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# THE IRAQ-KUWAIT CRISIS: AN ANALYSIS OF THE UNRESOLVED ISSUE OF WAR CRIMES LIABILITY

*Professor Kenneth A. Williams\**

## I. INTRODUCTION

The Gulf War is now over. Many of the issues concerning the war have been resolved. For instance, Iraq has agreed, among other things, to accept a 1963 border agreement with Kuwait, to compensate Kuwait for damages it caused during the occupation and to destroy its weapons of mass destruction.<sup>1</sup> Furthermore, the Kurdish refugee problem appears to have been resolved, at least for the time being.<sup>2</sup> However, one of the major issues that remains unresolved is the issue of war crimes liability.

Both Iraqi President Saddam Hussein and United States President George Bush could face possible war crimes liability: President Hussein for planning and initiating a war of aggression against Kuwait; President Bush for the United States bombing of an alleged civilian bomb shelter that resulted in hundreds of deaths. However, any war crimes tribunal would likely be patterned after the Nuremberg Tribunal. As such, only the vanquished — President Hussein — would be prosecuted while the victor — President Bush — would avoid such prosecution. This situation is the major flaw in the current tribunal structure. To make war crimes tribunals more effective, a permanent tribunal should be established.

This Article will analyze the issue of war crimes liability. In Part II, international law as it relates to war crimes will be discussed. Part III will analyze the potential war crimes liability of Iraqi President Saddam Hussein. An analysis, however, of only Saddam Hussein's potential war crimes would be inadequate,

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1. Security Council Resolution No. 687 reprinted in 28 U.N. Chron. 6 (1991). See also Patrick E. Tyler, *Baghdad Formally Agrees to 'Unjust' U.N. Conditions for Permanent Cease-Fire*, N.Y. TIMES, Apr. 7, 1991, at A1.

2. See *Excerpts from Bush's News Conference: Relief Camps for Kurds in Iraq*, N.Y. TIMES, Apr. 17, 1991, at A12.

since there will certainly be demands to prosecute United States President George Bush for war crimes as well. Thus, for this reason and in order to illustrate the inadequacies of the present war crimes machinery, Part IV will evaluate the potential war crimes liability of President Bush.<sup>3</sup> Finally, in Part V of this Article, I will critique the international law of war crimes and provide suggestions for improving it.

## II. INTERNATIONAL LAW CONCERNING WAR CRIMES LIABILITY

In order to prosecute either Presidents Hussein or Bush for war crimes, international law requires the authority — the jurisdiction<sup>4</sup> — to do so. Jurisdiction is based on one of five principles: one, the territoriality principle, which applies when an offense occurs within the territory of the prosecuting state; two, the nationality principle, which recognizes that jurisdiction exists when the offender is a national or resident of the prosecuting state; three, the protective principle, which allows for jurisdiction where an extraterritorial act threatens interests vital to the integrity of the prosecuting state; four, the passive personality principle, which recognizes jurisdiction where the victim is a national of the prosecuting state; and five, the universality principle, which holds that certain crimes are so universally condemned that their perpetrators are enemies of all people and that jurisdiction may be based solely on having custody of the perpetrator.<sup>5</sup> It was the universality principle which gave the Allied Powers the authority to prosecute Nazi officials at Nurem-

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3. It is possible that members of Presidents Hussein and Bush's staff would also be liable for war crimes. Article 7 of the Charter of the International Military Tribunal, provides that: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, 59 Stat. 1544, 82 U.N.T.S. 279, 288 (1945) [hereinafter Charter of the International Military Tribunal]. However, in the interest of economy of space, this Article will be limited to the liability of the two heads of state.

4. Jurisdiction is defined as "the authority of states to prescribe their law, to subject persons and things to adjudication in their courts and other tribunals and to enforce their law, both judicially and nonjudicially." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Part IV Jurisdiction and Judgments, Ch. 4 Invalidity and Termination of Int'l Agreements Introductory Note (1987) [hereinafter RESTATEMENT (THIRD)].

5. See J. Martin Wagner, Note, *U.S. Prosecution of Past and Future War Criminals and Criminals Against Humanity: Proposals for Reform Based on the Canadian and Australian Experience*, 29 VA. J. INT'L L. 887, 899-900 (1989).

berg for war crimes<sup>6</sup> and which would give the international community the authority to prosecute either Presidents Hussein or Bush.

The first attempt by the international community to codify rules of warfare began with the Hague Convention of 1907.<sup>7</sup> The Hague Convention created substantive rules of warfare, but did not contain any enforcement provisions. This issue was resolved, however, when the four major Allied Powers established the International Military Tribunal (the Nuremberg Tribunal) in Nuremberg, Germany following World War II "for the just and prompt trial and punishment of the major war criminals of the European Axis."<sup>8</sup> The Nuremberg Tribunal was governed by a Charter of the Military Tribunal (the Charter) which set out its constitution, jurisdiction, including the definition of war crimes, and its powers and procedures. The Charter is now a part of international law<sup>9</sup> as it relates to war crimes and it would be the basis of any prosecution of Presidents Hussein or Bush.<sup>10</sup>

Part II, Articles 6 to 13, of the Charter was its most important part since it contained the definition of war crimes.<sup>11</sup> Anti-

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

7. Convention (No. IV) Respecting the Laws and Customs of War on Land With Annex of Regulations (1907), T.S. No. 539, 1 Bevans 631.

8. The Nuremberg Tribunal was established pursuant to an agreement signed on August 8, 1945, between the United States, the United Kingdom, the Union of Soviet Socialist Republics, and the Provisional Government of France. See Charter of the International Military Tribunal, *supra* note 3.

9. International law is created in three ways: one, in the form of customary international law; two, by international agreement; or three, by derivation from general principles common to the major legal systems of the world. Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation. The practice of states would include diplomatic acts and instructions and other governmental acts and official statements of policy.

The Charter of the International Military Tribunal (the Charter) would be considered customary international law given the fact that a majority of states have consistently reaffirmed its provisions, either through United Nations resolutions or through treaties which embody many of its provisions. See Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(I), U.N. Doc. A/64/Add.1, at 188 (1946); U.N. CHARTER art. 2, para. 4; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

10. The Charter would be the basis of any prosecution not only because it has become international law but also because its use would eliminate any *ex post facto* problems. See Charter of the International Military Tribunal, *supra* note 3.

11. Part I of the Charter Tribunal dealt with the constitution of the Nuremberg

cle 6(a) defined crimes against the peace as follows: "[N]amely, 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 . . . ."<sup>12</sup> The Nuremberg Tribunal interpreted Article 6(a) in the Nuremberg case.<sup>13</sup> The Nuremberg Tribunal found that Nazi

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Tribunal. Each signatory was to provide one member of the Nuremberg Tribunal and an alternate, *see* Charter of the International Military Tribunal, *supra* note 3, at Art. II; each signatory had to be represented by its member or alternate at every session, *id.* at Part I, Art. II; the members of the Nuremberg Tribunal could not be challenged for any reason, *id.* at Part I, Art. III; the members were to choose one of themselves as President, *id.* at Part I, Art. IVb; the President was to have the deciding vote in the event of a tie on all matters except convictions and sentences, for which an affirmative vote of at least three to one was required, *id.* at Part I, Art. IVc.

Part III of the Charter required each signatory to designate a Chief Prosecutor. *Id.* at Part III, Art. XIV. The Chief Prosecutors were charged with the responsibility of investigating the charges against and the prosecution of major war criminals. *Id.* at Part III, Art. XIV and Art. XV. The four Chief Prosecutors were to serve as a committee to apportion the work between themselves. *Id.* at Part III. In addition, the Chief Prosecutors were required to prepare and present an indictment, settle the list of accused and submit suggested rules of procedure to the Nuremberg Tribunal. *Id.* at Part III, Art. XIV.

Part IV of the Charter set out certain provisions aimed at securing a fair trial for the defendants. An indictment was to be served upon the defendants within a reasonable time prior to trial. *Id.* at Part IV, Art. XVI. A preliminary examination was to be conducted and the defendants were entitled to the assistance of counsel both at the preliminary hearing and during trial. *Id.* at Part IV, Art. XVI. Finally, the defendants had the right to present evidence and to confront witnesses. *Id.* at Part IV, Art. XVI.

Part V dealt with the powers of the Nuremberg Tribunal and the conduct of the trial. The Nuremberg Tribunal had the power to compel the attendance of witnesses, to interrogate the defendants and to require the production of documents and other evidentiary material. *Id.* at Part V, Art. XVII. The Nuremberg Tribunal was not bound by rules of evidence and could admit any evidence which it deemed to have probative value. *Id.* at Part V, Art. XIX. All court proceedings and official documents were to be produced in English, French, Russian and in the language of the defendant. *Id.* at Part V, Art. XXV.

Part VI of the Charter required that a judgment be issued along with the reasons on which it was based. This judgment was to be final and not subject to review. *Id.* at Part VI, Art. XXVI. Finally, the Nuremberg Tribunal was given the power to impose upon a defendant, on conviction, any sentence which it deemed appropriate, including a death sentence. *Id.* at Part V, Art. XXVII.

Of the twenty-two accused, twelve received death sentences, three received life sentences, two were given sentences of twenty years, one a sentence of fifteen years, one a sentence of ten years and three were acquitted. *See* PETER CALVOCORRESSI, NUREMBERG, THE FACTS, THE LAW AND THE CONSEQUENCES 141 (1948) [hereinafter CALVOCORRESSI]. In addition to the proceedings at Nuremberg, thousands of lower ranking offenders were convicted at proceedings held throughout Germany.

12. Charter of the International Military Tribunal, *supra* note 3, at Part II, Art. VIa.

13. The Nurnberg Trial, 6 F.R.D. 69 (1946). An additional definition of the type of of conduct which would constitute a violation of Article 6(a) would be Article 3 of the

officials had "planned and waged aggressive war against twelve nations,"<sup>14</sup> in violation of Article 6(a). The planning of the aggressive wars began with Hitler's *Mein Kampf* in 1925.<sup>15</sup> Hitler's goal was to unite the German people, whom he believed to be superior to other races and peoples.<sup>16</sup> This goal required two things which "necessarily involved the seizure of foreign territories:" one, the disruption of the European order as it had existed since the Treaty of Versailles; and two, the creation of a greater Germany beyond the frontiers of 1914.<sup>17</sup> War was seen to be inevitable or, at the very least, highly probable, if these purposes were to be accomplished.<sup>18</sup>

Further evidence of war planning was found in the documents of a conference held on November 5, 1937, known as the Hossbach minutes.<sup>19</sup> During this conference, Hitler stated that the seizure of living space on the continent of Europe was essen-

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General Assembly's "Definition of Aggression" resolution, adopted unanimously in 1974 which defines aggression as:

(a) 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;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, marine and air fleets of another State;

(e) The use of armed forces of one State, which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

*Special Committee on the Question of Defining Aggression: Report of the Working Group*, U.N.G.A. Res. 3314 (XXIX), 29 U.N. GAOR, Supp. (No. 31) 142, U.N. Doc. A/9631 (1975).

14. *The Nurnberg Trial*, 6 F.R.D. at 106.

15. *Id.* at 86.

16. *Id.*

17. *Id.*

18. *Id.* at 88.

19. *Id.*

tial.<sup>20</sup> He stated his belief that this could be achieved "only by way of force,"<sup>21</sup> and that if he was still living, "then it would be his irrevocable decision to solve the German space problem not later than 1943 to 1945."<sup>22</sup> Finally, he indicated that his plain intention was to seize and annex Austria and Czechoslovakia as soon as a favorable opportunity presented itself.<sup>23</sup> Article 6(a) was also violated when Nazi officials waged aggressive war against twelve nations, beginning with the invasion of Austria on March 12, 1938 and concluding with the declaration of war against the United States on December 11, 1941.<sup>24</sup> Finally, Article 6(a) was violated as a result of the Nazi's waging of war in violation of numerous international treaties.<sup>25</sup>

Article 6(b) of the Charter prohibits crimes against fighting men and crimes against civilians as follows:

[N]amely, violations of the laws or customs of war. Such violations shall include, but not be limited to murder, ill-treatment or deportation to slave labour 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.<sup>26</sup>

The Nazi officials were found to have violated Article 6(b) as a result of: one, the order to slaughter commandos to the last man even if they surrendered; two, the order to separate political commissars from other Russian prisoners and shoot them; three, the ill-treatment and murder of Russian prisoners; four, the use of prisoners for medical experiments; five, the use of prisoners for labor contrary to international conventions; six, the extermination of certain segments of the population, particularly Jews, by organized mass murder; seven, the large scale deportation of labor in Germany in the most shocking conditions; eight, the

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20. *Id.*

21. *Id.* at 89.

22. *Id.*

23. *Id.*

24. *Id.* at 84-106.

25. *Id.* at 106-11.

Hitler had previously signed bilateral, non-aggression treaties with many of the nations he attacked, including Denmark and Russia. In addition, he violated several multilateral treaties which outlawed aggression, including the Hague Conventions of 1899 and 1907, the Versailles Treaty and the Kellog-Briand Pact.

26. See Charter of the International Military Tribunal, *supra* note 3, at Art. VIIb.

taking and shooting of hostages; nine, the economic exploitation of occupied territories over and above the needs of the occupying troops; ten, the wanton devastation of towns; and eleven, the plunder of works of art.<sup>27</sup>

Article 6(c) in many respects overlaps with Article 6(b). The major distinction between 6(b) and 6(c) is that the former covers crimes against civilians and fighting men whereas the latter covers crimes exclusively against civilians. Article 6(c) is defined by the Charter as follows:

[N]amely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crimes within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>28</sup>

Article 6(c) was not designed to cover purely domestic matters. Rather, it was designed to cover crimes, the commission of which was in some way connected with, in anticipation of or in furtherance of the crimes against the peace, as defined in Article 6(b).<sup>29</sup> The best illustration of a crime of this kind is what the Nazi officials called the "final solution of the Jewish question."<sup>30</sup> This persecution occurred both before and during the war, and its purpose was to advance the Nazi war plans.<sup>31</sup> It is estimated that this policy resulted in the killing of approximately six mil-

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27. See CLAVOCORESSI, *supra* note 11, at 48.

28. CLAVOCORESSI, *supra* note 11, at 133; see also Charter of the International Military Tribunal, *supra* note 3, at Art. VIc.

29. CLAVOCORESSI, *supra* note 11, at 58.

30: The Nurnberg Trial, 6 F.R.D. 69, 128 (1946).

31. *Id.* at 127-28.

The killing of the Jews advanced Nazi war plans in two important respects. First, the killings allowed the Nazis to confiscate the financial holdings of the Jews, which were used to purchase armaments. Second, Nazi officials believed that the Jews were a hindrance to the Nazi war policy. An illustration of this belief was stated in a German Foreign Office circular:

It is certainly no coincidence that the fateful year 1938 has brought nearer the solution of the Jewish question simultaneously with the realization of the idea of Greater Germany, since the Jewish policy was both the basis and consequence of the events of the year 1938. The advance made by Jewish influence and the destructive Jewish spirit in politics, economy and culture, paralyzed the German people to rise again, more perhaps even than the power policy opposition of the former enemy Allied powers of the World War.

*Id.* at 127.



lion Jews.<sup>32</sup> Article 6 concludes with a statement that: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."<sup>33</sup>

A further interpretation of the Charter's provisions is contained in the four Geneva Conventions: one, The Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;<sup>34</sup> two, The Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;<sup>35</sup> three, The Convention Relative to the Treatment of Prisoners of War (the Prisoners of War Convention);<sup>36</sup> four, The Convention Relative to the Protection of Civilian Persons in Time of War (the Civilian Convention).<sup>37</sup> Since serious questions have been raised as to whether the latter two conventions were violated during the Gulf War, the major provisions of each will be discussed in greater detail.

The Prisoners of War Convention is applicable to almost all armed conflicts.<sup>38</sup> This Convention defines prisoners in a way calculated to include every person likely to be captured in the course of hostilities.<sup>39</sup> Full and primary accountability for the treatment of prisoners of war falls upon the detaining power, not upon individuals.<sup>40</sup> The detaining power is under a general obligation to treat the prisoner humanely.<sup>41</sup> Medical and scientific experiments are prohibited, as are reprisals for breaches of the

32. *Id.* at 130.

33. *See infra* note 42.

34. 75 U.N.T.S. 31 (1949).

35. 75 U.N.T.S. 85 (1949).

36. 75 U.N.T.S. 135 (1950).

37. 75 U.N.T.S. 287 (1949). The United States, Iraq and Kuwait have ratified the Geneva Conventions. In 1977, two additional protocols were added to fill gaps in the Conventions. *See* Protocol Additional to the Geneva Conventions of August 12, 1949, (T.I.A.S. No. 3362, 3363, 3364, 3365), and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), with annexes, 1977 U.N. Jurid. Y.B. 95, *reprinted in* 16 I.L.M. 1391 (1977); Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977 U.N. Jurid. Y.B. 135, *reprinted in* 16 I.L.M. 1442 (1977).

38. *See* LOUIS HENKIN, ET AL., *INTERNATIONAL LAW, CASES AND COMMENTS* 808 (1987) [hereinafter *INTERNATIONAL LAW*]; *see also* The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135.

39. *INTERNATIONAL LAW*, *supra* note 38, at 808.

40. *INTERNATIONAL LAW*, *supra* note 38, at 808.

41. *INTERNATIONAL LAW*, *supra* note 38, at 808.

laws of war.<sup>42</sup> Prisoners are to be treated alike, regardless of race, nationality, religious beliefs, or political opinions.<sup>43</sup> They must receive maintenance and medical attention.<sup>44</sup> Prisoners are not subject to public curiosity or torture and may retain their personal effects.<sup>45</sup> Conditions at prison camps must meet certain minimum standards.<sup>46</sup> Finally, the work that the prisoner is required to perform must not be inherently dangerous, humiliating, or directly connected with the operations of the war.<sup>47</sup>

The Civilian Convention protects civilian inhabitants of an occupied territory.<sup>48</sup> In particular, the following acts are considered grave breaches of the Convention:

[W]ilfully killing, torture or inhuman treatment . . . , wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person . . . taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.<sup>49</sup>

### III. APPLICATION OF ARTICLE 6 OF THE CHARTER TO IRAQI PRESIDENT SADDAM HUSSEIN

In this section, President Saddam Hussein's liability under Article 6 of the Charter and possible defenses which he might assert will be analyzed.

One of the most serious charges against President Hussein at a war crimes trial is that he engaged in crimes against peace by planning, preparing, initiating and waging a war of aggression against Kuwait in violation of Article 6(a) of the Charter. There is an abundance of evidence which demonstrates that President Hussein planned and prepared the attack on Kuwait. First, it is widely known that he had been displeased with Kuwait's violations of the production quota allocated to it by the Organization of Petroleum Exporting Countries (OPEC), which helped to

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42. INTERNATIONAL LAW, *supra* note 38, at 808.

43. INTERNATIONAL LAW, *supra* note 38, at 808.

44. INTERNATIONAL LAW, *supra* note 38, at 808.

45. INTERNATIONAL LAW, *supra* note 38, at 809.

46. INTERNATIONAL LAW, *supra* note 38, at 809.

47. INTERNATIONAL LAW, *supra* note 38, at 809.

48. See Article 4 of the Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287 (1949).

49. *Id.* Art. 147.

drive down world oil prices, Iraq's primary source of revenue.<sup>50</sup> Second, Iraq has had a long-standing border dispute with Kuwait, claiming that Kuwait is in fact part of Iraq.<sup>51</sup> Third, Iraq faced a foreign debt of approximately sixty-five billion dollars as a result of its war with Iran, of which about fifteen to twenty billion was owed to Kuwait.<sup>52</sup> Thus, an invasion and annexation would eliminate part of its debt and would allow Iraq to use Kuwaiti assets to pay off the remainder of the debt.<sup>53</sup> Finally, shortly before its invasion of Kuwait, Iraq had moved one hundred thousand troops on the Iraq-Kuwait border.<sup>54</sup> This evidence, when considered as a whole, strongly indicates that Iraq's attack on Kuwait was premeditated, in violation of Article 6(a).

Iraq's unprovoked August 2, 1990 attack on Kuwait constituted an initiation and waging of war of aggression in violation of Article 6(a). Article 6(a) was further violated as a result of President Hussein's waging of war against Kuwait in violation of two important international treaties that prohibit the use of force in resolving disputes: one, Article 2(4) of the United Nations Charter;<sup>55</sup> and two, the 1945 Pact of the Arab League.<sup>56</sup>

Similarly, President Hussein could be charged with engaging in crimes against peace in the planning and preparation of war against Israel. As a result of the threats made to attack Israel<sup>57</sup> prior to the Gulf War, President Hussein could also be

50. See Youssef M. Ibrahim, *Iraq Said to Prevail in Oil Dispute with Kuwait and Arab Emirates*, N.Y. TIMES, July 26, 1990, at A1.

51. See *Excerpts from Iraq's Statement on Kuwait*, N.Y. TIMES, Aug. 9, 1990, at A18.

52. BARRY F. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 1306 (1991) [hereinafter CARTER & TRIMBLE].

53. *Id.* at 1306-07.

54. See Michael R. Gordon, *Iraq Army Invades Capital of Kuwait In Fierce Fighting*, N.Y. TIMES, Aug. 2, 1990, at A1.

55. Article 2 (4) of the Charter of the United Nations provides: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, ¶ 4.

56. Article 5 of the Pact of the Arab League states: "The Recourse to force for the settlements of disputes between two or more member States shall not be allowed . . ."

Both Iraq and Kuwait are adherents to the Pact. See Pact of the League of Arab States, 70 U.N.T.S. 248, 39 A.J.I.L. Supp. 266 (1945).

57. For instance, on September 23, 1990, Hussein issued the following statement:

We will never allow anybody, whomever he may be, to strangle the people of Iraq, without having himself strangled. If we feel that the Iraqi people are being strangled, that there are some who will deal a sanguinary blow to it, we will strangle all those who are the cause of this.

. . . Israel will be affected in all actions that affect the owners of the homeland

charged with waging a war of aggression in violation of article 6(a) of the Charter and in violation of section 2(4) of the United Nations Charter as a result of the unprovoked Scud missile attacks upon Israel.<sup>58</sup>

There are several defenses which President Hussein would be expected to raise to the charge of crimes against peace. President Hussein might initially assert that his actions were justified since Kuwait was once a part of Iraq.<sup>59</sup> Thus, Iraq was justified in using force to reclaim Kuwait, just as the United States, for instance, believes that it would be justified in using force to reclaim Puerto Rico. There are, however, two problems with this argument. First, Kuwait, unlike Puerto Rico, is recognized by the international community as a state, and the law is clear that states are to refrain from attacking other states.<sup>60</sup> Second, and most important, international law clearly prohibits the use of force as a means of settling territorial disputes with other states.<sup>61</sup>

Second, President Hussein might assert that its attacks on Kuwait and Israel were justified as a means of forcing Israeli compliance with United Nations resolutions concerning the Pal-

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*See Iraqi's Threaten to Attack Saudis and Israelis if Nation Is 'Strangled' by Embargo*, N.Y. TIMES, Sept. 24, 1990, at A1.

Furthermore, during a press conference shortly before the Gulf War commenced, the following exchange occurred:

Q. Mr. [Iraqi] Foreign Minister [Tariq Aziz], if the war starts in . . . the gulf, will you attack Israel?

A. Yes, absolutely, yes.

*See Thomas L. Friedman, Baker-Aziz Talks on Gulf Fail; Fears of War Rise; Bush is Firm; Diplomatic Effort to Continue*, N.Y. TIMES, Jan. 10, 1991, at A1.

58. *See Michael R. Gordon, Iraqis Fire Missiles at Israeli Cities after Second Day of Allied Bombing*, N.Y. TIMES, Jan. 18, 1991, at A1; *Iraq Fires New Missile Attack at Israel*, N.Y. TIMES, Jan. 18, 1991, at A1; *Missile Fired at Israel*, N.Y. TIMES, Feb. 1, 1991, at A1; *Joel Brinkley, 15 Hurt in Israel as Scuds Felled*, N.Y. TIMES, Feb. 9, 1991, at A7.

59. Kuwait, prior to being granted independence by the British in 1961, was once part of Basra Province in Iraq.

60. U.N. CHARTER art. 2, ¶ 4.

61. Reaffirming the prohibition against the use of force, the General Assembly stated: "Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another state or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of states." (Emphasis added) *See Declarations of Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28), at 121, U.N. Doc. A/8028 (1970).

estinian situation.<sup>62</sup> In international law, this defense is known as reprisals or countermeasures. A good definition of reprisals or countermeasures was provided by a special arbitral tribunal in the *Naulilaa*<sup>63</sup> case:

Reprisals are acts of self-help by the injured State, *acts in retaliation for acts contrary to international law on the part of the offending State, which have remained unredressed after a demand for amends*. In consequence of such measures, the observance of this or that rule of international law is temporarily suspended, in the relations between the two States. They are limited by considerations of humanity and the rules of good faith, applicable in the relations between States. They are illegal unless they are based upon a previous act contrary to international law. They seek to impose on the offending State reparation for the offense, the return to legality and the avoidance of new offenses (emphasis added).<sup>64</sup>

The use of reprisals or countermeasures, especially those involving the use of force, has been rejected in international law since the *Naulilaa* case. For instance, in the *Corfu Channel Case*,<sup>65</sup> Albania fired on two British cruisers as they passed through the Corfu Channel.<sup>66</sup> Albania claimed that the British had failed to request Albanian permission for passage through the channel, part of which included Albanian territorial waters.<sup>67</sup> The British decided to reassert their right of innocent passage by sending a squadron of warships through the channel.<sup>68</sup> While passing through the channel, the squadron ran into a minefield and two ships were damaged.<sup>69</sup> The British navy then swept the channel, including Albanian territorial waters, for mines.<sup>70</sup>

The International Court of Justice (the ICJ), was asked to decide whether the British passage through Albanian territorial

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62. Israel has failed to comply with numerous Security Council Resolutions, the most important being Resolution 242, which requires Israel to withdraw its armed forces from the West Bank, the Gaza Strip, the Golan Heights, and other occupied territories. See Resolution 242, reprinted in DUSAN J. DJONORICH, UNITED NATIONS RESOLUTIONS 42 (1989).

63. 2 R.I.A.A. 1011, reprinted in CARTER & TRIMBLE, *supra* note 52, at 1224.

64. See CARTER & TRIMBLE, *supra* note 52, at 1224.

65. The Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 1.

66. *Id.* at 19.

67. *Id.*

68. *Id.* at 14.

69. *Id.* at 12-13.

70. *Id.* at 13.

waters was a violation of Albanian sovereignty.<sup>71</sup> The British defended their action, partially on the ground of self-help.<sup>72</sup> The ICJ rejected this defense.<sup>73</sup> In its decision, the ICJ explained why the international community has rejected the reprisal or countermeasure defense:

Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself . . . [.] But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.<sup>74</sup>

In addition to the *Corfu Channel Case*, the use of reprisals or countermeasures has also been rejected in United Nations resolutions.<sup>75</sup> Thus, President Hussein's assertion of reprisals as a defense to his actions against Kuwait and Israel would be unsuccessful.

A final defense which President Hussein might assert is economic necessity. As discussed earlier,<sup>76</sup> Iraq had a large foreign debt at the time of the invasion. However, economic necessity has never been recognized as a defense to an unlawful use of force.

A strong case can also be made that President Hussein has committed war crimes in violation of Article 6(b). There exists strong, objective evidence that Iraqi soldiers, acting on President Hussein's behalf, committed murder and engaged in ill-treatment of the Kuwaiti civilian population. This evidence is contained in a report of the international human rights group, Amnesty International.<sup>77</sup> In its report, issued in response to the

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71. *Id.* at 12.

72. *Id.* at 34.

73. *Id.* at 35.

74. *Id.*

75. The General Assembly has stated that "States have a duty to refrain from acts of reprisal involving the use of force." *See Declaration On Principles Of International Law Concerning Friendly Relations And Co-Operations Among States In Accordance With The Charter Of The United Nations*, G.A. Res. 2625, October 24, 1970 (XXV 1970), U.N. Doc. A/8082.

76. *See supra* note 52.

77. Amnesty International monitors the human rights practices of governments worldwide and is independent of any government, political grouping, ideology, economic interest or religious creed. It has formal relations with the United Nations, UNESCO, the Council of Europe, the Organization of American States and the Organization of African Unity.

Iraqi invasion of Kuwait,<sup>78</sup> Amnesty International cites: widespread abuses of human rights, including the arbitrary arrest and detention without trial of thousands of civilians and 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; and the fact that hundreds remain unaccounted for, having effectively "disappeared" in detention.<sup>79</sup> According to the report, many of those slain were killed because they carried Kuwaiti money or refused to pledge allegiance to President Hussein.<sup>80</sup> The report lists thirty-eight methods of torture used by Iraqi forces, including beatings while the victim was suspended from a rotating ceiling fan, rape of women and young men, stubbing out of lighted cigarettes on victims' eyeballs and tethering of victims in the burning sun for hours without water.<sup>81</sup>

Article 6(b) may also have been violated by President Hussein as a result of his nation's ill-treatment of prisoners of war. This ill-treatment included beatings severe enough to dislodge teeth,<sup>82</sup> shocks with electrical wires,<sup>83</sup> and the public display of P.O.W.'s on television.<sup>84</sup>

Finally, Article 6(b) may have been violated as a result of Iraq's plunder of Kuwait's public and private property.<sup>85</sup> This included gold reserves; one billion in cash from the Kuwait Central Bank; computers; and anything of value contained in bank safety deposit boxes, office buildings, shopping centers, schools and Kuwait University.<sup>86</sup> Furthermore, the Kuwait National Museum was totally destroyed, along with its collections, which included "one of the world's best collections of ancient Islamic art and other items considered priceless."<sup>87</sup> At the Kuwait Zoo,

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78. See *Standoff in the Gulf; Amnesty Report Says Iraqis Tortured and Killed Hundreds*, N.Y. TIMES, Dec. 20, 1990, at A21.

79. *Id.*

80. *Id.*

81. *Id.*

82. See Michael Wines, *Ex-POW's Offer Accounts of Terror and Torture In Iraq*, N.Y. TIMES, Mar. 15, 1991, at A1.

83. *Id.*

84. See James Barron, *Iraqi TV Broadcasts Interviews With 7 Identified As Allied Pilots*, N.Y. TIMES, Jan. 21, 1991, at A1.

85. See Trevor Rowe, *Iraq Stole \$100 Billion in Goods, Kuwait Says*, WASH. POST, Mar. 14, 1991, at A35.

86. See Bob Drogin, *In 7 Months, Iraq's Stole 'the Very Sole' of Kuwait*, L.A. TIMES, Mar. 11, 1991, at A1.

87. *Id.*

animals were either killed or removed to Iraq.<sup>88</sup> The estimated one hundred billion dollar figure, however, does not include the damage to Kuwait's oil refineries and oil fields, which occurred as a result of fires started by Iraq,<sup>89</sup> and the spilling of over one million barrels of oil into the Persian Gulf, which has been described as "an ecological catastrophe of major proportions" because of the damage which has been inflicted on some sensitive coastal eco-systems.<sup>90</sup>

President Hussein could argue that any actions against Kuwait and its citizens were not war crimes, since the Charter was not designed to apply to the purely domestic affairs of a sovereign state. Rather, the crimes must have occurred against other nations or other nationals and no such crimes occurred since Kuwait is and always has been a part of Iraq. This argument, however, would be rejected, since Kuwait has been an independent state since 1961,<sup>91</sup> and otherwise meets all the attributes of a state under international law.<sup>92</sup>

Alternatively, President Hussein could argue that even if Kuwait was an independent state prior to August 2, it ceased being so after that date as a result of the Iraqi annexation, a fact which gave Iraq the authority to deal with Kuwait as though it were part of Iraq. A similar argument was made by Nazi officials at Nuremberg in response to accusations of German war crimes against civilians in occupied territories.<sup>93</sup> This argument was rejected at Nuremberg ("[this] 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"),<sup>94</sup> has subsequently been rejected by the international commu-

88. *Id.*

89. See Philip Shenon, *Iraq Sets Oil Refineries Afire As Allies Step Up Air Attacks, Missile Pierces Tel Aviv Shield*, N.Y. TIMES, Jan. 23, 1991, at A1.

90. See *The 'spoils' of war: Damaged Economics . . . Devastated ecologies: Aftermath of the Persian Gulf War*, 28 U.N. Chron. 16, 17 (1991).

91. *Id.* at 17.

92. Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities. RESTATEMENT (THIRD), *supra* note 4, § 201.

Kuwait satisfies each of these criteria. Furthermore, Kuwait is a voting member of the United Nations and only states are accorded such privileges. See U.N. CHARTER art. 4.

93. The Nuremberg Trial, 6 F.R.D. 69, 130 (1946).

94. *Id.*



nity<sup>95</sup> and thus would be rejected in the event Hussein asserted it as a defense with respect to his actions in Kuwait.

The provisions in Article 6(c) regarding the "enslavement . . . and other inhumane acts committed against any civilian population before or during the war" have also been violated as a result of President Hussein's taking of Western citizens as hostages following the August 2 invasion of Kuwait.<sup>96</sup> The action was justified on the ground that the hostages were needed in order to protect Iraq from a military attack by the West.<sup>97</sup> In the *Case Concerning United States Diplomatic Staff in Teheran*,<sup>98</sup> Iran seized and held as hostages members of the United States diplomatic and consular staff and *two private United States citizens*.<sup>99</sup> Iran justified its actions on its belief that the United States had engaged in criminal activities against Iran and its citizens during the twenty-five years prior to the hostage taking.<sup>100</sup> The ICJ rejected Iran's defense and held that its taking of hostages was a violation of international law.<sup>101</sup> Similarly, President Hussein's seizing and holding of Western hostages was a violation of international law and could not be justified on the ground of self-protection.

A very strong case can be made that Iraqi President Hussein has engaged in war crimes as a result of his invasion of Kuwait and subsequent attacks on Israel. Furthermore, war crimes were committed against both fighting men and civilians in order to further President Hussein's war objectives. However, President Hussein may not have been alone in the commission of war crimes. War crimes may also have been committed by President George Bush.

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95. See Declaration On Principles Of International Law Concerning Friendly Relations And Cooperation Among States In Accordance With The Charter Of The United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) (" . . . No territorial acquisition resulting from the threat or use of force . . . shall be recognized as legal . . . ")

96. Citizens of Italy, West Germany, Japan, France, Ireland, Greece, the Netherlands, Spain, Australia, Denmark and Belgium were held as hostages. See *Confrontation in the Gulf: Foreigners Will Share the Hardships*, N.Y. TIMES, Aug. 19, 1990, § 1, at 1.

97. See *Iraqi Remarks on Detention of Foreigners*, N.Y. TIMES, Aug. 19, 1990, at A11.

98. *Case Concerning United States Diplomatic and Consular Staff in Teheran* (U.S. v. Iran), 1980 I.C.J. 3.

99. *Id.* at 4.

100. *Id.* at 8.

101. *Id.* at 38.

#### IV. APPLICATION OF ARTICLE 6 OF THE CHARTER TO UNITED STATES PRESIDENT GEORGE BUSH

In this section, President George Bush's liability under Article 6 of the Charter and possible defenses he may assert will be analyzed on his behalf.

The most serious war crime allegation against Bush is that the 43-day bombing of Iraq was a "wanton destruction of cities, towns or villages, or devastation not justified by military necessity."<sup>102</sup> The results of this bombing, according to a United Nations report, has left Iraq in a "near apocalyptic" state.<sup>103</sup> The report found that the bombing resulted in the almost complete destruction of Iraq's infrastructure, electrical plants, oil refineries, transportation networks and approximately 9,000 Iraqi homes, leaving 72,000 Iraqi citizens homeless.<sup>104</sup> The report went on to say that "most means of modern life support have been destroyed or rendered tenuous" and warned that for "some time to come" Iraq has been "relegated to a pre-industrial age but with all the disabilities of post-industrial dependency on an intensive use of energy and technology."<sup>105</sup>

President Bush, of course, would assert that the extensive damage inflicted on Iraq was justified by military necessity. He has asserted in the past that the 43-day bombing was aimed at Iraq's offensive military capabilities and that any damage to Iraq's cities was unintentional and merely "collateral." Evidence obtained following the war, however, appears to contradict Bush's assertion. A Washington Post reporter<sup>106</sup> recently uncovered the following evidence:

(1) Some targets, especially late in the war, were bombed primarily to create postwar leverage over Iraq. Planners now say their intent was to destroy or damage valuable facilities that Iraq could not repair without foreign assistance.

(2) Many of the targets in Iraq's Mesopotamian heartland, the list of which grew from about 400 to more than 700 in the war, were chosen in the hope that the bombing would amplify the economic and psychological impact of sanctions on Iraqi society.

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102. See Charter of the International Military Tribunal, *supra* note 3, at Art. VI.

103. See Paul Lewis, *U.N. Survey calls Iraq's War Damage Near-Apocalyptic*, N.Y. TIMES, Mar. 22, 1991, at A1.

104. *Id.* at A9.

105. *Id.*

106. Barton Gellman.

(3) Damage to civilian structures was deliberately done to cause great harm to Iraq's ability to support itself as an industrial society. Among the justifications offered for this damage is that the Iraqi civilians were not blameless for the invasion of Kuwait.<sup>107</sup>

This evidence, *if true*, contradicts any assertion of military necessity and would constitute the strongest evidence of war crimes by Bush.

An allegation can also be made that President Bush planned and prepared a war of aggression against Iraq in violation of Article 6(a) of the Charter.<sup>108</sup> The clearest evidence that President Bush planned and prepared a war occurred on November 8, 1990, when he announced that the number of United States troops, stationed in Saudi Arabia shortly after the Iraqi invasion for the sole purpose of deterring an Iraqi attack, would be substantially increased and shifted to an offensive force: "I have today directed the Secretary of Defense to increase the size of the United States forces committed to Desert Shield to ensure that the coalition has an adequate offensive military option should that be necessary to achieve our common goals."<sup>109</sup> Further evidence of war planning and preparation would be President Bush's numerous declarations that Iraq would be at-

107. See Barton Gellman, *Allied Air War Struck Broadly in Iraq; Officials Acknowledge Strategy Went Beyond Purely Military Targets*, WASH. POST, June 23, 1991, at A1.

108. It has also been suggested that President Bush violated Article 6(a) in that he waged a war against Iraq in violation of both Article 2(4) of the U.N. Charter and the Treaty Providing for the Renunciation of War as an Instrument of National Policy (Also known as the "Pact of Paris" or the "Kellogg-Briand Pact"). Article 2(4) has been discussed in Note 55. The pertinent provisions of the Treaty are as follows:

*Article I*

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

*Article II*

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

(Both the United States and Iraq are parties to this Treaty.) See 46 Stat. 2343, 94 L.N.T.S. 57 (1929).

It is unlikely, however, that President Bush would be liable under either the United Nations Charter or the Treaty, given the fact that the use of force had been authorized by the United Nations.

109. See Michael R. Gordon, *Bush Sends New Units To Gulf To Provide 'Offensive' Option; U.S. Forces Could Reach 380,000*, N.Y. TIMES, Nov. 9, 1990, at A1.

tacked if it did not withdraw its forces from Kuwait.<sup>110</sup> These events occurred *prior* to the United Nations authorization to use force,<sup>111</sup> and as a result, President Bush could not claim that he was acting under the authority of the United Nations when these actions were taken.

President Bush's strongest defense to the planning and preparation allegation is that the United States troops were converted from a defensive posture to an offensive posture only as a compliment to the other Security Council resolution which had been passed.<sup>112</sup> Further, President Bush could argue that he had no intention of using force against Iraq without first obtaining Security Council support. This argument is buttressed by the fact that President Bush never acted unilaterally throughout the crisis, always acting instead through the auspices of the United Nations.

President Bush could also assert two internationally recognized defenses to the charge that he planned and prepared a war of aggression against Iraq. First, he could assert that the United States had a right to come to the aid of Kuwait following Iraq's attack. This is known in international law as collective self-defense and is permissible under Article 51 of the United Nations Charter.<sup>113</sup> There are two conditions which must be satisfied before states are allowed to act in self-defense: one, there must be a necessity to do so, which means that peaceful alternatives have either been exhausted or they clearly would be futile; and two, acts done in self-defense must be proportional, i.e., acts done in self-defense must not exceed in manner or aim the necessity provoking them.<sup>114</sup>

The key issue in assessing self-defense is whether the necessity requirement has been satisfied. For instance, in the *Case*

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110. These declarations began with President Bush's statement on August 5, 1990, "This will not Stand. This will not stand, this aggression against Kuwait," and continued throughout the crisis. See Thomas L. Friedman, *Bush, Hinting Force, Declares Iraqi Assault 'Will Not Stand,' Proxy in Kuwait Issues Threat*, N.Y. TIMES, Aug. 6, 1990, at A1.

111. On November 29, 1990, the United Nations Security Council authorized the use of force against Iraq. See U.N. Security Council Resolution 678, reprinted in CARTER & TRIMBLE, *supra* note 52, at 1317-18.

112. See U.N. Security Council Resolutions 661, 666 and 674, reprinted in CARTER & TRIMBLE, *supra* note 52, at 1308-14.

113. U.N. CHARTER art. LI.

114. See Oscar Schachter, *The Right of States To Use Armed Force*, 82 MICH. L. REV. 1620, 1635-38 (1984) [hereinafter Schachter].

*Concerning United States Diplomatic Staff in Teheran*,<sup>115</sup> the United States, in response to Iran's seizure of United States citizens as hostages, attempted to rescue them through the use of force, several months after the initial seizure took place.<sup>116</sup> This rescue mission occurred only after the protracted efforts of intermediaries and of the United Nations had produced no significant change in the Iranian position,<sup>117</sup> and after verbal threats and attacks against the hostages were exercised by emotional militants.<sup>118</sup> Although the issue has never been adjudicated in an international tribunal,<sup>119</sup> many international law scholars believe that the use of force in self-defense by the United States in this instance satisfied the necessity requirement and thus, was lawful since it had exhausted most of the peaceful alternatives and the hostages appeared to be in imminent danger.<sup>120</sup>

In President Bush's case, the key issue is also whether there was a necessity to plan and prepare a war in self-defense. International law is clear that had the United States gone to the aid of Kuwait during or shortly after the Iraqi attack, its actions would have satisfied the necessity requirement and would have been lawful. However, because the decision to convert the United States troops to an offensive posture did not occur until well after Iraq had succeeded in capturing Kuwait, President Bush was required to seek peaceful alternatives, if any were available in order to satisfy the necessity requirement.<sup>121</sup>

One peaceful alternative which was available was economic sanctions. The international community had imposed economic sanctions on Iraq following its attack on Kuwait.<sup>122</sup> Significant evidence existed indicating that sanctions were likely to force

115. 1980 I.C.J. 3.

116. *Id.* at 17.

117. Some of those efforts included: one, a Security Council resolution calling on Iran to release the hostages, *id.* at 16; two, the December 15, 1979 order of the ICJ calling for the release of the hostages, *Case Concerning United States Diplomatic and Consular Staff in Tehran*, (U.S. v. Iran), 1979 I.C.J.; three, the establishment of a U.N. fact finding commission, 1980 I.C.J. 3, 20.

118. See Oscar Schachter, *Self-Help in International Law: U.S. Action in the Iranian Hostages Crisis*, 37 J. INT'L AFF. 231, 244 (1984) [hereinafter Schachter, *Self-Help*].

119. The legal issues concerning the rescue mission were discussed briefly by the ICJ, but left undecided, since the issue of the mission's legality was never put before it. *Tehran*, 1980 I.C.J. at 43-44.

120. See, e.g., Schachter, *Self-Help*, *supra* note 118, at 244.

121. See Schachter, *supra* note 114, at 1636.

122. Security Council Resolution 661, reprinted in CARTER & TRIMBLE, *supra* note 52, at 1308-09.

Iraq to withdraw from Kuwait. For instance, a study conducted prior to the war indicated that virtually 100 percent of Iraq's trade and financial relations were subject to sanctions.<sup>123</sup> The resulting loss of 48 percent of Iraq's Gross National Product would have been twenty times the average economic impact in other successful episodes of sanctions and three times the previous highest cost imposed on any target country.<sup>124</sup> Far from inconclusive, the study suggested that sanctions had a high probability of forcing Iraq from Kuwait as early as the fall of 1991.<sup>125</sup> In addition to the study, several defense experts,<sup>126</sup> including President Bush's own Chairman of the Joint Chiefs of Staff, Colin Powell, believed that sanctions would be successful in forcing Iraq to leave Kuwait.<sup>127</sup> Despite this strong evidence that sanctions were likely to force Iraq to withdraw from Kuwait, President Bush opted for war instead of affording the sanctions an opportunity to work. Although President Bush would obviously contest the study, his claim of self-defense to the charge of planning and preparing aggressive war is not a legal certainty.

A second internationally recognized defense which President Bush could assert would be humanitarian intervention. Humanitarian intervention is controversial and involves actions by an outside state in order to prevent large-scale atrocities or acute deprivation by another state. President Bush could argue that any war planning or preparation which he engaged in occurred in response to the Iraqi atrocities against the Kuwaiti people.<sup>128</sup>

Humanitarian intervention by an outside state has generally been accepted by the international community where its purpose is to assist that state's citizens and not a pretext for other illegit-

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123. See Gary C. Hufbauer & Kimberly A. Elliott, *Sanctions Will Bite — and Soon*, N.Y. TIMES, Jan. 14, 1991, at A17.

124. *Id.*

125. *Id.*

126. United States defense experts who believed that sanctions would have been effective in forcing Iraq to withdraw its forces from Kuwait include former Chairmen of the Joint Chiefs of Staff, Adm. William J. Crowe and Gen. David Jones, and former Defense Secretaries Robert L. McNamara, Frank C. Carlucci, Caspar W. Weinberger, Elliot L. Richardson and James L. Schlesinger. See Michael R. Gordon, *Ex-Defense Secretaries Advise Patience in Gulf*, N.Y. TIMES, Dec. 3, 1990, at A14; Michael R. Gordon, *2 Ex-Military Chiefs Urge Bush to Delay Gulf War*, N.Y. TIMES, Nov. 29, 1990, at A1.

127. The views of Chairman Powell are contained in Bob Woodward's recent book, *The Commanders*. BOB WOODWARD, *THE COMMANDERS* 299-303 (1991).

128. See *supra* note 94.

imate purposes. An excellent illustration of the type of humanitarian intervention considered acceptable by many in the international community is the Israeli rescue at Entebbe, Uganda in 1976. While on a journey from Israel, via Athens, to Paris, an Air France aircraft carrying over 200 passengers was hijacked by a group of terrorists who had boarded it at Athens.<sup>129</sup> Having been denied landing rights in Libya, the plane was diverted to Uganda and landed at Entebbe.<sup>130</sup> After some delay, the terrorists demanded the release of more than 50 detainees of several countries, the majority of whom were Palestinian prisoners held by Israel.<sup>131</sup>

After the intervention of Ugandan President Idi Amin, the hijackers agreed to release most of their hostages, except those possessing Israeli or dual nationality.<sup>132</sup> The Israeli Government, breaking with its declared policies, announced a willingness to negotiate the release of some of the detainees in exchange for the safety of the remaining hostages.<sup>133</sup> In response, the hijackers increased their demands.<sup>134</sup> Finally, less than twenty-four hours before the expiration of the time limit set by the hijackers, three Israeli aircraft landed at Entebbe and after an exchange of fire, most of the hostages were airlifted to safety.<sup>135</sup> The Israeli actions were generally regarded as lawful by the international community, since they were taken in order to prevent a large number of atrocities against Israeli citizens and Israel did not have any other purpose for infringing on Uganda's sovereignty.<sup>136</sup>

Humanitarian intervention by an outside state has been frequently rejected, however, where the purpose of the action has been to prevent atrocities by a state against its own citizens.<sup>137</sup> For instance, after the Khmer Rouge political party came to power in Cambodia, it "began to remake Cambodian society by emptying the cities and destroying anything and anybody associ-

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129. See Leslie C. Green, *Rescue at Entebbe — Legal Aspects*, 6 *Isr. Y.B. H.R.* 312, 314 (1976).

130. *Id.* at 314.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 315.

136. See Schachter, *supra* note 114, at 1629-30.

137. The United Nations, on the other hand, would have the authority to act in such a situation pursuant to Articles 39, 41 and 42 of the United Nations Charter.

ated with the previous regime, with the West and, in due course, with Vietnam."<sup>138</sup> The Khmer Rouge engaged in numerous atrocities.<sup>139</sup> It is estimated that approximately two million Cambodians, a quarter of the entire population, were killed by the Khmer Rouge.<sup>140</sup> Despite these tremendous human rights abuses, Vietnam's intervention in Cambodia, which consisted of an invasion and occupation, has consistently been rejected by the United Nations General Assembly by large and increasing majorities.<sup>141</sup> Furthermore, similar interventions have also been rejected by the international community.<sup>142</sup> Since the international community has generally rejected humanitarian intervention except in cases involving the intervening states' own citizens, President Bush's actions in planning and preparing a war against Iraq prior to obtaining United Nations authorization, even if motivated by humanitarian concerns, may not have been a justification for doing so.

An allegation can also be made that President Bush committed crimes against humanity in violation of Article 6(c) of the Charter as a result of the February 13, 1991 bombing of Iraq.

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138. See GARY KLINTWORTH, *VIETNAM'S INTERVENTION IN CAMBODIA IN INTERNATIONAL LAW* 6 (1989).

139. These atrocities included:

- the termination of a large number of ethnic minorities;
- the elimination of all officers, soldiers and civil servants of the former administration, together with their families;
- the killing of those opposed to the regime, or likely to oppose it;
- the establishment of a repressive and coercive system of communes in which people were forced to work until exhausted and were reduced to conditions akin to slavery;
- the use of a network of secret informers;
- the abolition of traditional family and other relationships;
- the extermination of Buddhists, intellectuals, educated people and technicians;
- the use of the most savage methods to torture and kill to extract confessions;
- the abolition of religious freedom and education at all levels.

*Id.* at 60-61.

140. *Id.* at 7.

141. G.A. Res. 36, U.N. GAOR Supp. No. 48, at 2-5, Press Release GA/ 6546 (1981); G.A. Res. 35/6, U.N. GAOR Supp. No. 48, at 3-5. Press Release GA/6375 (1980); G.A. Res. 34/22 U.N. Doc. A/34/L. 13/Rev. 2 (1979). It should be pointed out, however, that although the atrocities of the Khmer Rouge were considered by the United Nations when these resolutions were enacted, Vietnam has never actually asserted it as a defense.

142. India justified its 1971 invasion of Pakistan on reports it had received of widespread Pakistani atrocities against Bengalis in East Pakistan. Despite the international community's sympathy for the Bengalis, the United Nations General Assembly called on India to withdraw its forces. G.A. Res. 2793 (XXVI), 26 U.N. GAOR Supp. No. 29, at 3, U.N. Doc. A Res./2793 (XXVI) (1971).



The United States bombing resulted in the death of several hundred Iraqi civilians.<sup>143</sup> The Iraqis claimed that the civilians were being housed in a civilian bomb shelter and that no military equipment was present at the facility and that the United States was aware of these facts.<sup>144</sup> The United States, on the other hand, contends that the facility was used as a command and control center by the Iraqi military and that it had no knowledge that civilians were being housed in the facility.<sup>145</sup> If the United States is correct, then President Bush obviously has not committed any war crimes. However, if the Iraqis are correct, President Bush has committed crimes against humanity in violation of Article 6(c) of the Charter. The available evidence, however, is too inconclusive to reach any conclusions regarding President Bush's liability at this time. Furthermore, the discussion of President Bush's liability is purely academic, given the fact that even if a war crimes tribunal is convened, it is unlikely that he would be the subject of any charges at such a tribunal.

#### V. THE FAILURES OF THE NUREMBERG TRIBUNAL AND THE NEED TO CREATE A PERMANENT WAR CRIMES TRIBUNAL

The Nuremberg Tribunal was a noble attempt to punish war makers and those who failed to adhere to the rules of warfare. However, one of the biggest failures of Nuremberg was the fact that possible Allied war crimes were overlooked. Some believe, for instance, that the Allies committed war crimes as a result of their February 13-15, 1945, bombing of the East German city of Dresden. The following is an eyewitness description of the bombing:

In the late hours of 13 February, strong Anglo-American bomber forces bombed the centre of the city [Dresden] on both sides of the Elbe and also the encircling ring of residential streets, and reduced them to blazing ruins. What had stood there previously can be seen on any map of the city printed in 1944: dwelling houses, streets of shops, a few dozen public buildings . . . That evening there must have been one billion

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143. See Alessandra Stanley, *Iraq Says United States Killed Hundreds Of Civilians At Shelter, But Allies Call It Military Post*, N.Y. TIMES, Feb. 14, 1991, at A1.

144. *Id.*

Peter Arnett, a reporter for the Cable News Network who resided in Baghdad during the war, agrees with Iraq that the facility housed civilians since the first days of the war.

145. *Id.*

souls within the city: several hundred thousand bombed-out people and refugees from the two neighboring Silesian provinces in addition to the 600,000 population. Sheets of flame consumed the narrow, closely-built streets, where many people found a quick death from lack of oxygen. At midnight a second enemy air fleet appeared in the red sky of the Elbe valley and bombed the masses of people who fled to the green, open spaces in a way that no one but Ilya, Ehrenburg could conceive. Twelve hours later, on Wednesday, when the sirens were out of action, a third attack laid a fresh belt of destruction upon the periphery of the city where the streams of homeless humanity might be expected to be. And on the following day, at midday again, enemy formations bombed the villages further along the Elbe valley where the long columns of refugees were seeking shelter.<sup>146</sup>

The bombing of Dresden occurred shortly before the end of the war. It resulted in the death of approximately 25,000 German civilians.<sup>147</sup> Many believe that the bombing constituted a war crime because it occurred after the Germans, for all practical purposes, had been defeated and thus was unnecessary.<sup>148</sup>

Another example of possible Allied war crimes was the bombing of Hiroshima and Nagasaki. On August 6, 1945, the United States dropped an atomic bomb on the Japanese city of Hiroshima.<sup>149</sup> This bombing resulted in 70,000 to 80,000 civilians being killed or missing and presumed dead and an equal number being injured.<sup>150</sup> In addition, a substantial number of buildings and factories were destroyed.<sup>151</sup> Three days later, the United States dropped another atomic bomb on the Japanese city of Nagasaki.<sup>152</sup> This bombing resulted in 35,000 to 40,000 civilians being killed or missing and presumed dead and an equal number being injured.<sup>153</sup>

The United States has consistently asserted that the bombing occurred "in order to shorten the agony of war, in order to save the lives of thousands and thousands of young Ameri-

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146. See ALEXANDER MCKEE, *DRESDEN 1945: THE DEVIL'S TINDERBOX* 268 (1984).

147. *Id.* at 274.

148. *Id.* at 262-77.

149. See P.M.S. BLACKETT, *FEAR, WAR, AND THE BOMB* 39 (1949).

150. *Id.* at 40.

151. *Id.* at 42.

152. *Id.* at 40.

153. *Id.*

cans."<sup>154</sup> This contention has been rejected by many after critical historical study.<sup>155</sup> Rather, these scholars suggest that the decision to use atomic weapons against Japan was motivated by super-power politics, rather than a desire to save American lives.<sup>156</sup> According to these scholars, the United States' desire was to significantly weaken Japan before the Soviet entry into the war so that America would be in complete control of Japan and would not have to compete against the Soviets for authority.<sup>157</sup> If the historians are accurate, the United States bombing of Hiroshima and Nagasaki would have constituted a war crime.

The discussion of the bombings of Dresden, Hiroshima, and Nagasaki helps to illustrate Nuremberg's major flaw, that only the vanquished were prosecuted for war crimes, while the victors were able to avoid prosecution. That this was allowed to occur contravenes the purpose of any war crimes tribunal, which is to deter war making and to punish those who conduct war in an inhumane manner. Moreover, the failure to prosecute the victors further divides the powerful nations of the world from those not so powerful by insulating the powerful from prosecution. Before any future war crimes tribunal is convened, this flaw must be corrected.

The best way to do so is to create a permanent war crimes tribunal. In order to ensure its success, states must be assured of the tribunal's neutrality and detachment. To this end, the statute creating the tribunal must contain three important provisions. First, the defendants who appear before the tribunal must be assured of a fair trial.<sup>158</sup> To this end, the judges who sit on the tribunal must be diverse and chosen in a democratic manner. The ICJ's process for selecting judges would be adequate.<sup>159</sup> Second, unlike the ICJ, a permanent war crimes tribunal cannot wait until cases are submitted to it. Rather, this tribunal must have an investigatory and prosecutorial component. This provision is essential and would be the best way of ensuring that war crimes of both victors and vanquished are investigated and pros-

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154. *Id.* at 128.

155. *Id.* at 132-43.

156. *Id.* at 137.

157. *Id.*

158. One can seriously question whether the accused at Nuremberg received a fair trial given the fact that the judges who conducted the trial and rendered the decision were citizens of the Allied powers who created the Tribunal.

159. See Article 4 of the Statute of the International Court of Justice, T.S. No. 993, 3 Bevens 1153, 1976 Y.B.U.N. 1052 (1945).

ecuted. Finally, a permanent tribunal must have subpoena powers and the power to require the extradition of any alleged war criminal residing in the territory of a United Nations member.

The final provision is probably the most controversial and raises an important issue: What happens in the event that a United Nations member refuses to extradite an alleged war criminal residing in its territory? It is inconceivable, for instance, that Iraq would extradite President Hussein at the present time or that the United States would extradite President Bush. In this situation, the Security Council does have the authority, pursuant to Articles 39 and 42 of the United Nations Charter, to obtain custody of an alleged war criminal. However, the use of Article 42, which authorizes force to carry out Security Council decisions, would be inappropriate. The use of force in this situation would be inconsistent with the purposes of the permanent tribunal and should only be used in exceptional circumstances. Rather, the use of economic sanctions, which the Security Council can impose pursuant to Article 41, is a more attractive alternative.

There are certain to be other objections to the creation of a permanent tribunal as proposed in this paper. These include objections that are likely to be raised by Western nations and Israel, since they are most likely to be affected by such a tribunal. These nations have, until very recently, believed that there is an anti-Western and anti-Israeli bias in the United Nations and these biases are likely to be carried over to a permanent war crimes tribunal, resulting in the selective prosecution of Western nations and Israel.

The concerns of Western nations and Israel are understandable. However, recent events suggest that any anti-Western and anti-Israeli biases which may have existed in the past have diminished considerably. An illustration would be the recent experience of the United States in the United Nations throughout the Gulf crisis. A further illustration would be the agreement by Arab nations to participate in a peace conference with Israel.

Another likely objection to the proposed tribunal is its selection process for judges, which would emulate the ICJ process. This objection is based on the alleged biases of the judges who sit on the ICJ. There are those who believe that these biases were particularly apparent in the *Nicaragua v. United States*

case<sup>160</sup> and to permit the permanent tribunal to select judges in a similar manner as the ICJ is unacceptable.

The ICJ justices are no more biased than judges who sit on any other tribunal. In fact, the evidence is to the contrary. This is reflected in the fact that most Western nations have submitted to the ICJ's compulsory jurisdiction.<sup>161</sup> Further, an increasing number of third world nations have recently brought cases before the ICJ, despite what they have perceived to be an historic pro-Western bias on the part of the ICJ.<sup>162</sup> Finally, those who argue that the ICJ's decision in the *Nicaragua* case reflects the court's biases overlook the fact that the judgment in that case was 12 to 3, with a substantial number of Western and non-Western judges in the majority.<sup>163</sup>

The success of any permanent war crimes tribunal will require the participation of powerful nations. To this end, it may be necessary to make certain concessions, such as subjecting some of the tribunal's final decisions to Security Council approval.<sup>164</sup> Such a concession might diminish the primary purpose of a permanent tribunal. However, it is hoped that the decisions of the tribunal, even if vetoed by a permanent member of the Security Council, would have moral suasion with the individual and nation affected and within the international community.

## VI. CONCLUSION

This paper has presented the case against Presidents Hussein and Bush in the event a war crimes tribunal is commenced. The case was based solely on news reports before, during and after the war, since the author did not have access to either military and political leaders or classified military documents. For

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160. Case Concerning Military Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). For criticism of the Court's decision, see James P. Rowles, *Nicaragua versus the United States: Issues of Law and Policy*, 20 INT'L LAW. 1245, 1281-1284 (1986).

161. The following Western nations have either accepted compulsory jurisdiction or have been a party before the Court: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany (Federal Republic of), Greece, Iceland, Israel, Italy, Luxembourg, Netherlands, Norway, Spain, Sweden, Switzerland, United Kingdom, and the United States.

162. See Edward McWhinney, *Western and Non-Western Legal Cultures and the International Court of Justice*, 65 WASH. U. L.Q. 873 (1987).

163. *Nicaragua*, 1986 I.C.J. at 14.

164. For instance, the decision to seek extradition of an alleged war criminal could be subject to Security Council approval.

this reason, the author would caution readers against forming any firm conclusions regarding either party's liability. Only a war crimes tribunal, created in a manner outlined in this paper, can definitively determine the liability issue.

