

MILITARY NECESSITY AND IRAQI DESTRUCTION OF KUWAITI OIL

BY

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I

The extent of the destruction inflicted on the Kuwaiti oil industry by the Iraqi armed forces during its seven month occupation of Kuwait was indeed massive. Estimates suggest that between 80-85 percent of the country's 950 oil wells were damaged or destroyed (1). In the Greater Burgan field itself, which lies just outside the capital of Kuwait City, every one of the 684 operating wells was dynamited (2). In excess of 500 wells continue to burn (3). Many others pour noxious gases into the air or lakes of oil onto the surrounding landscape (4). The current rate of loss to fire alone is 4.5-5 million barrels per day (bpd) (5), as much as Japan consumes every day (6) and twice what is used on a daily basis in West Germany (7). It may take 2 years or more to extinguish all the blazes (8) and cost as much as \$ 5 billion (9). Efforts fix the total amount of crude oil to be lost by Kuwait at no less than 9 billion barrels, 10 percent of Kuwait's reserves (10), or 1 percent of the world's total reserves (11). And the environmental damage suffered by the Persian Gulf aquahabitat as a result of the

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(1) See LORCH, « Burning Wells Turn Kuwait into Land of Oily Blackness », *N.Y. Times*, Mar. 6, A-1, col. 5, at A-7, col. 5.

(2) *Id.*, at A-1, col. 5.

(3) See IBRAHIM, « Fires Could Burn for Up to 2 Years », *N.Y. Times*, Mar. 16, 1991, at A-4, col. 1.

(4) See *Tulsa World*, Mar. 23, 1991, at B-6, col. 2.

(5) See IBRAHIM, « Slow Recovery is Seen for Kuwait and Iraq Oil », *N.Y. Times*, Mar. 21, 1991, at C-2, col. 6.

(6) See 1989 *Energy Statistics Sourcebook*, 243 (Penn Well Pub. Co., 1989) (4.7 million bpd in 1988).

(7) *Id.* (2.4 million bpd in 1988).

(8) See LORCH, *supra*, note 1 at col. 5.

(9) *Id.*, at A-7, col. 6 (suggesting a cost of from \$ 3-10 million per well).

(10) See IBRAHIM, *supra*, note 3 at col. 1.

(11) On the world's reserves see 1989 *Energy Statistics Sourcebook*, *supra*, note 6 at 123 (suggesting approximately 900 billion barrels in 1989).

8-11 million barrels discharged from the Sea Island loading terminal (12) is likely to be felt for years to come (13). Before coalition forces could bomb the pipe lines supplying the terminal (14), a slick 10 miles wide and 35 miles long escaped into the Gulf, threatening the wide diversity of animal and plant life located there (15).

In the event settlement of reparation claims commences pursuant to the obligations of the United Nations' cease-fire resolution (16), and disposition reflects compensation for destruction illegally inflicted (17), at least two specific international legal issues will merit close consideration. The first has to do with whether article 53 of the 1949 Geneva Convention on the Protection of Civilian Persons (Civilians Convention) (18), or article 23(g) of

(12) See APPLE, « Relentless Tide of Oil Fouls Shores of Empty Saudi City », *N.Y. Times*, Jan. 28, 1991, A-1, col. 3 at A-4, col. 3.

(13) See HORUSHA, « U.S. Companies to Join Bid to Minimize Gulf Oil Spill », *N.Y. Times*, Jan. 29, 1991, at A-5, col. 1.

(14) See *N.Y. Times*, Jan. 28, 1991, at A-5, col. 1.

(15) See WALD, « Currents, Not Man, Will Decide the Spill's Effects », *N.Y. Times*, Jan. 29, 1991, A-5, col. 3 at col. 4.

(16) U.N. Security Council Res. 674 (Oct. 29, 1990), reprinted in 1 Dispatch 239-240 (Nov. 5, 1990) (U.S. Dept. of State), very clearly reminded Iraq « that under international law it is liable for any loss, damage or injury arising in regard to Kuwait and third states, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq ». The April 3, 1991, Security Council Res. 687 on cease-fire followed this by obligating Iraq to make reparations for its illegal activities. See Resolution reprinted in 2 Dispatch 236 (Apr. 8, 1991).

(17) War claims have often been settled politically through treaties. International arbitral settlement applying legal rules is of comparatively recent origin. See BORCHARD, *Diplomatic Protection of Citizens Abroad*, 248 (1915). On some early cases see RALSTON, *Venezuelan Arbitrations of 1903* (1904), at 762 (Petrocelli case), 900 (Bembelista case). On legal liability for war crimes see Hague Convention IV (1907), 36 Stat. 2277, art. III; HANNA, « Legal Liability for War Damage », 43, *Mich. L. Rev.*, 1057 (1945); WORMER, *Collection of International War Damage Claims* (1944). Resolution 687 provides that settlement of claims against Iraq will be conducted under the supervision of the United Nations. Paragraph 16 of the Resolution is not clear on whether all the destruction flowing from the invasion is compensable simply because of the invasion's illegal nature. The paragraph just « reaffirms that Iraq, ..., is liable under international law for any direct loss, damage, ..., or injury ... as a result of Iraq's unlawful invasion and occupation of Kuwait ». To the extent the claims against Iraq will be honored only when destruction violated the laws of armed conflict, the parameters of that body of international law take on genuine significance.

It should also be noted that at one time there was considerable talk about war crimes trials for Saddam Hussein and his political associates. Within a few weeks following the coalition victory against Iraq, most of the public statements about war crimes trials subsided. This may have reflected : a desire to avoid complicating the release of prisoners of war and hostages ; apprehension about undermining domestic dissension within Iraq by providing Saddam Hussein with a pan-Arab rallying point ; recognition of the variety of foreign policy implications associated with trials *in absentia*. For examples of literature concerning the wisdom of post-World War II war crimes trials see e.g., S. GLURCK, *War Criminals, Their Prosecution and Punishment* (1944); FINCH, « Retribution for War Crimes », 37, *Am. J. Int'l L.*, 8 (1943); LEVY, « The Law and Procedure of War Crime Trials », 1943, *Proc. Am. Soc'y Int'l L.*, 29 (1943); ANDERSON, « The Utility of the Proposed Trial and Punishment of Enemy Leaders », 37, *Am. Pol. Sci. Rev.*, 1081 (1943).

(18) T.I.A.S., No 3365, Art. 53, provides : « Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the state, or to other public authorities, or to social or cooperative organizations is prohibited, except where such destruction is rendered absolutely necessary by military operations ».

the regulations annexed to Hague Convention IV of 1907 (19), sets out the applicable rule for assessing the lawfulness of Iraq's destructive activity. Reports of the burnings of the oil fields and the discharge into the Gulf did not surface until several days after the coalition bombing campaign began on January 17, 1991, more than five months into the occupation of Kuwait (20). Thus, given the presumptively responsive nature of the destruction, should Iraq's activity be judged by the terms of a provision dealing with behavior of an occupying power, or by the terms of one setting forth the limits on the methods and means of military engagement? The second question focuses on the doctrine of military necessity and concerns whether the destruction in Kuwait can qualify for the protection accorded by that concept (21). Analysts have speculated Iraq discharged oil from the Sea Island terminal to foul Saudi desalinization plants and complicate an amphibious assault (22), while the oil fields were burned to deny coalition forces access to the oil when the ground offensive began (23), secure troop and material emplacements in Kuwait by clouding aerial conditions (24), or cover retreat from Kuwait by the Iraqi armed forces (25). In view of the fact the doctrine of military necessity is captured as an exemption to the prohibition on destruction of property of both article 53 as well as article 23(g), could any or all of these explanations serve to exculpate Iraq from wrong doing for which compensation would have to be made?

This brief Comment is directed at the latter question alone, with particular attention devoted to the issue of whether appraisals of claims of military necessity are to look beyond the obvious need to link the specific action under consideration with some legitimate military objective, and consider, as a countervailing factor able to weaken an otherwise appropriate reference to the defense, that the nation raising necessity was engaged in an aggressive and illegal war from the outset. Notwithstanding this Comment's limited nature, it seems somewhat safe to suggest that, for

(19) 36 Stat. 2277, Art. 23(g) provides that it shall be prohibited: «To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war». On article 23(g)'s applicability to public and private property, see M. McDUGAL and F. FELICIANO, *Law and Minimum World Public Order*, 675, N. 454 (1961); G. VON GLAHN, *The Occupation of Enemy Territory*, 227 (1957). Compare C. GRABER, *The Development of the Law of Belligerent Occupation 1863-1914*, at 208 (1949) («apparently deals with private property»), with 2, H. LEVIE, *Code of International Armed Conflict*, 766 (1986) (suggesting applicable to public property alone).

(20) See SHENON, «Coalition Forces Moving Toward Kuwait Front — 10,000 Sorties», *N.Y. Times*, Jan. 23, 1991, at A-1, col. 6.

(21) Excellent discussions of military necessity are contained in M. McDUGAL and F. FELICIANO, *supra*, note 19 at 671-679; G. VON GLAHN, *supra*, note 19 at 224-231; B. RODRIK, *The Doctrine of Necessity in International Law*, 58-82 (1928); DOWNEY, «The Law of War and Military Necessity», 47, *Am. J. int'l L.*, 254 (1953).

(22) See SHENON, «Huge Slick Still a Threat to Saudi Water Plants», *N.Y. Times*, Jan. 25, 1991, at A-1, col. 3.

(23) See *Tulsa World*, Jan. 23, 1991, at A-1, col. 5.

(24) See SHENON, *supra*, note 20.

(25) *Id.*

a variety of reasons, the answer to the former question, the question about the applicable law, identifies the prohibition on destruction contained in article 53 of the Civilians Convention as governing only destruction in a case of occupation uncontested by outside military challenge (26). Once preparatory or full-scale external military opposition to the occupation is launched, destruction in occupied territory by the occupying power is controlled by the prohibition reflected in article 23(g) of the Hague regulations (27).

II

Iraq would seem to face substantial impediments in demonstrating the acceptability of any of the justifications mentioned above that have been ventured by analysts. The language of 23(g) allows departure from the basic prohibition contained in that article whenever destruction is

(26) Iraq is a party to the Civilians Convention and is bound by its terms. The reasons for article 53 not applying therefore have to be found elsewhere. On that matter, at least four such reasons happen to exist. First, any other conclusion would be incongruent with the distinction evidenced in the Lieber Code of 1863, the Brussels Declaration of 1874, the Oxford Code of 1880, and the Hague Regulations of 1899 and 1907 between regulating periods of relative calm and periods involving active military hostilities. That distinction has generally subjected «takings» to greater regulation than «destruction», due to the absence of the significant and pressing demands surrounding the latter. Thus, a complete prohibition on destruction like that in article 53 should be confined to situations that have historically called forth stringent regulation. Second, the «military operations» exception in article 53, and the article's placement in Part III, Section III, entitled «Occupied Territories», rather than Part III, Section II, entitled «General Protection of Populations Against Certain Consequences of War», suggest a narrow reading. Indeed, the 1949 Geneva Diplomatic Conference rejected the initial idea of including article 53's prohibition in the much broader Section II. See *Report of Committee III to the Plenary Assembly*, 2A, Final Record of the Diplomatic Conference of Geneva, 1949, at 812, 822 (art. 30), and 839 (art. 48A) (1949). See also comments by Du Pasquier, Switzerland, *id.*, at 721 (indicating the prohibition be moved to avoid ambiguity with the Hague rules). See also «Report to the Conference from the Second Commission on the Laws and Customs of War on Land» (July 5, 1899), reprinted in *Reports to the Hague Conferences of 1899 and 1907*, at 137, 145 (ed. J. Scott, 1917) (indicating article 23(g) was designed to cover hostilities, not occupation). Third, at the 31st meeting of Committee III, the Committee with the task of preparing the Civilians Convention, Colonel Du Pasquier, the Rapporteur, observed, against a backdrop of concern that the Committee not address the laws of the land warfare, that «even if it was not possible to provide for protection of property against *bombardments or acts of an invading army* ... it was necessary to arrange for the protection of property in an occupied territory». See, 2A, Final Record, *supra*, at 719-720 (emphasis added). Finally, comments made at the 1977 Geneva Diplomatic Conference suggest delegates to that Conference understood the prohibition of article 53 as not extending beyond instances of occupation uncontested by outside military challenge. See the remarks of Mrs. Bindshedler-Robert, International Committee of the Red Cross, III, H. LEVIE, *Protection of War Victims*; Protocol I to the 1959 Geneva Conventions, 98, para. 35 an 36; *id.*, at 99, para. 38.

(27) Though Iraq is not a party to Hague Convention IV and its annexed Regulations, it is bound by such as a matter of customary international law. See, *Documents on the Laws of War*, 44 (A. Roberts and R. Guelff, eds., 1982); U.S. Army Field Manual, 27-10, paras. 6 & 7 (1956). On article 23(g) dealing with hostilities, see *Report to the Conference from the Second Commission on the Laws and Customs of War on Land*, *supra*, note 26.

«imperatively demanded by the necessities of war» (28). In discharging oil into the Gulf and burning oil fields in Kuwait, however, the standard implicit in that language would appear to have not been met. With regard to the burnings to keep oil from falling into the coalition's hands (29), the indubitable requirement for linkage (30) between the action taken and a legitimate military objective is absent. No one can dispute the fact that depriving the opponent's forces of refined fuel products serves the permitted objective of gaining a military advantage. But the trouble in this case is that crude oil has no immediate use to invading military forces and exists in abundance in Saudi Arabia (31), the country that acted as the staging point for the coalition's counter-offensive. The discharge into the Gulf to foul Saudi desalinization plants is only slightly more troublesome, since the language of article 23(g) says nothing as clear about the likelihood of action accomplishing a desired purpose as it does about it having to be tied to a legitimate military objective. In insisting upon action imperatively «demanded» by the necessities of war, however, 23(g) implicitly requires something more than action akin to randomly firing in all directions (32). Yet in view of the unpredictability of ocean currents, and the impact of weather on the flow and direction of ocean pollutants (33), the discharge from Sea Island to foul the water works on the Saudi coast would seem

(28) See *supra*, note 19.

(29) See *supra*, note 23.

(30) It is clear that the reference in article 23(g) to action being demanded «by» the necessities of war fixes the need to establish a connection between a legitimate military operation and the action under consideration. The degree of connection required is clarified by the reference to the fact that the necessities of war must «imperatively» demand the action taken. See generally DOWNER, «The Law of War and Military Necessity», 47, *Am. J. Int'l L.*, 251 (1953).

(31) At the time of the launching of Operation Desert Storm, the Saudi's were producing approximately 9 million bpd, see GREENHOUSE, «OPEC Takes Up Oil Price Decision», *N.Y. Times*, Mar. 11, 1991, C-1, col. 3, at C-5, col. 5, from reserves estimated at 170 billion barrels, see 1989, *Energy Statistics Sourcebook*, 123 (Penn Well Pub., 1989), approximately 20 % of the total world reserves. Saudi Arabia's need to import refined fuel products is discussed in MILLER, «Saudis Importing Fuel to Fight War», *N.Y. Times*, Jan. 23, 1991, at A-4, col. 6. This suggests that Iraqi destruction of refined products may stand on a different footing than the destruction of crude oil facilities.

(32) Though outside the context of article 23(g), both the «Llandovery Castle case», *Annual Digest of Int'l Law Cases*, Cas No. 235 (1923-1924) and the «Peleus case», 1 U.N. War Crimes Comm'n, Law Reports of Trials of War Criminals (hereinafter *War Crimes Reports*), 1 (1945) inform the meaning of the doctrine of military necessity. The first involves the massacre of survivors of a hospital ship sunk by a German submarine in World War I. The second is factually very similar and comes from the Second World War. In each case the excuse offered was that of preventing the relay of information that could jeopardize the submarine involved in the sinking. In rejecting this argument in both cases, the relevant tribunal had reference to the fact that many other things (e.g., debris, oil slicks) could have been helpful in disclosing that kind of information. This certainly suggests that by «necessity» is meant that one's action must be somewhat likely to accomplish the desired result.

(33) Indeed, reports circulated in the media that the discharges of crude into the Gulf were going awry and fouling desalinization plants in Kuwait used to supply fresh water to the occupying Iraqi forces.

hardly in a better position than the burnings to keep crude out of the coalition's hands.

The justifications of hampering an amphibious assault (34), protecting troop and material emplacements (35), and covering retreat from occupied Kuwaiti territory (36) are much more complicated. These all tie the destructive actions to a legitimate military objective and pose situations where the purpose of the action is very likely to be at least somewhat achieved (37). It is quite possible that the evidence adduced with regard to such justifications could demonstrate weaknesses in any Iraqi case. All evidence aside, the reason the justifications are considered herein has to do with the controversial matter of whether the concept of military necessity reflected in article 23(g) envisions looking to see if the nation invoking the doctrine to excuse some destructive action has been engaged in an aggressive, illegal war from the very beginning (38). In other words, even if we assume an extremely close link to a legitimate military objective, is the fact that the destroying nation initiated an illegal war of aggression a consideration which is relevant under 23(g) in determining the availability of the excuse of military necessity. Little space has been devoted to this matter in learned journals. Those scholars who have offered suggestions have often done so in an oblique fashion and without articulating any elaborate rationale (39). Perhaps this is a consequence of the fact the Nuremberg tribunal acquitted German officials in two Second World War cases involving destruction of property in occupied territory to cover retreat (40) without discussing the role of Nazi aggression (41) in evaluating claims to the doctrine of military necessity (42).

(34) See *supra*, note 23.

(35) See *supra*, note 24.

(36) See *supra*, note 25.

(37) For the contention that a preexisting plan to take destructive action can undermine reliance on military necessity as an excuse, see transcript of 'Field-Marshal von Manstein case', 3391-3393 (1949), cited in DUNBAR, *Military Necessity in War Crimes Trials*, 19, *British Y.B. Int'l L.*, 4442 at 450. n. 1 (1952).

(38) See U.N. Security Council Res. 674 (Oct. 29, 1990), para. 8, *supra*, note 16, characterizing Iraq's occupation of Kuwait as 'illegal'.

(39) Compare J. APPLEMAN, *Military Tribunals and International Crimes*, 53 (1954) ('The effect of outlawing aggressive war is to remove the legal excuse ... of acts otherwise condemned by all penal codes ...'), with LAUTERPACHT, 'The Problem of the Revision of the Law of War', 19, *British Y.B. Int'l L.*, 360 at 378 (1953) ('most of the rules of warfare ..., operate regardless of the legality of the war').

(40) *U.S. v. List*, 11, *Trials of War Criminals*, 759 (1948); *U.S. v. von Leeb*, 12, *War Crimes Report*, 1 (1948).

(41) On the Nuremberg tribunal's determination that the Nazi's had undertaken a war of aggression, see *Judgment of the International Military Tribunal* (Nuremberg) (Oct. 1, 1946), reprinted in 41, *Am. J. Int'l L.*, 172 at 186-221 (1947).

(42) Putting aside the two cases referred to, it is not inconceivable that destruction in the course of retreat from occupied territory captured through aggression could be adjudged eligible for protection under military necessity. In this sense, the Nuremberg cases do not necessarily reject the availability of the doctrine in every instance of a war of aggression. The simplest scenario making the point would involve a bloodless takeover by one state of the territory of

The position stated in this Comment is that the fact the nation inflicting destruction has undertaken to conduct a war of aggression is indeed a relevant consideration which must be incorporated in the evaluation of any claim to military necessity (43). To be sure, however, the relevancy of the consideration is important to the extreme, but it is not the sole, decisive consideration that invariably tips the scales against the nation endeavoring to have the action of its forces excused. The reason for this has to do with the varying conditions under which initiating aggression can be carried out, the wide range of motivating factors that may precipitate the aggression, and the broad spectrum of interests the destructive action in the occupied territory may seek to promote.

III

In advance of setting forth the reasons which suggest the appropriateness of this position, a few observations are in order about possible explanations supporting the narrower, limited reading of article 23(g)'s exception. Unfortunately, due to the paucity of detailed commentary on this subject, one can only engage in cautious, uninformed speculation and conjecture. Yet even recognizing this complication, a couple rational explanations for a narrow reading do come readily to mind.

The first possibility is that a narrow reading is best because it avoids placing commanding officers in a position of dispute with political leaders who deliberately insist on the pursuit of clear aggressive designs against other nations. If a plan of action for a military campaign were to be subjected to a scrutiny that included consideration of the campaign's aggressive nature, members of the armed services charged with implementing the plan could well find themselves wrangling with political leaders, thereby undermining the kind of discipline required to conduct warfare successfully.

The difficulty with accepting this argument is that it fails to take into account the rejection of «superior orders» as an unqualified defense (44). Like the explanation for the narrow reading of article 23(g), superior orders is based on the importance of discipline within the military. From the Nuremberg war crimes experience, it is plain that while discipline is an

another, followed by a military campaign from the outside to oust the illegal occupant. In such a situation, it is not perverse to expect a tribunal, evaluating a claim by the occupant to excuse destruction of property to cover a retreat, to reach the conclusion that the aggressive and illegal nature of the initial occupation does not prevent reliance on military necessity. An approach of this sort would stress the bloodless nature of the original aggression as opposed to the peril to life and limb encountered by the retreating forces, and balance these with the destruction of property involved in covering the retreat.

(43) See *id.*, discussing the idea that aggression is a factor to be weighed against others, and not something which always overwhelms all other factors.

(44) See M. McDUGAL and F. FELICIANO, *supra*, note 19, at 690-699.

extremely important value, it is to be weighed against the prescriptions of international law on the methods and means of prosecuting armed conflict. Thus, superior orders has not been favorably received when the act leading to its invocation was clearly unlawful (45), or was not somehow tangibly opposed (46). More importantly, it has not mattered that the order involved was that of a political official rather than a military officer (47). Especially in view of the mere potential for disputes between commanding officers and political leaders having had no determinative influence in the context of superior orders, it would be unusual to accord it such influence under the exception of article 23(g). Just as an order clearly violative of the laws of war cannot serve as the basis for a defense under superior orders, so too destruction inflicted in the context of a war that is clearly aggressive cannot earn protection on the basis of the exception for destruction «imperatively demanded by the necessities of war» (48). If the value of military discipline alone is insufficient to assure that invocation of superior orders will insulate the claimant where it is plain that an act in contravention of the laws of war has been commanded, then that value should be equally as insufficient to assure protection of destructive acts taken during the course of any war that is plainly and obviously one of aggression (49).

A second possible explanation for reading article 23(g)'s reference to military necessity narrowly enough to exclude consideration of the legality of the overall conflict in which the destruction at issue has occurred, concerns the irrationality of war itself. In view of that basic fact, it would seem perfectly sensible for any reasoning person to conclude that incongruity would arise if the rules of armed conflict were interpreted as

(45) For cases accepting this proposition see «Trial of Wielen», 11, *War Crimes Reports*, at 47 (1947); «Trial of Renoth», *Id.*, at 78 (1946); «Peleus», *supra*, note 32, at 16 et seq. (1945). From the First World War, see «The Llandovery Castle», *supra*, note 32, at 437-438, where it is stated that «if ... an order is universally known to everybody, ..., to be without any doubt whatever against the law», then superior orders is no defense.

(46) «The Einsatzgruppen Case», 4, *Trials of War Criminals*, at 481 (1947), require that one invoking superior orders must not have been «in accord with the principle and intent of the superior»; it is not enough to just «rebel mentally». See «Trial of Bauer», 8, *War Crimes Reports*, at 16 and 21 (1945), for an example of the kind of showing of opposition required.

(47) See «Judgment of the International Military Tribunal» (Nuremberg), *supra*, note 41, at 221 (referring to article 8 of the IMT Charter).

(48) It is recognized that this conclusion has ramifications far beyond that of destruction inflicted by an occupying power in occupied territory. Since article 23(g) deals with destruction of property during military engagement, to say that the aggressive nature of a war affects the destruction the aggressor can take admits that every single act of destruction taken — and not just those in occupied territory inflicted when the aggressor has its status as a occupant challenged — is subject to examination in light of the illegal nature of the war. However, this factor alone is not dispositive. Just as it may be that one could determine that destruction to cover a retreat from territory occupied through a bloodless invasion may be permissible, see *supra*, note 42, so too it may be that destruction to cover a retreat ordered by a commanding official who defies directives from political and military superiors to push forward with the campaign of aggression may be permissible.

(49) For a statement on what constitutes «aggression», see «Consensus of Definition of Aggression», G.A. Res. 3314, 29, *U.N. GAOR*, Supp. 31, U.N. Doc. A/9631 at 142 (1974).

imposing anything more than the most rudimentary of constraints. Regulation of atavistic activity typifying the quintessence of human emotion and frustration, and the antithesis of human logic and temperance, should demand nothing but simple, practical connections between military objectives and the methods selected for accomplishing them.

As with the first argument for a narrow reading, the instant position, too, has problems which make it unconvincing. Most pronounced is the fact that article 23(g) itself already reflects expectations regarding rationality. By prohibiting destruction which is not essential to attain some legitimate military objective, it requires that armed forces engaged in destruction refrain from the senseless and unnecessary savagery that conflict might otherwise tend to precipitate. For a particular act to merit protection, it must not only be claimed as linked to a legitimate military objective but shown to be likely to accomplish the objective itself (50). This requirement imposes a duty on decisionmakers in the field to consider carefully the means selected for prosecuting war (51). Less pronounced, but also evidencing concern with rationality, is the fact that Hague regulation 23(g) even applies to full-scale conflict outside occupied territories (52). Yet if the irrationality of war supported a narrow reading of the article's exception, it would seem the provision and its requirement that destruction be tied to a military objective likely to be accomplished would not have been extended to encompass situations of that sort. Such incontestable impositions of rationality suggest it is not at all out of character with the thrust of 23(g) to read the concept of military necessity as alluding to whether the nation whose forces inflicted the destruction at issue initiated a war of aggression. To the extent that this reading fixes on commanding officers an obligation to proceed in a measured and reasoned fashion, it serves to transform the ultimate in human irrationality in no way not already dictated by the very terms of article 23 of the regulations annexed to Hague Convention IV.

The third and final possible argument in favor of a narrow reading of military necessity is associated with the preceding two by virtue of its pragmatic nature. Like the others, it claims that 23(g)'s exception is to be given a restricted interpretation because that fits best with the realities surrounding international conflict. But rather than developing the notion of a broad reading creating tensions between military and political players, or incongruity with the fundamental nature of war, this argument centers in on the potential for capricious and abusive determinations by victors

(50) See text accompanying *supra*, notes 28-32.

(51) Contrast this with *Kriegsraison geht vor Kriegsmanier*, which basically postulates that the existence of war overrides all legal limits. The theory is summoned up in the statement *inter arma silent leges*. See O'BRIEN, «The meaning of Military Necessity in International Law», 1, *World Polity*, 109 119-127 (1957) (discussing the theory of *Kriegsraison*).

(52) See *supra*, note 27.

who sit in judgment of the vanquished. The idea is that any tribunal comprised of those prevailing in war, and called upon to assess the propriety of acts of destruction inflicted by those who have been defeated, is very likely to find the existence of a war of aggression, thus complicating the possibility of military necessity ever being successfully invoked.

The weakness in this argument is not its logic, for one would expect that the normal human reaction to another who has compelled it to grudgingly draw on its valued economic and personal resources would be disgust and contempt. The weakness resides rather in the fact that this third possibility fails to evidence an appreciation of the structural forces which affect international decisionmaking. Most importantly in this respect is reciprocity. The reciprocal nature of relations in the international arena serves, as in every area of human interaction, to moderate the inclination towards abuse by those evaluating the conduct of others. Fully cognizant that in the future they may find themselves in the docket, nations emerging victorious from an international conflict are likely to be as interested in justice and fairness, and rules that promote such, as in retribution for hardships they have been compelled to endure. In spinning the full web of law outlined by the starkly skeletal rules of armed conflict, the reality that what is proffered could well be used to evaluate the future conduct of the one by whom it is proffered acts as a powerful incentive to impartiality and even-handedness. Though the victor may face strong pressures to exact a price from the vanquished, the pressures are often checked by the longer-term perspective imparted through the processes surrounding the making of international decisions (53).

IV

A variety of reasons exist for interpreting article 23(g)'s exception for destruction necessitated by the imperatives of war as including consideration of the legality of the overall conflict started by the nation whose forces inflicted the destruction in dispute. Briefly stated, the reasons can be said to be based on the concept of reasonableness, the perversity of results grounded in a narrow reading, the textual analysis of the terminology used to express the military necessity exception, and the implications gleaned from other language appearing in both the Hague regulations and Convention IV to which the regulations are annexed. The first two of these reasons could be categorized as pragmatic, in the sense that their focus is result-

(53) For reference to the nature of the international decisionmaking process, see MALLISON and MALLISON, 'The Judicial Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict', 9, *Case W. Res. J. Int'l L.*, 39, 40-43 (1977); SOLF and CUMMINGS, 'A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August', 12, 1949, *id.*, at 205.

oriented, and the last two as traditional, in that they turn on the very language of the international compact of concern.

The pragmatic explanation based on reasonableness seeks to construe the exception of article 23(g) as all principles of international law are to be construed, in a manner which yields a sensible and useful end product. The concept of reasonableness is not at all foreign to either the common law (54) or the civil law (55) systems. Stripped of the doctrinal coatings making it legally palatable, its emphasis is on viewing rules of law as normative devices for securing goals thought by decisionmakers to be compelling. In its most unadorned form, reasonableness conceives of law as the handmaiden, not the master, of society. Law serves not to paralyze the ability to make the moral judgments implicit in all decisions of social policy, but rather to facilitate the making of decisions in a manner that reflects such judgments. From this type of perspective, interpretations regarding the provisions of international law regulating armed conflict tend towards the production of results that serve the socially essential goal of promoting law-observance and discouraging law-violation.

The utility of the concept of reasonableness in understanding the meaning of legal standards is apparent in international jurisprudence. To begin with, the Vienna Convention on the Law of Treaties (56) provides that the language of international agreements is normally to be given its ordinary meaning (57). However, in the event that approach results in a meaning which is obviously not reasonable, recourse may be had to means of interpretation designed to correct that situation (58). Reasonableness has also been claimed in the opinions of some of the justices of the I.C.J. as a vital consideration when construing fundamental legal documents (59). Indeed, in both the 1951 *Anglo-Norwegian Fisheries Case* (60), and the more recent

(54) See e.g., *Schenck v. U.S.*, 249, U.S., 47 (1919) (meaning of a clear constitutional provision affected by reasonableness); *Kobayashi v. Zimring*, 566, P.2d, 725 (1977) (resolving dispute not controlled by antecedent common law rules in accordance with balancing approach); *State v. Shack*, 277, A.2d, 369 (1971) (meaning of a clear statutory provision affected by reasonableness).

(55) *Compañía Swift De La Plata, Frigorífica*, Creditor's Proceeding, Sup. Ct. of Argentina, Sept. 4, 1973, translation reprinted in, 6, *Lawyer Am.*, 330 (1974) (understanding the nature of law from the social objectives it seeks to secure).

(56) U.N. Doc. A/CONF. 39/27 (1969), entered into force, Jan. 27, 1980, reprinted in 63, *Am. J. int'l L.*, 875 (1969).

(57) *Id.*, art. 31.

(58) *Id.*, art. 32.

(59) See J. AZEVEDO's dissent in «Advisory Opinion Concerning the Competence of the General Assembly for the Admission of a State to the United Nations», 1959, *I.C.J.*, 4, 23, where he says about interpretations of the U.N. Charter that: «To comply with its aims one must seek the methods of interpretation most likely to serve the natural evolution of the needs of mankind» (Emphasis added). As alluded to above, reasonableness is integrally connected with mankind's needs.

(60) *United Kingdom v. Norway*, 1951, *I.C.J.*, 128, 133 (Judgment of Dec. 18) (the surrounding realities must serve as the backdrop against which international law is to be understood).

1984 *Gulf of Maine Case* (61), the I.C.J. itself appeared somewhat sympathetic to the notion of viewing law against a backdrop of reasonableness. The opinions of the Court in those cases seem to emphasize the influence of contextual factors on the international rules governing the conduct of nations. Additionally, leading scholars in the field stress the role of reasonableness. Some are explicit in their insistence that rules of law regulating the use of force be considered in light of reasonableness (62), while others seem to endorse the idea that factors subsumed by reasonableness have a privileged status in the formation of international law (63). Finally, the Vienna Convention, the intimations from the I.C.J., and the positions of respected scholars illustrate a primordial fact about all law. As expressed long ago by the renowned English legal historian Sir Henry Sumner Maine, from the very beginning the rules that comprise law have reflected not some antecedent directive mankind is helpless to avoid, but rather a judgment about how best to achieve the ambitions society sets before itself (64). Recognition of this fundamental fact casts a new light on every legal rule. For if law is to assist in the securing of a community's goals, then it must be understood as directing behavior and establishing standards reasonably suited to its task.

But how does one move from sensitivity to the importance of reasonableness, to the conclusion that article 23(g)'s exception for destruction demanded by the necessities of war is to be construed so as to consider the legality of the overall conflict in which the destruction at issue has occurred? This is where the second of the two pragmatic explanations comes in. In short, the basic idea is that a narrow reading of 23(g) produces the kind of unreasonable result that a broad reading is fully able to avoid.

With regard to the untoward nature of the result produced by interpreting the military necessity doctrine of article 23(g) so as to preclude reference to the legality of the overall conflict, it is apparent that anytime one nation can invade another and then, to secure its position and insure the fruits of its lawlessness are consolidated, destroy property located there by merely establishing a link to a legitimate military objective, the law-abiding members of the world community are likely to find themselves seriously disadvantaged. Once dug in, an adversary is often incredibly difficult to oust. Challenging military forces not only have to contend with the same obstacles that every combatant faces when engaged in battle on the

(61) *Canada v. U.S.*, 1984, *I.C.J.*, 246 (Decision of Oct. 12) (antecedent equitable criteria are those producing an equitable result).

(62) See M. McDUGAL and F. FELICIANO, *supra*, note 19 at 218 («reasonableness in particular context», suggested in regard to article 51 of the U.N. Charter). See also FALK, «The Beirut Raid in the International Law of Retaliation», 63, *Am. J. Int'l L.*, 415 at 437-39.

(63) C. DE VISSCHER, *Theory and Reality in Public International Law*, 157 (Corbett trans. rev. ed. 1968) (speaking of «social ends considered desirable» in the context of the formation of customary law).

(64) H. MAINE, *Ancient Law*, 3-17 (originally pub., 1861) (The World's Classics, ed. 1931).

open field, but they also have to overcome superior positions associated with defensive entrenchment. In the event the illegality of an invasion does not function to moderate the destruction an occupying power can inflict to maintain its position, the task facing an opponent can be complicated substantially (65). In an effort to confound a challenger, the occupying power could systematically destroy property in the occupied territory, thereby increasing the likelihood that opposition to the aggression would prove unsuccessful.

When the exception for destruction demanded by military necessity is given a reading which envisions reference to the existence of a war of aggression, a nation occupying another through the use of illegal force finds itself unable freely to have recourse to article 23(g) to justify destruction inflicted in the face of an external challenge. Aggression and occupation may put the foreign belligerent in a position of being able to strengthen its defenses against efforts to remove it, thus adding to the difficulties a challenger would otherwise face on the open field. The fact the occupation is the consequence of a use of force in contravention of international law, however, functions to undermine the ability to invoke 23(g) to protect every act of destruction. The result is to place lawless aggression in proper rank with the law-abiding behavior of the other members of the world community. Uses of force perceived as unacceptable by international standards can be addressed without other rules of law being adverted to in order to protect the fruits of illegality.

One additional point bears reference here as well. Specifically, construing military necessity as including consideration of the legality of the overall conflict goes beyond simply producing a more reasonable result as regards acclaiming the importance of law-abiding behavior and decrying law violation. As already alluded to, the exception in article 23(g) for destruction demanded by the necessities of war imposes a modicum of rationality on an otherwise irrational manifestation of human emotion (66). To the extent that reasonableness connotes an approach directed at a rational result, a broad reading of 23(g) is certainly more harmonious with the tenor of the military necessity exception. A narrow reading, which leaves aside the matter of the war's legality, seems somehow out-of-line.

Moving away from the two pragmatic reasons for a broad interpretation, and in the direction of the two traditional reasons, attention is called to the

(65) As is well known, Iraq was quickly ousted from Kuwait, a country it had occupied for almost seven months. Nonetheless, recent remarks of General H. Norman Schwarzkopf, commander of the coalition forces in the Gulf, suggest that had the Iraqi armed forces avoided concentrating combat units in Kuwait itself, a flanking effort would have been much more difficult, and, because of the preparations for combat in Kuwait, a consequent ground campaign would have been longer, more complex, and much costlier. Interview by David Frost with Gen. Schwarzkopf, PBS (aired Mar.29, 1991).

(66) See text accompanying *supra*, notes 54-64.

very terms used to express article 23(g)'s exception. The language of relevancy speaks of destruction imperatively demanded by the necessities of war. Since this is quite different from phraseology that would have substituted the word «for» in lieu of the preposition «of», it might be concluded that the exception makes clear a preference for a construction giving no weight to whether the overall conflict was one of aggression. However, that conclusion should not be reached in haste. It is obvious that reference to destruction demanded by the «necessities for war» would make it easier to argue that the legality of the conflict is a relevant consideration. Nonetheless, use of such language would have had the effect of weakening the position that the permissibility of destruction also turns on its necessity from a purely operational standpoint. In other words, were 23(g) to speak of the necessities «for», rather than «of», war, any reference to the matter of some particular military operation demanding the destruction would be inappropriate.

Reading the verbal configuration which actually appears in article 23(g) in a fashion that can support a broad construction may be accomplished, especially in view of the influence of reasonableness, without having to engage in acrobatics that too substantially twists the understanding of what certain words convey. In permitting destruction, the Hague rules use of the preposition «of» has meaning only in reference to the «necessities» that have «imperatively demanded» action of that unfortunate character. That it must be the extant «necessities» driving the destruction clearly suggests consideration of the exigencies at the very moment the act is taken. Just as clearly, however, since those exigencies are themselves concomitants of all the circumstances surrounding the initial use of force precipitating the war itself, the most complete picture of the existing «necessities» would seem to include the latter circumstances as well. What enhances the attractiveness of this position is that the necessities able to justify destruction must be those which render such action «imperatively demanded». This is a strict standard, undoubtedly requiring linkages of the sort discussed earlier (67). Beyond that, however, enough flexibility is incorporated by the standard to allow consideration of whether the nation inflicting the destruction engaged in a war of aggression. The fact a demand must be imperative, if it is to be sufficient to support destruction, invites reference to a broad spectrum of considerations. Determinations of the imperativeness of any demand that prove the most teeming with insight, significance, and perspective, reflect on the widest range of considerations available. It would be far too parsimonious to comprehend the expression «imperatively demanded» in any way other than that which reflects on the legality of the overall conflict in which the destruction in issue has occurred.

(67) See text accompanying *supra*, notes 28-33.

The final reason for supporting a broad reading of article 23(g) is also based on text. To this extent, it fits the traditional, conventional mold just as well as the reason drawing on the specific terminology of military necessity happens to fit that mold. The difference between the two resides in the directness of the evidence upon which they draw. The latter arrives at its conclusions with regard to the meaning of «imperatively demanded by the necessities of war» by virtue of deciphering the words themselves. Nothing could be more direct. In the case of the former, though, a more circuitous route is utilized. In essence, movement is from the language situated in other provisions of the Hague regulations, and Convention IV itself, to interpretation of article 23(g)'s exception. By no stretch of the imagination could this effort be conceived of as anything but inferential and indirect.

The most significant of the textual evidences implying a broad reading of 23(g) concerns the understanding that the rules of conduct established by the Hague regulations reflect what is acceptable behavior, even after military necessity has been considered. The Nuremberg war crimes tribunal made that point in its statement that the Hague prohibitions «are superior to military necessities of the most urgent nature except where the Regulations themselves provide the contrary» (68). This depicts the Hague rules as already reflecting what military necessity allows or prohibits. The only variation is when the rules themselves explicitly qualify a prohibition, as in article 23(g), by express reference to the concept of necessity (69). In cases of that sort, the prohibition thus qualified is susceptible to being departed from if necessity is shown to exist. At bottom, this all means that if the prohibitions contained in the Hague rules that are not so qualified outlaw conduct which can be linked to military objectives likely to be accomplished by the conduct, then the very concept of military necessity must be inescapably understood as encompassing considerations far beyond mere linkage. The task then becomes one of simply winnowing the prohibitory provisions of the Hague rules to ascertain if there exist prohibitions on conduct that can be tied to military objectives likely to be accomplished. For if such are present, then whether military necessity is to be construed as including reference to more than linkage alone is answered indirectly.

The provisions in the Hague regulations of 1907 prohibiting activity which can be connected to military objectives likely to be accomplished are almost too numerous to count. The most important and representative include not forcing prisoners of war (70) or inhabitants of occupied

(68) «Trial of List» (The Hostages Case), 8, *War Crimes Reports*, at 69 (1948).

(69) Necessity also appears in arts. 27, 33 and 54 of the Hague Regulations.

(70) See Hague Regulations, *supra*, notes 19 at art. 6.

territory (71) to engage in tasks associated with the operations of war ; not forcing inhabitants of occupied territory to supply information about the army of the other belligerent (72) ; not abusing the use of a flag of truce or the uniform of the enemy (73) ; not employing poison or poisoned weapons (74) or killing enemy soldiers who have surrendered (75). In each of these cases, there would be distinct military advantages that could be gained through violating the relevant restriction. By prohibiting such conduct, the Hague rules indicate that military necessity gives thought to a far wider range of considerations than linkage and likelihood of accomplishing military objectives.

Additional indirect evidence corroborates the idea of the prohibitions in the Hague rules implying that, where military necessity is expressly referred to, a broad reading is appropriate. Specifically, paragraph 5 of the Preamble to Hague Convention IV alludes to the values of humanitarianism and military necessity. This appears through a counterpositioning of « the desire to diminish the evils of war », and the notion of a diminution « so far as » military requirements « permit » (76). Obviously, with regard to the activities involved in the prohibitions discussed above, the concept of necessity, a concept reflected in the formulation of the prohibitions, is outweighed by the interest in reducing the effects of war. Given that the Convention both recognizes these two competitive values and sets forth instances where military requirements are not seen as preeminent to ameliorating the consequences of war, it is quite reasonable to expect other cases in which humanitarianism may overshadow arguments for permitting armed forces to engage in conduct serving militarily useful purposes. If standards for civility in the prosecution of combat do not envision permitting activity having a clear connection with military objectives when necessity is incorporated in the standards, then standards that are explicitly conditioned by necessity should be understood in precisely the same way. Just as humanitarianism compels avoidance of the kinds of conduct enumerated throughout the Hague regulations of 1907, so too in some instances it may compel the avoidance of property destruction because the inflicting army represents a nation engaged in a war of aggression. In both, the mere fact the conduct facilitates the accomplishment of a military objective is insufficient to support its legality.

(71) *Id.*, at art. 52.

(72) *Id.*, at art. 44.

(73) *Id.*, at art. 23(f).

(74) *Id.*, at art. 23(a).

(75) *Id.*, at art. 23(c).

(76) Hague Convention IV Respecting the Laws and Customs of War on Land, reprinted in *The Laws of Armed Conflict*, 57 at 63-64 (D. Schindler and J. Toman, eds., 1973).

V

The invasion of the tiny Gulf sheikdom of Kuwait by the armed forces of Iraqi President Saddam Hussein presented a variety of international legal issues ranging from the inviolability of diplomatic premises to the protection of art treasures (77), damage to the environment (78) to intervention to protect the minority Kurdish population from inhumane treatment (79). The principal issue surrounding the destruction of Kuwait's oil resources, in response to coalition efforts eventually ousting the occupying Iraqi army, involves consideration of Iraq's aggression in determining whether the destruction was «imperatively demanded by the necessities of war». What has been argued in the preceding pages is that the existence of illegal aggression undermines the ability of the destroying power to appropriately invoke military necessity as a basis for justification. The doctrine of necessity captured by the language of article 23(g) of the Hague regulations of 1907 envisions reference to the illegal nature of the overall conflict in deciding when destruction of property is permissible. Thus, with regard to reparations called for under Security Council Resolution 687, payments calculated on the basis of non-protected destruction must look far beyond what traditionally has been deemed sufficient.

(77) For a review of some of these topics see, MERON, «Prisoners of War, Civilians and Diplomats in the Gulf Crisis», 85, *Am. J. int'l L.*, 104 (1991).

(78) See e.g., articles 53-55 of Protocol I Additional to the Geneva Conventions of 12 August 1949, reprinted in «Documents on the Laws of War», *supra*, note 27, at 416-418. The Protocol was opened for signature on Dec. 12, 1977. On its current status see ALDRICH, «Prospects of United States Ratification of Additional Protocol I to the 1949 Geneva Conventions», 85, *Am. J. Int'l L.*, 1 (1991), at 3 (Iraq not a party), 19 (question of customary law problematic).

(79) See e.g. RIDING, «Europeans Urging Enclave for Kurds in Northern Iraq», *N.Y. Times*, Apr. 9, 1991, A-1, col. 6; TYLER, «Bush Sees Accord on 'Safe Havens' For Kurds in Iraq», *N.Y. Times*, Apr. 12, 1991, A-3, col. 4; SCIOLINO, «Iraq Says U.N. Must Take Over Camps for Kurds», *N.Y. Times*, Apr. 24, 1991, A-6, col. 3; «A Lifeline in Iraq», *Newsweek*, Apr. 29, 1991, at 18-21.