Army was in full retreat with thousands of its members surrendering. Saddam Hussein and his aides could have been made prisoners of war¹ and they could have been put on trial for violations of international law, and particularly of the law of war.² Had this been done, there would have been no need for embargoes and no difficulty in searching for, and destroying, nuclear, chemical, and biological plants, weapons, and materials in Iraq.

This essay examines, in retrospect, whether a legal basis existed for the establishment of an International Military Tribunal to try Saddam Hussein and his aides for war crimes in the Persian Gulf. It argues that a legal basis for such a Tribunal existed and still exists. It will do so by first establishing the legal foundation for and jurisdiction of a war crimes tribunal in the Persian Gulf. It will then describe the substantive law that the Tribunal would apply. Finally, it will outline the substantive evidence of war crimes already available that could be presented before the Tribunal, including, but not limited to, violations of the rights of foreign and protected persons, other human rights violations, and environmental destruction and use of chemical and biological weapons.³

II. Legal Foundation For And Jurisdiction of a War Crimes Tribunal in the Persian Gulf

The provisions of the 1945 London Charter which created the International Military Tribunal (IMT)⁴ were the foundation for most of the war crimes

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directives promulgated in Europe after World War II,⁵ and they were repeated almost verbatim in the corresponding activity in the Far East.⁶ There was, therefore, adequate precedent for the members of the Coalition of Nations involved in the Gulf War to draft and become Parties to an agreement such as the London Charter. This agreement would contain provisions for the establishment and procedure of an International Tribunal similar to, but not necessarily identical with, those contained in the London Charter. Moreover, we now have the additional precedents of the establishment, by the Security Council of the United Nations, of an International Tribunal for the Former Yugoslavia,⁷ and an International Tribunal for the trial of persons accused of having committed war crimes in Rwanda, or in neighboring States by Rwandans, during the year 1994.⁸ Therefore, in its 1991 cease-fire Resolution, the Security Council might well have declared its intention to establish an International Tribunal for the trial of persons accused of having ordered or committed war crimes in Kuwait and in Iraq on and after August 2, 1990.⁹

There is one jurisdictional issue that would undoubtedly be raised by the defense if Saddam Hussein and other members of the Iraqi military were to be tried by an International Tribunal. Article 63 of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War¹⁰ provided that any sentence adjudged against a prisoner of war must be "by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the Detaining Power."¹¹ In the famous *Yamashita Case*,¹² the United States Supreme Court held that this provision did not apply to trials for pre-capture offenses (war crimes), but only to offenses committed while under the status of a prisoner of war. This decision was almost uniformly adopted by the courts of other countries trying war crimes cases after World War II.¹³ When the 1949 Geneva Diplomatic Conference drafted the new version of the 1929 Convention,¹⁴ its Article 102 included a provision similar to that contained in Article 63 of the 1929 version but ending with the phrase "and if, furthermore, the provisions of the present Chapter have been observed."¹⁵ In addition, the Conference then drafted Article 85 of that Chapter which states, "[p]risoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."¹⁶

Undoubtedly, one purpose of this provision was to establish a rule contrary to that of the *Yamashita Case*.¹⁷ That is, to make the provisions of Article 102 applicable to all trials of prisoners of war by a Detaining Power, whether the offense charged was alleged to have been committed prior to, or after, the accused became a prisoner of war.¹⁸ The question which then arises is: Does this preclude the trial of a prisoner of war for war crimes by an internationally constituted tribunal? The answer would appear to be in the negative as such a

trial would not be “prosecuted under the laws of the Detaining Power,” but under international law. Furthermore, the accused would not be tried by a Detaining Power but by an international entity. While the Commentary on the 1949 Geneva Prisoner of War Convention, prepared by the International Committee of the Red Cross, advances a contrary interpretation of that phrase, its reasoning is not particularly convincing.¹⁹ Further, the Commentary states that Article 129 of the Convention, an article concerned specifically with the punishment of “grave breaches” of the Convention, “does not exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties.”²⁰

It appears that if a Detaining Power elects to try a prisoner of war pursuant to its national law, for a war crime committed prior to capture, it must do so “by the same courts according to the same procedure as in the case of a member of the armed forces of the Detaining Power.”²¹ However, if the trial is by an International Tribunal whose members have been elected by the Security Council and General Assembly of the United Nations, or have been selected by the members of a Coalition or by the Parties to a convention on the subject, such a Tribunal would have jurisdiction despite the above-mentioned provisions of the 1949 Geneva Prisoner of War Convention. The applicable rules of procedure and evidence could be included in the Charter of the Tribunal, as in the case of the International Military Tribunal which sat in Nuremberg, or they could be drafted and adopted by the members of the Tribunal, as in the case of the International Tribunal for the Former Yugoslavia.²²

III. The Substantive Law of the Tribunal

Having established that our International Tribunal would have jurisdiction to try individuals for war crimes alleged to have been committed during the Persian Gulf Crisis of 1990-1991, and assuming that its substantive provisions, like the Statute of the International Tribunal for the Former Yugoslavia, are based on Article 6 of the London Charter,²³ the provisions of that article would be applicable to the actions of Saddam Hussein and his military commanders.

A. Article 6(a): Crimes Against Peace

Article 6(a) of the London Charter states:

Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.²⁴

A number of writers have urged that in the post World War II trials this provision constituted the creation of an offense *ex post facto*.²⁵ This was also the contention of those accused at Nuremberg and Tokyo, as well as in other cases where the accused were charged with waging aggressive war. Nevertheless, both the International Military Tribunal (IMT)²⁶ and its counterpart in the Far East, the International Military Tribunal for the Far East (IMTFE)²⁷ ruled that such a crime already existed in international law. Professor B. V. A. Röling, the Dutch judge on the IMTFE, dissented from this ruling.²⁸ However, in an article written some years later he stated that the IMTFE had:

recognized the legal existence of the crime against peace as defined in the Charter. In so doing it contributed to the recognition of this crime. Its decision, combined with later actions taken within the United Nations, confirmed the crime against peace as a crime under international law.²⁹

Thus, it appears that since at least 1945, if not before, the waging of aggressive war, as well as the waging of war in violation of international treaties, has been a violation of international law and a war crime. Recognizing the severity of this offense the IMT said, “[t]o institute a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”³⁰

B. Application of Article 6(a) and the Law of Aggression Against Saddam Hussein.

In examining whether Saddam Hussein’s actions fall within the purview of Article 6(a),³¹ it is necessary to refer to Article 5 of the 1945 Pact of the League of Arab States.³² Both Iraq and Kuwait were original Parties to this treaty, Article 5 of which specifically prohibits the use of force for the resolution of disputes between member states. Better known, of course, are the provisions of Article 2(4) of the United Nations Charter which require members (and both Iraq and Kuwait are members) to refrain “from the threat or use of force against the territorial integrity or political independence of any state.”³³ After many decades of debate, that provision has been amplified by the General Assembly resolution entitled Definition of Aggression.³⁴ This Resolution provides in its Article 1 that “[a]ggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State . . .”³⁵ but also specifies, in Article 3(a), that the following qualify as acts of aggression:

The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.³⁶

Moreover, Article 5(2) of the resolution states that “[a] war of aggression is a crime against international peace. Aggression gives rise to international responsibility.”³⁷ It seems indisputable that Saddam Hussein has been guilty of this international crime and that he could have been indicted and tried therefor. In addition, it is equally clear that he has been guilty not only of planning, preparing, initiating, and waging a war of aggression against Kuwait, but also that his actions have been in violation of international treaties and agreements to which both Iraq and Kuwait were Parties.

Article 6(b) of the London Charter states:

War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.³⁸

Both Article 147 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War³⁹ and Article 130 of the 1949 Geneva Prisoner of War Convention,⁴⁰ to which Iraq and Kuwait (as well as most countries of the world) are Parties, list as “grave breaches” almost all of the acts listed in Article 6(b) of the London Charter, as well as a number of additional acts. Thus, a court trying war crimes cases today is even better supplied with specifications of substantive international criminal law than were the courts which tried those cases after World War II.

Iraqi troops invaded Kuwait on August 2, 1990.⁴¹ United States military forces were ordered to the Persian Gulf five days later, on August 7, 1990.⁴² Saddam Hussein announced the annexation of Kuwait on August 8, 1990.⁴³ After World War II the contention was frequently advanced that because an invaded country had been incorporated into Germany, the law of war, and specifically the law of military occupation, no longer offered protection to the inhabitants of the occupied territory. Concerning this contention the IMT said:

In the view of the Tribunal it is unnecessary in this case to decide whether this doctrine of subjugation, dependent as it is upon military conquest, has any application where the subjugation is the result of the crime of aggressive war. The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners. . .⁴⁴

The subjugation of Kuwait by Iraq was, without question, “the result of the crime of aggressive war”—but was there an army in the field, opposing Iraq, on August 8, 1990? The answer to that question must be in the negative. Kuwait

had been overrun and its army had disintegrated. Undoubtedly, Saudi Arabia had mobilized its armed forces prior to this date, and had an army in the field; but that army was mobilized solely for self-defense against an Iraqi attack. It was not to “restore [Kuwait] to its true owners.” While it might be urged that the United States forces (and those of the other nations which soon assembled in Saudi Arabia, on the Iraqi border) were “an army in the field,” at that time those forces lacked both national and international authority to restore Kuwait to the Kuwaitis. This raises the issue which the IMT felt it unnecessary to decide: Does the doctrine of subjugation apply where the subjugation is the result of a criminal war of aggression? Or, as in the context of this particular problem, does the law of war protect civilian inhabitants (and prisoners of war) of a country victimized by a war of aggression and formally annexed by the aggressor?

The doctrine applied by the IMT, that there could be no annexation of occupied territory while there was an opposing army in the field, was based upon the principle that any annexation announced before the conflict had fully terminated and peace had been restored was unlawful. Today, Article 5(3) of the Definition of Aggression states that “[n]o territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.”⁴⁵ While it is true that resolutions of the General Assembly of the United Nations are not binding, it would certainly appear that the provision with respect to aggression quoted above is an expression of present-day customary international law. In other words, it is a principle of customary international law that there can be no lawful annexation resulting from an aggressive war; *ergo* Iraq’s annexation of Kuwait was unlawful. Moreover, Security Council Resolution 662, adopted on August 9, 1990, stated that the Security Council, “[d]ecides that the annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void.”⁴⁶ In this Resolution, the Security Council also decided “to continue its efforts to put an early end to the *occupation*.”⁴⁷

If the annexation was unlawful, then the status of Kuwait continued to be one of military occupation, a status which began on August 2, 1990, and which continued thereafter despite Iraq’s unlawful attempt to change it to one of ownership by annexation on August 8, 1990. Moreover, Article 47 of the 1949 Geneva Civilians Convention provides, “[p]rotected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention . . . by any annexation by the latter [Occupying Power] of the whole or part of the occupied territory.”⁴⁸

Accordingly, it must be concluded that the annexation of Kuwait by Iraq was a nullity, and that subsequent to August 2, 1990, Iraq was bound by the law of war and, specifically, by the law of military occupation.

IV. Substantive Evidence of Iraqi Offenses

A. Violations of the Rights of Foreign Nationals and Protected Persons

The 1907 Hague Regulations⁴⁹ and the two 1949 Geneva Conventions referred to above, contain provisions which, as will be discussed later, were violated by the Iraqi army in Kuwait and in Iraq. The violations occurred both before and after the unlawful annexation. Convincing evidence of these offenses was collected and evaluated by the appropriate authorities during the course of, and after the hostilities.⁵⁰ Moreover, information with respect to numerous offenses against the law of war was available through the media, including the official Iraqi television, and from a report prepared by Amnesty International.⁵¹

When Iraq invaded Kuwait on August 2, 1990, there were many Americans and other foreign nationals in both Kuwait and Iraq. As these individuals were not allowed to leave Iraq, they had the status of "protected persons" and were entitled to all of the protections afforded by the 1949 Geneva Civilians Convention. Articles 48 and 35 thereof provide that protected persons "who are not nationals of the Power whose territory is occupied" have the right to leave the occupied territory, "unless their departure is contrary to the national interests of the State."⁵² The exception was included primarily to enable a State to prevent neutral persons, who were important to its economy, from leaving the occupied territory. Its purpose was not to enable a belligerent to detain such individuals as hostages.⁵³ The United States nationals, among others, were not only compelled to remain in Kuwait and in Iraq in violation of Article 48, but they were held there as hostages. This was well publicized and verified by the returnees, and constituted a violation of Article 134 of the Geneva Civilians Convention. This Convention specifically prohibits the taking of hostages and Article 147 makes such action a "grave breach" of that Convention.⁵⁴ Moreover, these hostages were frequently forced to remain in military installations and armament factories (including those producing chemical weapons), in an effort to deter the Coalition armed forces from attacking these sites by air bombardment. This violated Article 28 of that Convention which specifically prohibits using protected persons "to render certain points or areas immune from military operations."⁵⁵

There have been reports that thousands of persons, foreign, Kuwaiti, and Iraqi, who were in Kuwait as refugees from Iraq, were deported from Kuwait to Iraq. This was a violation of Article 49 of the 1949 Geneva Civilians Convention which prohibits "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power . . ."⁵⁶ Furthermore, Article 147 provides that a violation of this provision is a "grave breach" of the Convention—a war crime.⁵⁷

B. Other Human Rights Violations

In referring to the massive violations of human rights which occurred in Kuwait immediately after the Iraqi invasion and occupation of that country, the Amnesty International Report contains the following statement, “[t]hese include the arbitrary arrest and detention without trial of thousands of civilians and [Kuwaiti] military personnel; the widespread torture of such persons in custody; the imposition of the death penalty and the extrajudicial execution of hundreds of unarmed civilians, including children.”⁵⁸

Murder and torture are specifically prohibited by Article 32 of the 1949 Geneva Civilians Convention and both are listed among the “grave breaches” of Article 147. According to the Amnesty International Report, hundreds of extrajudicial executions were carried out.⁵⁹ Some of these were apparently occasioned by the refusal of the Kuwaiti citizens involved to pledge allegiance to Saddam Hussein. Civilians detained by the Iraqis were required to pledge such allegiance in order to obtain their freedom.⁶⁰ Article 45 of the 1907 Hague Regulations forbids compelling the inhabitants of occupied territory to swear allegiance to the hostile Power.⁶¹

The Amnesty International Report also indicates that:

[W]idespread destruction and looting of public and private property was carried out. Most critical of these has been the looting of medicines, medical equipment and food supplies. The massive scale of destruction and looting which has been reported suggests that such incidents were neither arbitrary nor isolated, but rather reflected a policy adopted by the government of Iraq.⁶²

These actions violated Article 23(g) of the 1907 Hague Regulations, which prohibits wanton destruction of property; Articles 46 and 56 thereof which protect private property and that of municipalities and institutions; and Article 47 of those Regulations, which prohibits pillage.⁶³ Article 53 of the 1949 Geneva Civilians Convention likewise prohibits the destruction and appropriation of real or personal property not justified by military necessity and Article 147 makes such destruction or appropriation a “grave breach” of that Convention.⁶⁴

Iraqi television is reported to have shown two captured American airmen being paraded through the streets of Baghdad. It also conducted on-screen interviews of prisoners of war from the United States and other Coalition nations. Both of these actions were violations of Article 13 of the 1949 Geneva Prisoner of War Convention which specifically provides that prisoners of war must be protected against “intimidation and against insults and public curiosity.”⁶⁵ Similar actions during World War II resulted in a number of convictions for violations of this aspect of the laws and customs of war.⁶⁶

Moreover, in the first few interviews each of the prisoners of war looked battered and bewildered and made a statement favorable to Iraq—which would seem to indicate that at least some of the prisoners, if not all, had either been coerced by force or drugged.⁶⁷

Iraq announced that it had placed prisoners of war in economic and scientific centers. As in the 1949 Geneva Civilians Convention, the 1949 Geneva Prisoner of War Convention, in its Article 23(1), specifically prohibits using the presence of prisoners of war “to render certain points or areas immune from military operations.”⁶⁸

War crimes trials conducted after World War II demonstrated that where there was a general pattern of violations of the law of war, it was the result of orders emanating from the top echelons of leadership—in this case, Saddam Hussein and his agents. It was on this basis that many of the higher-ranking Nazi officials were convicted of conventional war crimes. This rule of customary international law has now been incorporated into conventional international law. Article 29 of the 1949 Geneva Civilians Convention states, “[t]he Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.”⁶⁹ Articles 12(1) and 131 of the 1949 Geneva Prisoner of War Convention are to the same effect.⁷⁰

No attempt has been made to list and discuss every war crime that may have been committed by Iraq. However, those that have been enumerated indicate an almost total disregard for the provisions of the customary and conventional law of war. When the Coalition captured its first Iraqi armed soldiers, the men who composed the anti-aircraft crews on the oil platforms off the coast of Kuwait, the United States informed the Iraqi Government that the Coalition would comply with the 1949 Geneva Prisoner of War Convention and that it expected the same of Iraq.⁷¹ However, based upon the non-compliance by both sides during the Iran-Iraq War (1980-1988), it was undoubtedly realized that this Convention, as well as other law of war conventions, would be the subject of similar widespread violations by the Iraqis in this conflict.⁷² Referring back to Article 6(b) of the London Charter, it will be found that with one or two exceptions (for example, the murder of persons on the high seas⁷³), Saddam Hussein and his followers have substantially violated that provision.

C. Wanton Environmental Destruction

The Governments have been exceedingly slow in drafting law-of-war agreements, or even provisions, for protecting the environment.⁷⁴ Concerning Iraqi actions against the environment the following was found:⁷⁵

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The Gulf was fouled when between seven and nine million barrels of oil were discharged into it by Iraq. In the desert, five hundred and ninety oil wellheads were damaged or destroyed: five hundred and eight of them were set on fire, and the remaining eighty-two were damaged in such a manner that twenty-five to fifty million barrels of oil flowed freely from them onto the desert floor. The result was total devastation of the fragile desert ecological system and the pollution of water sources critical to survival. . . .

From 9 to 12 July 1991, the Government of Canada, in concert with the Secretary General of the United Nations, hosted a conference of international experts in Ottawa, Ontario, to consider the law of war implications of the environmental devastation caused by the Iraqis. There was general agreement that the actions cited constitute violations of the law of war, specifically:

a. Article 23(g) of the Annex to the 1907 Hague Convention IV Respecting the Customs of War on Land of 18 October 1907, forbids the destruction of “enemy property unless imperatively demanded by the necessities of war;” and,

b. Article 147 of the GC [1949 Geneva Civilians Convention], makes the “extensive destruction . . . of property, not justified by military necessity and carried out unlawfully and wantonly” a grave breach.⁷⁶

Clearly, the oil well destruction by Iraq served no military purpose, but was designed to wreck Kuwait’s future, carrying a scorched earth policy to the extreme.⁷⁷

D. Use of Chemical and Biological Weapons

The use of chemical and biological weapons is worthy of attention. In 1925 a Protocol was drafted in Geneva prohibiting the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials, or devices. It also prohibits “the use of bacteriological methods of warfare.”⁷⁸ Iraq is a Party to this Protocol as are most of the nations represented in the multilateral force which opposed Iraq.⁷⁹ Nevertheless, Iraq has used poison gas against Iran and against Kurdish and Shiite rebels in its own territory. It was apparently well supplied with this type of weapon and had threatened that in the event of hostilities by the Coalition forces it would use poison gas not only against the armed forces facing it, but also against Israel, which had played no part in the confrontation. While Iraq did fire a number of missiles against Israel, they had conventional warheads.

There are some claims that it did use gas or biological weapons during the hostilities. If proven that Iraq did so, this will be one more treaty Iraq will have

violated, and one more war crime or a crime against humanity to be charged against Saddam Hussein and his agents.

Article 6(c) of the London Charter contains the following definition of crimes against humanity:

Crimes against humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.⁸⁰

With respect to this category of offenses, the IMT said, "from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity."⁸¹ If one substitutes 1990 for 1939 in that statement, it aptly describes the situation in Kuwait and, perhaps, in Iraq.

V. Conclusion

This essay has demonstrated that if custody of Saddam Hussein and the members of his Military Council could be obtained, they could be charged and tried for having committed crimes against peace, war crimes, and crimes against humanity during the Iraqi invasion of Kuwait. To do so would require some or all of the States which actively supported the actions against Iraq (or the Security Council of the United Nations) to reach an agreement under which a Tribunal would be established, evidence collected, charges made, and a trial, or trials, conducted.⁸²

In any event, it is to be hoped that in the light of the experience in the Persian Gulf, and the problems that Saddam Hussein has caused in the implementation of the cease-fire resolution, should he or another military despot disturb the peace of the world at some future date, the international community will not commit the same mistake of not making him pay for his crimes.

Notes

1. Unfortunately, as so often happens, to have included a provision concerning trials for war crimes in the terms of the cease fire enunciated in U.N. Doc. S/RES/687 (1991), would undoubtedly have lengthened the period of hostilities. Eventually, this would have resulted in Saddam Hussein and other high ranking Iraqis seeking refuge in a country that would have granted them asylum and would have refused to try or extradite them as required by international agreements to which all of the States involved are Parties.

2. One eminent student of this area of international law has made a case for Saddam Hussein's assassination. Robert F. Turner, *Killing Saddam: Would It Be a Crime?*, WASH. POST, Oct. 7, 1990, at D1. Although the word "assassination" is inherently repulsive, this is not an idea that should be dismissed out of hand. Saddam Hussein was a uniformed member of the Iraqi Army and was, therefore, a legitimate target. Killing him during the course of hostilities would have been a legitimate act of war and not an assassination. During World War II the British in Africa mounted an unsuccessful operation in North Africa the sole purpose

of which was to kill German Field Marshal Rommel and his staff. In the Pacific, the United States mounted a successful operation aimed specifically at killing Japanese Admiral Yamamoto. (If the attempt to assassinate Hitler by members of the German resistance had been successful, World War II would have probably ended a year or so earlier and thousands of lives might have been saved at the cost of one life, which was already forfeited.)

3. One of the most extensive, if somewhat biased, reviews of the Persian Gulf Crisis of 1990-1991 can be found in GREENPEACE, *ON IMPACT: MODERN WARFARE AND THE ENVIRONMENT, A CASE STUDY OF THE GULF WAR* (1991) [hereinafter *ON IMPACT*]. For a broad, general view of the matter, see John N. Moore, *War Crimes and the Rule of Law in the Gulf Crisis*, 31 VA. J. INT'L L. 403 (1991). Moore properly concludes that, "[p]erhaps the most important reason for holding war crimes trials in the Gulf crisis is that we must bring deterrence home to totalitarian elites if we are to be most effective in avoiding aggressive war and human rights violations." See *id.* at 405. Perhaps, if there had been war crimes trials after the Gulf Crisis, the leaders of the various parts of the former Yugoslavia would have given more thought to compliance with the law of war in the conflict in Bosnia; see also Jordan J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 VA. J. INT'L L. 351 (1991).

4. Charter of the International Military Tribunal attached to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 27 [hereinafter Charter of the International Military Tribunal]; HOWARD S. LEVIE, *TERRORISM IN WAR: THE LAW OF WAR CRIMES* 549 (1993) [hereinafter *WAR CRIMES*]. The Charter was drafted by representatives of France, the Soviet Union, the United Kingdom, and the United States. The Agreement to which it was attached was subsequently adhered to by nineteen other nations. See *id.* at 51.

5. See *e.g.*, Allied Control Council Law No. 10, Dec. 20, 1945, 15 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 23 (1947) (hereinafter *TRIALS OF WAR CRIMINALS*); see also *WAR CRIMES*, *supra* note 4, at 558.

6. Charter of the International Military Tribunal for the Far East (IMTFE), Jan. 19, 1946, as amended Apr. 26, 1946, T.I.A.S. No. 1589, 4 Bevans 20, 27; *WAR CRIMES*, *supra* note 4, at 571. This Charter was issued by the Supreme Commander for the Allied Powers (SCAP), the post-World War II Military Governor of Japan, and was approved by the Far East Commission, the Allied body which was created to exercise overall political control of Japan during the Occupation.

7. Statute for an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1203 (1993).

8. International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and the Violations Committed in the Territory of Neighboring States, Between January 1, 1994, and December 31, 1994, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994).

9. Certainly, this would have been well within its power under Chapter VII of the Charter of the United Nations. However, such a provision would have been anathema to the Iraqi regime, and might even have caused it to refuse to agree to the cease-fire. However, this would have lengthened the hostilities by only a matter of days.

10. 1929 Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

11. Of course, not every potential accused will be able to claim the status of prisoner of war. However, as noted in note 2, *supra*, Saddam Hussein and most of his aides did maintain a military status.

12. Application of Yamashita, 327 U.S. 1 (1946).

13. See INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 413-14 (Jean S. Pictet ed., 1960) (hereinafter *Pictet*). The French *Cour de Cassation* held to the contrary, but not until 1950, when most war crimes trial programs, including that of the French, were all but completed. In recent years the French tried Klaus Barbie (a German, tried in 1987) and Paul Touvier (a Frenchman, tried in 1994) before civilian courts for crimes against humanity committed during World War II.

14. 1949 Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316; 75 U.N.T.S. 135 [hereinafter 1949 Geneva Prisoner of War Convention].

15. *Id.* art. 102, 6 U.S.T. at 3394, 75 U.N.T.S. at 212.

16. *Id.* art. 85, 6 U.S.T. at 3384, 75 U.N.T.S. at 202.

17. See *supra* note 12.

18. It is noteworthy that in Article 99 the draftsmen prohibited trials and punishment "for an act which is not forbidden by the law of the Detaining Power or by International Law." See 1949 Geneva Prisoner of War Convention, *supra*, art. 99, 6 U.S.T. at 3392, 75 U.N.T.S. at 210 (emphasis added.). As Article 85 contains

no reference to international law, it would appear that there was no intention on the part of the draftsmen to make its requirements applicable to trials under that law. See 1949 Geneva Prisoner of War Convention, *supra* note 14, art. 85, 6 U.S.T. at 3384, 75 U.N.T.S. at 202. Whether a national court trying a case involving a pre-capture offense is applying national or international law will frequently be a debatable matter.

19. Pictet, *supra* note 13, at 416-17. Pictet points out that the Italian Supreme Military Tribunal has held, in the *Case of Kappler*, 49 A.J.I.L. 96 (1955), that violations of the laws and customs of war are offenses against international law and not against the legislation of the Detaining Power. *Id.* at 426. Nevertheless, Pictet believes that the decision is erroneous. However, if, for example, a representative of a Detaining Power compelled prisoners of war held by it to remove land mines, this would be a violation of Article 52 of the 1949 Geneva Prisoners of War Convention and a war crime—but it is extremely doubtful that any State would have a national law making such action a crime. See 1949 Geneva Prisoner of War Convention, *supra* note 14, art. 52. Similarly, few, if any, States are known to have a penal statute making the waging of a war of aggression a criminal offense.

20. Pictet, *supra* note 13, at 624. As there was no permanent International Criminal Court in 1960, when the Commentary was published (and there still is none although the international community is moving closer to the establishment of such an institution), the reference could only be to an *ad hoc* International Criminal Court created for the specific purpose of trying "grave breaches." Therefore, it is difficult to understand how the competence of such a court could have been "recognized by the Contracting Parties," except in the unlikely event of such "recognition" being included in a cease-fire or armistice agreement.

21. For the United States this would mean trials by courts-martial, rather than by military commissions. Trials by courts-martial require more rigid rules of procedure and evidence than trials by military commissions. This will often create insurmountable problems for the prosecution as the trial may be held thousands of miles from the place of the offense and years after its commission, with witnesses scattered all over the world.

22. For the text of the Rules of Procedure and Evidence adopted by the members of the International Tribunal for the Former Yugoslavia, see 33 I.L.M. 493 (1994). (The Rules have since been the subject of a number of amendments. Rules on subjects other than procedure and evidence have been drafted and adopted by the Tribunal.) There can be no doubt that these Rules will ensure a fair trial for any accused whose trial takes place before one of the Trial Chambers of the Tribunal.

23. See Charter of the International Military Tribunal, *supra* note 4, art. 6(a), 59 Stat. at 1547, 82 U.N.T.S. at 286, 288. As the hostilities in Rwanda were of an internal nature, the substantive provisions of the Statute of the International Tribunal for Rwanda are somewhat different in form, if not in substance. See *supra* note 8. There is, of course, no "crime against peace." See *supra* note 8.

24. See Charter of the International Military Tribunal, *supra* note 4, art. 6(a), 59 Stat. at 1547, 82 U.N.T.S. at 286.

25. See *e.g.*, VISCOUNT MAUGHAM, U.N.O. AND WAR CRIMES, *passim* (Greenwood Press 1975) (1951); Hans-Heinrich Jescheck, *Nuremberg Trials*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 50, 52 (Rudolf Bernhardt ed., 1982) [hereinafter ENCYCLOPEDIA].

26. NAZI CONSPIRACY AND AGGRESSION: OPINION AND JUDGMENT 48-54 (1947) (hereinafter NAZI CONSPIRACY AND AGGRESSION).

27. 1 THE TOKYO JUDGMENT 27-29 (B. V. A. Röling & C. F. Rüter eds., 1977).

28. 2 *id.* at 1045-64.

29. B. V. A. Röling, *Tokyo Trial*, in 4 ENCYCLOPEDIA, *supra* note 25, at 242, 244. The "later actions taken within the United Nations" undoubtedly refers to such matters as *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, G.A. Res. 95I, 1st Sess., 55th plen. mtg. (1946), 1946-1947 U.N.Y.B. 254; *Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142 (1974); as well as numerous other resolutions.

30. NAZI CONSPIRACY AND AGGRESSION, *supra* note 26, at 16.

31. In *United States v. Wilhelm von Leeb (The High Command Case)*, 11 TRIAL OF WAR CRIMINALS, *supra* note 5, at 490, the Military Tribunal said:

The crime denounced by the law is the use of war as an instrument of national policy. Those who commit the crime are those who participate at the policy making level in planning, preparing or in initiating war.

....

The making of a national policy is essentially political, though it may require, and of necessity does require, if war is to be one element of that policy, a consideration of matters military as well as matters political.

(No accused in that case was found guilty of crimes against peace.) While there would be no question but that Saddam Hussein would meet the Tribunal's requirements for the crime of waging an aggressive war, a crime

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against peace, some of the members of his Military Council might be able to prove that they had had no influence in the reaching of the decision by Iraq to occupy Kuwait.

32. 1945 Pact of the League of Arab States, 22 March 1945, 70 U.N.T.S. 237.
33. U.N. CHARTER art. 2, § 4.
34. See G.A. Res. 3314, *supra* note 29.
35. G.A. Res. 3314, *supra* note 29, at 143.
36. G.A. Res. 3314, *supra* note 29, at 143. Although the resolutions adopted by the General Assembly are not lawmaking, it is believed that at this point in time the quoted provisions of the Resolution of the General Assembly represent customary international law.
37. G.A. Res. 3314, *supra* note 29, at 144.
38. See Charter of the International Military Tribunal, *supra* note 4, art. 6(b), 59 Stat. at 1547, 82 U.N.T.S. at 286, 288.
39. 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516; 75 U.N.T.S. 287 [hereinafter 1949 Geneva Civilians Convention]. See also U.N. Doc. S/RES/670 (1990), reprinted in 29 I.L.M. 1334 (1990) which:
Reaffirms that the Fourth Geneva Convention applies to Kuwait and that as a High Contracting Party to the Convention Iraq is bound to comply fully with all its terms and in particular is liable under the Convention in respect of the grave breaches of the Convention committed by it, as are individuals who commit or order the commission of grave breaches.
Id. art. 147.
40. See 1949 Geneva Prisoner of War Convention, *supra* note 14, art. 130, 6 U.S.T. at 3420, 75 U.N.T.S. at 238.
41. Apple Jr., *The Iraqi Invasion*, N.Y. TIMES, Aug. 3, 1990, at A1.
42. Bill Keller, *The Iraqi Invasion*, N.Y. TIMES, Aug. 8, 1990, at A1; Andrew Rosenthal, *Bush Sends U.S. Force to Saudi Arabia as Kingdom Agrees to Confront Iraq*, *id.* at A1, col. 6.
43. John Kifner, *Confrontation in the Gulf*, N.Y. TIMES, Aug. 9, 1990, at A1, col. 1.
44. NAZI CONSPIRACY AND AGGRESSION, *supra* note 26, at 83.
45. See G.A. Res. 3314, *supra* note 29, at 144.
46. U.N. Doc. S/RES/662 (1990), reprinted in 29 I.L.M. 1327 (1990).
47. *Id.* (emphasis added).
48. See 1949 Geneva Civilians Convention, *supra* note 39, art. 47, 6 U.S.T. at 3548, 75 U.N.T.S. at 318.
49. Convention Respecting the Laws and Customs of War on Land, No. IV., Oct. 18, 1907, Annex, Regulations, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Regulations]. While Iraq was not a Party to this Convention and its Regulations, the latter are now considered to be a part of customary international law. Thus, the International Military Tribunal said, "by 1939 these rules laid down in the [1907 Hague IV] convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6(b) of the Charter." NAZI CONSPIRACY AND AGGRESSION, *supra* note 26, at 83.
50. See e.g., WAR CRIMES DOCUMENTATION CENTER, INTERNATIONAL AFFAIRS DIVISION, THE UNITED STATES ARMY REPORT ON IRAQI WAR CRIMES (DESERT SHIELD/DESERT STORM) (Sec. of the Army ed., 1992) [hereinafter ARMY REPORT]. (This report later became U. N. Doc. S/25441 (1993)). This 116 page report identifies 16 specific types of violations of the law of war. *Id.* at 11-13.
51. AMNESTY INTERNATIONAL, IRAQ/OCCUPIED KUWAIT: HUMAN RIGHTS VIOLATIONS SINCE AUGUST 2, 1990 [hereinafter AMNESTY INTERNATIONAL REPORT]. See also ON IMPACT, *supra* note 3. In September 1990 the President of the International Committee of the Red Cross visited Baghdad. After several days of conferences with Iraqi officials he returned to Geneva and reported that he "did not succeed in obtaining the Iraqi Government's authorization to launch an operation in Iraq and Kuwait for the victims of the crisis." 30 INT'L REV. RED CROSS 437 (1990).
52. See 1949 Geneva Civilians Convention, *supra* note 39, arts. 35, 48, 6 U.S.T. at 3540, 3548, 75 U.N.T.S. at 310, 318.
53. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 235-36 (Jean S. Pictet ed., 1958).
54. Although there was no such conventional prohibition in existence during World War II, many courts found that this practice violated customary international law. *But see, United States v. Wilhelm List (The Hostage Case)*, 11 TRIALS OF WAR CRIMINALS, *supra* note 5, at 1230.
55. 1949 Geneva Civilians Convention, *supra* note 39, art. 28, 6 U.S.T. at 3538, 75 U.N.T.S. at 308. Additionally, according to the ARMY REPORT, evidence was available that "over 4,900 U.S. hostages [were] taken by Iraq, 106 of whom were used by Iraq as human shields." ARMY REPORT, *supra* note 50, at 6.

56. See 1949 Geneva Civilians Convention, *supra* note 39, art. 49, 6 U.S.T. at 3548, 75 U.N.T.S. at 318. This article also prohibits deportation to any other country. It is this provision which has served as the basis of the complaints against Israel when it deported Palestinian terrorists.

57. See 1949 Geneva Civilians Convention, *supra* note 39, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

58. AMNESTY INTERNATIONAL REPORT, *supra* note 51, at 4.

59. *Id.* at 45. The figures contained in the AMNESTY INTERNATIONAL REPORT are far below those emanating from refugee Kuwaiti officials and individuals. The Report includes a list of thirty-eight methods of torture employed by the Iraqis. *Id.* at 38-41.

60. *Id.* at 20.

61. See 1907 Hague Regulations, *supra* note 49, art. 45, 36 Stat. at 2306, 1 Bevans at 651.

62. See AMNESTY INTERNATIONAL REPORT, *supra* note 51, at 5. Similarly, the ARMY REPORT states:

The evidence collected during this investigation establishes a *prima facie* case that the violations of the law of war committed against Kuwaiti civilians and property, and against third party nationals, were so widespread and methodical that they could not have occurred without the authority or knowledge of Saddam Husayn [*sic*]. They are war crimes for which Saddam Husayn, officials of the Ba'ath Party, and his subordinates bear responsibility.

See ARMY REPORT, *supra* note 50, at 13.

63. See 1907 Hague Regulations, *supra* note 49, arts. 23(g), 46, 47, 56, 36 Stat. at 2302, 2306, 2309, 1 Bevans at 648, 651, 652, 653; see also *The Hostage Case*, *supra* note 54, at 1295. In the *Hostage Case*, General Rendulic of Germany was charged with ordering a scorched earth policy which was not militarily necessary during his retreat across Norway from Finland. The Tribunal held that although his information that the Soviet Army was in close pursuit of his troops was incorrect, he had a right to act on his belief that this information was correct. *Id.* at 1296. Much to the dismay of the Norwegians, he was acquitted of this charge. *Id.* at 1297.

64. See 1949 Geneva Civilians Convention, *supra* note 39, arts. 53, 147, 6 U.S.T. at 3552, 3618, 75 U.N.T.S. at 322, 388.

65. See 1949 Geneva Prisoner of War Convention, *supra* note 14, art. 13, 6 U.S.T. at 3328, 75 U.N.T.S. at 146.

66. *Trial of Kurt Maelzer*, 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS 53 (1949), WAR CRIMES, *supra* note 4, at 342; see also *id.* at 343 (*Trial of Masataka Kaburagi*).

67. In subsequent television interviews the prisoners of war did not look so battered and, while they gave more than "name, rank, serial number, and date of birth," they did not make statements favorable to Iraq.

68. See 1949 Geneva Prisoner of War Convention, *supra* note 14, art. 23, 6 U.S.T. at 3336, 75 U.N.T.S. at 154, 156.

69. See 1949 Geneva Civilians Convention, *supra* note 39, art. 29, 6 U.S.T. at 3538, 75 U.N.T.S. at 308.

70. See 1949 Geneva Prisoner of War Convention, *supra* note 14, arts. 12, § 1, 131, 6 U.S.T. at 3328, 3420, 75 U.N.T.S. at 146, 238.

71. The statement did not indicate who the Detaining Power was but, presumably, in this instance it was the United States. Only States, and then too only those states Parties to the Convention may be Detaining Powers. Fortunately, the mistake made in Korea, where the United Nations Command was deemed to be the Detaining Power, was not made again. Prisoners of war captured by the armed forces of Arab States were transferred to the custody of Saudi Arabia. All others were transferred to the custody of the United States. Such transfers are authorized by Article 12(2) of the 1949 Geneva Prisoner of War Convention, *supra* note 14, 6 U.S.T. at 3328, 75 U.N.T.S. at 146.

72. In 1985, during the Iran-Iraq War (1980-1985), the Secretary-General of the United Nations sent a mission to both Iran and Iraq to determine how these two countries were treating the prisoners of war held by them. The Mission found that both countries were in substantial violation of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. Moreover, it stated that: "Physical violence appeared to be particularly common in POW camps in Iraq." Report of the Mission, U.N. Doc. S/16962, Feb. 22, 1985, ¶ 273.

73. The ARMY REPORT, *supra* note 50, at 13, does charge that one naval war crime committed by Iraq was, "[e]mployment of unanchored naval mines and mines lacking devices for their self-neutralization in the event of their breaking loose from their moorings in violation of Article 1, Hague VIII." This refers to the 1907 Hague Convention No. VIII Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332, 1 Bevans 669.

74. The 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1976 (better known as the ENMOD Convention), 31 U.S.T. 333, 16 I.L.M. 88 (1977); and Articles 35(3) and 55 of the 1977 Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977,

72 A.J.I.L. 457 (1978), 16 I.L.M. 1391 (1977) constitute the entire international legislation on the subject of the protection of the environment during the course of hostilities. There are, however, a number of international rules that can be said to protect the environment indirectly. See 1907 Hague Regulations, *supra* note 49, and Article 2(4) of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 19 I.L.M. 1524, 1535 (1980). Iraq is not a Party to the ENMOD Convention, nor to the 1977 Additional Protocol, nor to the Conventional Weapons Convention.

While not drafted as an environmental protection provision, it is appropriate to call attention to Article 53 of the 1949 Geneva Civilians Convention, which provides, "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." 1949 Geneva Civilians Convention, *supra* note 39, 6 U.S.T. at 3550, 75 U.N.T.S. at 320.

75. The ARMY REPORT, *supra* note 50, at 10-11.

76. *Id.*

77. An elaboration of these events can be found in ON IMPACT, *supra* note 3, at 21-25, 62-72. The legal aspects of the problem have been widely commented upon. See e.g., Anthony Leibler, *Deliberate Wartime Environmental Damage: New Challenges for International Law*, 23 CAL. W. INT'L L.J. 67 (1992); Liesbeth Lijnzaad & Gerard Tanja, *Protection of the Environment in Times of Armed Conflict: The Iraq-Kuwait War*, 40 NETH. INT'L L. REV. 169 (1993); Mark J. T. Caggiano, *The Legitimacy of Environmental Destruction in Modern Warfare: Customary Substance over Conventional Form*, 20 B.C. ENVTL. AFF. L. REV. 479 (1993). But see W. MICHAEL REISMAN ET AL., *THE LAWS OF WAR* 28, 69 (1994).

78. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

79. Iraq became a Party to the 1925 Protocol in 1931. It made a "first use" reservation similar to that made by many other Parties. The Protocol does not have a general participation (*si omnes*) clause. Iraq is not a Party to the 1972 Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 11 I.L.M. 309 (1972).

80. See Charter of the International Military Tribunal, *supra* note 4, art 6(c), 59 Stat. at 1547, 82 U.N.T.S. at 286, 288.

81. NAZI CONSPIRACY AND AGGRESSION, *supra* note 26, at 84.

82. Many of the problems which can be envisioned for such a Tribunal could be solved easily by reference to the Statutes adopted by the Security Council of the United Nations for the International Tribunal for the Former Yugoslavia, *supra* note 7, and for the International Tribunal for Rwanda, *supra* note 8, and by the Rules of Procedure and Evidence adopted by the members of those Tribunals. (Concerning the rules of procedure and evidence adopted by the members of the International Tribunal for the Former Yugoslavia, see *supra* note 22. There have since been some amendments to these rules. See 33 I.L.M. 838, 1620 (1994). See also *Directive on Assignment of Defense Counsel*, 33 I.L.M. 1581; *Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal*. *Id.* at 1591 (1994).