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War Crimes and the Rule of Law in the Gulf Crisis

JOHN NORTON MOORE*

“The principles of the charter [at the Nuremberg Trials], no less than its wide acceptance, establish its significance as a step in the evolution of a law-governed society of nations. . . .

. . . If the nations which command the great physical forces of the world want the society of nations to be governed by law, these 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 charter will save the world from international lawlessness.”

Justice Robert H. Jackson, in
the preface to his official report
as United States Representative
to the Nuremberg Trials, Feb-
ruary 1949.

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In the Gulf crisis, Professor Moore has agreed to serve as the Chairman of an International Legal Advisory Committee on behalf of the Ambassador of Kuwait to the United States. As such, he is registered pursuant to 22 U.S.C. § 612 with the U.S. Department of Justice, where his registration statement is available for inspection. Registration does not indicate approval of this material by the United States Government.

The views expressed by Professor Moore, unless otherwise indicated, are his own and do not necessarily reflect the views of the University of Virginia, the United States Government, the Government of the State of Kuwait, or any other organization or entity with which he is or has been affiliated.

Mr. Chairman:

It is always an honor to testify before a committee of the Congress of the United States. I am particularly pleased to be with you this morning testifying on such an important subject.

Conventional wisdom, which has a strong intellectual grip on our thinking about international relations, is leery of war crimes trials. Indeed, there have been no major war crimes trials since World War II. This conventional wisdom, or "old thinking," however, is wrong. The Gulf crisis teaches us that we need "new thinking" if we are seriously to move forward with a new world order based on the rule of law.

I. REASONS FOR WAR CRIMES TRIALS IN THE GULF CRISIS

I believe that there are at least five reasons why it is of *great* importance that there be war crimes trials in the Gulf crisis for Iraqi violations of the basic norms of civilized behavior. (See the two annexes to this testimony for a partial list of potential Iraqi war crimes in the Gulf crisis.) These reasons are:

1. Holding such trials is a moral imperative in view of the scale, brutality, and depravity of Iraq's violations of the Third and Fourth Geneva Conventions,¹ Iraq's deliberate instigation of a new form of environmental terrorism, and Iraq's ballistic missile terror attacks against civilian populations. To sweep these actions under the rug is to diminish ourselves.
2. The United States, and all other nations bound by the 1949 Geneva Conventions, are required by existing international treaty obligations to search out and prosecute or extradite persons alleged to have committed "grave breaches" of these Conventions. In this respect, article 146 of the Fourth Geneva Convention (Relative to the Protection of Civilian Persons in Time of War) is representative as it provides:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their national-

1. Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

ity, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.²

This obligation is the heart of measures for implementation of the important human rights standards of these Conventions. Arguments against enforcing these human rights Conventions because to do so would somehow interfere with foreign relations are based on "old thinking" long ago rejected in our general human rights policy. Moreover, they fail to recognize the importance of the nation's existing legal obligations.

3. The United Nations Security Council warned Iraq that individuals, as well as the Government of Iraq, would be liable for the commission of grave breaches of the Fourth Geneva Convention.³ To permit flagrant violations of the Fourth Geneva Convention to go unpunished when brazenly committed *after* such a Security Council warning would be to doom the Council to irrelevance in enforcing the humanitarian laws of war during ongoing hostilities.
4. We have every reason to seek vigorously to apply the rule of law to Saddam Hussein. Although the allied coalition has chosen to let the people of Iraq struggle for the leadership of their country, we certainly have no interest in sheltering the world class evil of Saddam from the rule of law. Indeed, the core principle of Watergate (a setting which is not even remotely comparable in the extent of its lawlessness) is that even the position of President of the United States is subject to the rule of law.
5. Perhaps the most important reason for holding war crimes trials in the Gulf crisis is that we must bring deterrence home to totalitarian elites if we are to be most effective in avoiding aggressive war and human rights violations. The sad reality is that these elites, including Saddam Hussein by his demonstrated behavior, are prepared to sacrifice thousands of their own people in pursuit of their vile aggression. Deterrence, even if at the margin, must begin to work directly on these regime elites as they make deci-

2. Fourth Geneva Convention, art. 146, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

3. U.N. Docs S/RES/670, S/RES/674 (1990).

sions to commit aggression and human rights violations. In my judgment, this point is of far greater importance in creating a structure for peace than has been generally understood.

II. RESPONDING TO ARGUMENTS AGAINST HOLDING WAR CRIMES TRIALS

At a time during the Gulf crisis when it was still possible to obtain Iraqi acceptance of Security Council resolutions without the sacrifice of coalition force men and women, an argument could be made with some strength that war crimes trials might inhibit the chances for a peaceful settlement. Because coalition forces were required to physically evict Saddam Hussein and his forces from Kuwait, however, there would no longer seem to be any merit in such an argument. Indeed, perhaps it is a good message for future aggressors that if they force a military defeat as the only means for reversing their aggression, then they can expect war crimes trials.

At the time of the Nuremberg trials, a plausible (although incorrect) argument was made that planning and ordering an aggressive war were not offenses giving rise to personal criminal accountability. Since Nuremberg, and the International Law Commission adoption of the Nuremberg principles, this argument has no merit whatever. Moreover, this argument certainly has no merit with respect to trials for grave breaches of the Third and Fourth Geneva Conventions, which have been settled law for over forty years. In this respect, it might be noted that if Saddam Hussein ordered the kidnapping of thousands of Kuwaiti hostages or the torching of 600 to 700 Kuwaiti oil wells,⁴ then he committed grave breaches of the Fourth Geneva Convention, just to select two visible grave breaches of the Geneva Conventions. As such, *all* of the States bound by the Geneva Conventions are *now* legally bound to search him out and either try him or extradite him for trial.

A third concern with war crimes trials is that they may interfere with international relations or exacerbate regional tensions. But such arguments were also made against taking any military action in the Gulf crisis. The real cost in settings as outrageous as the Gulf crisis may be in giving an impression for the future that such depraved actions are acceptable and will incur no responsibility. Moreover, even if this argument that international relations may be affected were

4. See L.A. Times, Mar. 12, 1991, at 3, col. 1.

correct, is not the rule of law worth even considerable costs? Did we not just fight and win a major conflict for this principle?

A fourth concern is that war crimes trials could become a loose cannon on the deck—aimed in every direction including the United States and its allies. The answer to this objection, however, is obvious. Major war crimes trials should be seriously entertained only in settings of substantial clarity that aggression has been committed or that violations of the laws of war have been committed. In this respect, there are few clearer settings in modern international law than the aggression and human rights violations of Saddam Hussein in the Gulf crisis. The United States need not fear the rule of law; it is a major objective of our foreign policy. Efforts to carry out politicized war crimes trials—which have been frequent in recent years against the United States and its allies—should be rejected, as they have been, for the politicized exhibitions that they are.

Finally, there has been a general misunderstanding that war crimes trials necessarily require the presence of the accused. Normally, of course, that would be strongly preferable, but it would not be impossible to try persons accused of war crimes even in absentia. Any such accused persons should, of course, be offered an opportunity to participate, and such trials should be scrupulously honest and fair—but it is not an absolute bar to war crimes trials that a nation refrains from taking steps to topple a government militarily and seize its leaders for trial. The results of any such trials carried out against an accused in absentia could be made binding on all nations in the world through Security Council action, thus affecting the future freedom of movement of those convicted. Indeed, even indictments based on probable cause and filed with Interpol would seem to give rise to an obligation by 166 nations adhering to the Geneva Conventions either to try or extradite such accused persons found within their jurisdiction at any time in the future.

III. SOME PROCEDURAL POINTS

A number of procedural points are also worth noting in connection with violations of the laws of war in the Gulf crisis. These are:

- In addition to, or even in the absence of war crimes trials, the Government of Iraq is liable in state-to-state damages for reparations for such violations of the laws of war, and it is possible that individual Iraqis who have committed grave breaches of the laws of war may be liable for civil damages in national courts around the world.

- Whether or not war crimes trials are held, an important step that should be taken is that one or more commissions of impeccable international credentials and ability should begin work at an early time to document fully the Iraqi violations of the laws of war. The work of such commissions is as important for history as it is to lay the groundwork for possible war crimes trials. It is essential that future generations in Iraq, and indeed in the whole world, understand the reality and the extent of the Iraqi atrocities. In the Gulf crisis, I would prefer to see prestigious commissions established independently by both the United Nations Security Council and the Gulf Co-operation Council. I gather that on March 6, 1991, the U.N. Human Rights Commission authorized a report on Iraqi violations of human rights standards in its illegal occupation of Kuwait.
- With respect to the auspices of any such trials, there are a number of possibilities: Security Council authorization of an ad hoc international tribunal; authorization of such an ad hoc international tribunal by the allied coalition (as at Nuremberg and the Military Tribunal for the Far East);⁵ or by the Gulf Co-operation Council;⁶ or by the Arab League;⁷ or trials by individual nations in their own tribunals, such as by the State of Kuwait for violations of the Third and Fourth Geneva Conventions with respect to citizens and nationals of Kuwait, and possibly by the United States for violations of the Third Geneva Convention with respect to former United States prisoners of war. I believe that the best option would be a Security Council authorized ad hoc international tribunal that would try for crimes against peace as well as for war crimes. Another important option would be such a tribunal established by either the coalition or the Gulf Co-operation Council.

5. See R. Jackson, Report on the International Conference on Military Trials, 99 (1945).

6. The Gulf Co-operation Council was established in 1981 as an attempt to implement a regional common market, see U.N.T.S. 1/21244. Members include Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates.

7. The Arab League was established by the Pact of the League of Arab States in 1945, see 70 U.N.T.S. 237. Members include Egypt, Iraq, Lebanon, Saudi Arabia, Syria, Jordan, Yemen, Algeria, Kuwait, Libya, Morocco, Sudan and Tunisia.

IV. CONCLUSION

Mr. Chairman, the aftermath of the Gulf crisis is an important crossroads. The world community can respond to one of the truly outrageous atrocities in human history by vigorously insisting on a meaningful rule of law as it seeks a new world order, or it can succumb to "old thinking" and sweep war crimes violations under the rug. I would like to say in this connection that as a practical matter the allies accepted such "old thinking" after World War I. Perhaps the horror of World War II might at least have been lessened if the allies had stuck with the Versailles Treaty and their convictions and insisted that those who committed war crimes were criminals to be placed meaningfully on trial rather than to become celebrated as national heroes.

In considering this choice, I would particularly urge reflection on the following three points. If we are serious about the important humanitarian and environmental standards embodied in the laws of war, do we not have a responsibility to hold accountable those who commit grave breaches of these laws? Is it not important to live up to our existing international legal obligations under the Third and Fourth Geneva Conventions to seek out and either try or extradite those alleged to have committed grave breaches of these important Conventions? And if we seek peace more broadly, is it not important that we seek to add deterrence at a more personal level to the regime elites actually engaged in planning and ordering aggressive war and brutal war crimes?

Thank you.

ANNEX ON POTENTIAL IRAQI
VIOLATIONS OF THE FOURTH GENEVA CONVENTION

Any full accounting of Iraq's violations of the laws of war, and particularly of its violations of the Fourth Geneva Convention during its brutal illegal occupation of Kuwait, will likely await reparations proceedings or war crimes trials following the Gulf crisis. There have been, however, widespread allegations of continuing violations of the following provisions, among others, in Iraq's attack against and brutal occupation of Kuwait:

- seizure and destruction of property in Kuwait and pillage of Kuwait in violation of the 1907 Hague IV Regulations;
- disregard for the obligation to facilitate inquiries made by members of families and to encourage the work of the International Committee of the Red Cross, as provided by article 26 of the Fourth Geneva Convention (Iraq refused all access to Kuwait by international observers such as the International Committee of the Red Cross);
- inhumane treatment of protected persons, as prohibited by article 27 of the Fourth Geneva Convention, including willful killing and the protection of women against rape;⁸
- physical coercion exercised against protected persons to obtain information, as prohibited by article 31 of the Fourth Geneva Convention;
- torture and brutality directed against protected persons, as prohibited by article 32 of the Fourth Geneva Convention;
- collective penalties, pillage, and reprisals, as prohibited by article 33 of the Fourth Geneva Convention;
- the taking of hostages, as prohibited by article 34 of the Fourth Geneva Convention;

8. For an initial preliminary report on widespread charges of Iraqi torture, willful killing, rape, pillage, and collective reprisals, see Amnesty International News Release, "Iraqi Forces Killings [sic] and Torturing in Kuwait, Says Amnesty International Fact-Finding Team," AI Index: MDE 14/15/90, Distr: SC/PO (Oct. 3, 1990); see also Amnesty International Report, "Iraq/Occupied Kuwait Human Rights Violations Since 2 August," AI Index: MDE 14/16/90, Distr: SC/CO/GR (Dec. 19, 1990). For a personal testimony to the brutality of the Iraqi occupation of Kuwait and the courage of the Kuwaiti people, see N.Y. Times, Jan. 14, 1991, at A17, col. 1.

- mass transfers, detention of protected persons in areas particularly exposed to the danger of war, or transfers of part of an occupying power's own population into the territory it occupies, as prohibited by article 49 of the Fourth Geneva Convention;
- compelling protected persons to serve in the armed forces of the occupying power, as prohibited by article 51 of the Fourth Geneva Convention;
- destruction of property where not absolutely necessary for military operations, as prohibited by article 53 of the Fourth Geneva Convention, particularly the sickening destruction of Kuwait City and the torching of over 600 oil wells even after Iraqi forces had agreed to withdraw from Kuwait;⁹
- setting up places of internment in areas particularly exposed to the danger of war, as prohibited by article 83 of the Fourth Geneva Convention;¹⁰
- the use of foreign civilian hostages and prisoners of war to immunize military objectives in violation of article 28 of the Fourth Geneva Convention and article 23(1) of the Third Geneva Convention;
- compelling persons in occupied territories to swear allegiance to the occupying power, as prohibited by article 45 of the 1945 Hague Regulations; and
- refusal to provide information concerning internees and prisoners of war pursuant to the Third Geneva Convention.

9. The intentional dumping of millions of barrels of Kuwaiti (and Saudi) oil into the Gulf and the torching of 600 to 700 oil wells in Kuwait would seem to be particularly egregious examples of Iraq's violation of article 53 of the Fourth Geneva Convention.

10. Article 147 of the Fourth Geneva Convention lists the provisions of the Convention the violation of which is a "grave breach." Fourth Geneva Convention, art. 147, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

ANNEX ON POTENTIAL IRAQI
VIOLATIONS OF THE THIRD GENEVA CONVENTION

Cable News Network (CNN) reports of January 20, 1991, and subsequent reports from many sources, strongly suggested that, with respect to the treatment of the coalition prisoners of war which have fallen under Iraqi control, Iraq was also violating the Third Geneva Convention. These violations of the Geneva Convention Relative to the Treatment of Prisoners of War are additional grave violations of the laws of war committed by Iraq in the Gulf crisis. Sadly, these grave violations of the Third Geneva Convention follow a pattern of abuse of prisoners by Iraq during the eight-year Iran-Iraq War (1980-88).¹¹

Article 5 of the Third Geneva Convention provides: "The present Convention shall apply to the persons referred to in Article 4 [prisoners of war] from the time they fall into the power of the enemy and until their final release and repatriation."¹² Some of the important applicable Convention provisions, among others, that Iraq seems to be violating or has threatened to violate include the following:

ARTICLE 12

Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

. . . .

ARTICLE 13

Prisoners of war must at all times be humanely treated. . . .

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.

. . . .

11. A 1985 mission sent to Iran and Iraq by the Secretary-General of the United Nations to appraise the handling of POWs by both sides in the Iran-Iraq War concluded that both parties were in substantial violation of the Third Geneva Convention. The mission found, however, that "[p]hysical violence appeared to be particularly common in POW camps in Iraq." Report of the Mission, U.N. Doc. S/16962, at para. 272 (1985).

12. Third Geneva Convention, *supra* note 1, art. 5.

ARTICLE 17

. . . .
No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

. . . .

ARTICLE 19

Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger.

. . . .

Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone.

. . . .

ARTICLE 23

No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.

. . . .

ARTICLE 69

Immediately upon prisoners of war falling into its power, the Detaining Power shall inform them and the Powers on which they depend, through the Protecting Power, of the measures taken to carry out the provisions of the present Section. . . .

ARTICLE 70

Immediately upon capture, or not more than one week after arrival at a camp, even if it is a transit camp, likewise in case of sickness or transfer to hospital or to another

camp, every prisoner of war shall be enabled to write direct to his family, on the one hand, and to the Central Prisoners of War Agency provided for in Article 123, on the other hand, a card similar, if possible, to the model annexed to the present Convention, informing his relatives of his capture, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any manner.

ARTICLE 71

Prisoners of war shall be allowed to send and receive letters and cards.

. . . .

ARTICLE 78

. . . .

[Prisoners of war] shall also have the unrestricted right to apply to the representatives of the Protecting Powers either through their prisoners' representative or, if they consider it necessary, direct, in order to draw their attention to any points on which they may have complaints to make regarding their conditions of captivity.¹³

13. *Id.*, arts. 12, 13, 17, 19, 23, 69, 70, 71, 78. A recent Washington Post article reports the following in discussing Iraqi violations of articles 69 and 70 of the Third Geneva Convention:

The Defense Department changed the classification of seven U.S. fliers captured by Iraq from "missing in action" to "prisoner of war" yesterday, although it has not been formally informed of their detainment by Iraq as called for under the Geneva Conventions.

The seven were displayed last week on Iraqi television. Some of their faces appeared bruised and swollen. Some were displayed more than once and some gave statements that U.S. officials believe were coerced. The broadcasts were aired in the United States and elsewhere.

Under the Geneva Conventions, which outline international standards for treatment of captured enemy troops in wartime, nations holding prisoners are obligated to formally report their identities to the International Committee of the Red Cross through the use of the "capture card system," Pentagon spokesman Pete Williams said yesterday.

"We're not going to get those, it would appear," he said.

Wash. Post, Jan. 29, 1991, at A12, col. 4.

“It is good that we have adopted a universal human yardstick of good and evil, that we are calling aggression by its proper name and consider it necessary to condemn and punish its perpetrator and to help the victim of injustice.

. . . .

What we need . . . is to create as soon as possible a moral and legal environment in which anyone guilty of grave crimes against humanity, of participating in atrocities, in taking hostages, acts of terrorism or torture, and those guilty of particular ruthlessness in the use of force, could not escape punishment and would not be absolved from personal responsibility even if they acted under orders.”

Eduard Shevardnadze, Address
to the United Nations General
Assembly, September 25, 1990.

