American Bar Association Standing Committee on Law and National Security Standing Committee on Environmental Law Section of International Law and Practice Report to the House of Delegates

Iraqi War Crimes*

RECOMMENDATION

RESOLVED, That the American Bar Association supports efforts to strengthen the rule of law in international affairs by an appropriate investigation and, if found warranted, apprehension, prosecution, and punishment of individuals with respect to any violations of the 1945 Nuremberg Principles and/or other grave breaches of the laws of war associated with Iraqi aggression against other States.

BE IT FURTHER RESOLVED, That the American Bar Association supports the Nuremberg Principles as a part of customary international law and urges the Government of the United States to support policies which will strengthen these principles and insure that, where possible, present and future war criminals are held criminally accountable for their conduct through judicial procedures in which adequate safeguards are provided to insure the protection of the rights of the accused and the achievement of international justice.

BE IT FURTHER RESOLVED, That the ABA Blue Ribbon Committee on an International Criminal Court take this recommendation into account.

BE IT FURTHER RESOLVED, That a copy of this resolution be provided to the President of the United States, the Secretary of State, the President Pro tempore of the Senate, the Speaker of the House of Representatives, and the Secretary General of the United Nations.

*This Recommendation and Report was adopted by the House of Delegates in August 1991. The Recommendation and Report was co-sponsored by other ABA entities. Chair-elect Louis B. Sohn provided the major input from the Section of International Law and Practice along with William M. Hannay, chair of the Section's Committee on International Criminal Law.

REPORT

Between August 1990 and March 1991, the United States and twenty seven other States took a variety of actions under the authority of the United Nations Security Council—including the use of armed force—to bring an end to Iraqi aggression against Kuwait. These actions were justified as necessary to support the "rule of law" in international relations; and time and again it was suggested that Iraqi leaders and personnel who planned or engaged in war crimes would be held personally accountable for their conduct.

Since 1980, criminal decisions taken by Iraqi President Saddam Hussein and his chief lieutenants have cost an estimated one million lives. Ignoring for a moment his eight year war of aggression against neighboring Iran—which included most of the war crimes committed subsequently against Kuwait, as well as flagrant violations of the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases—war crimes directly attributable to Saddam Hussein or his forces almost certainly include:

- the planning, preparation, initiation and waging of a war of aggression in violation of the most fundamental rules of conventional and customary international law;
- the taking of third-country civilian hostages and their forceful relocation to nuclear, poison gas, and other facilities in an effort to protect said facilities from lawful military attack;
- the murder, torture, rape, or other ill treatment of civilian non-combatants in occupied Kuwait and the plunder, pillage, and wanton destruction of property in Kuwait City;
- grave breaches of various provisions of the Third Geneva Convention relative to mistreatment of prisoners of war;
- acts of ecocide—including the intentional discharge of more than 100 million barrels of oil into the Persian Gulf and the subsequent destruction and igniting of at least 175 oil wells—which are clearly inconsistent with the object and purpose of the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (signed by Iraq on May 18, 1977), other international treaties, and customary international law;

Through its initiation and conduct of this war of aggression, the Government of Iraq and its leaders in their individual capacities have violated well established international criminal prohibitions for which the world community has a duty to see them held legally accountable.

Some of these violations involve carefully established principles of customary international law tracing their modern origins back to the Nuremberg Principles established by the London Charter of 8 August 1945. These principles, which were unanimously reaffirmed (with Iraq concurring) as constituting customary international law by United Nations General Assembly Resolution 95(1) in

December 1946, include three categories of criminal acts. As set forth in Article 6 of the London Charter, these are:

(a) *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;

(b) *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 of 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;

(c) *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.

Article 7 of the Charter makes clear that government officials, even Heads of State, shall be held criminally accountable for these crimes and shall not be protected by traditional rules of sovereign immunity. Article 12 expressly provided for in absentia proceedings in the event an accused individual could not be found or "if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence."[1]

In addition to these rules of customary international law, Iraq is a party to a variety of treaties which create conventional legal duties of relevance to some of these war crimes. Iraq is a party, for example, to all four 1949 Geneva "Red Cross" conventions. To take just one of those conventions—generally referred to as the "Fourth Convention"[2]—Iraq would appear to have violated, at minimum:

- Article 24 (protected children under 15 from harm);
- Article 27 (prohibiting the rape of women);
- Article 28 (prohibiting the use of hostages to immunize lawful military objectives);
- Article 32 (prohibiting torture and brutality directed against protected persons);
- Article 33 (prohibiting pillage);
- Article 34 (prohibiting the taking of hostages);
- Article 49 (prohibiting "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of

1. Defendant Martin Bormann was tried at Nuremberg *in absentia.*

2. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, signed 12 August 1949, entered into force for Iraq on 14 February 1956.

the Occupying power or to that of any other country . . . regardless of . . . motive."

- Article 53 (prohibiting the destruction of real or personal property except when "rendered absolutely necessary by military operations";
- Article 83 (prohibiting internment in areas "particularly exposed to the dangers of war").

Article 146 of the Fourth Geneva Convention creates a legal duty for all parties to search for and put on trial individuals who have ordered or committed "grave breaches" of the convention—or, alternatively, to extradite the accused to stand trial elsewhere. "Grave breaches" are identified in Article 147 as including (but not limited to):

> wilful 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.

It should be noted that Iraq has a dual responsibility to comply with the Fourth Convention. Not only did it ratify the Convention in 1956, but by implication it reaffirmed that duty when it accepted U.N. Security Council Resolution 687 on 3 April. That resolution required Iraq to accept all previous Security Council resolutions dealing with the Gulf crisis, and Resolution 670, of 25 September 1990, expressly provided that Iraq was "bound to comply fully" with the Geneva Convention and "in particular is liable under the Convention in respect of the grave breaches committed by it, as are individuals who commit or order the commission of grave breaches." The term "grave breaches" is very much the language of war crimes and criminal responsibility. Not only does acceptance of Resolution 687 constitute an acknowledgement by the Government of Iraq of its treaty obligations not to commit certain categories of war crimes, but it also reaffirms Iraq's legal duty either to try or to extradite accused war criminals.

Iraq has violated numerous other treaty obligations as well, including: the 1961 Vienna Convention on Diplomatic Relations,[3] the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents,[4] the 1945 Pact of the League of Arab States,[5] the 1950 Joint Defence and Economic Co-operation Treaty Between the States of the Arab League,[6] and various articles of the United Nations Charter—such as the obligation in article 25 to "accept and carry out the decisions of the Security

3. 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, entered into force 24 April 1964. (Iraq is a party to this treaty.)

4. 28 U.S.T. 1975, T.I.A.S. 8532, 1035 U.N.T.S. 167, entered into force 20 Feb. 1977 (Iraq is a party).

5. 70 U.N.T.S. 237, 16 U.S. DEP'T STATE BULL. 967 (1945), entered into force in 1945 with Iraq as an original sponsoring member and Kuwait joining in 1961. See, e.g. articles 1, 2, 5, and 8.

6. 157 B.F.S.P. 669, 49 AM. J. INT'L L. SUPP. 51.

Council" (violated by Iraq during the conflict with respect to at least a dozen Security Council resolutions) and other obligations in articles 2, 24, 48 and 49.

In unanimously calling upon the United Nations Secretary General in mid-April to arrange for Saddam Hussein to be tried for war crimes,[7] the Foreign Ministers of the European Community identified not only his responsibility for invading other countries but also his use of chemical weapons against civilians and his attempted genocide of the Kurdish population. There is no reason that an international tribunal established to try Iraqi leaders for war crimes committed in connection with the invasion and occupation of Kuwait (and terrorist attacks on Israel and Saudi Arabia) could not also be empowered to consider evidence of war crimes against Iran during Saddam's eight year war of aggression against that country as well as evidence of violations of the Genocide Treaty in connection with attacks on Iraqi Kurds.

On 30–31 January, the Standing Committee on Law and National Security sponsored a conference in Washington D.C. on the Crisis in the Gulf. Among the many issues leading experts were asked to examine was the question of a war crimes tribunal for Saddam Hussein and other Iraqi war criminals following the war. The panel was unanimous in its support for such a tribunal. Many other experts, including some who participated in the war crime trials which followed World War II, have taken the same position.[8]

The stakes involved in this issue go far beyond the issue of Saddam Hussein's guilt or innocence. As a part of an international effort to use legal instruments as a means of preventing or deterring armed aggression, the world community established a principle—subsequently embraced unanimously by the United Nations Security Council—that even Heads of State who plan or engage in aggressive war or other war crimes will be held personally accountable. During the recent crisis, there were widespread signals from the Security Council,[9] the United States Government,[10] and other members of the coalition that the Nurem-

7. Responding to the appeal from the European Community Foreign Ministers, U.N. Secretary General Perez de Cuellar said it was "of course an interesting idea and one which deserves consideration," and that U.N. legal experts would examine the issue further. *See,* "U.N. to Assess Call for Trial of Iraqi Leader," *Washington Post,* 17 April 1991, A 24.

8. *See, e.g.* Piccoli, "War crimes lawyer says these are trying times," *Washington Times,* 7 March 1991, E 1 (quoting forming Tokyo war crimes prosecutor Robert M. Donihi as saying "Absolutely, unequivocally, I'll say this: He must be tried to build up a judicial record of what has happened there, for the future, for history." Donihi argued that even if the trial must be conducted in absentia it was necessary: "Theoretically he might escape judgement, but he should be tried. And judgement should be at least levied against him. I think otherwise you better wipe them all clean.")

9. In addition to Security Council Resolution 670, discussed *supra,* Resolution 674 (29 October 1990) invited States "to collate substantiated information in their possession or submitted to them on the grave breaches by Iraq . . . and to make this information available to the Security Council . . . ."

10. Kamen, "Geneva Conventions Basis of Allies' Charges," *Washington Post,* 22 Jan. 1991, A___; Isikoff, "U.S. Prepares for Possible War Crimes Trial," *Washington Post,* 12 Feb. 1991, A 10. But cf. Hoffman, "U.S.: No Plans To Try Saddam in Absentia," *Washington Post,* 24 April 1991, A 24.

berg Principles would be upheld by the establishment of war crimes trials following the conflict. A failure to do so at this time might dramatically undermine deterrence of future aggression and other war crimes—if the world community fails to act in such a flagrant case, why should it be expected to do so in the future?

While many war crimes are prohibited by conventional law as well, there is an additional concern about failing to reaffirm the Nuremberg Principles at this juncture. Customary international law is determined by State practice.[11] Given the widespread and flagrant nature of the crimes involved in this case, and the clear evidence that war crimes proceedings were once contemplated, if the international community at this point simply drops the issue its actions might well be interpreted as evidence that the Nuremberg Principles are no longer international legal custom. A defensive response to international aggression designed to uphold and strengthen the "rule of law" might, in the end, have the ironic and tragic consequence of actually undermining a very fundamental legal principle designed to deter international aggression and to hold aggressors criminally responsible for their misconduct.

This is an issue which should be of fundamental importance to the legal community. Irrespective of how individual members of the ABA felt about the decision to use force in response to Iraqi aggression, there ought to be widespread support for the idea of strengthening legal institutions designed to deter future armed aggression. World War II resulted in large part, in the eyes of many diplomatic historians, because the world community sought to impose legal constraints on armed aggression (through the League of Nations Charter and the Kellogg-Briand Pact of 1928) that they were ultimately unwilling to enforce. Were the United States now to fissure from its European allies and reject the call for a war crimes trial for Saddam Hussein would be inconsistent with the spirit of Nuremberg, the Geneva Conventions, and the "rule of law" under the banner of which the entire conflict was fought.

As already noted, on 15 April the Foreign Ministers of the European Community unanimously called upon the United Nations to consider war crimes trials for Saddam Hussein. On 18 April—following the unanimous recommendation of the Senate Committee on Foreign Relations—the United States Senate approved a statute[12] without dissent calling for the United States to work within the United Nations Security Council for the establishment of an international tribunal to prosecute Iraqi war criminals. If the Security Council fails to act, the Senate bill calls for the United States to cooperate with Gulf war allies to establish a tribunal.

In arguing for a war crimes trial at the January conference of the ABA Standing Committee on Law and National Security, former committee chair and Uni-

11. *See, e.g.*, Statute of the International Court of Justice, art. 38(b).
12. Persian Gulf War Criminals Prosecution Act of 1991, S. 253.

versity of Virginia Law Professor John Norton Moore quoted the late Supreme Court Justice Robert Jackson—who, at President Truman's request, had served as chief U.S. representative to the Nuremberg trials—as observing in his concluding report:

> If the nations which command the great physical forces of the world want the society of nations to be governed by law, these [Nuremberg] principles may contribute to that end. If those who have the power of decision revert to the concept of unlimited and irresponsible sovereignty, neither this nor any other charter will save the world from international lawlessness.[13]

The American Bar Association now has an historic opportunity to lend its voice to upholding the rule of law in international affairs and promoting world peace.

Robert F. Turner
Chairman
Standing Committee on Law and National Security

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13. U.S. Dep't of State, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, London, 1945, Dep't of State Pub. No. 3080, Feb. 1949, at ix.