The Gulf War 1990–91 in International and English Law

Edited by
Peter Rowe
The Gulf War 1990–91 in International and English Law

There is no doubt that international law was of major importance during the Gulf conflict of 1990–91. Military and other actions were repeatedly justified through reference to international law, and disputes about interpretation were frequent.

This book provides a definitive legal analysis of the conflict, with reference both to international and to English law. Some have been tempted to argue that international law is an ineffective means of controlling the activities of a state and its armed forces from the fact that there were no war crimes trials of the leaders of Iraq, or any other state. International law does, however, provide a set of norms either (a) agreed to by individual states through ratification of, or access to, a treaty, or (b) which apply to all states by the operation of customary international law and other secondary sources. This book determines these norms as a means of judging the manner in which individual states recognized the binding nature of them in the conduct of their operations. The contributors are all legal experts in their fields, and include military lawyers from each of the three British armed services.

The Gulf War 1990–91 in International and English Law is aimed particularly at international lawyers and at students of international relations. As it considers the effects of hostilities, not officially amounting to a war, on commercial contracts, and on the rights of foreign nationals in the United Kingdom, it will also be of value to those with an interest in commercial and public law.

Peter Rowe is Professor of Law and Head of the Department of Law at the University of Liverpool, England. He is currently Chairman of the United Kingdom Group of the International Society for Military Law and the Laws Of War. All authors’ royalties from the sale of this book will be donated to The Gulf Trust, which was established in February 1991 to cater for the relief of needs arising amongst the beneficiaries. The beneficiaries of The Trust are members of the Armed Forces involved in military and other operations relating to or in connection with the Gulf conflict, and civilian persons attached to or accompanying such forces, and their respective dependants.
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David Garratt became a solicitor in 1973 and went into private practice in Warwick for two years before joining the Legal Branch of the Royal Air Force in 1975. His work has consisted of prosecution at numerous courts martial, advice on a wide range of legal issues affecting the Royal Air Force both at home and abroad, advice on and instruction in the laws of armed conflict and the revision of service publications such as *The Manual of Air Force Law*. During the Gulf conflict he was a legal adviser to the Joint Headquarters and a member of a group of service and civilian lawyers advising the Ministry of Defence. He has been promoted three times since joining the RAF and now holds the rank of Group Captain.


Françoise J. Hampson is Senior Lecturer in Law at the Human Rights Centre of the University of Essex. Her publications have been mainly in the fields of nationality law, the law of armed conflicts and the European Convention on Human Rights. She has taken part in human rights fact-finding missions, has represented applicants before the European Commission and Court of Human Rights and has taken part in training sessions in the law of war for US Marines and Canadian forces. She is on the Red Cross Panel of Instruction, nationally and internationally.

Anthony H. Hudson is Professor of Common Law and formerly Dean of the Faculty of Law in the University of Liverpool having previously held appointments in the Universities of Hull, Birmingham and Manchester. He has contributed commercial and common law topics to a number of books and legal periodicals.

Shaun Lyons joined the Royal Navy in 1961, specializing in logistics and administration, and has served in a wide range of appointments, both ashore and afloat. In 1972 he attended the Inns of Court School of Law and in 1975 was called to the Bar. In 1989
he studied at the Research Centre for International Law in Cambridge before taking up his appointment as Chief Naval Judge Advocate in the rank of Captain.

Hilaire McCoubrey read law at Trinity College, Cambridge and having qualified as a solicitor, was appointed a Lecturer in Law at Nottingham University in 1978. He was appointed a Senior Lecturer in 1991 and is Director of the Nottingham University Centre for International Defence Law Studies. His teaching subjects include the laws of armed conflict, whilst his main research interests lie in that area and in legal theory. His published books include *The Development of Naturalist Legal Theory* (Croom Helm, 1987), *Effective Planning Appeals* (BSP, 1988) and *International Humanitarian Law* (Dartmouth, 1990).

Michael Meyer is Head of International Law at the British Red Cross. He is a graduate of Yale University and has degrees in international law and international relations from the University of Cambridge. He is an English barrister and has written articles on humanitarian matters related to armed conflict and disaster relief.

Gordon Risius was admitted as a solicitor in 1972 and was commissioned into the Army Legal Services in 1973. He has held the following appointments: Instructor, International Institute of Humanitarian Law, San Remo, Italy, 1989–91; Assistant Recorder, South-Eastern Circuit since 1991; Army Legal Staff Officer responsible for law of war matters, 1989–92. Currently Colonel Legal Staff, Ministry of Defence.


Peter Rowe is Professor of Law and Head of the Department of Law at the University of Liverpool. He has run courses for legal officers of the British Army and the Royal Air Force on the laws of war and has published *Defence: The Legal Implications* (Brasseys, 1987) and a number of other books and articles. He is currently chairman of the UK Group of the International Society for Military Law and the Laws of War. He gave a number of television and radio interviews during the Falklands and Gulf wars.

David Travers has taught at the University of Waterloo in Ontario, Canada; the University of Keele; the Open University; and Lancaster University. He has also been a Visiting Scholar at Columbia University, New York. At Lancaster he is a lecturer in Politics and Director of Graduate Studies. He specializes in international institutions, especially international peace-keeping bodies, United States foreign policy, and diplomacy. He has published articles recently about United States foreign policy and the United Nations and the Gulf War. During the Gulf crisis he was a regular contributor to Radio Cumbria and took part in a discussion programme on Radio Scotland.
Bernadette Walsh was a lecturer at the University of Liverpool from 1986–92. She has published articles on family law and public law and is a co-author of *Cases and Materials on Constitutional Law* (Blackstone Press, 1990).

Marc Weller is an Assistant Lecturer at the University of Cambridge and is a Research Fellow of the Research Centre for International Law and of St Catharine’s College, Cambridge. He is a joint editor of Lauterpacht, Greenwood, Bethlehem and Weller, *The Kuwait Crisis: Basic Documents* (Grotius Publications, 1991) and editor of *Iraq and Kuwait: The Hostilities and their Aftermath* (Grotius Publications, 1993).
Preface

This book is an attempt to analyse whether both international law and English law were effective as guidelines in dealing with the events of the Gulf conflict of 1990–91. It is hoped also that it will form an accurate account of those events that had legal significance and that it will indicate areas where either international or English law might be clarified or amended. The book has been compiled from a British perspective, but it is hoped that much of it will be relevant to those with an interest in such matters from other jurisdictions.

Some may be tempted to argue that international law is an ineffective means of controlling the activities of a state and its armed forces from the fact that there were no war crimes trials of the leaders of Iraq, or indeed, of any other state, at the conclusion of hostilities. International law does, however, provide a set of norms either agreed to by individual states through the ratification of, or accession to, a treaty or which apply to all states by the operation of customary international law and other secondary sources. This book attempts to determine these norms as a means of judging the manner in which individual states recognized their binding nature in the conduct of their operations.

Events unfolding in the Gulf had their effect also on English law. Two groups in particular, prisoners of war and foreign nationals, owed their rights to international law through the Geneva Conventions of 1949, but those who found themselves in the United Kingdom during the conflict had to be dealt with under English law. The way in which this was done is also analysed in this book.

The original idea for this collection developed from discussions held by members of the United Kingdom Group of the International Society for Military Law and the Laws of War, a number of whom have contributed, with others, to it.

I should like to convey my gratitude to all contributors, who bore my many demands with considerable equanimity, and to the publishers for their patience when, like a jigsaw puzzle, missing pieces were gradually put together until this book took its final shape. I am grateful also to Colin Wheeler for his permission to use in Chapter 11 his cartoon, which was first published in *The Independent*. I should also like to thank Gordon Smith, Senior Editor of my publishers, for his patience and advice, and my secretary, Ann Doherty, for her keen attention to detail which has saved this work from many a blemish.

*Peter Rowe,*
*Liverpool,*
*April 1992*
Introduction

The title of this book would seem to suggest that a ‘war’ had taken place in the Gulf; confusion ensues when it is referred to also as a ‘conflict’. The reason for the virtual synonymous use of these terms is that declarations of war, or a formal recognition by states that they are at war, occur rarely in modern international practice. As a means of describing that part of international law applicable when the armed forces of states are involved in an armed conflict the term ‘laws of war’, or the *jus in bello*, is still commonly applied. In order to avoid confusion the 1949 Geneva Conventions, and indeed earlier treaties that refer to ‘war’, apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them [and] to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

(Article 2)

As between Iraq and Kuwait these treaties came into operation on 2 August 1990 when the former invaded, and subsequently occupied, the latter. They certainly applied also between Iraq and members of the coalition forces when hostilities began on 16 January. The question as to whether the British, American and other nationals who were held as hostages in Iraq between 16 August and 13 December 1990 were protected persons under the Geneva Convention IV is addressed by Michael Meyer in Chapter 11.

In English law the legal effects of a war have been fairly well developed by Parliament and by the courts to reflect previous practice, especially in both World Wars where there was no doubt that the country was at war. It soon became obvious that English law would have to provide answers to issues raised where the formal state of war did not exist between the United Kingdom and Iraq. These issues are addressed in Part II of this book.

A treaty will be binding on a state if it is a High Contracting Party to it, either by signing and ratifying it or by acceding to it. In addition, Article 38 of the Statute of the International Court of Justice indicates that international law includes ‘international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations’ and such matters as judicial decisions. As between the principal states involved, the following treaties were the most significant, and applied as indicated*:

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In addition, the Hague Convention IV and Regulations on Land Warfare 1907 are widely accepted as reflecting customary international law and, as such, are binding on all states.

It will be noted that the First Additional Protocol 1977 to the Geneva Conventions of 1949 was not binding on Iraq, France, the UK or the USA as a treaty, since none of these states was a party to it. Many of its provisions, however, do reflect customary international law, an issue discussed by Christopher Greenwood in Chapter 4 but raised also in a number of other chapters in Part I of the book, especially by Françoise Hampson in Chapter 5 and by Adam Roberts in Chapter 6.

There was no doubt about the applicability of the four Geneva Conventions of 1949 during the conflict itself. These deal with the wounded, sick and shipwrecked, prisoners of war, and civilians. Chapters 8–10 detail the treatment accorded to these ‘victims of war’ in the Gulf region, while Chapters 14 and 15 discuss how these issues were handled in the UK. The problems encountered by the International Red Cross and Red Crescent Movement both in the Gulf region and within the UK in attempting to assist these ‘victims’ is explored in Chapter 11.

The impact of international law on the planners of military operations is brought out well in Chapter 7 by Captain Shaun Lyons. Moreover, it should not be thought that military lawyers are consulted only if things go wrong, or that the normal disciplinary procedures are placed in suspension during military operations. In Chapter 3 Group Captain David Garratt illustrates the extent to which military lawyers were involved in the planning stage of military deployment and action and how what might be considered to be the normal peacetime professional activities of military lawyers continued in the Gulf region.

The fact that no major war crimes trials have, at the time of writing, been instigated to try those alleged to have committed such acts does not detract from the principle that an individual may be held liable for a breach of the laws of war. This issue is discussed by Françoise Hampson in Chapter 12, while in Chapter 13 Lady Hazel Fox analyses the liability of Iraq to pay compensation resulting from its unlawful invasion and occupation of Kuwait through the creation by the UN of a Compensation Commission.
Finally, whilst in British military circles the Gulf conflict was known as Operation Granby, the American terminology of Operation Desert Shield and then Desert Storm is more likely to evoke the true nature of the activities in the Gulf region from 2 August 1990 to 3 April 1991, when the UN Security Council adopted Resolution 687.

Peter Rowe,
Liverpool,
April 1992
Part I
The Gulf War 1990–91 in international law
Chapter 1
A chronology of events

David Travers

1990

1 August Talks between Iraq and Kuwait in Jeddah broke down. Iraqi troops massed on the Kuwaiti border.

2 August Iraq invaded Kuwait at 3.00 a.m. GMT. The Emir and his family fled to Saudi Arabia. The Iraqi government claimed that it had intervened in Kuwait in response to a request from the ‘democratic Government of Kuwait’ which had overthrown the Al Sabahs. The Security Council, acting under Chapter VII of the Charter, approved Resolution 660 (14–0–0, Yemen absent) which condemned the invasion, demanded unconditional withdrawal and called upon Iraq and Kuwait to begin intensive negotiations to solve their differences.

The United States and United Kingdom froze Kuwait assets; the United States also froze Iraqi assets and suspended purchases of Iraqi oil. The Soviet Union announced an arms embargo against Iraq.

3 August Fourteen Arab League states condemned Iraqi invasion and called for an immediate withdrawal. Iraq announced that it would begin to withdraw troops from Kuwait on 5 August. Gulf Co-operation Council Ministerial Council held an emergency session in Cairo and condemned the Iraqi invasion.

There were press reports that Iraqi troops were deploying on the Saudi border. President Bush warned Iraq not to invade Saudi Arabia. The United States and United Kingdom announced that naval vessels were being sent to the Gulf.

The Soviet Foreign Minister and United States Secretary of State, meeting in Moscow, jointly condemned the invasion and called for a world-wide ban on arm sales to Iraq.

4 August An emergency meeting of the European Community in Rome agreed economic sanctions against Iraq. President Bush met advisers at Camp David; he then called King Fahd of Saudi Arabia to offer aid. Satellite photographs indicated reinforcement, not withdrawal, of Iraqi forces.

5 August Iraq claimed that it had withdrawn some of its armed forces from Kuwait. President Bush stated that the United States and its allies would not allow the setting-up of a puppet regime in Kuwait, and that Iraq had lied about withdrawal.

6 August The United Nations Security Council approved Resolution 661 imposing extensive mandatory economic sanctions against Iraq and Kuwait (13–0–2, Yemen and Cuba abstaining).

A large group of foreigners were moved by the Iraqi government from Kuwait to Baghdad. US Chargé d’Affaires Joseph Wilson met with Saddam Hussein in Baghdad and restated the US demand for the withdrawal of Iraqi forces from Kuwait. Saddam announced that the seizure of Kuwait was irreversible.
6/7 August Richard Cheney, the United States Secretary of Defense, visited Saudi Arabia and Egypt. The Secretary showed satellite photographs to Saudi officials detailing Iraqi troop concentrations along the northern border. King Fahd then invited friendly forces to Saudi Arabia to reinforce its defences. President Bush ordered a squadron of F15 fighter aircraft to Saudi Arabia, as well as the 82nd Airborne Division.

7 August Turkey closed the oil pipelines from Iraq. Iraqi oil exports through Saudi Arabia ceased because the storage tanks at Mu’ajjiz were full.

Switzerland applied economic sanctions against Iraq. A Soviet foreign affairs spokesman stated that the Soviet Union fully supported Security Council Resolution 660.

8 August The United Kingdom announced that British forces would be deployed to defend Saudi Arabia and the Gulf region. President Bush, in a Presidential address to the people of the United States, formally announced the deployment of United States armed forces to defend Saudi Arabia. He stated that the sovereign independence of Saudi Arabia was of vital interest to the United States; that appeasement did not work; that US policy was guided by four principles: the demand for the withdrawal of Iraqi forces from Kuwait; restoration of the legitimate government of Kuwait; a US commitment to peace and stability in the Gulf; and the protection of American lives in the region.

9 August The Security Council unanimously adopted Resolution 662 which declared that Iraq’s annexation of Kuwait was null and void.

The Iraqi government announced that diplomatic missions in Kuwait must be closed and their activities transferred to Baghdad by 24 August.

President Mitterrand ordered the French aircraft carrier Clemenceau to the Gulf.

10 August Australia stated that two guided missiles frigates and a tanker would be sent to the Gulf.

Saddam Hussein called for a jihad against the United States and corrupt Arab leaders.

11 August Douglas Croskery—a British citizen—was shot by an Iraqi soldier as he attempted to escape into Saudi Arabia.

A squadron of RAF Tornadoes was deployed to Dhahran in Saudi Arabia. Egyptian and Moroccan troops landed in Saudi Arabia to deter an Iraqi invasion.

12 August A squadron of RAF Jaguar aircraft arrived in Thrumrait in Oman. The United States stated that it would use force if necessary to interdict trade with Iraq.

13 August Saddam Hussein offered a peace initiative: Iraq would withdraw from Kuwait if Israel withdrew from all the occupied territories and if Israel and Syria withdrew from Lebanon.

The Dutch government announced that it would send two frigates to the Gulf. The government of Pakistan stated that it intended to send ground forces to Saudi Arabia.

14 August Italy decided that it would order two frigates and a support ship to the Eastern Mediterranean. Belgium announced that it would send two mine-hunters and a support ship to the Mediterranean. President Assad expressed Syria’s support for United States military deployment. The Royal Navy started to challenge Gulf shipping.

15 August It was announced that Saddam Hussein had, the previous day, written to President Rafsanjani of Iran, offering to accept the Iranian conditions for a comprehensive settlement of the conflict between the two states.

US F-117 stealth fighters began deployment to the Middle East.

16 August The Iraqi authorities in Kuwait stated that United Kingdom nationals were required to assemble at the Regency Palace Hotel and United States nationals at the
International Hotel. President Bush ordered the US Navy to intercept shipping to and from Iraq and Kuwait.

17 August The Iraqi National Assembly decided that all nationals of those states that were participating in the economic embargo against Iraq and intended to attack the country would be interned until the threat of war against the country ended.

18 August The Iraqi Ministry of Labour and Social Affairs stated that the United States and its allies had begun to impose an economic blockade using force; that this was an act of war under international law; and that foreigners living in Iraq would suffer as a consequence of economic sanctions.

The Security Council adopted Resolution 664 (15–0–0) condemning Iraq’s actions against the foreign communities in Kuwait and Iraq.

Iraq ordered all Western nationals in Kuwait to assemble at the Meridien, International and Regency Palace Hotels. They were to be sent to strategic military and civilian sites to prevent ‘military aggression’. Iraq would not be responsible for the safety of any who failed to heed the instructions.

19 August Two United States warships fired shots across the bows of two Iraqi tankers in the Gulf.

Iraq stated that it would release hostages from those states which were not sending armed forces to the Gulf.

France ordered its fleet in the Gulf to use force if necessary to ensure compliance with UN sanctions against Iraq.

20 August President Bush referred to Americans detained in Iraq as hostages, in a speech given to the national convention of the Veterans of Foreign Wars. Iraq repeated its threat that if missions in Kuwait were not closed by 24 August, diplomats would lose their special status. The United States, the EC member states and Japan refused to close their missions. Iraq warned Iraqis and Kuwaitis that they risked the severest punishment if they sheltered and helped foreigners.

Greece decided in principle to send her frigate the Limnos to the Gulf. Germany stated that a destroyer was to be sent to join mine-hunters in the Eastern Mediterranean.

21 August President Mitterrand announced that French ground forces would be sent to the Gulf. Mrs Thatcher stated in a press conference that there would be no negotiations with Iraq while British hostages were held. A similar statement was made by the United States.

22 August President Bush called up over 40,000 military reservists. Syria announced that its troops had been deployed to Saudi Arabia.

23 August An RAF Squadron of Tornado GR1 strike bomber aircraft was deployed in Bahrain. The European Community announced that it had approved the expenditure of 1.3 m. ECUs to help fly refugees out of Jordan and to provide financial aid to Turkey and other countries whose economies had been badly hit by the Gulf crisis.

Saddam Hussein appeared on television with British hostages.

24 August Twenty-five diplomatic missions in Kuwait ignored the Iraqi demand that they should close. Iraq stated that diplomats from these missions would not be allowed to leave Iraq. Iraqi troops surrounded nine, including the UK and US missions. The United States provided $1 million to meet urgent humanitarian needs in Jordan.

25 August The Security Council adopted Resolution 665 (13–0–2, Yemen and Cuba abstained). This allowed navies assisting the Government of Kuwait to use force to
prevent breaches of the embargo. President Waldheim of Austria visited Iraq and returned with ninety-five released Austrian citizens.

26 August The Emir of Qatar announced an agreement to extend military facilities to friendly states at their request.

27 August The United States decided to expel thirty-six of the fifty-five Iraqi diplomats and non-diplomatic staff members from the Embassy in Washington in response to Iraq’s illegal order to close the US Embassy in Kuwait.

28 August The United States deployed armed forces to Qatar. Iraq announced that Kuwait had become the nineteenth province of Iraq. Iraq declared that all foreign women and children would be allowed to depart from Kuwait and Iraq, providing that they had exit visas, beginning on 29 August.

29 August Iraq stated that men as well as women would be allowed to leave Iraq, if the United States promised not to attack.

Japan announced that it would provide $1 bn. for co-operation with the multinational forces in the Gulf; substantial additional help for front-line states and $10 m. assistance for refugees in Jordan. It would also send civilian cargo planes to deliver non-military supplies and a team of 100 medical personnel to the Gulf region. Saudi Arabia offered $100 m. aid to Egypt to resettle Egyptian refugees from Iraq.

The United Nations Secretary-General asked the United Nations Disaster Relief Office to co-ordinate humanitarian assistance arising from the Gulf crisis.

30 August President Bush announced a plan to persuade allied states to share the financial burden of sanctions and the expenses of the deployment of US armed forces to the Gulf.

The first Pakistani troops were sent to Saudi Arabia. HMS Gloucester was deployed to the Gulf.

31 August The Danish parliament approved the deployment of a corvette to the Gulf. The Norwegian government approved the deployment of a coastguard vessel to the Gulf.

United Nations Secretary-General Perez de Cuellar and Foreign Minister Aziz of Iraq held discussions in Amman, Jordan.

1 September Evacuation of British women and children from Iraq began.

2 September The Iraqi government insisted that foreign evacuees from Kuwait must leave via Baghdad and that all foreigners must depart only on chartered Iraqi Airlines aircraft. At his press conference in Amman, the Secretary-General revealed his disappointment with the position adopted by Iraq.

4 September Mr Shevardnadze called for an international conference on the Middle East; he stated that Israeli agreement could exert a positive influence on the Gulf crisis.

The International Organization for Migration and the United Nations Disaster Relief Office began the airlift of Bangladeshi refugees from Amman to Dhaka.

Iraq announced that it would not be held responsible if foreigners faced food shortages.

Senegal announced that it would send troops to Saudi Arabia. They left on 17/18 September.

Pakistan announced the temporary closure of its Embassy in Kuwait, due to ‘difficult circumstances’.

5 September The Turkish parliament authorized the government to permit the stationing of foreign troops and the deployment of the army abroad.
6 September The United Kingdom parliament reconvened for a two-day debate on the Gulf crisis.

7 September The United States placed Iraq on a list of states sponsoring terrorism.

8 September Mr Lilley, the United Kingdom Secretary of State for Trade and Industry, announced that it would be permissible under Security Council Resolution 661 to export medical supplies to Iraq and Kuwait.

10 September Presidents Bush and Gorbachev, after their summit meeting in Helsinki, demanded the complete and unconditional withdrawal of Iraqi troops from Kuwait and reaffirmed their support for all the five United Nations Resolutions. They agreed that if the current measures were not successful then additional measures, under the Charter, would be considered.

Iraq announced that free oil would be made available to third world states if they could arrange to collect it. Iran and Iraq agreed to renew full diplomatic relations.

11 September Navies in the Gulf agreed to co-ordinate patrols to enforce better United Nations sanctions against Iraq. Greece withdrew its remaining diplomats from its mission in Kuwait.

12 September The Secretary-General appointed Saddruddin Aga Khan his personal representative for humanitarian assistance. Iraqi soldiers entered the residence of the Netherlands’ Ambassador to Kuwait and removed the Dutch flag. The Swiss and Austrian Ambassadors left Kuwait.

United Nations officials state that Iraq was refusing to allow direct food shipments to foreign nationals trapped in Kuwait and Iraq.

13 September The Security Council adopted Resolution 666 (13–2–0 Cuba and Yemen opposed). Iraqi troops entered the Canadian Embassy in Kuwait.

14 September The United Kingdom announced that the 7th Armoured Brigade would be sent to Saudi Arabia and a further eighteen Tornado aircraft to the Gulf. Italy announced the deployment of additional naval vessels and eight Tornado aircraft to the Gulf. Canada announced the deployment of up to eighteen CF-18 fighter aircraft to the Gulf. Japan announced a further contribution of $2 m. in aid to Egypt, Jordan and Turkey, and $1 bn. to financing the multinational force.

Iraqui troops entered the residence of the French Ambassador to Kuwait. French diplomats and nationals in the residence were abducted.

15 September France announced that it had deployed 4,000 troops and thirty combat aircraft to the Gulf.

Belgian diplomats in Kuwait were forbidden to move between the Residence and the adjacent Chancery building.

16 September The Security Council unanimously approved Resolution 667. Germany announced a DM 3.3 bn. financial contribution to the US military effort in the Gulf and to Egypt, Jordan and Turkey.

17 September The Foreign Affairs Council of the European Council met in Brussels. It agreed to the expulsion of Iraqi military attachés and restrictions on the freedom of movement of Iraqi diplomats in protest against the Iraqi invasion of the diplomatic missions of France, Belgium and The Netherlands in Kuwait. The United Kingdom ordered the expulsion of the Iraqi military attaché and staff and the deportation of twenty-three other Iraqis.
The Indian ship *Vishava Siddhi* left with food for Iraq and Kuwait, the distribution of which would be under international supervision.

Saudi Arabia and the Soviet Union re-established diplomatic ties.

*18 September* Argentina announced that it would despatch a combined force to the Gulf.

*19 September* Prince Sadruddin Aga Khan abandoned the United Nations aid mission after Iraq refused to admit him.

*20 September* Iraq ordered the expulsion of the British Defence Attaché and staff.

*21 September* Iraq ordered the expulsion of about forty diplomatic staff from Baghdad, including the military attachés from the United States, France, Germany, Italy, The Netherlands, Spain and Greece.

*22 September* Saudi Arabia ended oil supplies to Jordan. It ordered the departure of Jordanian and Yemeni diplomats for activities which undermined the security of the Kingdom and its safety, and which were not compatible with the code of conduct and rules of diplomatic service.

*23 September* Saddam Hussein warned that he would retaliate against Saudi Arabian and Kuwaiti oilfields and Israel if attacked.


*25 September* Soviet Foreign Minister Shevardnadze addressing the United Nations General Assembly indicated that the Soviet Union would support the use of force if Iraq did not withdraw from Kuwait. The Security Council approved Resolution 670 (14–0–1, Cuba opposing).

The United Kingdom announced that two of the four staff left in the British Embassy in Kuwait were being withdrawn.

*27 September* The United Kingdom and Iran resumed diplomatic relations.

*28 September* The Foreign Office summoned the Iraqi Ambassador in London to clarify reports that Iraq intended to deny food rations to foreigners.

*1 October* President Bush told the United Nations General Assembly that an Iraqi withdrawal from Kuwait could provide opportunities for solving other disputes—such as the Arab-Israeli problems.

*3–5 October* Yevgeniy Primakov, Soviet Middle East expert and personal envoy of President Gorbachev, met with King Hussain and Mr Arafat in Amman and Saddam Hussein and Tariq Aziz in Baghdad.

*4 October* British Foreign Secretary Douglas Hurd stated that there was no hope of progress in the Palestinian issue until Saddam Hussein was driven out of Kuwait, but that it must be tackled as soon as the Gulf crisis was resolved.

*6 October* Two British diplomats left the Embassy in Kuwait and arrived in Baghdad. The Ambassador and another official remained.

*7 October* Israel began to distribute gas-masks to all civilians except Palestinians.

*8 October* President Mitterrand called for an international conference to deal with all Middle East conflicts.

Israeli security forces killed at least twenty-one Palestinians at the Temple Mount in Jerusalem. Saddam Hussein, commenting on the incident in Jerusalem, warned that Iraq had missiles that were capable of striking targets well within Israel.
9 October Japan revoked its invitation to Iraq to send a high level official to Emperor Akihito’s enthronement ceremony on 12 November.

Bolivia announced that because of an Iraqi troop raid in September it would close its Embassy in Kuwait.

15 October Mr Shevardnadze told the Supreme Soviet that the Soviet Union would not send troops to the Gulf. Iran and Iraq resumed diplomatic relations and reopened embassies in each other’s capitals.

16 October The first British combat troops from the 7th Armoured Brigade arrived at the Saudi port of Al Jubayl on the Persian Gulf.

17 October Mr Primakov met the Italian President in Rome, then visited Paris to consult with French officials.

18 October Mr Primakov discussed the Gulf crisis with Secretary of State James Baker and National Security Adviser Brent Scowcroft in Washington.

19–23 October Mr Edward Heath, former British Prime Minister, visited Jordan and Iraq. He obtained the release of thirty-seven sick and elderly Britons and the promise that another thirty would be allowed to leave at the end of their contracts.

20 October Canada withdrew diplomats from its Embassy in Kuwait.

23 October General Powell met General Schwarzkopf to discuss force deployment.

27 October Mr Gorbachev, in Spain, warned Iraq that it would not be able to upset the resolve of the world community, which wanted to see the crisis settled in accordance with United Nations resolutions.

27/28 October The European Council, meeting in Rome, declared that government representatives would not be sent to Iraq to negotiate the freedom of the hostages.

29 October The United Nations Security Council, by 13–0–2 abstentions (Yemen and Cuba), adopted Resolution 674.

31 October The British Foreign Secretary, speaking in London, said that the knowledge that the international community was prepared to use force was the most potent pressure.

4 November Iraq’s Minister of Information ruled out talks linked to a withdrawal from Kuwait.

4/10 November United States Secretary of State James Baker visited Bahrain, Saudi Arabia, Egypt, Turkey, the Soviet Union, the United Kingdom and France.

5 November The United States announced that more reservists would be called up.

7 November The Prime Minister told the House of Commons that time was running out for Saddam Hussein.

8 November President Bush announced that the United States would deploy additional armed forces to provide the coalition forces in the Persian Gulf with an offensive option. The President stated that the coalition forces in the Persian Gulf did not need additional United Nations approval for the use of military force to remove Iraq from Kuwait.

9 November The Second Secretary at the British Embassy, James Tansley, was expelled from Iraq.

10 November The Iraqi Second Secretary, Wajid Mardan, was expelled from the United Kingdom in retaliation.

After her meeting with Secretary of State Baker at 10 Downing Street, Mrs Thatcher stated that there was no need for a United Nations resolution granting authority to use force to remove Iraq from Kuwait, because the coalition forces already had such authority.
13 November Secretary of State Baker said that Iraq’s invasion and occupation of Kuwait threatened the economic lifeline of the West and that United States efforts to contain Saddam Hussein were to protect United States jobs.

14 November Defense Secretary Richard Cheney authorised the call up of 72,500 reservists.

15 November Saddam Hussein told ABC News that he was willing to negotiate a resolution of the Gulf crisis with Saudi Arabia and the United States but that he would not agree to a precondition that Iraqi forces be withdrawn from Kuwait before the negotiations.

Secretary of State Baker arrived in Brussels to begin a three-day visit to members of the Security Council. It was reported that he would discuss the need for a United Nations resolution granting authority to use military force to remove Iraqi forces from Kuwait.

President Bush told CNN that the world remained united against Saddam Hussein and Iraq’s aggression against Kuwait; and that he had not made a decision to launch an offensive action against Iraq, but maintained all options.

18 November Iraq announced that it would free the remaining 2,000 foreigners held hostage or trapped in Kuwait and Iraq in groups beginning on 25 December 1990 and ending on 25 March 1991, providing nothing was done to disturb the situation in the Gulf.

Allied forces began an amphibious and air assault training exercise in Saudi Arabia, some eighty miles south of the Kuwaiti border. US marines, navy and air force, Saudi marines, and British and French aircraft took part in the exercise. Iraq stated that the exercise was a provocation.

19 November Press reports stated that Iraq was to send 250,000 new troops to Kuwait.

20 November Iraq introduced the death penalty for hoarding grain.

22 November The British Defence Minister, Tom King, said that the 14,000-strong 4th Armoured Brigade would be transferred from Germany to Saudi Arabia to join the 7th Armoured Brigade as the 1st Armoured Division. The division would have 30,000 men, 175 Challenger tanks, 96 Scorpion or Scimitar light tanks, and 135 Warrior armoured fighting vehicles by mid-January 1991. A further two naval vessels were also to be deployed to the Gulf.

26 November Press reports stated that President Gorbachev had informed Iraqi Foreign Minister Tariq Aziz that Iraq should withdraw from Kuwait or face the consequences.

All British hostages held in Iraqi installations in Kuwait were moved to Baghdad.

27 November The United States Department of Defense stated that a total of 4,162 ships had been intercepted in the Gulf, whilst the navies were implementing United Nations sanctions against Iraq and Kuwait. Five hundred boardings had taken place and nineteen ships had been diverted. The US had been responsible for 320 of the boardings, coalition forces 162, and combined forces eighteen.

28 November The International Atomic Energy Agency announced after its inspection of Iraq’s reactors that it had found no evidence of the diversion of nuclear fuel from civilian to military purposes.

The United Nations Security Council unanimously adopted Resolution 677. The Iraqi Press Bureau in London stated that Iraq was threatened with famine and disease because of the United Nations embargo.

The United Kingdom and Syria resumed diplomatic relations.
29 November The United Nations Security Council adopted Resolution 678 by twelve votes to two (Cuba and Yemen), China abstaining.

30 November Iraq rejected Resolution 678, claiming that it was illegal and invalid.

President Bush invited Iraqi Foreign Minister Tariq Aziz to visit the United States in mid-December and offered to send James Baker to see President Hussein between 15 December and 15 January. The President said that he was willing to ‘go the extra mile’ for peace.

1 December Iraq accepted in principle President Bush’s invitation for talks, but stated that the Arab-Israeli problem would have to be at the forefront of the issues which Iraq would discuss in any dialogue.

An adviser to President Gorbachev stated that the USSR would not send troops to the Persian Gulf.

3 December Defense Secretary Richard Cheney informed the Senate Armed Forces Committee that Iraq would probably outlast the embargo, and that war was the only certain means of forcing an Iraqi withdrawal from Kuwait. The Iraqi Minister of Health claimed that 1,416 children under the age of five had died as a result of ‘the blockade of medicines’.

4 December A Soviet Ministry of Foreign Affairs statement appealed for energetic efforts to find a peaceful solution to the Gulf crisis and welcomed President Bush’s initiative.

The European Community decided that Tariq Aziz should be invited to meet the President during his return trip from Washington.

5 December CIA Director William Webster told the House of Representatives Armed Services Committee that the international trade embargo against Iraq had dealt a serious blow to the Iraqi economy; that mounting shortages would close everything but Iraq’s energy and military industries by the summer of 1991; that Iraqi armed forces could maintain their current levels of readiness for as long as nine months; and that there was no guarantee that economic hardship would compel Saddam Hussein to change his policies or would lead to internal unrest that would threaten his regime. Secretary of State Baker, appearing before the Senate Foreign Relations Committee, stressed the need to prepare for the possible early use of force.

6 December Saddam Hussein proposed that all foreigners should be allowed to go home in time for Christmas and the New Year. President Bush welcomed the hostage release but repeated that Iraq still had to withdraw from Kuwait without reservation and without condition.

7 December Iraq’s National Assembly approved the proposal that all foreigners should be allowed to leave Iraq if they wished.

9 December The text of the Decree permitting all foreigners to leave Iraq was published.

10 December In a press report attributed to Soviet sources, it was stated that Soviet Foreign Minister Eduard Shevardnadze had told Secretary of State James Baker that the Soviet Union would not deploy troops with the coalition forces in Saudi Arabia, because of opposition at home.

11 December France stated that it would send an additional 4,000 troops to reinforce the 6,000 troops already in the Gulf.

13 December The evacuation of Western nationals from Kuwait was virtually completed. The US Ambassador and four other diplomats left Kuwait; the Embassy remained technically open. The five diplomats had been confined to the Embassy, eating tinned
food and drinking swimming-pool water. Harold Walker, British Ambassador to Iraq was recalled for consultations.

16 December The British Ambassador and Consul left Kuwait; the Embassy remained technically open.

17 December The NATO Foreign Ministers, meeting in Brussels, issued a statement that there could be no partial solution to the demand for complete Iraqi withdrawal from Kuwait. Earlier, Secretary of State Baker had told his NATO allies that Iraq might partially withdraw from Kuwait as a ploy to divide the coalition against it.

US deployment reached 260,000.

18 December Amnesty International published a document detailing Iraqi atrocities in Kuwait.

21/22 December John Major, the new British Prime Minister, visited Washington. After meeting with the President he stated that the West was serious about its position that Iraq would have to withdraw from Kuwait.

23 December Secretary of Defense Richard Cheney and Colin Powell stated at a news conference in Saudi Arabia, at the end of a five-day tour of the Gulf, that the 300,000 American troops in Saudi Arabia and the Persian Gulf were ready to fight.

26 December Saddam Hussein addressed Iraqi Ambassadors recalled for consultations.

27 December According to a press account, coalition shipping enforcing the blockade had intercepted 5,833 cargo ships since August, requesting identification, cargo and destination; about thirty vessels had been diverted from the region, either because of faulty documents or cargo manifests, or because they were carrying cargoes bound for Iraq. About 90 per cent of the interceptions had taken place in the northern Red Sea, near the mouth of the Gulf of Aqaba and the access point to the Jordanian port of Aqaba.

29 December The Ministry of Defence in London confirmed that it was preparing to inoculate troops in the Gulf against biological warfare agents. The Armed Forces Minister threatened ‘massive retaliation’ if Iraq used biological or chemical weapons against coalition forces in the Gulf.

31 December The British Ambassador returned to his post in Baghdad. French government sources stated that the additional 4,000 French troops being deployed to the Gulf would be ready for combat by 15 January, the deadline set out in the United Nations Resolution 678.

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2 January NATO’s Defence Planning Committee agreed to a request from Turkey for the deployment of forty-two aircraft from the Allied Mobile Force contributed by Belgium, Italy and Germany. Iraq had about 530,000 forces in Kuwait. The United States now deployed 325,000 troops and the coalition about 245,000.

3 January The staff at the British Embassy in Baghdad were reduced to six UK-based officers. The United Kingdom declared eight members of the Iraqi Embassy in London persona non grata. Sixty-seven non-diplomatic Iraqis were also required to leave.

President Bush invited Tariq Aziz to have talks with Secretary of State Baker in Geneva on 7, 8 or 9 January.
4 January Iraq accepted a meeting in Geneva on 9 January. EC Foreign Ministers invited Aziz to talks in Luxembourg, but both this, a further offer on 6 January and yet another offer on 9 January for talks in Algiers were rejected.

5 January President Bush, in a nationwide television address, stated that during the meeting with Iraq’s Foreign Minister Tariq Aziz in Geneva, Secretary of State Baker would restate in person a message to Saddam Hussein—withdraw from Kuwait unconditionally and immediately, or face the terrible consequences.

6 January Saddam Hussein promised ‘the mother of all battles’ if war broke out.

7 January James Baker began a European tour. He met the Foreign Secretary in London. They reaffirmed 15 January as the final withdrawal date.

8 January President Bush submitted a letter to Congress asking for authorization to use ‘all necessary means’ to drive Iraq from Kuwait.

9 January Baker and Aziz talked for six-and-a-half hours in Geneva. No progress was made. Aziz refused to accept a letter from President Bush addressed to Saddam Hussein.

10 January Secretary-General Perez de Cuellar flew to Baghdad.

United States Congress opened its debate on the Gulf crisis.

The British Embassy staff, except for the Deputy Head of the Mission, left Baghdad.

11 January United States State Department warned that Iraqi terrorists were planning attacks around the world if there was war over Kuwait.

Saudi Arabia informed James Baker that it agreed to war if necessary.

12 January US Congress authorized the use of force against Iraq. The vote was 250–183 in the House of Representatives and 52–47 in the Senate. The last British and US diplomats left Baghdad; France, however, maintained diplomats. The United States expelled all but four Iraqi diplomats.

13 January The Secretary-General met the President of Iraq. Twenty-eight more members of the Iraqi Embassy in London were expelled: the Ambassador and a skeleton staff of four were allowed to remain.

14 January French efforts to prevent war did not receive support in the Security Council.

Turkey temporarily suspended its diplomatic operations in Baghdad. The Ambassador and twenty staff returned to Turkey.

The Israeli Supreme Court ordered the free issue of gas-masks to Palestinians.

15 January The UN Secretary-General made a final appeal to prevent war. He stated that he was prepared to deploy United Nations forces to monitor a withdrawal, and that every effort would be made to resolve the Palestinian question after the existing crisis was resolved. The United Nations deadline for Iraqi withdrawal from Kuwait expired at midnight New York time (EST).

16 January Operation Desert Storm began shortly before midnight GMT. Large-scale air and missile attacks were made on targets in Iraq and Kuwait by the Kuwaiti, Saudi, United States, British and French air forces. Military targets included communication systems, airports, transport systems, military installations and nuclear and chemical weapon facilities. French forces were placed under United States control. Greece agreed to the United States using Greek bases and airports for logistic support.

17 January Turkey authorized the use of its air bases by the coalition for air-strikes against Iraq.

The first Iraqi Scud missiles struck Israel. Six surface-to-surface missiles, carrying conventional high-explosive warheads, were aimed at population centres and not military
targets; twelve people were injured. Another missile fired at Dhahran was destroyed by a Patriot missile.

Iraq claimed that forty coalition aircraft had been shot down.

18 January Coalition air forces dropped over 2,500 tonnes of bombs in the first twenty-four hours. Seven coalition aircraft were lost; all the crews were listed as missing.

United States troops attacked offshore oil platforms and captured the first Iraqi prisoners of war.

The Soviet Union reported that it was attempting to persuade Saddam Hussein to stop fighting.

19 January The USA airlifted Patriot missiles to Israel after three Scud missiles injured seventeen people in the Tel Aviv area.

India, Algeria and the Soviet Union offered peace proposals to Iraq. Coalition aircraft flew over 4,700 sorties. Ten Iraqi aircraft were destroyed.

The Iraqi Ambassador was summoned to the Foreign Office in London to be reminded of the obligations to prisoners of war. He was again summoned on 21 January.

20 January Iraq fired ten Scud missiles at the Saudi cities of Riyadh and Dhahran. Patriot missiles destroyed nine; one Scud fell into the sea. Seven captured coalition aircrew were shown on Iraqi television.

Deputy Secretary of State Eagleburger arrived in Israel to co-ordinate the US-Israeli response to the Scud missile attacks. Coalition aircraft from Incirlik Base, Turkey, attacked Iraq. Iraq had now lost fifteen aircraft, the coalition ten.

21 January A shot-down US pilot was rescued in Iraq. Iraq stated that it would use coalition prisoners of war as human shields against air attacks. Coalition aircraft losses had now risen to fourteen.

Saddam Hussein rebuffed the peace proposals put forward by President Gorbachev the previous week.

22 January President Gorbachev called for a peaceful solution to the Gulf crisis.

Iraqi troops set fire to oil storage tanks and facilities in Kuwait and began to release crude oil into the Gulf from the Kuwaiti terminal off Mina al-Ahmadi.

There were further Scud attacks on Saudi Arabia and Israel. The attack on Tel Aviv killed three and injured more than ninety Israelis. Two Scuds were destroyed by Patriots in the air over Riyadh, and another four fell into the sea. Twelve people were injured by falling debris.

EC Foreign Ministers meeting in Luxembourg expressed their profound concern at the unscrupulous use by Iraq of prisoners of war.

23 January United States officials announced that the coalition had achieved air superiority in the war theatre, and denied the claim by Saddam Hussein that coalition aircraft had attacked a baby-milk factory; they stated that it was a chemical weapons plant. The Minister of State at the Foreign Office, Mr Hogg, had talks with senior officials of the International Committee of the Red Cross on British prisoners of war and Iraqis detained in the United Kingdom.

United States naval jets attacked Iraqi naval vessels. There were Scud attacks on Israel and Saudi Arabia: Iraq fired one Scud at Israel and five at Saudi Arabia. All six were intercepted and destroyed by Patriot missiles. The Qatari Air Force flew its first combat mission.
24 January Japan announced increased contributions to the allied war effort at a Group of 7 meeting. 

Iraqi forces fired rockets at United States marine positions near Kjafji, a Saudi coastal town.

The International Committee of the Red Cross in Geneva expressed concern to the Iraqi government about the treatment of allied airmen taken prisoner during the Gulf War. The Committee reminded Iraq of its obligations under the Third Geneva Convention relating to the treatment of prisoners of war, especially Article 13 which states that prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.

Germany expelled twenty-eight Iraqi diplomats and government officials employed at the Iraqi Embassy in Bonn and Iraq’s mission in Berlin, as a precaution against the diplomats ordering terrorist attacks.

The Egyptian President Hosni Mubarak said that Iraq’s Scud missile could not win the Gulf War and appealed to Saddam Hussein to end the bloodshed by withdrawing from Kuwait.

25 January The United States accused Iraq of pumping oil into the Gulf. Two Scud missiles aimed at Saudi Arabia were destroyed by Patriot missiles, but falling debris killed one Saudi and injured thirty others. Iraq fired seven Scuds at Israel, but all were shot down by Patriots. Falling debris killed one Israeli and injured forty.

French aircraft flew their first combat missions into Iraq. Coalition forces attacked and captured the island of Qaruh, taking prisoner fifty-one Iraqis.

26 January The oil slick increased in size, threatening Saudi desalination and industrial plants, and the environment of the Gulf. Coalition forces bombed the Mina al-Ahmadi installations to halt the flow of crude oil into the Gulf. The Pentagon confirmed that the first cruise missile launched in combat from a submarine was fired from the USS Louisville. A Patriot missile intercepted one Scud fired at Saudi Arabia. President Bush ordered a team of United States government oil pollution and environmental experts to Saudi Arabia to assist the Saudi government to minimize the environmental damage from the oil slick.

27 January Iran announced that twelve Iraqi planes had been detained. By the end of the month the number had increased to 100. The Iranian government stated that any aircraft defecting to Iran would be detained until the war ended. At this point, twenty-seven coalition personnel were missing; there were 110 Iraqi prisoners of war.

28 January Iraq claimed that allied prisoners of war had been injured in coalition bombing raids. Iraqi air losses twenty-six, coalition losses nineteen.

29 January Iraq started to pump oil into the Gulf from Mina al-Bakr in Iraq. United States marines fired artillery mortars and TOW missiles at Iraqi bunkers in Kuwait.

Secretary of State Baker and Soviet Foreign Minister Bessmertnykh met in Washington: a joint statement claimed that coalition bombing would end if Iraq would make an unequivocal commitment to withdraw from Kuwait. Such a commitment had to be backed by immediate concrete steps leading to full compliance with Security Council resolutions.

The German contribution to the war effort was increased.

29/30 January Iraqi tanks and troops attacked and seized Khafji. United States marines, Saudi and Qatari forces contained the attack. Eleven marines were killed.
30 January Iraq’s Ambassador left London; the Chargé d’Affaires and two other officials remained. The first US female soldier was reported missing. King Fahd and President Mubarak offered Saddam Hussein an immediate ceasefire if he announced the withdrawal of Iraqi forces from Kuwait.

31 January Saudi and Qatari troops, assisted by United States artillery, recaptured Khafji. B-52s operating from NATO bases in Spain bombed Iraq.

A Red Cross convoy carrying nineteen tonnes of emergency medical supplies for Iraqi civilians crossed from Iran into Iraq. The International Committee said that it was the first mission since the war began.

A Scud missile hit the Israeli-occupied territory of the West Bank. No damage or injuries were reported. No patriot missiles were fired.

1 February France granted permission for B-52 overflights from the United Kingdom to Iraq.

2 February A Scud missile fired at Riyadh was intercepted and destroyed by a Patriot missile; twenty-nine people were injured by falling debris. Two Scud missiles hit the Israeli occupied territory of the West Bank. No injuries or damage were reported. No Patriot missiles were fired at the missiles. Pope John Paul II criticized the violence and the deaths in the war.

3 February It was claimed that the United States had now dropped more bombs in the campaign than in the whole of the Second World War.

4 February United States State Department claimed that Iraq was transporting military material, including some Scud missiles, in convoys of civilian oil trucks, which made them legitimate military targets.

Syrian troops repelled an Iraqi probe on the Saudi-Kuwaiti border. uss Missouri shelled Iraqi shore installations in Kuwait for the first time.

5 February President Bush announced at his press conference that he was sceptical that the air war alone would remove Iraq from Kuwait; that the United States was not attempting to destroy Iraq; that he was sending Secretary of Defense Cheney and General Powell to Saudi Arabia to meet General Schwarzkopf to assess the military situation, and that no specific Iranian peace proposal had been received by the United States.

6 February Iraq severed diplomatic relations with Egypt, France, Italy, Saudi Arabia, the United Kingdom and the United States.

US F-15s shot down two Iraqi jets as they attempted to flee to Iran. There were 120 Iraqi planes in Iran.

United States Secretary of Defense Cheney and General Powell flew to the Gulf to assess the progress of the war. Secretary of State Baker gave testimony to the House of Representatives Foreign Affairs Committee, which emphasized that the main responsibility for the post-crisis arrangements would rest with regional countries.

7 February USS Wisconsin joined USS Missouri in firing at the Iraqi positions in Kuwait. This was the first time since the Korean War that the Wisconsin had fired its guns in combat. United States officials stated that 109 Iraqi fighter aircraft and twenty-three Iraqi transport planes had been flown to Iran. The United States had lost fifteen aircraft, and the allies seven, to Iraqi ground fire. Iraq had lost thirty-three aircraft and three helicopters in air-to-air combat, and another ninety-nine aircraft on the ground.
8 February Coalition aircraft shot down at least two Iraqi aircraft. Thirteen more Iraqi aircraft flew to Iran. A Scud missile attack on Saudi Arabia was thwarted by two Patriot missiles.

Cheney and Powell met with Schwarzkopf and other military leaders in Riyadh for more than eight hours. White House spokesman Marlin Fitzwater stated that despite being a party to the Geneva Convention, the Iraqi government had refused the International Committee of the Red Cross requests to visit coalition prisoners of war.

9 February President Gorbachev warned that the military operations in the Gulf threatened to exceed the United Nations mandate. He intended to send an envoy to Baghdad for talks with Hussein. The Emir of Kuwait requested that Kuwaiti ground forces be included in the liberation of Kuwait.

A Scud missile aimed at Israel was destroyed by Patriot missiles. Falling debris injured a number of people and damaged buildings.

10 February Saddam Hussein, in a nation-wide address, pledged victory and praised the people for their steadfastness and their faith. Iraq ordered all seventeen-year-old males to sign up for military service or face legal action.

President Gorbachev said that the military operations in the Gulf threatened to exceed the United Nations mandate. He intended to send an envoy to Baghdad for talks with Hussein. The Emir of Kuwait requested that Kuwaiti ground forces be included in the liberation of Kuwait.

12 February Coalition forces commenced a combined air, land and sea bombardment on Iraqi staging areas in Southern Kuwait. Soviet envoy Yevgeniy Primakov met Saddam Hussein in Baghdad. The President stated that Iraq was prepared to negotiate a solution to the war.

13 February A US F-111 dropped two bombs on what the Iraqis claimed was a public air-raid shelter, and which the coalition argued was a fortified underground military command and control centre (the Amiriya bunker). Civilian deaths were estimated to be between 300 and 500. The White House spokesman Marlin Fitzwater expressed sadness at the loss of life, but stated that it was a legitimate military target, a well-documented command and control centre that fed instructions directly to Iraqi armed forces. The Iraqis had a history of using civilians as military shields, and were now placing tanks and artillery beside private houses and small villages, and had located command and control centres on top of schools and public buildings.

14 February The United Nations Security Council met in closed session to discuss the war.

15 February Iraq announced the conditions on which it would withdraw from Kuwait: Israel must withdraw from all Arab territory, Iraqi debts must be waived, and the
coalition states must pay for the rebuilding of Iraq. President Bush described the Iraqi offer as a cruel hoax; Mr Major called it a bogus sham.

16 February United States helicopters launched night raids against Iraqi positions. Iraq’s Ambassador to the United Nations warned that his country would use weapons of mass destruction if the coalition bombing continued.

The Pentagon announced that United States troops were prepared to launch a ground, sea and air assault. The United Nations Children’s Fund announced a joint humanitarian mission with the World Health Organization to deliver $600,000 worth of emergency medical supplies to Baghdad which would be used to help care for children and mothers. It would also explore essential health-care needs.

A Scud missile fired at the Saudi city of Al Jubayl on the Persian Gulf coast missed its target and fell into the sea.

17 February Two Scud missiles were fired at Israel. Coalition and Iraqi troops engaged along the Saudi-Kuwaiti border. Twenty Iraqis surrendered to an Apache helicopter.

President Bush stated that the Iraqi takeover of Kuwait would end very, very soon.

United States military intelligence estimated that 15 per cent of Iraqi fighting forces in Kuwait had been either killed or wounded.

18 February President Gorbachev met Foreign Minister Aziz in Moscow and announced a peace plan.

The British Foreign Secretary, Douglas Hurd, told the House of Commons that proof that Iraq was withdrawing from Kuwait would be needed before there was any pause in coalition operations. France expelled the Iraqi Ambassador. The envoy and most of his staff also departed.

19 February Coalition aircraft bombed Baghdad for the first time in daylight.

President Bush stated that the Soviet peace plan fell short of what was required to end the war.

There was another Scud attack on Israel. This was intercepted by a Patriot missile. A total of sixty-eight Scud missiles had been launched: thirty-two at Saudi Arabia and thirty-six at Israel. Over 83,000 coalition air sorties had been flown.

20 February One American was killed and seven were wounded in fighting along the Saudi-Kuwaiti border. A US helicopter destroyed an Iraqi bunker complex and about 500 Iraqis surrendered.

United States officials warned Iraq that it should announce a timetable for the withdrawal from Kuwait as a condition for a peace settlement.

The Turkish Foreign Ministry stated that nearly 900 Iraqi soldiers and more than 1,000 civilians had crossed the mountains from Iraq into Turkey, nearly half of them in the previous four days. Many demonstrated on a hotel roof against the possibility of being sent back to Iraq.

21 February Three Scud missiles were launched at Saudi Arabia, but no damage was reported.

Secretary of Defense Cheney stated that the coalition forces were preparing one of the largest land assaults of modern times.

22 February After a second meeting with Gorbachev, Aziz announced the Iraqi acceptance of the Soviet eight-point peace plan. President Bush, however, rejected the Soviet Plan, deplored the Iraqi destruction of the Kuwaiti oilfields and stated that a
ground campaign would not be initiated if Iraq accepted the following terms and communicated that acceptance to the United Nations:

— It had to begin to withdraw troops from Kuwait by midday EST (1700 GMT) on 23 February and complete it in one week.
— It had to remove all its forces from Kuwait City within forty-eight hours and allow the prompt return of the legitimate government of Kuwait.
— It had to withdraw from all prepared defences along the Saudi-Kuwait and Saudi-Iraq borders, from Bubiyan and Warbah Islands, and from Kuwait’s Rumailah oilfield within one week.
— It had to return all its forces to their positions of 1 August, in accordance with Resolution 660;
— It had to release all prisoners of war and third country civilians being held against their will.
— It had to return the remains of killed and deceased servicemen.
— The release process must commence immediately and must be completed within forty-eight hours.
— All explosives or booby traps must be removed.
— Iraq had to designate military liaison officers to work with coalition forces on Iraq’s withdrawal.
— Data on the location and nature of all land and sea mines had to be provided.
— There had to be a cessation of combat aircraft flights over Iraq and Kuwait, except for transport aircraft carrying troops out of Kuwait, and coalition aircraft had to be allowed exclusive control over and use of all Kuwaiti air space.
— All destructive actions against Kuwaiti civilians and property must cease, and all Kuwaiti detainees must be released.

The United States and its coalition partners reiterated that their forces would not attack unarmed retreating Iraqi forces and would exercise restraint so long as the withdrawal proceeded in accordance with the guidelines.

Mr Major stated that the Soviet proposals were an improvement on previous proposals but they still seemed to fall a significant way short of the United Nations resolutions. The Department of State ordered the departure of one of the four remaining Iraqi diplomats, for activities incompatible with his status as a diplomat.

22 February Iraqi troops destroyed Kuwaiti installations, setting alight twenty-five pumping stations and oil wells.

23 February A new Soviet plan was accepted by Aziz, but it did not meet the terms of President Bush’s ultimatum.

About 200 Kuwaiti oil wells and facilities were burning. World Health Organization officials who had just returned from their fact-finding mission and delivery of medical supplies to Baghdad, stated that they had seen no malnutrition among Iraqi children during their one-week visit.

President Bush declared that the liberation of Kuwait had now entered a new phase. He directed General Norman Schwarzkopf, in conjunction with coalition forces, to use all forces available, including ground forces, to eject the Iraqi army from Kuwait.
United States 2nd Armoured Cavalry Regiment bulldozers breached the Iraqi sand defensive positions along Saudi Arabia’s northern border. The United States First Infantry Division conducted Apache Helicopter raids near to the breached sites.

24 February The coalition ground offensive began at 1.00 a.m. GMT (4.00 a.m. Saudi time). The states participating in the action were the United States, Saudi Arabia, the United Kingdom, France, Egypt, United Arab Emirates, Bahrain, Qatar, Oman, Syria and Kuwait.

25 February The United Nations Security Council met in private to discuss a Soviet peace plan which, in accordance with UNSC Resolution 660, would set a date for the Iraqi withdrawal, establish a short withdrawal period, and allow no other conditions. The Council members concluded that it could not act until Iraq officially notified the United Nations of its compliance with the Council’s resolutions.

Baghdad Radio broadcast a statement that orders had been issued to the armed forces to withdraw to their positions held before August 1 1990. A White House spokesman stated that the war went on, although United States forces would not attack unarmed soldiers in retreat.

Mr Hurd, in evidence to the House of Commons Foreign Affairs Committee, said that the allies might have to remain in partial occupation of Iraq immediately after the liberation of Kuwait.

Debris from a Scud missile fell upon a United States military barracks near Dhahran, Saudi Arabia, killing twenty-eight servicemen and women and wounding over 100. A Scud missile fired at Bahrain was intercepted in flight by a Patriot missile.

26 February The ICRC in Geneva again appealed to Iraq to respect the Third Geneva Convention and allow the ICRC access to coalition prisoners of war held by Iraq. The coalition had taken over 30,000 Iraqi prisoners of war.

A Scud missile was fired at Duha, Qatar; no injuries or damage were reported. Iraq fired two Scuds at Bahrain, which were both destroyed by Patriots.

26/27 February Kuwait City was liberated by Kuwaiti, Saudi, Egyptian, Qatari, United Arab Emirates, Omani and Syrian armed forces; Iraqi forces fled from Kuwait.

27 February At 1800 GMT the United Nations Security Council received a letter from Foreign Minister Aziz in which Iraq accepted Resolutions 660, 662 (declaring the Iraqi annexation of Kuwait as null and void) and 674 (making Iraq responsible for war reparations) if there was a cease-fire and if Resolutions 661, 665 and 670 (on economic sanctions against Iraq) were no longer operable. The Council President demanded an unconditional, explicit acceptance of all twelve resolutions.

President Bush, on behalf of the coalition, announced that fighting would cease at midnight Eastern Standard Time (0500 GMT). He warned that the coalition would resume the assault if Iraq continued to fight, or launched missiles at any country. He stated that a permanent ceasefire would depend upon Iraq’s immediate release of all coalition prisoners of war and Kuwaiti detainees, third country nationals and the remains of those who had fallen, and complied with all relevant United Nations resolutions on Kuwait.

28 February The Security Council met to discuss the letter setting out Iraq’s compliance which had been delivered to the United Nations the previous evening. It stated that Iraq sought a cease-fire, that Iraq’s withdrawal from Kuwait was complete, that Iraq accepted all the Council’s resolutions unconditionally, and that Iraq would return prisoners of war
to their home countries within a very short period of time. Saddam Hussein ordered his forces to cease firing, and Iraq agreed to begin discussions on how to arrange a permanent ceasefire.

Reconnaissance photographs released by the Pentagon confirmed that the holy shrines in the cities of An Najaf and Karbala remained intact, despite six weeks of coalition air attacks against strategic and military targets in Iraq. The Deputy Assistant Secretary of State David Mack stated that the photographs were taken and released to disprove Iraqi claims that coalition pilots had deliberately destroyed religious structures in Iraq.

The British Ambassador reoccupied the Embassy in Kuwait.

The United States Defense Department reported that during the period of hostilities between 16 January to 27 February:

— Coalition forces had destroyed or rendered ineffective forty-two Iraqi divisions.
— More than 50,000 Iraqi POWs had been captured (this was increased by the United States Central Command on 3 March to 80,000).
— More than 3,000 Iraqi tanks out of the 4,030 that were located in Kuwait and Southern Iraq when hostilities started had been destroyed (later increased on 3 March to 3,300).
— 962 armoured vehicles out of 2,870 (increased to 2,100) had been destroyed.
— 1,005 artillery pieces out of 3,110 (increased to 2,200) had been destroyed.
— 103 aircraft out of 639 located in Iraq had been destroyed. Another 100 combat planes were in Iran.
— Coalition forces were continuing to destroy captured and abandoned Iraqi armour and artillery.
— The coalition had flown over 110,000 sorties over Iraq and Kuwait, one half of which were combat and one half support (reconnaissance, air-refuelling and search and rescue).

1 March The United States Ambassador and twenty of his staff returned to the Kuwait Embassy, which had been evacuated on 14 December 1990.
2 March The Security Council approved Resolution 686, which was its thirteenth on Kuwait, by 11 to 1 (Cuba), with three abstentions: China, India, and Yemen.
3 March The Military Commanders met at Safwan, on the border between Kuwait and Iraq, and reached agreement on how prisoners of war were to be released; how information on minefields was to be provided; and how further incidents were to be prevented between the respective armed forces.

The Security Council approved requests for flights of food, medicine and water purification equipment into Baghdad.

4 March Ten coalition POWs were released to an International Red Cross representative in Baghdad: one Italian, three British and six American, one of whom was a female soldier.

After seven months in exile, Crown Prince and Prime Minister Saad Abdullah Sabah returned to Kuwait to be the temporary military governor.

5 March Iraq released thirty-five more POWs: nine British, nine Saudis, one Italian, one Kuwaiti, and fifteen United States, including a second female POW. Iraq claimed that all POWs had been released.
7 March The British government announced that thirty-six British armed forces personnel had been killed in the Persian Gulf, seventeen in combat. Eight others (five RAF and three Army) were missing, and forty-three had been wounded.

19 March The Pentagon stated that 182 United States military personnel had been killed between 16 January and 1 March 1991. The United States had deployed 539,000 troops to the Persian Gulf.

3 April The United Nations Security Council passed Resolution 687 by 12 votes to 1 (Cuba), Yemen and Ecuador abstaining.

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Chapter 2
The United Nations and the *jus ad bellum*¹

Marc Weller

On 2 August 1990, the government of the state of Iraq issued an invitation to the world to reorganize itself. The international community, represented at the United Nations, was challenged to find a response to the invasion of Kuwait which would not only restore the territorial integrity and political independence of that state, but which would also contribute a further building-block towards the edifice of world order based on a strong system of collective security.

The world organization had solid foundations to build upon. Despite the challenges posed during the Cold War years, its institutional structure had survived unimpaired. The thaw in superpower relations had opened up the possibility that consensus could be achieved in the Security Council, which had hitherto been vulnerable to the veto of one of its permanent members. And there had been some modest successes already in the attempted settlements of regional conflicts, from Namibia to Angola and Cambodia to Afghanistan. In fact, the conclusion of another conflict involving Iraq, the Iran-Iraq war, appeared to be one of the jewels in the crown of achievements of the organization during this period of reawakening.²

This chapter touches upon the question of whether the international community was able to extend these successes into the area of actual enforcement measures of the United Nations. After all, Chapter VII of the UN Charter provides for a comprehensive system of collective security which has long been dormant, and which could have been activated in the new climate of co-operation to face and defeat challenges such as that issued by the Iraqi government. In addition, this chapter seeks to set the stage for the chapters which follow, giving an overview of the major legal aspects of the Kuwait conflict other than those concerning the *jus in bello*.

The international community, including the former victims of colonialism, spoke on the issue of the invasion of Kuwait with unprecedented unity. Even the few supporters of Iraq, such as Yemen and Cuba, rejected the purported annexation of the territory as illegal and supported unreservedly the demand for the restoration of the territorial sovereignty and political independence of Kuwait. In fact, international law provided the focal point of agreement which allowed the United Nations to act decisively. Although the actions carried out in the name of the organization might be subject to critical discussion, the initial goals of the organization in this crisis were uncontested and universally agreed. These goals were defined authoritatively by the Security Council only hours after the invasion had commenced.
THE IMMEDIATE RESPONSE TO THE INVASION IN THE UN SECURITY COUNCIL

At about midnight local time, on the night of 1/2 August 1990, a massive Iraqi force crossed the border into Kuwait. Almost immediately, delegates to the UN Security Council in New York were alerted. They met for an informal session at UN headquarters at around 3.00 a.m. and quickly hammered out the essential elements of a draft resolution. The Council convened formally at 5.08 a.m., the debate being opened by a passionate speech from the Ambassador of Kuwait. He described the desperate situation in his country, stating that his government was still in control, although the Emir and most of his family had sought refuge in Saudi Arabia, adding that:

It is now incumbent on the Council to shoulder all its responsibilities and to maintain international peace and security. The Council is responsible for the protection of Kuwait and its security, sovereignty and the territorial integrity, which have been violated. In order to shoulder all its responsibilities and to carry out its tasks, the Council is urgently requested to demand that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990.

Iraq, on the other hand, rejected the intervention of the Council in the affair. The ambassador put forward the following view:

First, the events taking place in Kuwait are internal matters which have no relation to Iraq.

Secondly, the Free Provisional Government of Kuwait requested my Government to assist it to establish security and order so that the Kuwaitis would not have to suffer. My Government decided to provide such assistance solely on that basis.

Thirdly, the Iraqi Government energetically states that Iraq is pursuing no goal or objective in Kuwait and desires cordial and good-neighbourly relations with Kuwait.

Fourthly, it is the Kuwaitis themselves who in the final analysis will determine their future. The Iraqi forces will withdraw as soon as order has been restored. This was the request made by the Free Provisional Government of Kuwait. We hope that it will take no more than a few days, or at the most a few weeks.

Fifthly, there are reports that the previous Kuwaiti Government has been overthrown and that there is now a new Government. Hence, the person in the seat of Kuwait here represents no one, and his statement lacks credence.

Sixthly, my Government rejects the flagrant intervention by the United States of America in these events. This intervention is further evidence of
the co-ordination and collusion between the United States government and the previous Government of Kuwait.

My country’s Government hopes that order will be swiftly restored in Kuwait and that the Kuwaitis themselves will decide upon their future, free from any outside intervention.

It is interesting to note that Iraq did not attempt to justify the invasion with reference to the claim to the territory of Kuwait, the alleged ‘theft’ of oil from the Rumaila oilfield or to the claim that Kuwait had flooded the international market with cheap crude, thus depressing prices and hurting Iraq’s economic interests. These points were made in the political arena, but it was apparently recognized even by Iraq that they would not furnish a legal argument when addressing the Security Council. Instead, its justification was based on the alleged invitation to intervene by a provisional revolutionary government. This argument was swiftly rejected by the Council, as it had been rejected by a large majority of the UN membership in the cases of Hungary, Czechoslovakia and Afghanistan. And, in terms of fact, there was no evidence of a significant revolutionary movement within Kuwait itself. As the US delegate to the Council pointed out:

While the Iraqi invasion was carefully planned and professionally executed, the Iraqis at one salient point made a serious mistake. Instead of staging their coup d’état and installing this so-called free provisional government before the invasion, they got it the wrong way around: they invaded Kuwait and then staged the coup d’état in a blatant and deceitful effort to justify their action—like the effort they have just made here.

The condemnation of the Iraqi action in the Council was virtually unanimous, although Yemen failed to participate in the vote on Resolution 660, having been unable to receive instructions from its capital. The resolution determined that there existed a breach of international peace and security as regards the Iraqi invasion of Kuwait. Initially, the draft text had indicated that an act of aggression had taken place, but at the urging of the Soviet delegation that wording was changed. In substance there was no difference, as both formulations constituted a finding under Article 39 of the Charter, which must precede enforcement measures under Articles 41 and 42.

Still, as opposed to the diplomatic and imprecise language usually employed when urging ‘the parties’ or some other unspecified entity to cease hostilities, the resolution clearly named Iraq as being responsible for the invasion. It condemned the invasion, and, by way of a provisional measure adopted explicitly under Article 40, it demanded ‘that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on August 1, 1990.’

By adopting this wording, the Council avoided having to make a pronouncement on the validity of territorial claims in the context of the withdrawal. Thus, even if Iraq had a valid claim to certain territories, such as Warba and Bubiyan Islands, it was required to withdraw fully and re-establish the status quo. The resolution did, however, indicate that certain issues could be made subject to immediate negotiations.

The government of Iraq precluded negotiations when it announced the annexation of Kuwait less than a week after the invasion. Again, this measure was rejected by the
Council with unanimity in Resolution 662, which demanded that it should be rescinded.\textsuperscript{8} In that resolution, the Council also affirmed the legitimacy of the government of the state of Kuwait, by then in exile in Saudi Arabia.\textsuperscript{9} In calling upon all states, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation, the resolution in effect mirrored the consequences arising from the unlawful acquisition of territory in general international law.

Iraq challenged this action of the Council when it required the closure of diplomatic and consular missions in Kuwait. Under the 1961 Vienna Convention, the termination or suspension of diplomatic relations is a sovereign act of the respective states which had established such relations.\textsuperscript{10} Acceptance of the order to close the missions would have amounted to an acknowledgement of the authority of the State of Iraq to act on behalf of Kuwait. Although a protest would have been enough, a number of states kept their embassies open in Kuwait to underscore the refusal of the international community to accept the validity of the annexation. The Council supported this attitude, demanding, in Resolution 664 (1990), that Iraq rescind its orders for the closure of diplomatic and consular missions in Kuwait and the withdrawal of diplomatic immunity of their personnel, and refrain from any such actions in the future.

When Iraq attempted to enforce its decision concerning the closure of embassies and consulates, the response in the Council was once more unanimous.\textsuperscript{11} In Resolution 667 it expressed outrage at the violations by Iraq of diplomatic premises in Kuwait and at the abduction of personnel enjoying diplomatic immunity and of foreign nationals who were present in these premises, and it issued a veiled threat that non-compliance might trigger further enforcement measures, in addition to economic sanctions.\textsuperscript{12}

ECONOMIC SANCTIONS

Iraq had initially announced its desire to withdraw quickly from Kuwait. Before adopting enforcement measures, the Council gave the government of Iraq four days to furnish evidence of the seriousness of its declarations. Much hope was placed in inter-Arab efforts of mediation in this respect, but there was no success. Hence, in Resolution 661 (1990), the Security Council imposed comprehensive economic sanctions. The Secretary-General was requested to report within thirty days from the adoption of Resolution 661 (1990) on the progress made in its implementation. To examine these reports, and to seek further information from states concerning the actions taken, a committee with membership identical to that of the Security Council was established.\textsuperscript{13}

The request directed at the Secretary-General to report within thirty days on implementation was somewhat misunderstood by a few members of the organization. Jordan, for example, initially appeared to interpret this stipulation as allowing for a thirty-day period within which to decide upon the adoption of sanctions. However, Resolution 661 (1990) was binding from the moment of its inception and demanded immediate implementation. Similarly, the right of member states to consult the Council with respect to special economic hardship in accordance with Article 50 of the Charter did not imply that, pending a grant of relief, sanctions would not have to be implemented. This was made clear at the very first substantive session of the Sanctions Committee.\textsuperscript{14}
Generally, however, compliance with Resolution 661 (1990) was astonishingly solid.\textsuperscript{15} National measures implementing sanctions were adopted in some 140 jurisdictions.\textsuperscript{16} Allegations concerning violations of the embargo were comparatively rare, and seldom substantiated.\textsuperscript{17}

On one issue, however, consensus within the Council and the Sanctions Committee was soon threatened. A large number of foreign workers were stranded in occupied Iraq and Kuwait. Many of those were not permitted or were unable to leave and were lacking in supplies of food and medicine. Whereas the sanctions committee was able to grant certain exemptions, for example with respect to the use of aircraft, including Iraqi aircraft, to return mostly Western nationals out of the country, it had more difficulty in accepting that relief shipments for the remaining foreigners should be permitted. This issue was complicated by Iraq’s demands that it would only permit entry of food shipments if they were made available to Iraqi civilians at the same time. This demand was contextually linked with the view, put forward in the Council by Yemen and Cuba, that food supplies were generally exempt from the application of Resolution 661. Reference was made to the provision in that resolution for exceptions in case of ‘humanitarian circumstances’.\textsuperscript{18}

However, the Council determined that it had to make a specific finding as to the existence of humanitarian circumstances within Iraq before being able to permit food supplies. The Sanctions Committee requested the Secretary-General to ascertain whether such circumstances prevailed in Iraq. Perhaps unwilling to participate in this highly emotional debate, he reported back that he did not have the means to furnish such a finding. He was then requested to seek relevant information from United Nations and other agencies, with particular reference to children under fifteen years of age, expectant mothers, maternity cases and the sick and the elderly.\textsuperscript{19} At the same time, the Sanctions Committee began to authorize individual food shipments to supply the foreign nationals in Kuwait, provided that the supplier country could guarantee, through the involvement of agencies like the respective national Red Cross Societies, that this food would only be used for its intended purpose.\textsuperscript{20}

Upon the adoption of the conditions for cease-fire in Resolution 686 of 2 March 1991, the Council endorsed a fact-finding mission by Under-Secretary-General Martti Ahtisaari, whose report indicated that great suffering was setting in among the Iraqi population.\textsuperscript{21} On 23 March, the Sanctions Committee determined that relevant humanitarian circumstances prevailed within Iraq.

THE NAVAL AND AERIAL BLOCKADE

The United States and Great Britain, which had deployed significant naval forces in the region, decided to institute a naval ‘interdiction’ campaign a week after the adoption of Resolution 661. This measure engendered some controversy. It was taken under the following request of the Emir of Kuwait, made from his exile in Saudi Arabia:\textsuperscript{22}

Kuwait is grateful to all those Governments that have taken a principled stand in support of Kuwait’s position against aggression and occupation by Iraq. It is considered essential that these efforts be strengthened so that
the provisions of the relevant Security Council resolutions be fully and effectively implemented.

In the exercise of its inherent right of individual and collective self-defence and pursuant to Article 51 of the Charter of the United Nations, Kuwait should like to notify you that it has requested some nations to take such military or other steps as are necessary to ensure the effective and prompt implementation of Security Council Resolution 661.

This request had been made to the United States, Great Britain and a number of other states, and it was immediately accepted by the former two. Both states stressed that the operation was undertaken in the exercise of the right to self defence. Britain, in addition, added that

the Kuwaiti request is put firmly in the context of the economic sanctions, as was given in the drafting of it which I read out: ‘…other steps as are necessary to ensure that economic measures designed to restore our rights are efficiently implemented’.\(^{23}\)

This formulation, cited from the text of the request actually made by the Kuwaiti government to the British authorities, differs slightly from the wording of the request as relayed to the Council in the above communication. It does not refer to steps necessary to ensure the implementation of Resolution 661 (1990), but is couched in somewhat more general language. It appears that this wording had been agreed upon in advance between the British and Kuwaiti authorities to avoid giving the impression of a unilateral act, taken at the request of Kuwait, to enforce sanctions which had been adopted by a collective body, i.e., the United Nations.

However, the politicians were less subtle than the British lawyers. President Bush, Secretary of State Baker, the then Prime Minister Mrs Thatcher and her Foreign Secretary Douglas Hurd, all spoke of a request to enforce UN sanctions, in addition to the right of self-defence, when they announced the ‘interdiction.’ And the United States, in its official communication to the Council, affirmed that the operation was indeed designed to ensure that sanctions would be effective and that Resolution 661 would not be violated.\(^{24}\)

This assertion led to an unnecessary and acrimonious debate in the Council. In closed emergency session, a wide range of delegations, including those very friendly to the US and Britain, such as Canada, made it clear that it was for the Council only to authorize the enforcement of its sanctions by military force. Although Resolution 661 did not formally invoke the provision, economic sanctions were adopted under the authority of Article 41 of the Charter, which relates specifically to measures ‘not involving the use of armed force’.\(^{25}\) The initiation of a blockade, even if semantically converted into an interdiction, was a quasi-belligerent act falling clearly and explicitly within the ambit of Article 42. As such, it would have required a further authorization from the Council. But in this case, the members of the Council had not even been consulted about the measure in advance.

Contrary to some speculation at the time it was, however, not really disputed in the Council that the US and British action was nevertheless lawful. As opposed to other texts which had been negotiated jointly, sanctions Resolution 661 had been very carefully
drafted by the United States alone. It contained a preambular reference affirming ‘the inherent right of individual or collective self-defence in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter.’ In addition, it stated that the application of economic sanctions should not ‘prohibit assistance to the legitimate Government of Kuwait.’

Few delegations had interpreted these provisions as encouraging unilateral action outside of the framework agreed by the Council. In particular, the reference to Article 51 had just been seen as a customary reiteration of a well-known provision of the Charter, which would not really be relevant, at least while the Council was able to discharge its primary responsibility for the maintenance of international peace and security. But technically, these references were important indeed. For, under Article 51, self-defence applies if an armed attack occurs, and until the Council has taken ‘the measures necessary’ for the maintenance of international peace and security. While most delegations felt that Resolution 661 had been precisely the ‘measure necessary’ to suspend the right of self-defence pending Security Council action, they had in fact agreed in adopting the US drafted text of that resolution that self-defence survived as an option.

In effect, neither Britain nor the United States went ahead and really used force unilaterally before a UN mandate was granted. Britain asserted that it was merely monitoring compliance with Resolution 661 by interrogating shipping. The United States did actually fire some shots across the bow of an Iraqi vessel, but, when this had no effect, the vessel was not boarded, disabled or sunk.

Still, the affair had created much distrust among the Council members, who were wary of losing control over the UN operation concerning the Gulf crisis at the very moment when the organization was, for the first time, able to operate as had been originally envisaged. The danger of threatening the unanimous support in the Council for the tough measures instituted against Iraq led the United States to go back to the Council and ask for a mandate, although it was asserted that legally this would not be necessary.

This time, the other members of the Council were rather more distrustful, and it took some ten days of intense negotiations to arrive at the adoption of Resolution 665. A reference to the blockade as an act on behalf of Kuwait had to be deleted, as it would have hinted at the institution of the blockade in the exercise of the right to self-defence. Instead, in slightly more vague terms, it referred to states ‘co-operating with the government of Kuwait’, and the action was to be co-ordinated through the Military Staff Committee. In a sense, therefore, the organization attempted to make it clear that the operation was undertaken under the authority of the United Nations, rather than under the right of individual and collective self-defence.

Article 42 was also deliberately not invoked formally, although the measure was adopted under its authority. That Article empowers the Council to

\[
take \text{ such action by the air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.}
\]

The provision was specifically not invoked to preclude an expansive interpretation of the authority that was granted. It was thus made clear that no action other than a naval
interdiction, i.e., no action of land or air forces, which were also mentioned in the Article, was authorized at this point.

The initial US draft text would have authorized the use of ‘minimum force’ by naval units to ensure compliance with Resolution 661. At the insistence of the Chinese, the reference to ‘minimum force’ was deleted and, instead, the states deploying maritime forces in the area were called upon to use such measures ‘commensurate to the specific circumstances as may be necessary.’ It was, however, generally accepted that this did in fact include the possible use of force, only China taking a different view. China, in fact, made a unilateral statement upon adoption of the resolution, asserting that the use of force had been positively ruled out. This view is not in line with the negotiating history of the resolution. It was rejected by the majority of the Council Members and was more of an attempt by China to allow passage of the resolution without publicly abandoning its objection to the use of force against less developed nations.

The United States and Great Britain were similarly forced to make a unilateral statement, highlighting their isolation on the issue of self-defence. US Ambassador Thomas Pickering said that the resolution clearly ‘does not diminish the legal authority of Kuwait and other States to exercise their inherent right’, in apparent reference to self-defence. The British delegate also referred to self-defence, but then emphasized the need for further measures to be agreed by the Security Council, if necessary. However, a number of other delegations insisted that no further unilateral measures should be taken, and, most decisively, Kuwait itself appeared to accept that Resolution 665 constituted a measure necessary in the sense of Article 51. If, in consequence, Kuwait’s right to individual self-defence had been suspended pending Security Council action, then the United States and Great Britain themselves could of course not invoke a derived right of collective self-defence on its behalf.

The issue of the revival of Kuwait’s right to self-defence remained, however, academic. After the alleged violations committed against some of the remaining foreign embassies in Kuwait, the Council took further measures. In Resolution 670 the Council confirmed that Resolution 661 applied to all means of transport, including aircraft, in effect pronouncing an aerial blockade. However, states were not empowered to use force to achieve compliance with the aerial embargo. Operative paragraph 7 referred to the applicable general international law and to the Chicago Convention on International Civil Aviation of 7 December 1944. That Convention had been amended in 1984 to include a specific provision prohibiting the use of weapons against civil aircraft in flight.

With the adoption of Resolution 670, the Council had exhausted the catalogue of measures short of active hostilities against Iraq. In light of reports concerning atrocities committed by the Iraqi occupation forces in Kuwait, the Council turned to drafting Resolution 678.

**THE AUTHORIZATION TO USE FORCE AGAINST IRAQ**

At the very moment when the permanent members of the UN Security Council appeared to be inching towards a new resolution which would empower states to end the illegal occupation of Kuwait by military means, Iraq called on the General Assembly to hear its case and adopt a resolution discouraging the use of force. In the Assembly all members
of the organization have an equal voice, and it is therefore dominated by the large number of neutral and non-aligned states. These have traditionally displayed a hostile attitude towards the application of military force against a developing nation, especially where a great power like the United States might be involved. Iraq was hoping to employ the solidarity of fellow Third World nations to preclude military action by the international coalition which was assembling in the Gulf.

In terms of law, it is of course only the Security Council which can raise its voice loudly and issue orders, directives and demands. The Assembly, in contrast, can only whisper a recommendation, which lacks binding force. And to avoid a conflict of authority, the Assembly is actually barred from pronouncing on resolutions relating to matters of peace and international security which are under consideration by the Council. In practice, however, the Assembly has never been averse to discussing cases which were being deliberated by the Council. Arguably it can even adopt recommendatory resolutions on issues which have been languishing on the Council’s agenda if there is no hope of any action being taken, or if the Council has been precluded from action due to a veto.

Iraq, however, seriously miscalculated the attitude of the neutral and non-aligned members. First of all, their views had already been heard in the Council, where they were represented by states ranging from Malaysia and Columbia to Yemen and Cuba. The neutral and non-aligned nations had generally supported the tough sanctions adopted against Baghdad. Furthermore, in the opening debate of the Assembly in September, Iraq had been condemned just as strongly and consistently as it had been in the Council.

Thus, the General Committee of the Assembly, which manages its business, refused to admit a special agenda item on the danger of a military confrontatoin in the Gulf, as proposed by Iraq. Instead, the members of the Committee delivered a strong denunciation of Baghdad’s attitude. The general discussion by the Assembly of the Kuwait crisis must also have been discouraging for the Iraqi Government. In stark contrast to the usual diplomatic language employed to describe acts of aggression (e.g. ‘the situation in Afghanistan’), the respective agenda item was concerned with the ‘Iraqi aggression and the continued occupation of Kuwait in flagrant violation of the Charter of the United Nations’, and condemnation was once more nearly unanimous. Iraq’s attempt to split the international community failed spectacularly. Instead, the Security Council offered the government of Iraq a tough choice in Resolution 678. Unless it was willing to implement Resolution 660 and all subsequent relevant resolutions by 15 January 1991, and furnished concrete evidence of this desire, the Council authorized member states co-operating with the government of Kuwait to use all necessary means to uphold and implement Resolution 660 and all subsequent relevant resolutions, and to restore international peace and security in the area.

There was no doubt in the Council that the term ‘all necessary means’ was meant to cover the use of military force.

Was Resolution 678 adopted validly?

The legal validity of Resolution 678 was attacked occasionally, in particular by the delegations of Iraq, Yemen and Cuba in the debate preceding its adoption. The resolution was adopted by twelve votes to two, China abstaining. As the International
Court of Justice, the principal judicial organ of the United Nations, pointed out in connection with the Namibia opinion:  

the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions.

Resolution 678 was adopted specifically with reference to Chapter VII of the Charter. The failure to formally invoke Article 42 as a source of authority was not decisive. There is no formal requirement for such an invocation and there is no practice of the Council which might add to the provisions of the Charter in that respect. Neither Resolution 83, which had concerned assistance to repel the armed attack against the Republic of Korea during the Korean war, nor Resolution 221, which had authorized the United Kingdom to use force, if necessary, to prevent the arrival of oil destined for Southern Rhodesia at the harbour of Beira, contained such a reference. And, in fact, the wording of Resolution 678 did actually mirror the wording of Article 42, thus hinting at the source of authority under which it had been adopted.

The formal requirement of Article 39 concerning a finding of a threat to the peace, breach of the peace or act of aggression was fulfilled in this case. Such a finding, which had to be made to permit recommendations or decisions of the Council under Article 42, had already been made in Resolution 660, only hours after the invasion. And legally, at least, the Council was also entitled to authorize the use of military force, despite the fact that sanctions had arguably not been given long enough to take effect. Article 42 does not require an actual exhaustion of peaceful remedies, as it were, but merely a finding by the Council that the measures provided for in Article 41 would be inadequate. This finding was inherent in the terms of Resolution 678.

The failure to utilize the mechanisms provided for in Article 43 did not impinge on the validity of the measure. That provision contains an obligation on the part of the members to respond to a call from the Council, but no obligation on the part of the Council to make use of the facilities offered by its members. The function of Article 43 is to provide the non-permanent and non-members of the Council some form of guarantee that their forces and facilities will only be used in accordance with an agreement with the Council, i.e., they have an influence on the nature of their contribution, and they know in advance what form their contribution might take.

According to Article 46 of the Charter, plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee. Again, the Charter does not require the Council itself to direct the armed forces operating on its behalf. Its right to plan for the application of armed force includes the right to authorize member states to take over the execution of a military task defined by the Council.

Similarly, the Military Staff Committee exists to advise and assist the Council. If it is a servant of the Council, it can be assumed that the Council has authority to dispense with the services of the Committee if those are not deemed appropriate. The provision in
Article 47 (3), providing that the Military Staff Committee shall be responsible for the strategic direction of forces, applies only to those placed at the disposal of the Council, presumably in accordance with Article 43. As no forces were placed at the disposal of the Council, it was not applicable. Rather, action was taken in accordance with Article 48, which permits the delegation of authority to implement the decisions of the Council to ‘the Members of the United Nations directly’.34

The outbreak and conduct of hostilities and the nature and extent of the authorization to use force under Resolution 678

On 9 January 1991, Tariq Aziz, the Iraqi Foreign Minister, and US Secretary of State James Baker met in Geneva for some six and a half hours. Despite the length of these talks, no success was achieved. Apparently, the Iraqi envoy was presented with a tough letter from President Bush, demanding an immediate and unconditional withdrawal, in line with Resolution 660. This approach proved unacceptable to Iraq, whose Government also rebuffed mediation efforts by the UN Secretary-General and the Soviet Union.

At 7.00 p.m. EST, or 3.00 a.m. Baghdad time, on 16/17 January 1991, a massive aerial attack was launched against Iraq and Iraqi forces in Kuwait. Coalition forces soon gained full air supremacy and proceeded systematically to destroy both the military and civilian infrastructure of Iraq.

The international community’s response to the outbreak of hostilities was varied. The government of the state of Kuwait initially announced that a military operation in the exercise of its right of self-defence had been launched. Saudi Arabia referred to the armed implementation of Arab and Islamic Resolutions, in addition to Resolutions of the Security Council. The Western members of the coalition, in particular the United States, the United Kingdom, France, Canada, Italy, and indirectly Turkey, affirmed that they were participating in an exercise of collective security.

A number of neutral and non-aligned states regretted the outbreak of hostilities, but few complained of a breach of international law. Yemen saw the operation as a flagrant challenge to the will of the international community, as peaceful procedures had not been exhausted. Cuba asserted that an illegal use of force, not covered by Chapter VII, was taking place. Iraq complained of an act of aggression.

The UN Secretariat took a somewhat ambiguous position. Secretary-General Javier Perez de Cuellar asserted that ‘this is not a UN war’. His chief legal adviser later clarified that, although the operation had not been undertaken under Article 42, it was covered by Chapter VII of the Charter.36 The Secretary-General, in his Report on the work of the organization, later wrote: ‘Another important aspect is that enforcement action was not carried out exactly in the form foreseen by Articles 42 et sequentia of Chapter VII. Instead, the Council authorized the use of force on a national and coalition basis’.37

Apart from those flatly denying the legality of the military campaign, there were three possible views. The operation may have been an action of collective self-defence. Secondly, it may have amounted to a mixture between self-defence and collective security, the UN Security Council having clarified, through the authorization contained in Resolution 678, that Kuwait was entitled to rely on the right of collective self-defence and having authoritatively defined the content of that right, i.e., the outer limit of the permissive use of force. Thirdly, one could consider the operation as one undertaken in
pursuit of collective security, although none of the means established in the Charter for
the management of such operations were utilized. As mentioned above, Article 48 would
allow for such a delegation of authority from the Council to particular states. Which of
these three views best fits the facts can only be ascertained after a brief review of the
actual conduct of hostilities. At this stage it is sufficient to note that Resolution 678 was
addressed to member states co-operating with the government of Kuwait. Israel, for
example, was not covered by the Resolution, although it had been subjected to armed
action in the same political context which had given rise to the actions undertaken in
pursuit of Resolution 678. It was left to Kuwait to determine which states would
participate in the operation; those which did not co-operate with the Kuwaiti government
did not enjoy the special legal status conferred upon them by the resolution.

The legal effect of the authorization was to dispense the member states co-operating
with the government of Kuwait from compliance with obligations which would be
violated if the envisaged acts were undertaken in the absence of such an authorization. In
other words, the states involved could rely upon an authorization to act which precluded
wrongfulness of that action, assuming it remained within the authority granted. And the
resolution clarified that the action undertaken was not an action inconsistent with the
purpose and principles of the United Nations in the sense of Article 2 (4) concerning the
prohibition of the threat or use of force.

In effect, a legal imbalance had been established between the forces co-operating with
the government of Kuwait on the one side, and Iraq on the other. States which
participated in the coalition effort or furnished assistance were not liable to lawful
counter-attack, as Iraq could not invoke the right of self-defence against the actions of the
coalition forces. This issue gained in relevance when Iraq threatened to retaliate against
Turkey when Ankara granted permission for the use of its airfields to coalition air forces.
The question arose whether such an armed attack against Turkey would trigger the
application of the Nato treaty. In view of the special situation created by Resolution 678
the answer would have been affirmative.

The members of the coalition were of course subject to legal limitations in prosecuting
the conflict. International law frowns upon war and violence, and exceptions to the
prohibition of the use of force by states are narrowly defined. There were three kinds of
legal limitations applicable to military operations in the Gulf. First, the authority to use
force was not only granted but also limited by the terms of Resolution 678. Secondly,
principles of general international law, including the principle of proportionality, were
applicable to the conflict. And thirdly, operations had to be conducted within the
constraints imposed by humanitarian law (or the laws of war, also known as the jus in
bello).

In the case of the Kuwait conflict, the most specific restraints on the application of
force were indeed provided by enabling Resolution 678 itself. The words ‘necessary
means’ indicated that no blanket authorization for the use of force had been granted. In
line with principles of general international law, which furnished the second type of
restraint, the doctrine of proportionality required that the mildest possible means had to
be employed to achieve a lawful objective and that no ‘unreasonable or excessive’ action
be undertaken. The principle of proportionality was recently affirmed by the
International Court of Justice in the Nicaragua case, but its precise content is subject to
much dispute. However, it is certain that proportionality in international law did not
require weighing the goal of liberating Kuwait against the possible human costs necessary to achieve it with a view to deciding whether or not the operation as such was legally defensible. The United Nations Security Council, to which states have delegated the highest authority in matters of peace and security, had already determined that military measures, with all their consequences, were legitimate in this case. It was only the amount of force utilized to achieve that goal which could be subject to legal dispute.

The degree of military force necessary to fulfill the mandate granted by the United Nations depended to a large extent on the Iraqi authorities. The more vigorously the Iraqi forces resisted, the more determined the international coalition had to be in its attempts to subdue them in and around Kuwait. And military planners were not legally obliged to risk the lives of their own soldiers by restricting their freedom of action unduly. There was a certain margin of safety operating in favour of the forces arrayed against Iraq. Of course, enemy combatants could not be subjected to ‘unnecessary’ suffering, for example through the use of exploding bullets. Civilians and cultural and religious objects were to be spared altogether, in accordance with humanitarian law, which provided the third legal restraint on military operations.

A number of practical consequences flowed from these considerations, discussed in detail in Chapter 5. Clearly, air attacks against Iraq’s military infrastructure were permissible. Command and control centres, airfields and missile bases within Iraq were being used in support of the occupation forces in Kuwait. They had to be put out of action if the actual removal of Iraqi forces from Kuwait was to be achieved with limited casualties among the coalition. And with one tragic exception, it appears the aerial attacks were generally limited to military or infrastructure installations, although civilian casualties did occur.

The attacks against Iraqi forces held in reserve behind the border with Kuwait, both by air and during the land campaign, were equally covered by the grant of authority. However, the US-led coalition had apparently also embarked upon the implementation of wider goals. In addition to removing Iraq’s forces from Kuwait, the long-term military potential of Iraq was to be reduced so as to make future aggression impossible or less likely. The destruction of Iraq’s nuclear research facilities marks the sharp end of this policy, which was also carried through against targets which were of a more unambiguously economic character, such as power stations and sewage works. It appears that these installations did not contribute to Baghdad’s immediate war effort, but they were destroyed to contain Iraq in the long run. The wholesale destruction of Iraq’s civilian economic infrastructure in pursuit of this policy may well have exceeded the requirement of ‘necessity’ in the terms of Resolution 678 and in general international law.

However, while the land offensive of the coalition was in progress, it was argued that even more ambitious military measures could be undertaken, including those necessary to extract reparation from Iraq, to topple its government and to try its members for crimes against peace and for war crimes. This argument was made with reference to the goals which had been established in Resolution 678. Particular emphasis was placed upon the wording in operative paragraph 2, relating to the establishment of ‘peace and security in the area’. However, this wording was a reflection of the terms of Article 42. It was a procedural device, pointing indirectly to the source of authority for the operation and was not, in the view of the majority of delegations to the Council, intended substantially to
broaden the mandate which had been granted. When Resolution 678 was adopted, the Yemeni delegate to the Council pointed to the danger of a possible wider interpretation, but the fact that all the other states which expressed a restrictive view as to the extent of the authorization to use force voted in its favour indicates they assumed that the restrictive view had been accepted.41

United Nations forces have been used on numerous occasions to safeguard or re-establish the constitutional systems of states in distress. The most notable example of this is furnished by the massive UN intervention in the Congo in 1960. But there is only one precedent for a mandate to remove an established government by military means. In October, 1950, the General Assembly adopted a resolution which contained implicit authorization for the forcible unification of Korea and specifically referred to the establishment of a ‘unified, independent and democratic Government of Korea’.42 In the end, North Korea was not defeated and this goal could not be realized. And, at any rate, this case does not establish a good precedent in terms of law. The resolution on Korea was adopted by the UN General Assembly, an organ with limited authority in matters of peace and security. The Security Council, which has primary responsibility in that field, was unable to accept such a mandate, due to the Soviet veto. Still, the very fact that it was felt necessary to obtain approval at least from the General Assembly is instructive, as in that case a previous resolution of the Security Council authorizing the use of force to repel the invasion of the Republic of Korea did actually include the very same formulation concerning the restoration of international peace and security in the area which also appeared in Resolution 678.43 Nevertheless, an explicit authorization to intervene in the affairs of North Korea was sought—a step which reflected the sense that explicit authorization for effecting a change in the governmental structure of Korea was legally necessary.44

The imprecise reference in Resolution 678 to the restoration of peace and security in the area did not amount to such an explicit grant of authority, and an extensive interpretation of that phrase was therefore barred. However, Resolution 678 not only authorized the use of force to implement Resolution 660, relating to the withdrawal of Iraqi forces from Kuwait, it also referred to ‘all subsequent relevant Resolutions’. Would this reference have permitted the use of force to implement goals which were mentioned in other Resolutions on Kuwait? The destruction of Kuwaiti oilfields and the apparent mistreatment of prisoners of war and civilians brought the issues of reparations and of war crimes trials to mind.

However, the relevant Resolutions 670 and 674 only invited states to collate information concerning possible claims for reparations, and the Iraqi authorities were merely reminded of their responsibility for the commission of grave breaches of humanitarian law. A reminder concerning responsibility and the invitation to record claims for compensation are not intended to be, nor are capable of, being enforced militarily. This was made clear by the Malaysian delegate to the Security Council, whose views tended to reflect those held by most neutral and non-aligned countries. He stated upon adoption of Resolution 678: ‘The resolution does not provide a blank cheque for excessive and indiscriminate use of force. The Council has certainly not authorized actions outside the context of its Resolutions 660, 662 and 664.’45 These resolutions related to the withdrawal requirement and the nullification of the purported annexation of
Kuwait. There was no mention of an intervention in the political structure of Iraq, nor of military enforcement of claims for reparations and criminal justice.

Of course, the international community could easily have widened the mandate of the coalition fighting in the Gulf by adopting further enabling resolutions at the United Nations. Surprisingly, this is precisely what happened when the Council adopted cease-fire Resolution 686.

**THE TEMPORARY CEASE-FIRE**

On 29 January, twelve days after the commencement of the aerial campaign, the USA and the USSR, in a joint statement, offered a cease-fire to Iraq in exchange for a full and unconditional withdrawal. Three days later, Soviet envoy Primakov went to Baghdad to pursue further negotiations.

Despite urgent calls for a meeting of the Security Council from the very onset of hostilities, the Council only convened on 14 February—four weeks after the commencement of the aerial campaign. On 15 February, the Iraqi Revolutionary Command Council began hinting that a withdrawal would be possible. Two days later, Tariq Aziz went to Moscow, and a peace plan emerged, which was communicated to the Council. Iraqi forces would withdraw from Kuwait City within four days, and within twenty-one days from all of Kuwait. The withdrawal would be supervised by UN peace-keeping troops. There would be a release of all prisoners of war and the Council would rescind its resolutions after two-thirds of the withdrawal had been completed. The latter point proved difficult to accept for the Council. It would have meant an automatic lifting of economic sanctions even before a full withdrawal, and all of the Council’s pronouncements concerning the Kuwait crisis would have had to be annulled.

These conditions were answered by an ultimatum issued by US President Bush. It granted the Iraqi authorities one day to declare that they would withdraw fully and unconditionally, and to provide evidence of the seriousness of their intentions. In effect, the coalition gave the government of Iraq a final opportunity to refute the presumption that a massive land campaign would be ‘necessary’ in order to implement United Nations resolutions.

Tariq Aziz, the Iraqi Foreign Minister, who had flown to Moscow to refine the withdrawal proposal, apparently dropped the condition concerning the automatic termination of economic sanctions upon the completion of two-thirds of the withdrawal. At this point it seemed as if a land campaign could indeed be averted. In fact, the UN Secretariat began to assemble an observer force which could have been dispatched to the Gulf at short notice to supervise the withdrawal. The differences in the positions of Iraq and the coalition concerning the time-frame for the withdrawal and for the exchange of prisoners of war could have been bridged by the Security Council when it met just before the expiry of the ultimatum.

Legally it appeared very difficult indeed to justify the launching of a potentially destructive land war at that juncture. Of course, there were conflicting signals emanating from the Iraqi government. The Revolutionary Command Council in Baghdad was still formulating proposals which were designed to rule out the return of the legitimate government of Kuwait, even after a withdrawal. Iraq’s envoys in Moscow and at UN
headquarters were ambiguous about the annulment of the purported annexation of Kuwait and about the renunciation of territorial claims—two points which were indisputably part of the UN ‘war-aims’ which had to be fulfilled prior to an acceptance of a cease-fire. But a clear word from the Iraqi delegate to the United Nations, uttered five minutes before the expiry of the ultimatum, might have been sufficient to resolve the issue. However, instead of an unambiguous acceptance of all UN requirements, the government of Iraq still insisted on one condition. The Iraqi government, apparently particularly interested in averting the threat of war crimes trials and reparations, argued again that ‘after the end of the withdrawal of Iraqi forces from Kuwait, the causes for the corresponding resolutions of the Security Council would cease to exist, so those resolutions would cease to be in effect.’

This proposition was flawed. Arguably, the economic sanctions would have come to an end once a full withdrawal had been effected and once the legitimate government had been restored to Kuwait. This was actually implied in a preambular paragraph of sanctions Resolution 661. But it would have required a formal finding on the part of the Security Council that these conditions had been fulfilled. Of course, the Council could decide that sanctions should be kept in place pending a settlement of the questions of war crimes trials and reparations, etc. After all, the causes of demands for war crimes trials and reparations did not cease to exist upon completion of a withdrawal. And, in fact, the Council later affirmed that economic sanctions would continue to apply even after the permanent cease-fire took effect. Also, Iraq apparently expected some sort of guarantee that the two issues of war crimes and reparations, which had been covered in Resolutions 670 and 674, would not be raised in the future.

Obviously, Kuwait, and possibly select third states, would have retained their right to conduct proceedings against alleged war criminals and demand reparations independently of the Security Council, even if Baghdad’s request for a rescinding of the resolutions had been granted. These claims were not primarily derived from the authority of the Council, but were also based on general international law. And although the settlement of the issues of war crimes trials and reparations would not have had to be a necessary precondition for accepting a cease-fire and a withdrawal, the Council was unwilling to give up its authority to enforce these claims at a later stage.

When reports of mass killings of civilians in Kuwait and of the wholesale destruction of the economic infrastructure of the country (in particular the incineration of oil installations) reached the United Nations, hopes of an avoidance of the land offensive were lost. On 23/24 February, a massive land operation of coalition forces commenced. The rapid success of the coalition soon led to calls for an intervention by the Security Council to demand an immediate cease-fire. On 26 February the Soviet delegate relayed to the Council a message from Saddam Hussein to President Gorbachev. That message read: ‘The Iraqi leadership has decided in accordance with Resolution 660 (1990) immediately to withdraw all its troops from Kuwait. The order to that effect has already been issued.’ However, initially no cease-fire was achieved in the Council, although a number of delegations strongly argued in favour of one. Instead, the Council sought authoritative assurances from the Iraqi government that it was willing to accept all Resolutions concerning Kuwait. Meanwhile, the tragic episode of the ‘turkey shoot’ of retreating Iraqi forces continued to be played out until President Bush announced a cease-fire, which took effect at midnight on 27/28 February.
The question arose as to whether the coalition had been entitled to prosecute the conflict after the Iraqi forces in the theatre of operations had been almost encircled, when they were effectively defeated and in the process of withdrawal under fire. Under the terms of Resolution 678, the application of military force had to cease when it was no longer necessary for the achievement of the goals established by the United Nations. Had the government of Iraq accepted the obligation of a full and unconditional withdrawal prior to the initiation of the land campaign, then an immediate cease-fire would have been required. With the initiation of the land battle, however, the situation apparently changed. The Security Council seemingly recognized that it would not be possible to freeze the position of the coalition troops until they had achieved and secured their objectives. In addition, in demanding Iraq’s acceptance of all UN Resolutions before contemplating a cease-fire, the Council appeared to have at least implicitly accepted the wider interpretation of the mandate contained in Resolution 678, which would allow for the implementation even of secondary goals of the United Nations, such as the apprehension of war criminals and the possible extraction of reparations by military means from Iraq. On the other hand, it has to be admitted that these views were not fully shared by all members of the Council. Clearly, the representatives of the coalition forces and their allies were not responsive to the ceasefire proposals put forward by the neutral and non-aligned states at this stage of the conflict.

At any rate, the failure of the Security Council to call for a cease-fire did not imply a mandate for the excessive use of force against the Iraqi troops. Those forces were still protected by the second branch of international law applicable to the conflict, the laws of war. According to the Regulations annexed to the Fourth Hague Convention of 1907, the right of belligerents to adopt means of injuring the enemy is not unlimited. More specifically, it is especially forbidden ‘to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion and to declare that no quarter will be given.’ The Iraqi soldiers had to be given a reasonable opportunity to lay down their arms—an obligation which had been enforced with rigour in numerous war-crimes trials at the conclusion of the Second World War. In practice, the coalition forces on the ground did at least formally comply with that requirement. The surrender of several units was achieved without casualties. Still, there was no mass surrender. Instead, Iraqi units attempting to withdraw were engaged in the process, in particular from the air, in circumstances making a surrender difficult, if not impossible.

Following upon the cease-fire declared unilaterally by the United States, the Council met on 2 March to discuss the situation and consider a draft resolution. The draft affirmed that all previous Council resolutions on Kuwait would continue to have effect and demanded their implementation by Iraq. In particular, Iraq was required to rescind its actions purporting to annex Kuwait, accept liability for reparations and return all Kuwaiti property that had been seized, release all detained Kuwaiti and third-state nationals, including prisoners of war, and cease air operations. In an extraordinary paragraph, the Council recognized that ‘during the period required for Iraq to comply’ with these demands, ‘the provisions of paragraph 2 of Resolution 678 (1990) remain valid.’ This provision was bitterly attacked in the Council by the delegates of Yemen and Cuba, who rightly saw in it an extension of the mandate concerning the use of force contained in Resolution 678. In effect, the Council was now adopting a view on the permissibility of the use of force which was even broader than the widest possible interpretation of that
Resolution. Some members emphasized that a resumption of hostilities should be avoided, but in adopting the US draft as Resolution 686, the members of the coalition were given great latitude of action by the Council.

THE CEASE-FIRE

In Resolution 687 the Security Council established the peace terms for Iraq. The government in Baghdad accepted that resolution formally, and is now obliged to consent to the demarcation of the boundary with Kuwait, to accept limitations of its armaments, including the inspection of possible nuclear, bacteriological and chemical warfare installations, to provide for the payment of compensation, and to return persons and property taken from Kuwait.

A commission to administer the complex process of determining the recipients and amount of compensation has been constituted (as to which see Chapter 13), but it has thus far not been endowed with funds to distribute. With respect to states which suffered from the economic consequences of the sanctions against Iraq, the UN has been slow to provide actual assistance, although individual states have been urged to pledge funds to be distributed for that purpose and some have responded favourably.

The cease-fire terms, comprehensive though they appeared, were lacking in at least two respects. They did not impose upon Iraq restrictions with respect to the treatment of individuals present in its territory, in particular the Kurds and Shiites. Another issue which was conspicuously absent from the Resolution concerns war crimes and crimes against peace. Most prisoners of war were rapidly repatriated, without an investigation into individual responsibility for grave breaches of the Geneva law having been conducted. The political and military leadership of Iraq has also not been seriously threatened with proceedings in accordance with the spirit of the Draft Code on Offences against the Peace and Security of Mankind, which is at present being prepared by the UN International Law Commission. Considering that it may well have been the issue of individual responsibility which kept the Iraqi government from accepting an entirely unconditional withdrawal before the land offensive started, this is perhaps tragically surprising.

One further issue connected with the cease-fire talks is of particular interest, considering the very reason for the outbreak of the conflict. The Iraqi delegation, when addressing the Council at its 2,981st meeting shortly before the adoption of Resolution 687, voiced the following opinion:

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The Security Council has never before imposed disputed international boundaries on States Members of the United Nations. Recognized international boundaries represent a basic pillar of the territorial integrity of States. Therefore, the views of all States concerned should be taken into consideration. Iraq views this question and the manner in which it has been addressed in this draft resolution as an infringement upon its sovereignty and territorial integrity. The text contravenes operative paragraph 3 of Resolution 660 (1990), which calls upon Iraq and Kuwait to begin negotiations for the resolution of their differences, and among
those differences is that of boundaries. Iraq reserves its right to demand its legitimate territorial rights in accordance with international law.

In Resolution 687 of 3 April 1991, the Security Council, acting under Chapter VII of the Charter:

2. Demands that Iraq and Kuwait respect the inviolability of the international boundary and the allocation of islands set out in the “Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters”, signed by them in the exercise of their sovereignty at Baghdad on 4 October 1963 and registered with the United Nations and published by the United Nations in document 7063, United Nations Treaty Series, 1964;

3. Calls on the Secretary General to lend his assistance to make arrangements with Iraq and Kuwait to demarcate the boundary between Iraq and Kuwait, drawing on appropriate material including the map transmitted by Security Council document S/22412 and to report back to the Security Council within one month.

The government of Iraq accepted the provisions of that resolution, but in the identical letters addressed to the Secretary-General and to the President of the Security Council, dated 6 April 1991, it made some preliminary comments on the juridical and legal aspects of this resolution, so as to encourage men of conscience in the countries members of the international community and world public opinion to make an effort to understand the truth as it is and the need to ensure the triumph of justice….

With reference to Resolution 687, the Iraqi letter continued:

In fact, the resolution constitutes an unprecedented assault on the sovereignty, and the rights that stem therefrom, embodied in the Charter and in international law and practice. For example, where the question of boundaries is concerned, the Security Council has determined in advance the boundary between Iraq and Kuwait. And yet, it is well known, from the juridical and practical standpoint, that in international relations boundary issues must be the subject of an agreement between States, since this is the only basis capable of guaranteeing the stability of frontiers.

Moreover, the resolution fails to take into account Iraq’s view, which is well known to the Council, that the provisions relating to the boundary between Iraq and Kuwait contained in the “Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters” dated 4 October 1963, have not yet been subjected to the constitutional procedures required for ratification of the Agreed Minutes by the legislative branch.
and the President of Iraq, thus leaving the question of the boundary pending and unresolved. The Council has nevertheless imposed on Iraq the line of its boundary with Kuwait. By acting in this strange manner, the Council itself has also violated one of the provisions of Resolution 660, which served as the basis for its subsequent resolutions. In its paragraph 3, Resolution 660 calls upon Iraq and Kuwait to resolve their differences through negotiations, and the question of the boundary is well known to be one of the main differences. Iraq officially informed the Council that it accepted Resolution 660 and was prepared to apply it, but the Council has gone beyond this legal position, contradicting its previous resolution, and adopted an iniquitous resolution which imposes on Iraq, an independent and sovereign State and a Member of the United Nations, new conditions and a boundary line which deprive it of its right to establish its territorial rights in accordance with the principles of international law. Thus, the Council is also depriving Iraq of its right to exercise its free choice and to affirm that it accepts that boundary without reservation.

In a letter to the Secretary-General dated 23 April 1991, the Iraqi Minister for Foreign Affairs raised similar points, arguing that the demarcation of the Kuwait-Iraq boundary could not be ‘imposed’ by the Security Council. Nevertheless, the Government of Iraq expressed a willingness to participate in the work of the Demarcation Commission established in pursuance of paragraph 3 of Resolution 687. ‘We do this because the circumstances forcing our acceptance persist’, the Iraqi Minister for Foreign Affairs added.

In making these assertions and claims, the government of Iraq appeared to be laying the groundwork for another challenge to the international boundary with Kuwait, and they therefore require brief comment.

The power of international organizations to make binding decisions rests upon a grant of authority from their membership. The United Nations, an organization enjoying objective legal personality, has been accorded such authority in general terms, *inter alia*, in Article 25 of the UN Charter, which states that the members of the United Nations agree to accept and carry out the decisions of the Security Council. In order to ensure prompt and effective action by the United Nations, its members have conferred on the Security Council primary responsibility for the maintenance of international peace and security and, in Article 24 of the Charter, they have agreed that in carrying out its duties under this responsibility the Security Council acts on their behalf. In adopting Resolution 687, the Security Council has explicitly acted under Chapter VII of the Charter.

Resolution 687 was adopted in accordance with the requirements established in the Charter for the application of Chapter VII. It followed upon a finding of the Council, made under Article 39 of the Charter, that a breach of the peace and security as regards the Iraqi invasion of Kuwait had occurred. It far exceeded the number of votes required for its adoption. And the Resolution was even expressly accepted by the government of Iraq.

Juridically, of course, acceptance of paragraph 2 of Resolution 687 was not necessary. While some of the provisions of the Resolution (mostly involving procedural issues, such as the setting up of certain Commissions, etc.) have required the co-operation of the
government of Iraq, the Security Council demands that Iraq and Kuwait must respect the inviolability of the international boundary and the allocation of islands set out in the 1963 agreement. Thus, paragraph 2 of Resolution 687 is not phrased in recommendatory language. It is absolute and immediate in its binding effect and application, establishing an independent legal obligation for both states in accordance with Article 25 of the Charter.

It must be noted, however, that this obligation is in fact a reflection of the pre-existing legal situation. The boundary between Iraq and Kuwait had been reaffirmed in the legally binding 1963 Agreed Minutes, to which Resolution 687 explicitly refers. Thus, there is no room for the argument, put forward by the government of Iraq, that the Council has ‘imposed’ a solution of an ongoing boundary dispute. Rather, the Council has recognized a legal situation which has resulted from the consent of Iraq and the State of Kuwait when establishing and reaffirming their common boundary on numerous occasions over the past decades. As the representative of India explained when addressing the Council at its 2,981st meeting:

In this particular case we find that the boundary between Iraq and Kuwait was agreed upon by the highest authorities of the respective countries as two fully independent and sovereign States. Furthermore, they both took the precaution to register their agreement with the United Nations. Thus, the Council is not engaging itself in establishing any new boundary between Iraq and Kuwait. What it is doing is to recognize that such a boundary, agreed to by the two countries in the exercise of their full sovereignty, exists and to call upon them to respect its inviolability.

Seen in this light, Paragraph 2 of Resolution 687 is not in itself an original source of the legally established boundary line. Rather, it serves to internationalize the obligation to respect the boundary as it had been freely established between Iraq and the State of Kuwait. In future, a failure to recognize the international boundary between Iraq and Kuwait on the part of the authorities of Iraq, or its violation by those authorities, would not only amount to a violation of the rights of the state of Kuwait, but it would also constitute a violation of Resolution 687 and thus of Article 25 of the United Nations Charter. This effect of paragraph 2 of Resolution 687 is emphasized in paragraph 4 of the same Resolution, which formally guarantees the boundary line.

This international guarantee of the boundary is not inconsistent with the terms adopted by the Security Council in Resolution 660. In operative paragraph 2 of that Resolution the Council demanded the immediate and unconditional withdrawal of Iraqi forces from all Kuwaiti territory. The wording adopted in paragraph 3 relating to negotiations of certain differences between Iraq and Kuwait in the resolution is not necessarily mandatory. This distinction in the language used is amplified in Resolution 661, in which the Council adopted certain enforcement measures after having determined that Iraq had failed ‘to comply with paragraph 2 of Resolution 660 (1990)’. There is no mention of a failure to implement paragraph 3, despite the fact that Iraq had in effect made negotiations impossible, indicating that the call for negotiations did not amount to a mandatory measure.
In any case, it is to be noted that negotiations did of course take place, including negotiations conducted under the aegis of the League of Arab States, as was indicated under paragraph 3 of that Resolution. It was the government of Iraq which frustrated this process by purporting to annex the state of Kuwait. Furthermore, the suggestion of negotiations cannot in itself be taken to cast doubt upon the validity of the boundary between Iraq and Kuwait. It is the essence of negotiations that the states involved are not compelled to relinquish their rights if they do not wish to do so. Also, it is not even established that the negotiations were meant to cover territorial issues. Rather, Kuwait might argue that negotiations were to focus only and exclusively on the modalities of an Iraqi withdrawal from the territory of the state of Kuwait. To hold otherwise would amount to an admission that Iraq was to be granted concessions as the result of the unprovoked aggression which it had launched against Kuwait. This could not have been the intention of the Council.

In terms of substance, Resolution 687 provides for the demarcation of the international boundary between Iraq and the state of Kuwait under the aegis of the United Nations. This procedure relates simply to the geographical description and physical demarcation of a long-established boundary line. The Demarcation Commission, established pursuant to Resolution 687 (1991), therefore has only a limited, technical function. There is no room for delimitation, or even a quasi-judicial role of the Commission, as it is explicitly bound to demarcate the boundary line agreed between Iraq and the state of Kuwait in the 1963 Agreed Minutes.

Although no further consent on the part of Iraq is necessary in order to establish the definite nature of that boundary line, the government of Iraq has given its consent to the procedure for the demarcation envisaged in operative paragraph 3 of Resolution 687. The Secretary-General, in his letter to the Minister of Foreign Affairs of Iraq, dated 1 May 1991, recalled that Resolution 687 had been adopted under Chapter VII, and in addition the Secretary-General found that the acceptance of its terms by both governments involved had provided the ‘necessary element of consent’ in that respect.51 In accordance with the obligation thus undertaken, the government of Iraq initially participated in the work of the Demarcation Commission.

The report of the Commission was not yet available at the time of writing. Although it is not a judicial body, it will have considered the views put forward by the representative of Iraq, just as it will consider the views put forward by the representative of Kuwait. But the independent nature of the Commission, established by the Secretary-General in accordance with Resolution 687 and accepted by Iraq and the state of Kuwait, cannot be questioned. Having accepted the mandate of the Demarcation Commission, the government of Iraq is henceforth precluded from challenging its authority.52

**CONCLUSION**

The response of the international community to the invasion of Kuwait was unprecedented. The aggression was condemned immediately, and tough economic sanctions were not only imposed but were administered effectively as enforcement measures, consistent with the concept of collective security. With respect to military enforcement, the membership of the United Nations was willing to engage in an
experiment. As there were no forces at the disposal of the organization, the military enforcement of its resolutions was delegated to the coalition of states co-operating with the government of Kuwait. However, once legal authority had been granted, the Security Council lost control over the subsequent course of events.

Under Resolution 665, the naval blockade was at least to be co-ordinated through the Military Staff Committee. No such requirement was included in Resolution 678, which merely provided that the Council was to be informed after the event.

After the air offensive started, numerous, mostly neutral and non-aligned states called for a rapid meeting of the Council. This attempt to re-establish UN control over the operation was frustrated. When the Council finally met, almost a month later, its deliberations were held in closed session.

When Iraq was offering to comply with the terms of Resolution 660, it was not possible in the Council to agree upon a cease-fire and a withdrawal under UN supervision. Apparently the use of force not only for the achievement of the goals enunciated in Resolution 660, but in pursuit of far wider aims, was accepted in the Council. This retroactive broadening of the ‘war aims’ during the conflict was subsequently ratified by the Council in Resolution 686.

When it appeared that Iraq was defeated, the Council was unable to assert its voice. The temporary cease-fire was announced by the United States on behalf of the international coalition, not by the United Nations. Initially, participation by the UN in administering the cease-fire was frustrated by the states co-operating with the government of Kuwait. And the Council, anxious not to see the organization entirely excluded from the conclusion of the crisis, adopted Resolution 686, granting even more powers of military enforcement to the coalition.

Although it is difficult to find violations of law in the conduct of the operations, the virtual exclusion of the organization from decision-making and even from consultation throughout the last period of the crisis will have increased doubts among the membership whether in future cases it may be wise to delegate authority to enforce UN decisions militarily. The neutral and non-aligned nations, undoubtedly already alarmed by the tendency of the five permanent members to present them with decisions arrived at in informal consultations, cannot, therefore, regard the Kuwait case as one which unambiguously points the way towards a desirable way of managing collective security in the future. Although, formally, the operation was conducted and legally justified within the structures of UN authority concerning collective security, in fact it was carried out in the manner of a traditional exercise of the right of collective self-defence. The opportunity to create a precedent which would dissuade dictators in other regions from preying upon their neighbours who may possess a strategic location or rich natural resources may well have been wasted.
Chapter 3

The role of legal advisers in the armed forces

Group Captain David Garratt

THE REQUIREMENT FOR LEGAL ADVISERS

Lawyers have been involved in the codification of the international laws of armed conflict for more than a century, and discussing its principles for longer than that and yet it was not until 1977, after some years of debate, that a requirement to make legal advisers available to advise military commanders on this body of law became a reality. ¹ Article 82 of Additional Protocol I states:

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

Article 82 was to be the third in a line of implementation devices to appear in the most important treaties of this century dealing with the law of armed conflict.² The first two of these devices, contained respectively in Hague Convention IV 1907 and the Geneva Conventions 1949, imposed obligations upon contracting parties to include the study of those treaties in their programmes of military instruction. This meant that from as early as 1914³ lawyers became involved in the dissemination of the subject to members of the armed forces. Although the status of legal advisers to the armed forces changed over subsequent years,⁴ their responsibilities in this respect became considerably wider, to incorporate programmes of instruction at all levels in addition to specialist advice to the Ministry of Defence and representation at international gatherings (UK representation at the Diplomatic Conference from 1974 to 1977 including officers from Army Legal Corps and the Directorate of Legal Services (RAF)). Service lawyers were also called upon to give legal advice at a variety of levels during the armed conflicts in which the United Kingdom has been involved since the Second World War.⁵ During the Falklands Campaign in particular, advice was given on the application of the law of armed conflict including the treatment of prisoners of war. Furthermore, participation in military exercises had formally established a need for uniformed legal advisers at the headquarters of the principal military commanders involved.⁶ Thus, by 2 August 1990 when Iraq invaded Kuwait, the role of the legal adviser in the UK armed forces was becoming well established. However, since at that time the United Kingdom had not ratified Additional Protocol I there was no clear legal obligation to make legal advisers available to advise military commanders at the appropriate level on the law of armed conflict. The requirement for legal advice during the Gulf conflict was therefore dictated more by the
established role of service and other government lawyers, than by the recognition of the requirement in Article 82. In fact it was the need for advice on legal issues arising from disciplinary and administrative matters that gave rise to the initial call for legal advisers to form a part of military headquarters staff. An RAF Legal officer was detached to the Joint Headquarters at High Wycombe in August 1990, with the initial function of giving advice on personnel and disciplinary matters, although his duties widened considerably to cover the law of armed conflict as issues in this area arose with the deployment of increasing numbers of servicemen to the Gulf. By the end of September 1990 he had been joined by an officer from Army Legal Corps. A legally qualified Naval officer was also available to give advice from the headquarters of the Commander-in-Chief, Fleet, at Northwood in the post of Fleet Legal and Personnel Officer.

The deployment of forces to the Gulf created problems of domestic and international law upon which advice was sought by the Defence Staff. Legal advice in such matters was to come not only from the practitioners within the Ministry of Defence but also the legal advisers of other government departments involved. The requirement for legal advice to be available to military commanders in the armed forces of other nations involved in the Gulf conflict may have arisen for different reasons, or may have been solely due to the requirement of Article 82. It is clear, however, that lawyers in the US armed forces were deployed to give assistance with not only international and operational law issues, but also mobilization, legal assistance, military justice, contracts and other issues. Certainly the USA was in a similar position to the UK in relation to Article 82, in that it had not ratified Protocol I. However, it is difficult to imagine the deployment of US forces without at least some of its large staff of uniformed legal advisers accompanying the body of the force. Whilst the requirement for legal advice to be available to the armed forces of other nations involved may not have been for the same essentially practical reasons as for the UK, of the thirty-four nations actively participating in the Gulf conflict, twenty-four had either ratified or acceded to Protocol I and were thus subject to the obligations of Article 82.

It is known that, prior to the Gulf conflict, some teaching of the law of armed conflict had been given by the ICRC to members of the Iraqi army, and at least two Iraqi government officials are believed to have had a good knowledge of the subject. It seems clear, however, that dissemination to other members of the Iraqi armed services was not achieved universally. Iraq was not a signatory to the Additional Protocols of 1977 and judging by its conduct in other areas, it must be debatable whether it would have taken seriously its obligations with regard to legal advisers.

THE DEPLOYMENT OF LEGAL ADVISERS

Senior government lawyers and service lawyers became involved at a very early stage in the crisis. Among the first matters to receive their attention being the rules of engagement to be used by the UK forces to be deployed. That advice came from senior government lawyers. It was evident that numerous issues with legal implications would require attention, not least of which was the application of the law of armed conflict. The need was immediately perceived for lawyers within the Ministry of Defence to speak with one voice, and thus on 16 August representatives from the offices of each legal department
within the Ministry met to discuss initial plans for the formation of a legal group. On 22 August the Ministry of Defence Lawyers Group met formally for the first time to commence consideration of some of the legal issues which had arisen. From that date the Group was to meet frequently throughout the crisis.

On 10 August the Chief of the Defence Staff appointed the Commander-in-Chief of Royal Air Force Strike Command, Air Chief Marshal Sir Patrick Hine, to be the Joint Commander of the UK operation which was to be run from the recently completed Primary War Headquarters’ bunker at RAF High Wycombe. It was not long before the functional cells, at what was to be known as the Joint Headquarters, started to seek advice on legal problems concerning the initial deployments of RAF Squadrons to the Gulf. Of initial concern were to be instructions for the command, control and discipline of the deployed force and prospective prisoner-of-war handling.

As the requests for legal advice from the Joint Headquarters increased, a small legal cell was established in the bunker, which was eventually to expand to include a complement of three uniformed legal officers from Army Legal Corps and the Directorate of Legal Services (RAF). Prior to the RAF deployments, the Royal Navy had been conducting patrols in the Gulf which were controlled from the headquarters of the Commander-in-Chief, Fleet, at Northwood where a legally qualified naval officer was available to advise on matters affecting the Navy and he continued to advise from this location throughout the crisis. Thus, in the early stages, legal advice was available only from sources in the UK, although this was undoubtedly sufficient at that time bearing in mind the sophisticated communications equipment available at the Joint Headquarters and elsewhere. Indeed, staff officers in the Gulf did not, initially, foresee a need for legal advice to be available on the spot, and in one instance it was suggested that advice could be obtained from local legal firms, until it was pointed out that their expertise in the area of the law of armed conflict and service law might be limited. In any event, the posting of uniformed lawyers to the Gulf became something of a fait accompli when, on 11 October, one of the legal staff officers with Headquarters 1 Armoured Division in Germany accompanied 7th Armoured Brigade to the Gulf as part of the operational planning for deployment of that Brigade. Within five days of that deployment, a request was received at the Joint Headquarters for a suitable uniformed legal officer to become part of the Headquarters British Forces Middle East at Riyadh, and this post was duly filled by Wing-Commander R.A.Charles of the Directorate of Legal Services (RAF) on 25 October.

The legal officer at Riyadh was given wide terms of reference including the giving of advice on the application of the international law of armed conflict, the interpretation of international agreements in relation to the exercise of jurisdiction, the interpolation and application of rules of engagement, disciplinary matters, legal aid, and advice in civil contracts. There was a proviso that in any matter touching upon government policy, reference should be made to the government department responsible via the Joint Headquarters at High Wycombe. These terms of reference were also harmonized with those of the Army legal officer with 7 Armoured Brigade in an attempt to ensure the impartiality of advice in such matters as legal aid and discipline where a conflict of interest might arise. Nevertheless, as time passed, it became necessary to make informal amendments to the terms of reference to meet the requirements of those seeking advice; as a result of requests from staff at the Headquarters British Forces Middle East, the
terms of reference for the officer at this location were widened to enable his advice to cover all tri-service issues.

The build-up of lawyers in the Gulf was to continue with the arrival of a further Army legal officer at the Headquarters Force Maintenance Area at Al Jubayl as a replacement for the existing lawyer who was to move forward with 1 Armoured Division. This post at the Force Maintenance Area did not take shape, however, because of increasing concerns over prisoner-of-war handling and the need for legal advice to be given to the Prisoner of War Guard Force. The third legal officer, who had arrived on 26 December, was therefore to become the legal adviser at the Headquarters Prisoner of War Guard Force on detachment from his originally planned post at the Force Maintenance Area. Further, the residual responsibilities of the UK in relation to the prisoners of war it had arranged to transfer to the US, meant that another uniformed legal officer arrived in the Gulf, after the commencement of hostilities, to take up a post as adviser with the prisoner of war monitoring team. With the approach of the UN deadline, the RAF legal officer at Headquarters British Forces Middle East was finding it difficult to give advice around the clock, and thus the need for an additional lawyer in support was quickly staffed and accepted, and a further RAF legal officer arrived in theatre on 11 January 1991 at Riyadh. A total of six uniformed lawyers were eventually deployed to Saudi Arabia, four Army and two RAF, to advise the main commanders of the UK force which, by the commencement of hostilities, totalled about 45,000 servicemen and women.

During the crisis, UK uniformed lawyers were to have regular contact with their US counterparts and government lawyers from the host nations. UK lawyers did not, however, meet any lawyers deployed by other nations actively involved in the crisis, although, in view of the lead taken by the US in operations planning, contact with US legal advisers was seen as a priority. By comparison, the US Army and Air Force were to deploy with about 400 lawyers. The US Navy also had about thirty lawyers in the Gulf area. At the peak of operations in the Gulf, the US forces totalled in excess of half a million personnel deployed, with lawyers stationed at all levels of command down to Brigade. A simple calculation reveals that the US lawyers outnumbered their UK counterparts by a ratio of at least 70:1. This disparity is probably accounted for by the considerably wider responsibilities of the US lawyers, but has nevertheless been the subject of amusing comment.

THE WORK OF THE LEGAL ADVISERS

The nature of the work of legal advisers during the Gulf crisis has already been touched upon in this chapter and elsewhere in this work. This section is therefore intended as a guide to the extent of involvement of practitioners in their main areas of concern. It is not intended as an exhaustive list of all topics where advice was given, nor as an analysis of the law involved, but it may be regarded as an indication of the likely areas for consideration in the future, should UK forces again be called upon to deploy to foreign soil in support of an international operation.
Informal international instruments

UK forces and accompanying civilian personnel were to have a presence in the majority of friendly states in the Gulf, but it was necessary to formalize the arrangements for such presence by the execution of memoranda of understanding or exchange of notes. These arrangements are termed informal international instruments, since they do not involve the formalities of a treaty and their contents are not, normally, published, nor are they the subject of registration with the United Nations in accordance with Article 102 of the UN Charter. They are not intended to be legally binding but, nevertheless, effectively regulate the relationship between visiting foreign nationals and a host state, particularly with regard to the extent of application of a host state’s legal system. It should be remembered that the UK armed forces have their own legal system which is designed to operate both inside and outside the jurisdictional limits of English criminal law. A UK servicemen is thus subject to service law throughout the world, and it is clearly desirable that offences committed against his code of discipline should be dealt with by a system with which he is familiar.

The drafting of informal international instruments was therefore a primary concern of government officials and lawyers prior to the deployment of forces. Past practice in this field had shown that the negotiations leading up to the execution of these arrangements could be protracted, but with assistance from the Foreign and Commonwealth Office and its staff at embassies abroad, they were concluded swiftly. It is known that the US were also able to reach formal understandings with friendly Gulf states at an early stage and it is assumed that other allies proceeded along similar lines.

The actual contents of the various arrangements concluded are confidential, but each agreement was deliberately kept simple and limited to arrangements for jurisdiction, claims, and financial matters.

Arrangements of this type were concluded not only with friendly Gulf states but also with other participating states, particularly where one state was to support another in its operations. A notable example of this type of agreement was the one prepared to take account of the loan to the UK of two Hercules aircraft and their crews by the New Zealand government. Here the draftsman could, but did not, take advantage of the special statutory arrangements which already exist for the exchange of personnel between New Zealand and the United Kingdom. The Visiting Forces (British Commonwealth) Act, 1933 contains provisions for the disciplinary arrangements which will apply when Commonwealth forces are acting together. Nevertheless, it is now common practice for the provisions of the Visiting Forces Act to be modified by the terms of the agreement so that the power of one force to take disciplinary action against a member of another is limited.

Command and discipline

Arrangements for the command and discipline of the deployed UK force was to be one of the first concerns of the uniformed legal officers in the legal cell at the Joint Headquarters. Whilst UK forces were to act under the operational directives given to them by the Joint Commander, the disciplinary chain of command required clarification.
to ensure that commanders at all levels were given appropriate disciplinary powers over those under their operational command. To achieve this it also had to be borne in mind that members of all three services would be acting together.

UK service law makes provision for command by superior equivalent rank of a member of one service over a member of another service when they are acting together. Further provision is also made for servicemen to be subject to the disciplinary code of another service. As a matter of policy, however, it was decided that, in most cases, a serviceman would be subject to his own disciplinary code. Thus, the British Force Commander Middle East, an Army General, was issued with a warrant from Her Majesty to convene courts martial under section 86(1) of the Army Act 1955 and another warrant to convene courts martial under section 86(1) of the Air Force Act 1955. The warrants were then delegated respectively to the commanders of each Army Brigade in theatre and the Air Commander British Forces Middle East to enable each such commander to convene courts martial under his own service legal system. Commanders in the field were also to have single service powers to dispose of cases summarily involving offenders of their own service under their command. The Navy was also to follow single service arrangements on discipline. With the disciplinary framework in place, uniformed legal advisers in the Gulf were to give advice, where necessary, on the disposal of disciplinary cases, including the drafting of appropriate charges. Additionally they would have been prepared, had the need arisen, to prosecute at courts martial.

The law of armed conflict

UK forces in the Gulf area were constrained in their actions by rules of engagement. The rules are based upon models prepared for future eventualities and are the result of the combined efforts of both policy-makers and lawyers in government. Details of the rules are classified but, in general terms, they take the form of permissions and prohibitions applicable upon the happening of certain eventualities. The constraints which they contain are based upon a combination of political requirement, criminal law and international law.

As the Gulf crisis developed, deployed UK forces submitted requests to higher command for amended rules of engagement to meet changing circumstances. The requests would, in turn, be approved or disapproved by higher authority. The sophisticated communications equipment in use meant that such requests could be approved in short time. However, provision was made to ensure that at no time would a commander be unable to act in an emergency. In this process of request and approval, legal advice was received at each level and, at Riyadh in particular, the RAF lawyers were to become a focal point for all matters concerning the rules.

In addition to the rules, other issues related to the law of armed conflict were to be the subject of advice including special forces activities, medical establishments, Red Cross convoys and Iraqi aircraft in Iran. In considering many of these matters the uniformed lawyers at Riyadh were able to put their excellent working relationship with the US lawyers to good effect.

The deployed lawyers were also to have contact with representatives of the International Committee of the Red Cross to discuss prisoner-of-war handling and the law of armed conflict in general.
Legal aid

In accordance with existing practices and regulations the uniformed legal officers in the Gulf were provided with authority to operate the service Legal Aid Scheme. The scheme is designed to ensure that servicemen abroad can receive advice from qualified lawyers in matters where local civilian practitioners would have no expertise. The servicemen could therefore receive assistance with problems concerning UK law which might have arisen whilst he was in the Gulf or which might have existed prior to his deployment there. Fortunately, few such problems arose: legal advisers would have been overstretched to give full assistance.

In addition to giving assistance in civil legal problems, arrangements were also made to provide those suspected of committing serious service offences with legal advice when interviewed by service police under the provisions of the Police and Criminal Evidence Act 1984. However, indiscipline was not to be a major problem.

APPRAISAL OF THE ROLE OF THE LEGAL ADVISER

It is inevitable that sophisticated modern-day armed forces will require legal advice on the conduct of their activities to ensure compliance with both national and international law. Most military commanders would have no difficulty in accepting a peacetime role for lawyers in this respect, but, as practitioners in the area of military law will know, a certain amount of scepticism still exists about the role of the lawyer in advising on matters affecting the conduct of a conflict. The writer’s conversations with practitioners in a number of armed forces suggest that there is still some way to go before there is an easy acceptance of the role which lawyers can play in time of crisis and conflict. Military lawyers within the US armed forces, however, seemed to have achieved a level of acceptability at most levels of command for the purposes of reviewing doctrine, operations plans, contingency plans, and rules of engagement; reviewing of new weapons and participation in exercises. Such a level of integration has yet to be achieved within the UK armed forces, although there is no doubt that the last decade has seen an improvement in the relationship between military lawyers and operational planners. That the principles of the international laws of armed conflict are now accepted as part of the planning process is, however, clearly evident; for example, when giving evidence to the House of Commons Defence Committee after the conclusion of the Gulf conflict, Air Vice-Marshal Wratten (now Air Marshal Sir William Wratten KBE, CB, AFC) made it clear that he had a power of veto over particular targets, and that he had made use of that power twice when selected targets had been in locations where severe collateral damage might have resulted had there been a weapon system malfunction. Uniformed lawyers at Headquarters British Forces Middle East were called upon to advise on detailed operational matters within overall planning guidelines and the rules of engagement agreed by the Minister.

In strengthening the position of legal advisers to the armed forces, it must not be forgotten that they must also be well acquainted with the world of the operational planner and the technicalities of modern weaponry. Without such knowledge, there is the danger that the legal adviser will still be seen as an impediment to operational planning rather than a member of a team endeavouring to ensure the efficient achievement of a goal.
within the constraints of the law. It is to be hoped that, in future, lawyers and operators will be able to improve upon their working relationships.\textsuperscript{38}
Chapter 4
Customary international law and the First
Geneva Protocol of 1977 in the Gulf conflict

Christopher Greenwood

INTRODUCTION

Throughout the Gulf conflict, the states ranged against Iraq made clear their intention of conducting hostilities in strict accordance with the laws of war. In one major respect, however, the content of those laws was uncertain. The First Geneva Protocol of 1977 had attempted to codify and revise the law relating to the conduct of hostilities between states. Particular attention had been paid to the protection of civilians from the effects of hostilities, most of the rules on which had not been revised since 1907. As much the largest conflict since the adoption of Protocol I, the Gulf conflict highlighted the importance of many of these rules. Whereas the 1949 Geneva Conventions were binding on all the states involved in the Gulf, several of those states, including Iraq, the United States and the United Kingdom, had not become parties to Protocol I. The Protocol was not, therefore, applicable to those hostilities. It thus became of considerable interest to determine which of the provisions in Protocol I could be regarded as stating rules of customary international law, since such rules were applicable to all states irrespective of whether they were parties to the Protocol.

The significance of this question had been recognized by the United States government in 1987, when it had decided not to become party to Protocol I. A senior official of the State Department summarized the effects of that decision in these terms:

First, the United States will consider itself legally bound by the rules contained in Protocol I only to the extent that they reflect customary international law, either now or as it may develop in the future…

Second, Protocol I now cannot serve in itself as a baseline for the establishment of common rules to govern the operations of military alliances in which United States forces participate. To establish a basis for such common rules, the United States and its friends must now decide which of the rules in Protocol I either reflect customary law or should be adhered to by free world forces as a predicate for their ultimate recognition as customary law.

Third, Protocol I cannot now be looked to by actual or potential adversaries of the United States or its allies as a definitive indication of the rules that United States forces will observe in the event of armed conflict and will expect its adversaries to observe. To fill this gap, the United States and its friends would have to give some alternative clear
indication of which rules they consider binding or otherwise propose to observe.\(^5\)

The United States therefore proposed to consult its allies (many of whom had already ratified Protocol I) with a view to arriving at an agreed statement of those rules which were generally acceptable, either as customary law or as ‘positive innovations’.\(^6\) No such statement had been agreed, however, by the time Iraq invaded Kuwait.

That invasion gave a new urgency and importance to the question concerning which provisions of Protocol I were declaratory of customary law. Although the United States provided the majority of the forces which subsequently drove Iraq out of Kuwait, it did so as part of a diverse international coalition. The reference to the need to arrive at ‘common rules to govern the operations of military alliances in which United States forces participate’ had been made with NATO operations in mind. Common rules now had to be agreed in a very short period of time for a coalition which included not only long-standing allies of the United States, but also forces drawn from states such as Syria, with which the United States had no tradition of military co-operation.

Of the states which took part in the main coalition operations\(^7\) against Iraq:

— Bahrain, Canada, Italy, Kuwait, The Netherlands, Oman, Qatar, Saudi Arabia, Syria and the United Arab Emirates were parties to Protocol I;
— Australia, Egypt and the United Kingdom had signed but not ratified the Protocol;
— France had neither signed nor become a party to the Protocol;
— The United States had signed Protocol I but had subsequently announced its intention not to become a party.\(^8\)

Protocol I becomes binding upon a state only after it has ratified or acceded to the Protocol. The fact that a state has signed the Protocol does not make it a party to the Protocol unless it subsequently deposits an instrument of ratification (Article 95). Even then, the Protocol applies only between states which are parties (Article 96 (2)), so that the effect of Iraq’s refusal to become a party to Protocol I was that even those coalition states which were parties were not required to apply the Protocol in hostilities with Iraq.

Nevertheless, the customary law on the conduct of hostilities was binding on all the states involved in the conflict.\(^9\) In so far as certain provisions of the Protocol stated rules of customary international law, therefore, Protocol I provided a convenient point of reference for all the states engaged in the hostilities. Moreover, it is probable that most, if not all, of the coalition states which were parties to Protocol I had incorporated the standards of the Protocol into their training and military manuals,\(^10\) so that the standards laid down in the Protocol had become part of the military doctrine of their armed forces. In addition, those states, such as the United Kingdom, which had signed the Protocol but had not announced whether they would ratify it were under an obligation ‘to refrain from acts which would defeat the object and purpose’ of the Protocol.\(^11\) The nature of the hostilities, which involved, for example, the heaviest aerial bombardments since the Second World War, meant that many of the provisions of Protocol I were potentially of great importance. The coalition states regularly reported to the United Nations\(^12\) on the measures which they were taking and went to great lengths to demonstrate that their actions were in accordance with all relevant rules of international law. The result is that the status and interpretation of many of the provisions in the Protocol, especially those
relating to the protection of civilians from the effects of hostilities, received greater attention than in any previous conflict.13

The purpose of this chapter is therefore to examine the practice in the Gulf conflict to see what light it sheds upon two questions. First, which provisions of Protocol I are today regarded as stating rules of customary international law? While that will necessarily involve consideration of the status of those provisions at the time they were adopted in 1977, the Gulf practice also provided a good opportunity to consider to what extent the customary law has developed since 1977. Some of the provisions which were regarded in 1977 as innovative, or as refinements of the existing law, may have become absorbed into custom since that date. Secondly, what does practice in the Gulf say about the interpretation of those rules? It is not the intention to engage in a debate about how far the coalition actually lived up to its promises to ensure scrupulous observance of the rules. That question is the subject of several other chapters in this volume. The present chapter is concerned with identifying the legal standards which were regarded as applicable in the Gulf, rather than determining whether or not those standards were observed in every case. Allegations that the law was violated will be considered here only insofar as they may shed light upon the customary law status or interpretation of the rules concerned.

The principal focus of attention will be upon Articles 48 to 58 of the Protocol, which concern the protection of civilians, because it is in this area that the Gulf practice is particularly informative.14 Most of the material relied upon is drawn from the reports made to the Security Council by the various coalition states, two Reports to Congress by the United States Department of Defense15 and a number of other public statements. While Iraqi statements have been taken into account as far as possible, most of the discussion concerns the practice of the coalition, because evidence of that practice is more readily available and because questions of compliance with the law were more extensively discussed on the coalition side. In addition, reference will be made to a number of public appeals and press releases issued by the International Committee of the Red Cross (ICRC).16

So far as the practice of the coalition states is concerned, most of the material has had to be drawn from United States and British sources. It should be remembered, however, that although the various national contingents in the coalition were not (at least in the formal sense) subject to a single unified command, there seems to have been general agreement amongst the coalition States regarding targeting policy. In discussing the Rules of Engagement (ROE) which were applied, the Pentagon Interim Report notes that ‘as military command relationships developed among the coalition, US ROE became effective for, or were consistent with, all Coalition combatant forces.’17

Similarly, the United Kingdom Secretary of State for Defence, the Rt. Hon. Tom King, giving evidence to the House of Commons Defence Committee, commented that:

We agreed certain overall objectives between the governments concerned in the Coalition before the campaign started. We agreed on the importance, for example, of military objectives; we agreed on the need to minimize the risk of civilian casualties on the Iraqi side; we agreed on the importance, for example, of avoiding cultural or religious sites; we agreed that, for instance, we were not attacking water supplies or sewage
installations; we agreed on what were military strategic targets and what were specific direct military targets and on the targets that we would seek to ensure were avoided.\textsuperscript{18}

While there may have been differences of opinion regarding the application of this targeting policy, it seems reasonable to assume that agreement on the policy itself reflected a wide measure of agreement concerning the applicable law.

\section*{TREATIES AND CUSTOMARY INTERNATIONAL LAW}

It is generally assumed that the provisions of a multilateral treaty are to be treated as authoritative statements of customary international law in two cases:

1 when they codify principles which already form part of customary international law prior to the conclusion of the treaty; and

2 when, although they go beyond the existing customary law, the principles which they lay down come to be accepted as generally applicable and thus become part of a new customary international law.

The first of these categories requires little discussion. It should, nevertheless, be remembered that even when a treaty provision is ‘merely codifactory’, the adoption of that provision may nevertheless have an important effect. In the first place, it serves to confirm the customary rule and remove doubts which may have existed about its continued existence. This was a particularly important feature of Protocol I and, indeed, one of the main purposes of the Diplomatic Conference, for many of the customary principles codified in the Protocol had been violated on such a massive scale during the Second World War and many of the post-1945 conflicts that their continued existence was being called into question. Moreover, most of these principles were the product of a much smaller world community and their reaffirmation by a conference in which the newly independent states participated fully had considerable political significance. For example, the principle that the rules of humanitarian law apply equally to both sides in a conflict has been challenged by North Vietnam during the Vietnam War and was in danger of being eroded by the growth of a modern ‘just war’ school of thought, particularly in relation to wars of national liberation. The preamble to Protocol I and the provisions of Article 96 (3) make clear that humanitarian law continues to apply equally to both sides in an international conflict.

Secondly, the codification of a hitherto unwritten rule will almost invariably affect the content of that rule. In selecting words to codify a customary principle, those responsible for the draft are generally forced to try to resolve ambiguities about the scope and content of that rule and their choice may have the effect of creating new ambiguities. Attention in the future will focus upon the text so that the scope of the customary rule will tend to become a matter of textual interpretation.\textsuperscript{19} As will be seen, many of the provisions of Protocol I regarding the protection of civilians from the effects of hostilities have codified for the first time principles of customary law in ways which have had profound effects upon those rules.
The way in which treaty provisions which cannot be regarded as codificatory may come to affect customary law requires closer attention. In the *North Sea Continental Shelf* case,\(^2\) the International Court of Justice laid down three requirements which had to be met if a treaty provision which was substantially innovative was to be deemed to have become binding as part of the general law:

1. the provision must be of a norm-creating character;
2. state practice, particularly that of the states whose interests are most specifically affected, must indicate a widespread acceptance of the principle; and
3. that practice must be based upon *opinio juris*.

The Court warned, moreover, that such a result was ‘not lightly to be regarded as having been attained’\(^2\) and held that it had not occurred in the case of the provision of the Geneva Convention on the Continental Shelf, 1958, which lay at the heart of the *North Sea* cases. The *North Sea* test suggests that an innovative provision in a treaty can only be regarded as having passed into custom if there is convincing evidence of widespread state practice applying the principle enshrined in that provision in circumstances where the treaty itself was not applicable and the states concerned appear to have treated the principle as binding in customary law.

Nevertheless, in the *Nicaragua* case\(^2\) the Court, while quoting with approval its earlier judgment in the *North Sea* cases, adopted in practice a far less rigorous approach, holding that numerous provisions in multilateral conventions—including common Articles 1 and 3 of the 1949 Conventions—had become part of customary law. The judgment, however, contains no examination of the state practice upon which such conclusions should have been based if the approach in the *North Sea* cases had indeed been followed.\(^2\) Nor is the *Nicaragua* judgment unique in adopting such a cavalier approach. The International Military Tribunal at Nuremberg assumed, without explanation, that the provisions of the Hague Regulations on Land Warfare, 1907, had become part of customary international law by 1939.\(^2\) Even more striking is the readiness with which the United States Military Tribunal in *United States v. Von Leeb* (the *High Command* case) was prepared to accept that many provisions of the Geneva Convention on Prisoners of War, 1929, had passed into customary law before the outbreak of war between Germany and the USSR in 1941.\(^2\)

This suggests two refinements to the test in the *North Sea* cases. First, where a treaty provision is merely a detailed application of a more general principle which is already well established in customary law, the passage of the detailed provision into custom may more easily be assumed. Professor Baxter has suggested that the provisions of humanitarian treaties may more readily be accepted as having entered into customary law than those of other multilateral agreements:

> on the ground that each new wave of such treaties builds upon the past conventions, so that each detailed rule of the Geneva Conventions for the Protection of War Victims is nothing more than an implementation of a more general standard already laid down in an earlier convention, such as the Regulations annexed to Convention No. IV of The Hague.\(^2\)
Secondly, in examining the state practice as required by the \textit{North Sea} test, it should be remembered that the adoption of the treaty text is itself an important piece of state practice which in some cases may be sufficient to bring about a change in the customary law.\textsuperscript{27} If abused, this approach runs the risk of obliterating the distinction between conventional and customary law and of ignoring the often delicate ‘package deal’ nature of treaty negotiations. Nevertheless, it is suggested that it is acceptable—and is, indeed, applied in practice—cases where the treaty provision concerned commands general acceptance (amongst the international community as a whole), not merely as part of a treaty package but as the statement of a rule of general application.\textsuperscript{28}

Even with these refinements, the application of the \textit{North Sea} test to the provisions of the 1977 Protocols presents problems. It is clear that one of the factors which is in practice of great importance in establishing the customary law status of treaty provisions is the existence of decisions of the International Court of Justice or another authoritative international tribunal. Once such a tribunal has decided that a particular provision has become part of customary law, its customary law status tends to be assumed in subsequent discussion.\textsuperscript{29} Thus, a series of decisions of the International Court of Justice is generally regarded as having settled the status of some of the most important provisions of the Vienna Convention on the Law of Treaties, 1969.\textsuperscript{30} No such decisions exist regarding the 1977 Protocols. Indeed, international decisions are rare in respect of any of the humanitarian law treaties, the war crimes cases quoted above being the exception rather than the rule. Nor is state practice easy either to discover (given the secrecy which generally surrounds the wartime activities of states) or to evaluate (since the nature of armed conflict means that the gulf between principle and practice is likely to be particularly marked).

**PROVISIONS OF PROTOCOL I CONCERNING THE PROTECTION OF CIVILIANS (ARTICLES 48–58)**

The provisions of Protocol I regarding the protection of civilians from the effects of hostilities are built around two general principles:

1 the principle of distinction, which Article 48 states in the following terms:

\begin{quote}
the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.\textsuperscript{31}
\end{quote}

2 the principle of proportionality, which prohibits an attack upon a military objective.

\begin{quote}
which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.\textsuperscript{32}
\end{quote}
These general principles are amplified by a number of more detailed provisions. Thus, in order to give effect to the principle of distinction, Article 50 provides, in effect, that everybody who is not a member of the armed forces is to be regarded as a civilian, while Article 51 (1) and (3) provides that civilians shall enjoy protection so long as they do not take a direct part in hostilities. Article 51 (2) prohibits making the civilian population or individual civilians the object of attack. So far as civilian objects are concerned, Article 52 (2) provides that:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Article 51 (7) prohibits the use of civilians in an attempt to shield military objectives or operations.

The Protocol also contains a number of specific prohibitions, additional to the general principles of distinction and proportionality but said to have been derived from them. Articles 51 (4) and (5) prohibit indiscriminate attacks. Article 53 protects cultural objects and places of worship. Article 54 prohibits attacks upon objects indispensable to the survival of the civilian population. Article 55 bans the use of methods and means of warfare which are intended or may be expected to cause ‘widespread, long-term and severe’ damage to the natural environment. Article 56 contains a complex series of provisions which prohibit, in most circumstances, attacks upon dams, dykes and nuclear electrical generating stations. Finally, Protocol I prohibits reprisals against civilians (Article 51 (6)), civilian objects (Article 52 (1)), cultural objects and places of worship (Article 53 (c)), objects indispensable to the survival of the civilian population (Article 54 (4)), the natural environment (Article 55 (2)) and installations protected by Article 56 (Article 56 (4)).

Article 57 translates these provisions into a series of precautions which must be taken by those responsible for an attack. Those who plan or decide upon an attack are required to do everything feasible to verify that the target is a military objective, to take all feasible precautions in the choice of methods and means of attack, with a view to minimizing incidental harm to civilians and damage to civilian objects, and to refrain from launching any attack which might be expected to violate the principle of proportionality. Article 57 also requires the cancellation or suspension of an attack if it becomes apparent after the attack has been ordered that the target is not a military one or that excessive civilian casualties or damage to civilian objects is likely. Article 57 (2) (c) requires that advance warning of attacks which may affect the civilian population shall be given ‘unless circumstances do not permit’. Article 58 then requires states to keep their own forces and military objectives apart from the civilian population ‘to the maximum extent feasible’.
THE PRINCIPLE OF DISTINCTION

The basic principle of distinction in Article 48 of Protocol I and the rule in Article 51 (2) that attacks should not be directed against civilians were already well established in customary international law before the Gulf conflict. Practice during the Gulf conflict reinforces the view that both provisions are codificatory. In a memorandum sent by the ICRC on 14 December 1990 to all states party to the Geneva Conventions, it was said that one of the principles of customary international law which would be binding on any party to an armed conflict was that:

a distinction must be made in all circumstances between combatants and military objectives on the one hand, and civilians and civilian objects on the other. It is forbidden to attack civilian persons or objects or to launch indiscriminate attacks.36

The coalition states took the same position, at least with regard to civilian persons (as opposed to civilian objects). At an early stage in the conflict, the United States declared, in terms which closely follow the language of Article 51 (2), that ‘the civilian population, as such, as well as individual civilians, should not be the object of attack.’37 The Pentagon Interim Report quoted Article 48 as follows:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict [i.e., both defender and attacker] shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives.

The report went on to state that ‘the language of Article 48 quoted above is regarded as a codification of the customary practice of nations, and therefore binding on all nations.’38 Coalition targeting policy was repeatedly stated to be based on this principle.39

So far as the prohibition of attacks upon civilian objects is concerned, the Pentagon Interim Report states that ‘as a general principle, the law of war prohibits the destruction of civilian objects not imperatively required by military necessity.’40 At first sight this seems more equivocal than the provisions of Articles 48 and 52 (1), neither of which makes any mention of military necessity as a justification for attacking a civilian object. It has been suggested that the protection accorded by customary law to civilian objects is not as absolute as that accorded to civilian persons (so that Protocol I would have to be seen as an extension of the law in this respect).41 In the Gulf conflict, however, nothing seems to have turned on this putative distinction. The coalition states announced that they were attacking only military targets,42 and at no stage did the coalition suggest that an object which they did not classify as a military objective was being attacked for reasons of military necessity.

Iraq’s practice is more difficult to assess. In its missile attacks upon Saudi Arabian and Israeli cities, Iraq made no attempt to comply with the principle of distinction and, as in the Iran-Iraq War, attacked civilian and military objectives and persons
indiscriminately. On the other hand, Iraq repeatedly complained to the Security Council about what it characterized as coalition attacks upon civilian targets. In that sense Iraq appears to have acknowledged the existence of a duty not to attack civilian persons and objects, even if it disregarded that duty in its own actions.

The principle of distinction, however, is of little value without a working definition of what constitutes a military objective. The definition adopted in Article 52 (2) of Protocol 1 (quoted above) had already achieved a wide measure of acceptance before the Gulf conflict. In 1976 the United States Army’s *Field Manual* was amended to incorporate a definition of military objective which was drawn directly from what became Article 52 (2) of the Protocol. The United States *Naval Commander’s Handbook*, published after the United States decided not to ratify Protocol I, employs a slightly different wording, but the accompanying note states that ‘this variation of the definition in Additional Protocol I Article 52 (2) is not intended to alter its meaning and is accepted by the United States as declarative of the customary rule.’ The same attitude seems to have been taken by the United Kingdom and other members of the coalition. It seems, therefore, that the definition of a military objective in Article 52 (2) was treated as the legal yardstick to be applied in devising coalition targeting policy.

The Pentagon Interim Report gives the following list of target sets for the air campaign:

1. leadership command facilities;
2. electrical production facilities powering military systems;
3. command, control and communication nodes;
4. strategic and tactical integrated air defence systems;
5. air forces and airfields;
6. known nuclear, chemical and biological weapons research and production facilities;
7. Scud production and storage facilities;
8. naval forces and port facilities;
9. oil refining and distribution facilities, as opposed to long-term oil production capability;
10. railroads and bridges connecting Iraqi military forces with logistical support centres;
11. Iraqi military units to include Republican Guard Forces in the Kuwait Theatre of Operations;
12. military storage sites.

Items 4, 5, 7, 8, 11 and 12 on this list would clearly fall within any definition of a military objective and require no further comment. In view of the importance of oil to any military operations, the same is true of item 9, subject to one qualification which will be mentioned below. Attacks on nuclear facilities raise questions about the status of Article 56 of Protocol I, which are discussed later in this chapter, but otherwise there can be no doubt that the targets listed in item 6 fall within the definition of military objectives in Article 52 (2) of the Protocol. Items 1, 2, 3 and 10 require some comment here, because of what they reveal about the coalition interpretation of Article 52 (2).

There is no doubt that the ‘leadership command facilities’ and ‘command, control and communication nodes’ (items 1 and 3 on the Pentagon list) of an enemy’s armed forces are a legitimate—and highly important—military objective. In the case of Iraq, however, these categories seem to have been interpreted as including the Ba’ath Party’s command structure and a wide range of government ministries. That suggests that the coalition
regarded much of the leadership and command structure of the Iraqi state (and not just the armed forces command structure) as contributing to Iraq’s military action and thus as a legitimate target. In view of the highly militarized nature of the Iraqi government and the close integration of the Ba’ath Party with that government, such an approach was probably justified on any interpretation of Article 52 (2). That does not mean, however, that practice in the Gulf should be seen as supporting a view that government ministries and political party facilities will naturally constitute military objectives in any armed conflict. The coalition also attacked the telecommunications system of Iraq, and not just those telecommunications facilities which were used exclusively or primarily by the military. Although armed forces seldom rely primarily upon the ordinary telecommunications system, the importance of that system as a supplement, or alternative, to dedicated military communications networks means that the coalition’s practice is likely to be the model in future conflicts.

One of the most controversial features of the coalition’s air campaign was the attacks on ‘electrical production facilities powering military systems’ (item 2 on the Pentagon’s list of target sets). There is no doubt that power supplies for the armed forces are a legitimate military objective. The question, however, is in what circumstances power plants and distribution lines which provide electricity for both military and civilian use may be attacked. The ICRC’s 1956 list of categories of objectives of ‘generally recognized military importance’ referred to ‘installations providing energy mainly for national defence, e.g….plants producing gas or electricity mainly for military consumption’. The coalition seems to have taken the view, however, that since Iraq had an integrated national electricity grid, which was used both by the armed forces and civilians, all Iraqi generating stations anywhere in the country were involved in supplying that grid and thus in providing power for military use. The entire electricity generating and distribution system was thus treated as a lawful target.

Middle East Watch has criticized this approach to what it describes as ‘dual use’ targets as going beyond the terms of Article 52 (2). That provision, however, divides objects into only two categories: military objectives and civilian objects. If an object is a military objective, it may be attacked (subject to the requirements of the principle of proportionality which are discussed in the next section), while if it is a civilian object, it may not be attacked. There is no intermediate category of ‘dual use’ objects: either something is a military objective or it is not. In deciding whether the Iraqi power stations and electricity distribution network were a legitimate target, therefore, the question is whether the Iraqi national grid was making an effective contribution to military action, such that its destruction or neutralization offered a definite military advantage in the circumstances ruling at that time.

The coalition view was that it did. Thus, the Pentagon Interim Report stated that ‘it was impossible…to destroy the electrical power supply for Iraqi command and control facilities or chemical weapons factories, yet leave untouched that portion of the electricity supplied to the general populace.’

The importance of the power stations as targets was also emphasized by the commander of the British forces in the Middle East, Lieutenant-General Sir Peter de la Billère, in evidence to the House of Commons Defence Committee:
The strategic air campaign was designed to destroy the Iraqi capability supporting his forces in the field and delivering chemical weapons and generally giving aid and succour to his military machine. An important aspect of this was, of course, to destroy his ability to produce power, which, in turn, supported a large area of strategic military support. In my view, I think that to take out the power stations was essential.\textsuperscript{59}

The question as to whether an integrated power grid means that all power stations are liable to attack as military objectives has been the subject of discussion in the past.\textsuperscript{60} It is difficult to deny that the availability of power from such a national grid is likely to be of great importance to an enemy’s armed forces, even if many military installations also have their own generators on which they can fall back.\textsuperscript{61} In most cases denning that power to the enemy’s armed forces will offer a definite military advantage. It is likely, therefore, that in future conflicts states will take the same view as the coalition, that power stations and distribution networks are military objectives. Whether they may lawfully be attacked will then turn upon the application of the proportionality principle.

Bridges (item 10 on the Pentagon list) are also objects used by military and civilians alike. The Pentagon Final Report makes clear that the motives for attacking them were not simply to disrupt troop movements:

Baghdad bridges crossing the Euphrates River contained the multiple-fiber optic links that provided Saddam Hussein with secure communications to his southern group of forces. Attack of these bridges severed those secure communication links, while restricting movement of Iraqi military forces.\textsuperscript{62}

There remains one further question, raised in particular by coalition attacks upon bridges and road and rail links but also important with regard to power supplies and oil distribution facilities. Article 52 (2) of Protocol I provides that an object is a military objective only if its destruction, neutralization or capture offers a definite military advantage \textit{in the circumstances ruling at the time}. As Professor Kalshoven has said:

This element in the definition precludes military commanders from relying exclusively on abstract categorizations in the determination of whether specific objects constitute military objectives (‘a bridge is a military objective’; ‘an object located in the zone of combat is a military objective’, etc.). Instead, they will have to determine whether, say, the destruction of a particular bridge, which would have been militarily important yesterday, does, in the circumstances ruling today, still offer a ‘definite military advantage’: if not, the bridge no longer constitutes a military objective and, thus, may not be destroyed.\textsuperscript{63}

It has been suggested that once the coalition had achieved air supremacy,\textsuperscript{64} some targets which might have been military objectives in the early stages of the campaign ceased to be such. The coalition has been criticized, for example, for continuing to attack the electricity network in this phase of the campaign.\textsuperscript{65} It is not known what steps were taken...
as the campaign progressed to ensure that the status of potential targets as military objectives was assessed ‘in the circumstances ruling at the time’. Further information on this subject would provide potentially valuable guidance as to how this part of the test in Article 52 (2) is likely to be applied in practice.

While the definition of a military objective in Article 52(2) was accepted as declaratory of custom during the Gulf conflict, the status of Article 52(3) was less clear. That provision states that:

In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

This presumption applies only to objects normally used exclusively for civilian purposes and not to objects habitually used both by the military and civilians, such as bridges or railway lines.\(^{66}\) Even with that qualification, however, it is very doubtful that Article 52 (3) represents customary international law. It was not in the original ICRC draft of the Protocol and the ICRC Commentary on Protocol I describes the provision as ‘an important step forward in the protection of the civilian population’,\(^{67}\) which suggests that it was regarded as an innovation in 1977. In the discussions which followed the United States decision not to ratify Protocol I, United States officials indicated that Article 52(3) was unlikely to ‘become established as customary international law’\(^{68}\) and the presumption of civilian status is not incorporated in the various United States manuals.

Middle East Watch (which assumes, without giving reasons, that Article 52(3) states a rule of customary law\(^{69}\)) accuses the coalition of failing to observe the presumption of civilian status in a number of cases.\(^{70}\) There is no indication that, as a matter of policy, the coalition decided not to apply the presumption of civilian status. The Pentagon Final Report, however, repeated the United States’ view that Article 52 (3) ‘is not a codification of the practice of nations’, and criticized it as a defective provision.\(^{71}\)

**PROPORTIONALITY**

While the matter was not free from doubt, the prevailing view before the Gulf conflict was that the principle of proportionality set out in Articles 51 (5) (b) and 57 (2) (a) (iii) of Protocol I was part of customary law. It was possible that, as a prominent ICRC lawyer suggested, ‘the rule as codified …slightly develops the generally agreed concept, mostly on the drafting level’.\(^{72}\) The principle itself, however, seemed to have become well established by 1990 and the wording of the two provisions in the Protocol had also achieved a wide measure of acceptance. Thus, the United Kingdom representative at the Diplomatic Conference which adopted the Protocol described Article 51 (5) (b) as ‘a useful codification of a concept that was rapidly becoming accepted by all states as an important principle of international law relating to armed conflict’.\(^{73}\) The United States Army’s *Field Manual* was amended in 1976 to include a provision on ‘unnecessary killing and devastation’ which incorporates much of the language of Article 51 (5) (b).\(^{74}\) The United States *Naval Commander’s Handbook* contains a proportionality test in
somewhat different terms, but the Annotated Supplement to the *Handbook* (published in 1989) comments, in a note, that ‘the rule of proportionality, which is inherent in both the principles of humanity and necessity upon which the law of armed conflict is based…, is codified in Additional Protocol I, Articles (51) (5) (b) and 57 (2) (a) (ii) and (iii).’

On the other hand, the Chief of the International Law Team in the Office of the Judge Advocate General of the United States Army has written that:

> In the course of the American military review of Protocol I, it was concluded that the concept of proportionality is not a rule of customary law, as it has been represented. By American domestic law standards, the concept of proportionality as contained in Protocol I would be constitutionally void for vagueness. Statements made by some nations in the course of the Diplomatic Conference or in conjunction with their subsequent signature or ratification of Protocol I make it clear that there is no agreement as to what the concept means, or the level at which generally it will be applied.

The article goes on to raise a number of questions of fundamental importance regarding the scope and application of the principle of proportionality. So far as reservations and declarations are concerned, several of the coalition states had made declarations, when signing or ratifying Protocol I, to the effect that the reference in Article 51 (5) (b) to the military advantage to be expected from an attack was ‘intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack’.

Coalition practice on the Gulf conflict provides strong support for the proposition that customary law includes some kind of proportionality principle requiring a balance to be struck between the military gain and the collateral civilian losses which may be expected from an attack. Coalition states insisted on numerous occasions that every effort was being made to keep collateral civilian casualties to a minimum. Moreover, there were clear indications that the states concerned regarded themselves as under a legal obligation to endeavour to minimize civilian casualties and damage to civilian objects. During the conflict, the United States, in a letter to the President of the Security Council setting out some of the requirements of the law of armed conflict, stated that ‘hostilities must be conducted in a manner so as to minimize injury to civilians’. Subsequently, the section on the law of armed conflict in the Pentagon Interim Report stated:

> An uncodified…provision is the principle of proportionality. It prohibits military actions in which the negative effects (such as collateral civilian casualties) clearly outweigh the military gain. CENTCOM conducted the air and ground campaigns with a purposeful focus on minimizing collateral civilian casualties and damage to civilian objects. United States and Coalition forces took a number of steps to minimize the risk of injury to non-combatants.

The ICRC also emphasized the principle of proportionality in its Memorandum to the parties to the Geneva Conventions.
Although the coalition states have been accused of violating the principle of proportionality in some of the attacks carried out during the air campaign, it is evident that the general policy of the coalition forces was to seek to minimize incidental civilian casualties and damage and that they went to considerable lengths to achieve that goal. That is a major piece of state practice which, together with the clear indications of *opinio juris* in the statements quoted above, is sufficient to remove any doubts about the existence of a customary law principle of proportionality.

It has been suggested, however, that the coalition interpreted the requirements of proportionality in a way which constitutes a departure from the statement of the principle in Protocol I. Articles 51 (5) (b) and 57 (2) (a) (iii) require that the loss of civilian life, injury to civilians and damage to civilian objects which may be expected from an attack must not be excessive ‘in relation to the concrete and direct military advantage anticipated’. Paragraph 2209 of the ICRC *Commentary* states that:

> The expression ‘concrete and direct’ was intended to show that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded.

Much has been made of the fact that the Pentagon Interim Report makes no reference to ‘concrete and direct’ military advantages but states that the principle of proportionality ‘prohibits military actions in which the negative effects (such as collateral civilian casualties) clearly outweigh the military gain). Middle East Watch has argued that the language in the Interim Report is more relaxed than that in the Protocol, which might suggest that a different standard is being applied. That is probably to attach too much significance to language which was intended for a report to Congress, rather than a piece of precise legal drafting. It is true that neither the Interim Report nor the Final Report follows the language of the Protocol, but it is quite close to the wording used in the *Naval Commander’s Handbook* which the Annotated Supplement treats as stating the same principle as that in the Protocol. Moreover, even the ICRC Memorandum departs from the wording of the Protocol in that it refers only to ‘direct’, rather than ‘concrete and direct’, military advantages. In the absence of more substantial evidence, it would be rash to conclude that the United States, let alone the coalition as a whole, was applying a radically different standard of proportionality from that laid down in Protocol I.

Yet, however the principle of proportionality may be expressed, there is ample scope for differences over the way it is interpreted and applied. Thus, Air Vice-Marshal Wratten (now Air Marshal Sir William Wratten, KBE, CB, AFC), the British air commander in the Middle East, in testifying to the House of Commons Defence Committee that he had twice decided not to proceed with attacks upon targets because of the risk of collateral damage, added that the targets concerned were not—and this is the most important issue—in my judgement and that of the Americans of a critical nature, that is to say, they were not fundamental to the timely achievement of the victory. Had that been the case then, regrettably, irrespective of what collateral damage might have
resulted, one would have been responsible and had a responsibility for accepting those targets and for going against them.\textsuperscript{87}

This statement may be contrasted with a passage in Paragraph 1980 of the ICRC \textit{Commentary} on Article 57 (2) (a) (iii):

\begin{quote}
The idea has also been put forward that even if they are very high, civilian losses and damage may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol.…. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.
\end{quote}

It would be wrong to make too much of the contrast between these two passages. The former is oral evidence given by someone who is not a lawyer and who was, at this point, discussing a theoretical question. The latter is contained in a commentary which, however influential, represents only the views of certain ICRC lawyers regarding the interpretation of Protocol I and not a statement of the official views of the ICRC.\textsuperscript{88} Nevertheless, it is thought that Air Vice-Marshall Wratten’s comments are probably closer to the interpretation which most states would place on the proportionality principle (whether or not that principle is stated in the terms used in Protocol I) than are those in the passage quoted from the ICRC \textit{Commentary}.

Another question highlighted by the hostilities in the Gulf is what has to be taken into account in assessing the degree of collateral civilian damage. At the time that Protocol I was drafted, the main concern was to minimize the civilian casualties and damage to civilian objects occurring during attacks, for example those killed by the explosion of a bomb or the collapse of a building which had been hit. It seems that during the Gulf conflict great pains were taken to minimize this kind of collateral damage and that such casualties were remarkably low.\textsuperscript{89} Some attacks, however, produced results which had severe repercussions for the civilian population in the longer term. Thus, the coalition attacks on Iraqi power stations led to a loss of power supplies which in turn had serious effects on the sewage treatment facilities and water purification plants in some Iraqi cities, with very serious effects for public health.\textsuperscript{90} It is not clear how far such longer-term effects were taken into account in applying the proportionality criterion. Indeed, it is far from certain how such effects could be taken into account, given that they are necessarily more difficult to predict and may be due to a mixture of factors, such as (in the case of the Gulf conflict) the effects of sanctions and the priority given to military needs by the Iraqi government.

Practice during the Gulf conflict thus reaffirms the customary law principle of proportionality in a way which other recent conflicts have failed to do.\textsuperscript{91} Without more detailed information, however, it is difficult to draw any lessons from the Gulf conflict about how that principle is to be interpreted and applied in practice.
SPECIAL PROTECTION (ARTICLES 53–6)

In addition to the general principles of distinction and proportionality, Protocol I contains a number of specific provisions designed to give special protection to cultural objects and places of worship (Article 53), objects indispensable for the survival of the civilian population (Article 54), the natural environment (Article 55) and works containing dangerous forces, i.e. dams, dykes and nuclear electrical generating stations (Article 56). All of these provisions were discussed during the Gulf conflict. With the exception of Article 55 (which will be discussed later in this chapter), this section will consider the status of those provisions and of the prohibitions on reprisals in Articles 51–6 of the Protocol.

There was little controversy over Article 53, under which it is prohibited:

(a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;

(b) to use such objects in support of the military effort.

Although this article did not appear on the lists of provisions recognized by the United States as declaratory of customary international law, the coalition states were careful not to attack cultural objects. Thus, the United Kingdom stated at the outset of the conflict: ‘British commanders have also been briefed on the location and significance of sites of religious and cultural importance in Iraq and operations will take account of this.’

The Pentagon Interim Report, after accusing Iraq of using its civilian population as a shield for military operations, stated that:

Similar actions were taken to utilize cultural property to protect legitimate targets from attack; a classic example is the positioning of two fighter aircraft adjacent to the ancient temple at Ur on the theory that Coalition respect for the protection of cultural property would preclude the attack of those aircraft. While the law of war would have permitted the attack against the two fighters, with Iraq bearing responsibility for any damage to the temple, the Commander-in-Chief, Central Command elected not to attack the aircraft on the basis of respect for cultural property and the belief that positioning of the aircraft adjacent to Ur (without servicing equipment or runway nearby) effectively had placed each out of action, thereby limiting the value of their destruction by Coalition air forces when weighed against the risk of damage to the temple.

There were, of course, good political reasons for the United States and the United Kingdom to be particularly careful not to attack sites of religious significance, given the effect such attacks might have on the Islamic states in the coalition. Nevertheless, the statements quoted suggest that both states acknowledged that there was an obligation not to attack cultural property as such and to take the damage to cultural objects into account.
in applying the proportionality principle. Neither the United States nor the United Kingdom is party to the Hague Convention for the Protection of Cultural Property, 1954, so that any legal obligation had to be derived from customary international law.

So far as the other provisions were concerned, the ICRC Memorandum, after referring to the principles of distinction and proportionality being ‘recognized as binding on any party to an armed conflict’, went on to state:

The ICRC invites states which are not party to Protocol I to respect, in the event of armed conflict, the following articles of the Protocol, which stem from the basic principle of civilian immunity from attack:

— Article 54: protection of objects indispensable to the survival of the civilian population;
— Article 55: protection of the natural environment;
— Article 56: protection of works and installations containing dangerous forces.94

The language of this ‘invitation’, coming as it did immediately after a reference to provisions which the ICRC claimed were recognized as part of customary international law, suggests that the ICRC did not see Articles 54–6 as declaratory of custom, even though they were said to stem from a principle which clearly did have customary law status.

In fact, however, the position may not have been so clear-cut, even before the Gulf conflict started. Thus, a senior ICRC lawyer, speaking in his personal capacity, argued in 1987 that Article 54 stated a rule of customary international law.95 The annotations to the United States Naval Commander’s Handbook state that Article 54 (2) codifies a rule accepted by the United States as part of customary law and that Article 54 (1) created a new rule, prohibiting starvation of civilians as a means of warfare, ‘which the United States believes should be observed and in due course recognized as customary law.’96

Although there were allegations during the Gulf conflict that coalition aircraft bombed food warehouses,97 there is no evidence that the coalition did not regard itself as bound by the rule stated in Article 54 (2); disputes seem to have been about the application of that rule on the facts. There was, however, a dispute as to whether the United Nations was required to observe the principles in Article 54 (1) and (2) in implementing sanctions against Iraq under Security Council Resolution 661.98 After initial doubts, the Security Council adopted a further resolution making provision for foodstuffs to be imported for the Iraqi civilian population,99 although little use was made of it in practice.

Article 56, on the other hand, was generally regarded as an innovation in 1977 and was one of the provisions which the United States expressly rejected as ‘militarily unacceptable’ at the time it decided not to become a party to Protocol I.100 Clearly the United States did not regard this provision as having become codificatory of customary law and it was not so regarded by others.101

Article 56 (1) provides that:

Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may
cause the release of dangerous forces and consequent severe losses among the civilian population.

Military objectives located at or in the vicinity of such works and installations enjoy the same protection. Article 56 (2) provides that this special protection shall cease:

(a) for a dam or dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
(b) for a nuclear electrical generating station only if it produces electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
(c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.

During the Gulf conflict, coalition forces attacked and put out of action two Iraqi nuclear power stations. The British Secretary of State for Defence told the House of Commons Defence Committee that the coalition had concluded, on the basis of intelligence reports, that Iraq was seeking to manufacture a nuclear weapon and stated:

That being the case, we were not prepared to put any of our forces at risk of facing some sort of nuclear or possibly some form of crude radioactive weapon that might have been developed, to face them with that, and that is why with the very greatest care and after the most detailed planning to minimize the risk of any contamination or the risk of any radiation spreading outside the site, that very carefully and very precisely those sites were attacked. I am not aware of any evidence that there was a risk of contamination outside the site which would tend to suggest that those were very precise and very carefully planned attacks.

The United States also emphasized the care taken to avoid collateral damage through the release of radiation. It seems that there were no collateral casualties from these two attacks and certainly no substantial escape of radiation. Moreover, since the end of the conflict, considerable evidence has come to light that Iraq was indeed developing a nuclear weapon.

The fact that these attacks were carried out may be seen as a reaffirmation of the United States’ rejection of Article 56. However, the location of the Iraqi reactors and the fact that it was possible to attack them in a way which avoided the escape of radiation meant that the attacks would probably have been legitimate even if Article 56 had been applicable, since the attack was not expected to, and did not in fact, ‘cause the release of dangerous forces and consequent severe losses among the civilian population.’ The same seems to have been true of attacks on Iraqi hydro-electric facilities.

The United States has also rejected suggestions that the prohibitions on reprisals in Articles 51–6 should be regarded as declaratory of customary international law.
view of the Iraqi Scud missile attacks on population centres in Saudi Arabia, the conditions for taking reprisals against the Iraqi civilian population or, at least, against Iraqi civilian objects, existed. There is, however, no indication that such reprisals were ever taken or even contemplated. The doctrine of reprisals was never advanced by the coalition as the justification for any of the attacks mounted. Moreover, while Iraq was threatened with retaliation if it resorted to the use of chemical or biological weapons, no similar threat appears to have been made regarding attacks on the civilian population.

PRECAUTIONS IN ATTACK AND DEFENCE (ARTICLES 57–8)

In order to ensure that civilians and civilian objects are spared as far as possible, Article 57 (2) (a) of Protocol I requires that those who plan or decide upon an attack shall:

(1) do everything feasible to verify that the target is a legitimate military objective;
(2) take all feasible precautions in the methods and means of attack with a view to minimizing incidental civilian casualties and damage; and
(3) refrain from launching any attack which may be expected to violate the principle of proportionality.

Under Article 57 (2) (b) an attack should be cancelled or suspended if it is discovered that the target is not a military objective or the civilian losses are likely to be disproportionate. Article 57 (2) (c) requires that ‘advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.’ Article 57 (3) provides that where a choice of military objectives is available for obtaining a similar military advantage, the objective should be selected which will be likely to cause least danger to civilians and civilian objects.

Most of these provisions were regarded as declaratory of custom before the Gulf conflict, although Article 57 (3) may have gone beyond the customary law as it had stood in 1977. Coalition announcements regarding targeting policy were generally based upon the same principles as Article 57. Thus, a number of coalition pronouncements stressed the duty to verify that targets were military objectives and the duty to call off an attack if it was discovered that the target was not, in fact, a military objective. The duty to verify at the planning stage that targets were military objectives was accepted. The United States Defense Secretary told a press conference that: ‘the pilots of the allied forces have operated in accordance with clear instructions to launch weapons only when they are certain they’ve selected the right targets under correct conditions.’

Similarly, the coalition acknowledged the legal duty to assess military targets against the criteria of the proportionality principle and to call off attacks if the likely collateral damage was excessive. Air Vice-Marshal Wratten stated that he had twice decided not to proceed with attacks upon targets allocated to the Royal Air Force, because he concluded that the risk of collateral damage was too great:

when we were experiencing collateral damage, such as it was, and some of the targets were in locations where, with any weapon system
malfunction, severe collateral damage would have resulted inevitably, then there were one or two occasions that I chose not to go against those targets.109

The coalition’s stated policy was to choose methods and means of warfare which minimized the risk of collateral damage to the greatest extent feasible. The Pentagon Interim Report stated that:

To the degree possible and consistent with risk to aircraft and aircrews, aircraft and munitions were carefully selected so that attacks on targets within populated areas that [sic] could provide the greatest degree of accuracy and the least risk to civilian objects and the civilian population. Where required attacking aircraft were accompanied by a high number of support mission aircraft in order to minimize aircrew distraction from their assigned missions.110

The Interim Report also goes some way to acknowledging the obligation stated in Article 57 (3):

One reason for the maneuver plan adopted for the ground campaign was the fact that it avoided populated areas, where US, Coalition and Iraqi civilian casualties and damage to civilian objects necessarily would have been high.111

The statement by Air Vice-Marshal Wratten also indicated that, having decided not to attack the targets allocated because of the danger to the civilian population, the Royal Air Force had attacked other targets as an alternative. The duty to give warnings in Article 57 (2) (c), which had earlier been acknowledged as part of customary law,112 was also implemented on a number of occasions. Although there were many attacks of which no warning was given, the duty imposed by that provision is, of course, heavily qualified by the phrase ‘unless circumstances do not permit’.

Middle East Watch has accused the coalition of failing to observe the requirements of Article 57 on numerous occasions, for example by failing properly to assess the risk of collateral damage and in the selection of methods and means of attack.113 Whether these allegations are well founded cannot be considered here. The question under discussion in this chapter is not whether the coalition always complied with the standards in that Article, but whether it regarded those standards as binding upon it. All the indications are that the coalition states accepted that they were bound to take the precautions set out in Article 57 and that they regarded that provision as being largely declaratory of international law.

The controversy surrounding the bombing of the bunker at Amiriya in Baghdad on 13 February 1991 is a case in point. The results of that attack were tragic—some 400 Iraqi civilians who had taken refuge in the bunker were killed—and the coalition was variously accused of failing to verify whether the target was a military objective, of attacking without due regard for likely civilian casualties and of failing to give advance warning of the attack. Coalition statements, however, suggest that the United States Air Force
commanders who decided to attack the bunker were convinced that it was a military command and control centre and did not suspect that there were civilians present. Acting on that basis, they then took all the precautions which were required. The bunker was attacked with a precision bomb to minimize the risk to civilians in the surrounding area (there seems to have been very little damage in the surrounding area). Although no warning was given, the belief that there were no civilians in the bunker and that those in the vicinity would be unaffected meant that no warning would have been required. In short, it seems to have been accepted that the Article 57 standards were applicable. The attack did not raise difficult questions about the applicable law, but rather factual questions about whether the requirements of that law were complied with in this instance.

On signing or ratifying Protocol I, a number of coalition states made a declaration to the effect that:

military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all the sources which is available to them at the relevant time.

In the case of Amiriya, therefore, the questions which remain to be answered are, first, whether sufficient care was taken to obtain all the relevant information which could be gathered (and was therefore ‘available’ to the coalition) and, secondly, whether that information was properly assessed in reaching the conclusion that the bunker was a military objective and that there were no civilians taking refuge inside it.

On one point, however, the coalition interpretation of the Article 57 standards requires further examination. Article 57 (2) (a) (ii) requires that an attacker should:

take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

The Pentagon Interim Report and a number of other United States statements make clear that the United States did not regard itself as bound always to select the method or means of attack which would cause the least danger to civilians, but was entitled to take account of the risk to coalition aircrews and the likelihood of successfully destroying the target. It seems inconceivable that any state would fail to take such factors into account and to do so is surely in accordance with the requirements stated in Article 57. More controversially, it seems that modern high-precision, ‘smart’ weapons were not invariably used whenever an attack involved a risk of collateral damage, on the ground that supplies of these weapons were limited and they might have to be conserved for attacks on other objectives later in the campaign. This approach involves a broad (though not an untenable) interpretation of what is meant by the duty to take ‘feasible’ precautions.

Article 58 of Protocol I requires states to take a number of precautions against the effects of attacks. In essence, states are enjoined, ‘to the maximum extent feasible’, to keep military objectives separate from civilians and civilian objects. In addition, Article 51 (7) prohibits a state from using the presence of civilians or civilian objects as a shield
for military operations. The United States stated, as one of the requirements of customary international law, that:

The defending party must exercise reasonable precautions to separate the civilian population and civilian objects from military objectives, and avoid placing military objectives in the midst of the civilian population; a defender is expressly prohibited from utilizing the civilian population or civilian objects as a shield from attack.

The United States accused Iraq of systematic violation of this requirement. It is clear that Iraq failed to comply with this requirement, but that does not mean that it denied the existence of such an obligation in customary law. During the Iran-Iraq conflict, Iraq had complained to the Security Council accusing Iran of using centres of civilian population to shield troop concentrations, contrary to Article 28 of the Fourth Geneva Convention, and continued: ‘this prohibition was reaffirmed clearly in Protocol I, signed at Geneva in 1977. Article 58, paragraph (b), states the necessity of avoiding the establishment of military targets in or near densely populated areas.’

Both sides in the Gulf conflict, therefore, seem to have accepted the customary law status of the rules in Article 58.

PROTECTION OF THE ENVIRONMENT

Protocol I contains two provisions, Article 35 (3) and Article 55, which prohibit the use of methods and means of warfare ‘which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.’ At the time Protocol I was adopted, these provisions were widely seen as innovative and they were not treated as part of customary law by the United States when it conducted its review of Protocol I in 1986–7. The Gulf conflict however, saw an unprecedented threat to the natural environment posed by Iraq’s actions in releasing large quantities of oil into the Gulf and subsequently setting fire to the Kuwaiti oil wells.

Iraq’s action was widely condemned as illegal, and some of the condemnations made reference to the environmental provisions in Protocol I. Surprisingly, in view of earlier United States indications that these provisions were not declaratory of customary law, the Pentagon Interim Report contained the following statement:

Iraq’s release of oil and burning of the wells could implicate a variety of customary and conventional international law principles, including:

(3) Additional Protocol I to the Geneva Conventions…(to which neither Iraq nor the United States is a party) contains in Articles 35 and 55, ‘a prohibition of the use of means or methods of warfare…intended or …expected to cause’ widespread, long-term and severe damage to the environment.

The Pentagon Final report, however, takes a very different view. While arguing that Iraq’s actions were illegal under the Fourth Geneva Convention and the 1907 Hague
Regulations, it dismisses the two provisions of Protocol I on the basis that the Protocol was not applicable in the conflict and makes no mention of any possibility that the two provisions reflect customary international law. In addition, the Final Report suggests that, even if Articles 35 (3) and 55 had been applicable in the Iraq conflict, it was questionable whether they had been intended to apply to acts of the kind perpetrated by Iraq.\(^{128}\)

The ICRC’s statements on this subject are also equivocal with respect to the status of Articles 35 (3) and 55. The ICRC Memorandum of December 1990 appeared to treat Article 55 as innovative.\(^ {129}\) However, on 1 February 1991 the ICRC issued an appeal in which it stated that: ‘The right to choose methods or means of warfare is not unlimited. Weapons having indiscriminate effects and those likely to cause disproportionate suffering and damage to the environment are prohibited.’\(^ {130}\) The reference to the environment in this appeal was thus linked to provisions which are undoubtedly part of customary international law.

In view of the lack of consistency in the statements regarding the environmental provisions of Protocol I, it is clearly unsafe to draw any firm conclusion regarding the status of those provisions. Nevertheless, the fact that they were mentioned at all in official publications concerning a conflict in which Protocol I, as such, was manifestly inapplicable will be taken by some commentators as adding credence to the suggestion that they represent an emerging norm of customary law.

**CONCLUSIONS**

One of the difficulties in assessing the extent to which provisions in a treaty on the law of armed conflict reflect customary international law is that there is often a paucity of the kind of state practice, accompanied by opinio juris, which can be analysed to determine which, if any, provisions of the treaty concerned have been treated as binding by the belligerents. The Gulf Conflict is unusual in that the coalition states made public their views about a number of the rules of customary law. For the first time since Protocol I was adopted in 1977, therefore, it is possible to examine the practice of states during an armed conflict and draw some conclusions about which provisions of the Protocol they regarded as binding in customary law.\(^ {131}\)

That practice suggests the following conclusions:

1. The principle of distinction and the prohibition of attacks against the civilian population, individual civilians and civilian objects, laid down in Articles 48, 51 (2) and 52 (1), continues to be regarded as part of customary law. Although Iraq systematically violated this principle and the coalition has been accused of violating it in some instances, neither side denied the applicability of the principle or its legal force and coalition targeting policy was expressly based upon it.

2. The definition of a military objective in Article 52 (2) is generally regarded as declaratory of customary law. The interpretation placed upon that provision by the coalition, especially in respect of attacks on electric power systems, gives an insight into how it is likely to be applied in the future.

3. The presumption of civilian status in Articles 50 (3) and 51 (3) is not regarded as declaratory of custom, although that conclusion is based more upon statements made before the conflict than on any practice during it.
4 The principle of proportionality laid down in Articles 51 (5) (b) and 57 (2) (a) (iii) is generally accepted as part of customary law, notwithstanding doubts expressed before the conflict. Its application continues, however, to be problematic, particularly with regard to long-term damage.

5 The principle of the protection of cultural objects (Article 53) was probably treated as part of the customary law.

6 Practice during the conflict tells us little about the status of the Article 54 provisions regarding objects indispensable to the survival of the civilian population, although there is some indication that they were treated as part of the customary law.

7 The conflict seems likely to have given added impetus to the emergence of a rule of customary law forbidding the use of methods or means of warfare likely to cause widespread, long-term and severe damage to the natural environment.

8 The conflict suggests that the precautions required by Articles 57 and 58 form part of the customary law.
Chapter 5
Means and methods of warfare in the conflict in the Gulf
Françoise J. Hampson

INTRODUCTION

The Gulf conflict was unusual in several respects. In the first place, five months separated the Iraqi invasion of Kuwait from the launch of air operations by the coalition forces.\(^1\) This had implications for the planning of operations and also placed unusual demands on the coalition powers in their handling of domestic and international public opinion. Considerable emphasis, for example, was placed on the desire of the coalition forces to avoid civilian casualties in Iraq.\(^2\) Whilst the motive may have owed little to legal obligations, the principle of distinction between combatants and civilians is at the heart of the laws of war.\(^3\) Lawyers were recognized as having a part to play. Over two hundred American military lawyers were deployed, the majority to deal with matters internal to the forces or with relations with the host government and other forces. Lawyers were also involved in the planning of operations.\(^4\)

One particular aspect of the potential public reaction in the United States also played an important part in shaping the way in which the conflict was handled. The public and the authorities alike were haunted by the spectre of Vietnam.\(^5\) This resulted in less political interference in the conduct of the conflict, the immediate use of overwhelming air power, rather than a gradual escalation in its use, the postponement of contact between the two land forces until the Iraqi forces had been ‘softened up’ by massive aerial bombardment and, above all, an overwhelming desire to avoid American military casualties, body counts and body bags.\(^6\) The legal implications of these ‘policies’, if that is not too positive a term for a reaction against previous experience, will be examined later in this chapter.

The conflict was highly unusual in another respect. Visual images from both sides of the fighting were transmitted almost instantaneously into people’s homes. However much the media were manipulated and news reports sanitized, the coalition governments were not able to exercise total control over what news emerged.\(^7\) The choice of particular episodes which this chapter will examine in some detail owes a good deal to the television coverage of the conflict.

Some of the issues regarding targeting and weapon use are dealt with elsewhere in this book, for example the environmental impact of the way in which hostilities were conducted and the status of certain provisions of Additional Protocol I of 1977 to the Geneva Conventions of 1949 as customary international law.\(^8\) In this chapter, it will simply be assumed that the prohibition of intentional and indiscriminate attacks against civilians and civilian property and the requirement that attacks themselves be not
indiscriminate, which are to be found in Additional Protocol I, were binding on all the forces as customary international law. Additional Protocol I was not binding as treaty law on, inter alia, the USA, the UK, France or Iraq.

This chapter will examine the legal provisions applicable to targeting and weapon use in the context of the conduct of operations in the Gulf. Particular attention will be paid to three matters which aroused popular concern at the time or subsequently. These were, first, the attack on the Amiriya bunker or air-raid shelter; second, the cumulative effect of attacks on the civilian infrastructure and, finally, the attacks against Iraqi land forces, particularly the burial of forces alive and the attacks against fleeing forces on the road from Kuwait City to Basra. The conduct of Iraqi forces in Kuwait involves principally the rules on belligerent occupation, rather than those on the conduct of hostilities and is discussed in Chapter 10. The environmental impact of its actions in Kuwait is dealt with in Chapter 6 and elsewhere. The inactivity of the Iraqi forces means that any examination of the conduct of hostilities necessarily involves concentrating on the actions of the coalition forces. An exception is the Scud missile attacks launched by Iraq against Israel and Saudi Arabia.

**THE STRUCTURE OF THE RULES**

The law designed to set limits on the conduct of hostilities does so by reference to three elements—targets, attacks and weapons. They are interrelated. Certain targets are absolutely unlawful and some weapons are absolutely prohibited on account of the ‘unnecessary suffering’ and ‘superfluous injury’ to which they give rise. At the other end of the spectrum, certain otherwise lawful targets are not legitimate targets if there is a likelihood of disproportionate civilian casualties. Similarly, certain weapons, which can be used against concentrations of the opposing forces, cannot be used where there is a likelihood of indiscriminate injury to civilians. In other words, the principles on targeting and weapon use meet. A military target, such as a command and control centre, may be attacked, even in a built-up suburban area, but only by means of weapons which can be and actually are very precisely targeted. Similarly, a weapon which can be lawfully used against an isolated military target could not be used where there was a likelihood of disproportionate civilian casualties. Where these principles meet, the rules on targeting and weapon use are reinforced by requirements which the attack itself must satisfy. The criteria used involve concepts such as ‘proportionality’ and ‘discrimination’. The rules themselves will be examined in more detail below. What is being emphasized here is the interrelationship of the rules on targeting and the rules on weapon use.

There can be no appeal to notions of military necessity independent of the legal provisions. The rules themselves represent a balance between legitimate military requirements and humanitarian concerns. According to the St Petersburg Declaration of 1868, ‘the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.’
TARGETING

Attacks directed against civilians

The only lawful targets of attack are military objectives, which have been defined as those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. It is prohibited to target civilians and the civilian population; area bombardment, particularly in an area with no military targets, is therefore unlawful. Insofar as the object of such attacks is to terrorize the civilian population, that is also expressly prohibited. Other targets are prohibited on account of the likely effect on the civilian population. There is an interrelationship between the use of indiscriminate weapons and attacks directed against civilians. Scud missiles, for example, are regarded as relatively indiscriminate weapons. The modifications the Iraqis had introduced to extend their range made them even less discriminate. Their use against ‘targets’ in Israel, in and around Tel Aviv, was unlawful on account of the characteristics of the weapon. That in turn created the impression that the Israeli population was being targeted. They represented an unlawful target.

There is no evidence to date that the coalition forces targeted civilians or the civilian population. Indeed, they had committed themselves not to do so. In practice, respect for this rule should be something that one could take for granted. To target civilians is to waste ammunition, fire-power and military effort.

Prohibition of indiscriminate attacks

The determining characteristic of indiscriminate attacks is that they ‘are of a nature to strike military objectives and civilians or civilian objects without distinction’. An illustration of the type of attack which will be found to be indiscriminate is found in Article 51 (5) of Additional Protocol I. Prohibited attacks include those ‘which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.’

So, for example, clearly separated military objectives in built-up areas must be attacked individually and not treated as a single objective. In practice, this rule may lead to more disagreement over its application than the prohibition on targeting civilians, since it involves striking a balance between two dissimilar considerations.

The treaty itself makes it clear that ‘attacks’ include acts of violence against the adversary, whether in offence or in defence. Statements made at signature by various states suggest that the direct military advantage anticipated means ‘the advantage
anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.  

The commander is therefore required to estimate foreseeable incidental loss to civilian life. There may be a distinction between generally foreseeable loss arising from the nature of war, such as the possibility of mistakes and the malfunction of weapons, and foreseeable loss caused by an attack against a particular target with a particular weapon. The principle will have to be applied in the confusion of battle but, as a matter of logic, commanders must first define the target and proposed weapon. Second, they must estimate the number of casualties and, third, the anticipated military advantage. The important element is that they cannot proceed to the second stage until they have a particular weapon in mind. The characteristics of the weapon in relation to the target and its surroundings will determine a major part of the foreseeable civilian losses.

It is not clear to what extent the commander must take into account what are characterized as generally foreseeable losses arising from the nature of war. Article 51 is in the part of the Protocol concerning the protection of civilians. They need protection from both generally and specifically foreseeable harm. Any calculations as to general risk are, however, likely to be vague. If the commander is bound to take into account the risk of weapons malfunctioning and, possibly, pilot error when taking evasive action, is the commander also obliged to take into account the effect of actions of the adversary? The obvious example is the bringing down of a precisely targeted Cruise missile in a suburban area in the outskirts of Baghdad. It is submitted that there is a material distinction between the actions of one’s own forces, as when bombs are released whilst the pilots are taking evasive action, and the actions of the adversary. One has some control over the former, for example through the issuing of orders, and it is therefore reasonable that risk of civilian losses on account of such actions should be taken into account in assessing proportionality. It would be wholly unreasonable to expect a commander to take into account actions over which he has no control. Similarly, if the adversary unlawfully places missile batteries in densely populated areas, the commander is not prohibited from attacking what is a lawful military objective. The commander cannot, however, ignore the presence of civilians. The unlawful act on the part of his adversary will determine how the attack is carried out, but not whether it takes place.

Even where the constituent elements of what must be compared are identified, there are difficulties in applying the criteria to the facts.

In order to determine the risk to civilian life, the commander must have detailed information not only about the target but also on the surrounding area. It is not merely a question of whether it is civilian in character, but of what type of activities are carried out. A hospital is entitled to special measures of protection at all times. The risk of incidental damage to a school will be less out of school hours, and to a religious building less when services are not being held. It should be emphasized, however, that these are not legitimate targets, unless in fact being used for military purposes. The question at issue here is the risk of incidental damage to them.

In statements made at signature, certain states explained their understanding of Articles 51–8 inclusive. Military commanders and others responsible for planning, deciding upon or executing attacks ‘necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time’. They do not have to have information from every type of source...
available to them throughout the theatre of operations before taking a decision. This question of intelligence is vital to the effective application of Article 51, but it raises a wide variety of issues. The problems are particularly acute for those involved in aerial attacks or attacks by means of long-range missiles. Ground forces can modify their conduct if they discover that the target is in fact civilian in character. The commanders are clearly at fault if they ignore information available to them. They are more likely, however, to be faced with conflicting information. It would not be surprising if they chose to act on that information which suited their plans. Are they at fault where they fail to modify the plan to take account of information which is inconsistent with other intelligence? That must depend on the respective weight to be given to the conflicting intelligence. Where commanders have information from some sources but not from others, such as satellites, which they could reasonably expect, must they request such information, or can they act on the basis of the information they actually have? The statement of understanding is ambiguous on this score. How strenuous must the efforts be to obtain intelligence? How regularly must it be updated? Does the answer depend on the scale of the risk of civilian casualties, even though the commander may be unable to determine that until the information is received? Even with the statement of understanding, is there not a more onerous obligation on technologically developed states than on less developed states? It is submitted that the statement of understanding achieves a realistic balance. Commanders cannot ignore information available to them simply because it would not be available to the adversary. The state will be using intelligence-gathering for other military purposes, so it can be expected to use it to protect civilians from indiscriminate attack.

The other element in the equation, the ‘direct military advantage anticipated’, also poses problems. As already seen, that has been stated to mean the advantage from ‘the attack considered as a whole’. The difficulty of this is that the ultimate military advantage, the end of the war, could be held to justify a very high number of incidental civilian casualties. The statement, however, does not refer to the war as a whole but an attack considered as a whole. It is not clear what is the definition of attack in this sense. A further difficulty arises during the course of a conflict, particularly one such as the Gulf war, in which one party has total air superiority. At the outbreak of hostilities between Iraq and the coalition forces, the thousands of targets could be ranked. At that stage, third-tier command and control centres and secondary bridges would be a low priority. The military advantage to be anticipated from an attack would be slight. The likelihood of even a low number of civilian casualties might make an attack against such a target unlawful. As the more important targets were taken out, the relatively less significant targets would assume a greater priority. This would be for two separate reasons. First, the military importance of the target to the adversary might have increased. If the bridge became the only way of crossing a river because all the other bridges had been destroyed, then in military terms its importance would have increased. Second, if the attacking forces were to be kept busy, for whatever reason, they would have to work down the list of targets, whatever the actual military usefulness of a particular target. Whilst it might appear that the first is a legitimate reason for reclassifying a target as the military advantage anticipated from its destruction increased, the second would appear illegitimate. It is likely to be difficult to distinguish the two in practice.
Both in assessing the military advantage anticipated and in balancing that against the likely loss to civilian life, commanders are likely to be heavily influenced by their attitude to military casualties. If military casualties are to be avoided as a matter of the highest priority, this is likely to mean aerial bombardment in preference to ground war, and the use of aircraft flying beyond the range of surface-to-air missiles (SAMS). No forces are indifferent to military casualties. Indeed all forces will go a long way to keeping them to a minimum.46 The extent to which this happens, however, does appear to vary. The attitude of commanders is probably determined largely by recent experiences and by the prevailing outlook in their particular armed forces, and it is likely to vary as between different forces fighting in coalition.47 The law intended to prohibit indiscriminate attacks is framed in objective terms. It ought, therefore, to be capable of identical and universal application. That that will not be the case is not simply on account of the infinite variety of actual situations in which different commanders could legitimately come to a different conclusion. It will also be due, less acceptably, to the differing attitude taken to military casualties within different armed forces. Sleeping dogs should perhaps be allowed to lie. Any attempt at standardization of attitudes is unlikely to succeed and might reduce them all to the lowest common denominator. That would be bad news for civilians.

The execution of attacks

The earlier discussion concerned the principles of targeting involved in planning an attack. Commanders have, relatively speaking, time at their disposal. They can choose the appropriate weapon for the target. In evaluating the information available to them, their starting point is the rules on what can and cannot be attacked. There is no presumption as to the lawfulness or unlawfulness of a particular target until its nature is known.

When the orders have been given and the attack is about to be launched or is already under way, the field commander responsible for the conduct of the attack must refrain from launching the attack, or must suspend it, where the incidental loss of civilian life may be expected to be excessive in relation to the direct military advantage anticipated.48 In other words, the same criteria apply with regard to the actual attack as to the determination that a particular target is lawful. The same issues of interpretation and application of the principles will arise, but in a different context. The leaders of the attack have received their orders and probably have little or no choice of weapons for the prosecution of the attack. Those in charge of the attack will presume the target to be lawful. They may have less incoming intelligence from a narrower range of sources than those who planned the attack. They will, however, have the evidence of their own eyes and of those under their command. This may make a difference in the case of pilots, but cannot assist those launching missiles from a great distance.

The legal rules bind all the forces of a state. Rank is not relevant. Nevertheless, the issue arises of the rank of the person with the responsibility for taking such decisions. Where a person has the information necessary to determine that the facts are not as they were thought to be, he is clearly responsible for his own actions. Where the position is less clear-cut, at what point is the individual combatant expected to query the orders? If they are confirmed and the combatant does not know that the target is unlawful (e.g. a school erroneously believed to be in use as a command and control centre), the combatant
will have to rely on the information of others. In other words, the rules concerning precautions in attack have an immediate impact on all those who carry out attacks, whereas those on targeting will, in the nature of things, be of concern principally to the much smaller group responsible for planning attacks.49

The attack on the bunker/air-raid shelter

On 13 February 1991, news bulletins were full of reports from Iraq showing the remains of hundreds of people, burnt beyond all recognition, being brought out of a concrete structure and grieving relatives waiting for news of family members who had been sheltering there.50 That a large number of civilians were killed is to be deplored. That does not mean, however, that the rules on targeting were necessarily broken. To argue that the lawfulness of an attack cannot be judged solely by its effects is not to support the proposition that nothing can be done about the carnage of war. The attack must be evaluated in terms of what was known or ought to have been known when the attack was launched.51

The structure involved in the particular case in question was in a civilian area and the surrounding buildings included a nursery school, a supermarket and a mosque.52 For the building to be targeted at all, it had to be attacked by a ‘clean’ weapon. It was so attacked, as evidenced by the total absence of damage to surrounding buildings and the lack of casualties in the adjacent area.53 It has been suggested that much less concern would have been generated if the Americans had admitted to making a mistake, as the British did when a missile broke away from its designated target, a bridge, and caused civilian casualties in a nearby market.54 That is to confuse two quite separate types of mistake. The British forces were aiming for one target but in fact, owing to a malfunction, hit another. All the evidence suggests that the Americans succeeded in attacking precisely the building which they were targeting. In that sense, there was no mistake. The question then becomes one of whether or not they were entitled to attack that particular target? If they were, the attack was lawful, whatever the number of casualties that resulted from it.

Clearly, if the Americans knew that the building was being used as an air-raid shelter for civilians, they were not entitled to attack it. The Americans claimed, however, that they thought the building housed a command and control centre and that they had no knowledge of its being used as an air-raid shelter.55 Both elements are important because they suggest that the Americans did not think it was a building with a dual function, but that it was solely and exclusively a military objective.56 In order to be able to attack the structure, the Americans had to evaluate whether the risk of incidental civilian losses outweighed the anticipated military advantage. The possible civilian casualties were those in the surrounding area, since the Americans say that they had no knowledge of any civilians using the building itself. The Iraqis may have been in breach of their own obligations if they situated a military objective in an area of high population density.57 The Americans took that into account. By using a ‘clean’ weapon, they could minimize the risk to civilians in adjacent buildings. There were no reports of any such casualties. If the risk of foreseeable incidental civilian casualties was minimal, it would be outweighed by even a small military advantage.
The attack on the bunker/air-raid shelter illustrates the problem discussed above of targets assuming a higher priority as more important military objectives are neutralized. The Americans claimed that the structure housed a command and control centre, from which military radio communications had been monitored for two or three weeks.\textsuperscript{58} To attack such a target earlier in the air war would have yielded a minimal military advantage, and indeed it might not have been known then that it was a command and control centre. By 13 February, its importance had increased. There appears to be no legal cut-off point, below which degree of military usefulness a target cannot be attacked. The value of the target has to be assessed at the time of the attack.

The question then becomes whether the Americans were entitled to rely on the information which suggested the building housed a command and control centre. In order to answer that, one needs to know the nature and source of that intelligence, how recent it was and whether there was conflicting intelligence; also whether intelligence should have been gathered from other sources. Without additional information, it is not possible to answer these questions. All that can be stated with any certainty is that if the Americans were entitled to rely on the intelligence they had and if all such intelligence pointed to the structure being used exclusively as a command and control centre, then it was a military objective and hence a lawful target. This need not have precluded an expression of regret at the civilian casualties that were unintentionally inflicted.\textsuperscript{59}

Cumulative effect of air attacks on the civilian infrastructure

A representative of the UN Secretary-General, visiting Iraq after the ceasefire, claimed that it had been bombed back to a pre-industrial age.\textsuperscript{60} Reports since then have suggested that the initial reports may have been exaggerated.\textsuperscript{61} There is a considerable difference, even in short-term effect, between damage to an electricity generating station and damage to power lines. At first, the effect is the same. The loss of power affects communications, sewerage plants and hospitals. Damage, as opposed to complete destruction, of a generating station may be more quickly repaired than damage to power lines. That may be one of the explanations as to why initial reports were later said to have been exaggerated. It is, nevertheless, clear that the level of destruction, rather than merely damage, to the infrastructure had a devastating effect on conditions of life for the civilian population.\textsuperscript{62} Nor can this simply be ascribed to the two uprisings which followed the ceasefire, in which extensive destruction was caused by the Iraqi forces, but of a different nature.\textsuperscript{63} The damage to the infrastructure was the result of carefully targeted attacks.

The damage to power and communication facilities, sometimes in areas remote from the conflict, affected hospitals, sanitation plants, with consequent risk of disease from untreated sewerage, food supplies, where road communications were disrupted, and the ability of the system to restore these services.\textsuperscript{64} The situation for the civilian population is exacerbated by the continued imposition of sanctions. They also make it difficult to assess, in some cases, what suffering is attributable to the conduct of the conflict and what to sanctions.\textsuperscript{65}

The law with regard to targets such as power stations is structured, in general terms, in a similar way to that on attacks against the civilian population. Whilst the effect on civilian life is an important element in the determination of the lawfulness of a target, each target is assessed individually.\textsuperscript{66} There appears to be no requirement that the
cumulative effect of attacks against targets of a similar type should also be taken into account.

In examining the provisions of Additional Protocol I applicable to such attacks, it is important to remember that only some of its provisions represent customary international law. Those provisions which do not have that status were not binding on the American, British, French or Iraqi forces. It is not that they were tried and found wanting; they were not tried.

The first question is whether power plants and communication centres are military objectives. The criterion is whether they serve a purpose or are used in such a way as to ‘make an effective contribution to military action’ and whether their ‘total or partial destruction…or neutralization in the circumstances ruling at the time, offers a definite military advantage.’ In other words, there is no general rule for roads, bridges, or telephone exchanges. It is necessary to examine each attack individually. The difficulty is that many potential targets have a combined function. A road or a bridge may be used predominantly for local civilian traffic but also be essential for any military traffic going from A to B. The law does not establish any presumption in the case of dual-function targets. Nor is any guidance to be obtained by an examination of the definition of civilian objects. They are defined negatively as ‘all objects which are not military objectives’. If a potential target satisfies the criteria for a military objective, it can, prima facie, be attacked, subject to the protection of civilians from excessive incidental casualties.

There is one advantage in the definition of a military objective. By requiring an examination of each target, it is possible to say that road W or bridge X are legitimate targets but that road Y and bridge Z are not. On that basis, attacks on the roads running west from Baghdad can be questioned. It will be argued, however, that the road was used to move Scud missile launchers around, which were used in attacks against Israel, and that the power stations supplied power which contributed to the military effort. In other words, the more efficient and technologically advanced a state, with electricity being moved from one end of the country to another, the more this will be used to justify attacks on power stations, wherever they are situated. In conflicts run from distant capitals, confining legitimate military targets to those geographically proximate to the fighting is unrealistic. It is nevertheless regrettable that there is no express reference to this as one factor to be taken into account. These problems illustrate only too vividly how much depends on the interpretation given to ‘a definite military advantage’ (emphasis added) by the commanders of the attacking force.

Where a target is prima facie a military objective, it may nevertheless be an unlawful target where the damage is of a particular character and the harm to civilians will be severe. Protocol I contains express provisions with regard to attacks on objects indispensable to the survival of the population and on certain works and installations containing dangerous forces, together with a requirement that the natural environment be protected against widespread, long-term and severe damage. The damage to the sewerage plants and water supplies does not fit readily into the provision for the protection of objects indispensable to the survival of the civilian population, particularly where the damage was the foreseeable but incidental effect of attacks on power supplies. Attacks against ‘drinking water installations and supplies and irrigation works’ are unlawful where the attack is for the specific purpose of denying the sustenance value to the civilian
population or to the adverse party. Attacks which brought about damage to sewerage plants do not seem to have been for that purpose. It would appear that ‘purpose’ means something other than motive. It may mean ‘the military objective which the attack is designed to secure’. It would not appear to mean the same thing as effect, since that word could perfectly easily have been used instead and was used in other contexts.

An attack against such installations is not prohibited where the object in question is used in direct support of military action, unless it could be expected to bring about the starvation or forced movement of the civilian population. The provision also applies to food supplies. Starvation of civilians as a method of warfare is prohibited. The UN sanctions regime imposed on Iraq provides an exception for humanitarian relief, even assuming that the regime is subject to the rules on the conduct of hostilities.

The damage to power supplies and the consequent effect on sewerage plants do not fit any more readily into the prohibition of attacks against ‘works or installations containing dangerous forces’. The provision applies to nuclear electrical generating stations and dams, but not to other forms of power generation, where an attack would not give rise to the release of ‘dangerous forces’. The attacks are prohibited on account of the risk of severe losses among the civilian population arising out of the release of the ‘dangerous forces’, and not on account of the indirect effect of the loss of power.

The requirement that, even against legitimate targets, attacks need to be proportionate is not of assistance since the balance to be achieved is between the anticipated military advantage and the incidental loss of civilian life or damage to civilian objects. If it is assumed that power supplies are military objectives then, by definition, they are not civilian objects. The likely loss of civilian life brought about by the attack itself may be slight. Questions of remoteness of damage arise where the impact on civilians arises from an incidental effect of the attack.

In order to determine whether there is a real subject of concern here, it would be necessary to establish exactly what the effect has been of the damage to the civilian infrastructure brought about by the hostilities. If that points to a need further to refine the law, it is submitted that what is needed is a qualification to the definition of military objectives. Either it should require the likely cumulative effect on the civilian population of attacks against such targets to be taken into account, or the same result might be achieved by requiring that the destruction of the object offer a definite military advantage in the context of the war aim. There is at present no legal requirement that the war aim be identified, but during the Gulf crisis commanders and politicians alike came under considerable political pressure to identify what they were seeking to achieve. If, in practice, the war aim is going to have to be defined, there can be less objection to making it a legal requirement. Even better protection would be afforded to the civilian population if the object had to satisfy two cumulative requirements; first that its destruction offers a definite military advantage and second that it be necessary to the achievement of the war aim.

Proposals for the amendment of Additional Protocol I are not likely to be taken seriously, particularly when states such as the USA and the UK have not yet ratified it, and France has not signed it. More progress is likely to be achieved by working on the concept of ‘direct military advantage’ as actually applied by armed forces. There is some evidence that different forces reach different conclusions when applying the same formula. This will be discussed further below, in the final section. Here it is only
necessary to note that, if all forces were to apply the qualifications strictly, the cumulative
effect on the civilian population of attacks against such targets might be avoided. The
advantage would have to be both definite and military.

It would appear that the Gulf conflict ran counter to the trend of an ever-increasing
proportion of the casualties of war being civilians.\textsuperscript{88} It would indeed be paradoxical if
Additional Protocol I, in elaborating rules to protect civilians from the effects of the
hostilities, had opened the way to their suffering slow and lingering death from
malnutrition, epidemics and disease.

\section*{WEAPON USE}

\textbf{Unlawful weapons}

The use of certain weapons is unlawful, whether they are used against civilians or
combatants. It might be thought that such a principle would be the recent product of
technological developments: that is not the case. The notion that the use of certain
weapons was prohibited arose at a time when battlefields were fairly clearly defined and,
except in the case of sieges, set apart from centres of population. In other words,
combatants shaped the notion of an unlawful weapon. This is reflected in three reasons
which lead to a particular weapon being prohibited. They may overlap. The first is the
notion of treachery or the absence of ‘fair play’. This probably explains the abhorrence of
poison, whether on the tip of an arrow or used more generally.\textsuperscript{90}

The second is the idea that some suffering is unnecessary. At first sight, this may
appear paradoxical. It is legitimate to kill an enemy soldier but not to cause him
‘unnecessary suffering or superfluous injury’.\textsuperscript{91} The distinction is reflected in other areas
of international law. The prohibition of torture and of cruel, inhuman or degrading
treatment is absolute in all human rights texts, but the protection of the right to life is
qualified.\textsuperscript{92} This principle has at least three facets. At the military level, it may serve a
military purpose to kill an enemy soldier or to cause him such injury that he ceases
fighting. To kill the enemy after he is so disabled or further to disable him is a waste of
military effort. At the humanitarian level, some injuries are more difficult to treat than
others. It is only necessary to prevent the soldier from continuing to fight; it is cruel to
impose injuries of a character which will either result inevitably in his death or which
will exacerbate his suffering.\textsuperscript{93} The third facet is the reaction of armed forces. It would
appear that they fear certain types of injury more than they fear death.\textsuperscript{94}

This relates to the third reason which may prompt states to declare a weapon unlawful.
If forces fear the use of a particular mutilating weapon, however irrationally and
irrespective of its actual characteristics, they will be less effective on the battlefield and
will suffer the effects of stress earlier. In certain cases, they may fear a weapon on
account of the particular injuries which it inflicts. In others, the fear seems to owe as
much to the secrecy of the weapon, or its invisible presence. Ground forces are known to
have such a fear of the use of gas.

The principle that weapons causing or used in such a way as to cause ‘unnecessary
suffering or superfluous injury’ are unlawful is binding both as customary international
law and as treaty law.\textsuperscript{95} Certain weapons are also the subject of specific treaty
prohibitions, such as ‘dum-dum’ bullets and gas.\textsuperscript{96} It would appear that their use might be lawful by way of reprisal, however.\textsuperscript{97}

In 1981 a UN Convention on the Prohibition or Restriction on the use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects was concluded, with three annexed Protocols.\textsuperscript{98} It will be noted from the title that it deals with four discrete issues: outright prohibition of use, restriction on use, excessive injury and indiscriminate effect. The last cannot be at issue in the case of attacks where no civilians are in the vicinity. All the military forces of the enemy are legitimate targets of attack, whilst fighting or in a position to fight. The treaty has been signed by, amongst other nations, Canada, France, the UK and the USA. Of those, only France has ratified the treaty and accepted Protocols I and II. Iraq, Kuwait and Saudi Arabia have not signed the treaty.

The third Protocol prohibits the use of incendiary weapons against civilians, civilian objects and against military objectives located within a concentration of civilians, unless the military objectives are clearly separated from the civilians and the weapon is not air-delivered.\textsuperscript{99} ‘Incendiary weapon’ is defined so as to include ‘any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target’ but it does not include weapons with an \textit{incidental} incendiary effect or munitions designed to combine penetration, blast or fragmentation effects with an \textit{additional} incendiary effect designed to be used against military objectives.\textsuperscript{100} Where the incendiary effect \textit{is} specifically designed to cause injury to persons, the weapon will not come within the exception and may, therefore, be considered an incendiary weapon. The restrictions on the use of such weapons, however, do not prevent their use where there is no risk to civilians. It would therefore appear that the Protocol does not prohibit the use of incendiary weapons against combat personnel.\textsuperscript{101}

The Gulf conflict could potentially have involved the use of unlawful weapons. The Iraqi forces were said to be equipped not only with gas and chemical weapons, but also with bacteriological weapons. Since the use of the last type of weapon is unlawful in all circumstances, their development, manufacture, stockpiling and use are prohibited under the 1972 UN Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction.\textsuperscript{102} The threat of their use had to be taken seriously because Saddam Hussein was generally believed previously to have used unlawful weapons internally, against the Kurds, and against Iran, during the Iran-Iraq war. It is not known whether Saddam Hussein wanted to use such weapons against the coalition forces but was prevented by the refusal of his military commanders, or whether the President was deterred by the likely response. It has been reported that Saddam Hussein was warned that tactical nuclear weapons had been deployed and would be used in response to the use of chemical or biological weapons.\textsuperscript{103}

The use of certain questionable weapons, notably fuel-air explosives, and tactics, such as burying Iraqi forces alive, will be examined below.

\textbf{Unlawful use of weapons}

Weapons not inherently unlawful may be used in an unlawful way. This can take three forms. First, they may be used so as to cause ‘unnecessary suffering or superfluous
injury’ against combatants. Second, weapons may be used against civilians, in which case the unlawfulness arises on account of the illegitimate target. Finally, against a military objective, a weapon may be used which is unlawful on account of the characteristics of the weapon in relation to the circumstances of its use. In other words, in a situation in which only a precisely targeted weapon could be used, it would be unlawful if a less discriminate weapon were in fact used. Whilst it is possible for a weapon to be inherently indiscriminate, that would not appear, on its own, to be a reason for regarding its use as necessarily unlawful. If used against large-scale military objectives, remote from civilians, then it would only be unlawful if it caused ‘unnecessary suffering’ to the opposing combatants or would be likely to cause prohibited damage to the environment. If, however, its effects could not be confined to the lawful target, the use of such a weapon would be unlawful if it produced an unlawful effect, such as harm to neutral territory or indiscriminate injury to civilians.

Two weapons were used during the conflict which require to be examined in this context. If it is assumed that Scud missiles are not capable of being precisely targeted, at least when subject to the Iraqi modifications, they could not be used against military objectives where there was a risk of disproportionate civilian casualties. There is a material difference between such risks arising out of the defending state’s location of military objectives in densely populated areas and those arising out of the use of an indiscriminate weapon by the attacking state. The use of Scud missiles against the coalition forces was lawful, subject to the likelihood and degree of risk to Saudi Arabian civilians. In the case of the attacks against Israel, their use was unlawful since Israel was not taking part in the conflict and there was no evidence of any attempt to target military objectives. The inaccuracy of the weapon system is illustrated by the fact that, on at least two occasions, missiles fell in the Israeli-occupied territories.

The second weapon which needs to be considered is the B52 bomber. It acquired its reputation for devastation during the Vietnam war. Its bomb-load capacity is remarkable both for the weight of individual bombs and for the number capable of being dropped in one sortie. The B52 flies at a considerable height, giving it an all-weather capability but making it dependent on radar targeting, rather than visual target identification. This would make its use unlawful where precision targeting was necessary. It would not, however, make the use of B52s unlawful against military objectives away from densely populated areas or ‘against targets of sufficient size to establish a desired mean point of impact (DMPI) that would minimize the likelihood that any part of the bomb train would fall outside the target’. So, for example, to have attacked the Amiriya bunker/air-raid shelter by means of B52 bombers would have been unlawful. To attack the Iraqi Republican Guard, dug-in on the Kuwait/Iraq border, in the same way, was not unlawful. The bombs do not cause ‘unnecessary suffering or superfluous injury’.

There seems to be no evidence to suggest that B52 bombers were used to attack targets other than those against which they might be lawfully used.

**Weapons available to the coalition forces**

The conventional weapons delivered by aircraft in the Gulf conflict included general purpose bombs, guided bombs, napalm, fuel-air explosives, cluster bombs and air-to-surface missiles. ‘Smart weapons’ included not only laser-guided bombs but also Cruise
missiles, often sea-launched. The fallacy of the suggestion that technologically advanced states should not be able to use weapons not available to their adversary is at once apparent. Cruise missiles were shown to be disconcertingly accurate. Such missiles can enable the achievement of the objective of keeping civilian casualties to a minimum.

The availability of such weapons does, however, raise a different problem. Where a state possesses such ‘clean weapons’, is it obliged to deploy them and to use them in preference to other lawful but less accurate weapons? There would appear to be no such requirement in international law. The only test is whether the use of the weapon was lawful in relation to the particular target. It does not appear to be relevant that an even more discriminate weapon could have been used. The significance of this question is demonstrated by the report that ‘92 per cent of the weapons delivered in the war by tonnage, and 90 per cent of the individual weapons, were unguided, or “dumb” bombs.' Issues involved in the use of napalm and fuel-air explosives will be examined in the next section. All that needs to be noted here is that napalm does not appear to have been used as an anti-personnel weapon. As already seen, even if fuel-air explosives are incendiary weapons, nothing in the third Protocol to the 1981 Conventional Weapons Convention prohibits their use against combatants. The use apparently made of napalm and fuel-air explosives may have been lawful, but it raises the issue of whether it ought to be lawful.

Problems relating to tactics and weapon use

Independently of the lawfulness of tactics and weapon use, questions have been asked about the acceptability of certain practices. Three particular issues need to be examined; the use of fuel-air explosives and cluster-bombs against military personnel, the tactic of ploughing through a minefield and burying Iraqi forces alive in the process and, finally, the tactic of killing thousands of fleeing Iraqi forces on the road from Kuwait City to Basra. These will be examined in turn.

It is not merely squeamish television viewers who objected to the effects of fuel-air explosives. Indeed, relatively little was seen on television of that aspect of the conflict. The coalition forces, however, saw the effects of such weapons at close quarters as they advanced. It has been reported that ‘at least five British officers resigned their commissions after seeing the effects of cluster-bombs and fuel-air explosives on Iraqi soldiers.’ The significance of this cannot be over-emphasized. If there is perceived to be a gap between what is morally acceptable and what is legally permitted, this may reduce respect for the law and what it prohibits. Whilst in this instance following moral imperatives might be an improvement, in other circumstances it might lead to a breach of legal rules thought to be morally unnecessarily restrictive. It would also place all the emphasis on the personal moral code of the individual fighter, rather than on relatively objective legal principles. It has already been seen that the reaction of forces to particular weapons has played an important part in shaping the law on weapon use. Protocol III of the Conventional Weapons Convention was the subject of protracted disagreement at the conference which led to its adoption. On grounds of military expediency, if for no other reason, the use of fuel-air explosive and cluster-bombs as anti-personnel weapons may have to be examined again.
The second issue that aroused concern was the burying alive of Iraqi soldiers. Use of this innovatory tactic was only revealed on 12 September 1991. In the interim report to Congress on Operation Desert Storm, Secretary of Defense Cheney had made no mention of the tactic. It has been reported that the Pentagon withheld details of the assault from both the House of Representatives and Senate armed services committees. In the first two days of the ground fighting, the 1st Mechanized Infantry Division of the US Army used earthmovers and ploughs mounted on Abrams battle tanks to destroy trenches and bunkers.

Bradley Fighting Vehicles and armoured carriers straddled the trenches and fired at the Iraqi soldiers as the tanks buried them with sand. Not a single American was killed during the attack that made an Iraqi body count impossible. ‘For all I know, we could have killed thousands’, Colonel Anthony Moreno, Commander of the 2nd Brigade, said. Colonel Moreno acknowledged the attack was at odds with an army doctrine that calls for, but does not require, troops to leave their armoured vehicles to capture the trenches, or to bypass and isolate fortified positions.

The reason for the tactic is clear. Colonel Moreno and Colonel Maggart, Commander of the 1st Brigade, said that the tactic was used as a means of minimizing American casualties by avoiding hand-to-hand combat.

In analysing this extraordinary episode, it must be remembered that the tactic was used against enemy combatants. It was not used against those who had surrendered, or at least those who had not only surrendered but had also got out of the trenches. The tactic must have resulted in the burial of some Iraqis who had already been killed as a result of the fighting, but with no means for identifying them or accounting for their deaths. Principally, however, we are concerned here with the effect on living members of the Iraqi forces.

It was seen above that a weapon is unlawful if it causes ‘unnecessary suffering or superfluous injury’. This requires a balance to be struck between the military usefulness of a weapon and its effects on the victim. The use of tank ploughs appears to have served two purposes. First, it was a way of clearing a way through a minefield. By pushing sand into trenches, it had the secondary effect of neutralizing the threat posed by the Iraqi forces in those trenches. The question of ‘double effect’ is addressed in the case of attacks against military objectives where there is a risk of considerable civilian casualties, by means of the principle of proportionality. The principle does not appear to be applicable, at least in the current state of the law, to military operations in an exclusively military environment. The clearing of a way through a minefield might be regarded as sufficiently militarily necessary to outweigh the suffering caused to those buried alive in the trenches.

That would be less likely to be the case if tank ploughs were used to clear the whole minefield, rather than merely a way through it, or if the ploughs were used by tanks coming after the initial breakthrough. In those two cases, the reason for the use of the tank ploughs would not be the clearing of a way through the minefield. It might be inferred that the secondary effect, that of burying those fighting in trenches, was in fact the primary purpose behind their use. There are other ways of clearing trenches but they
involve the risk of military casualties amongst the forces attacking the fixed positions. The minimizing of American casualties would seem to have been the second purpose served by the use of the tank ploughs. Indeed, from the press reports, it would appear to have been the main reason for their use. It is far from clear that the desire to avoid military casualties amongst one’s own forces is sufficient to determine military necessity.

The form of the rule makes it clear that the prohibited type of injury need not be a product of the characteristics of the weapon itself. The basis of the prohibition is the result, the unnecessary suffering; any weapon which causes that is unlawful. Furthermore, Article 35 (2) of Additional Protocol I speaks not only of weapons but also of ‘methods of warfare’. This would appear to include tactics which bring about the prohibited result. The question then becomes whether death by suffocation, if that was the cause of death, represents ‘unnecessary suffering’.

The 1925 Geneva Protocol, which the United States has ratified, prohibits, amongst other things, the use of asphyxiating devices. It is also said to apply to ‘analogous liquids materials or devices’. It could be argued that the Protocol is designed to prohibit the use of certain substances, rather than particular results. Nevertheless, if the objection to the use of a particular substance is the asphyxiation to which it gives rise, this suggests that producing that result by means of a ‘natural’ material, such as sand, is also prohibited. The tactic made it impossible to comply with the rules on identification of casualties. It may be significant that no reference was made to the tactic in the interim report to Congress, and that it represented a departure from army doctrine: the normal way to clear trenches is with grenades and bayonets. Swords would have been preferable to ploughshares.

The third matter of controversy is the ‘turkey shoot’ on the road from Kuwait City to Basra, The reaction of people to the televised images of death and destruction may have contributed to the timing of the end of hostilities. Military equipment and looted civilian property was destroyed or abandoned over miles of desert. The figures for Iraqi military casualties, both in relation to the whole campaign and this particular episode vary dramatically. There seemed to be a popular sense that the killings were unnecessary and possibly in breach of an alleged assurance that retreating or fleeing troops would not be attacked if they did not attack the coalition forces. Those forces were already stretched in processing the thousands of prisoners of war who had surrendered or deserted. The distaste for the apparently unnecessary killings seems to have been shared by at least some of the coalition forces.

The military forces and equipment of the adversary are a legitimate target of attack until they surrender. There may have been a misunderstanding if the Iraqis thought they would not be attacked, provided they did not attack the coalition forces, whereas what was required was the abandonment of all their equipment. Allowing the coalition forces the benefit of the doubt on that score, it would appear that the Iraqi forces could be attacked. The question then becomes whether they were subjected to ‘unnecessary suffering or superfluous injury’.

If weapons such as fuel-air explosives and cluster-bombs were used, this would involve the concern about anti-personnel weapons discussed above. If the devastation was wrought by general purpose bombs or the strafing of the columns of vehicles and forces, this would appear to be lawful unless it represented ‘unnecessary suffering or superfluous injury’.
The killings might seem both unnecessary and superfluous, but the prohibition concerns suffering or injury, rather than unnecessary or superfluous actions. In the case of the tank ploughs, it was seen that a tactic can fall within the rule, but only where it produces the prohibited effect.

This may suggest, particularly if military forces were unwilling to carry on attacking an unresisting adversary, the need for a new principle. It would be an extension of the existing rule. It would require that an attack should not proceed, even against a legitimate target and by means of a lawful weapon, where it is unnecessary or superfluous to the attainment of the war aim. The principal difficulty with such a rule would be in distinguishing between an unresisting enemy and one in tactical retreat. So long as the Iraqi government took no steps to obtain a cease-fire, its fighting forces were a legitimate target, even if they no longer offered an immediate threat to the coalition forces.

LESSONS OF THE GULF CONFLICT

It is still too soon after the conflict to establish whether or not issues which arose will be addressed. One can speak of lessons, but not yet of lessons learned. It has already been seen that it might be advisable to move towards the adoption of a principle that otherwise lawful attacks should not be prosecuted where they are not necessary for the attainment of the war aim. This would restrict attacks where the cumulative impact on the civilian infrastructure would be likely to be devastating and, in exceptional circumstances such as the situation which arose on the road to Basra, might also serve to restrict attacks against clearly defeated combatants. Such a principle might slightly prolong a conflict and might result in slightly higher military casualties, but not to an appreciable extent. The war aim would be the standard against which to evaluate attacks. Only those unnecessary to the attainment of that objective would be prohibited.

There are two other interrelated lessons, where the law is not the problem but where it forms the backdrop to the problem. The coalition forces were drawn from several states but fought as one integrated force. Some of the participating states had ratified Additional Protocol I of 1977. This might have been expected to pose a problem, particularly with regard to targeting, where a provision in the Protocol is not binding as customary international law but only as treaty law. What is more troubling is that such a problem is known to have arisen between two forces, neither of which has ratified the Protocol. Air Vice-Marshall Bill Wratten told the House of Commons Select Committee on Defence that ‘The RAF refused at least twice to bomb targets given it by American commanders during the Gulf war because the risk of collateral damage…was too high.’ It is not clear whether he meant that the targets could have been attacked but only with higher precision weapons than the British had available, or whether they could not have been attacked at all.

This problem of ‘legal inter-operability’ arose between two forces which spoke basically the same language, which are used to working together in an integrated military alliance and which share a legal heritage, the common law.

The difficulty did not arise on account of problems with Additional Protocol I. The forces seemed rather to interpret the same rules in different ways. This could be, but is not necessarily, the product of ambiguity in the rules. In that case, one would expect to
find military lawyers recognizing possible differences in interpretation and then choosing one of them. They appear rather to disagree in their interpretation of provisions which neither force regards as ambiguous.\textsuperscript{130} NATO, in its capacity as an integrated military alliance, seems to have acknowledged the potential problem rather late in the negotiation of the Protocol, and tried to resolve it.\textsuperscript{131} A group was set up, which included representatives of the UK, USA and Germany, to examine possible problems of interpretation. It failed to reach agreement and was disbanded, with the British and Americans allegedly suggesting that they could not bridge the gulf between the common law and civil law traditions and the Germans apparently attributing the failure to disagreement. The Germans seem to have been vindicated by what happened in the Gulf conflict. Since then, a group with the acronym AUSCANZUKUS has been meeting in an attempt to harmonize military manuals.\textsuperscript{132} The group consists of military lawyers from Australia, Canada, New Zealand, the UK and USA—all common law jurisdictions. The group has not been able to reach agreement on the scope of concepts such as ‘proportionality’.

In addition to being a problem in its own right, if forces are to fight as part of an integrated military operation, this disagreement between lawyers is evidence of a more fundamental difference. Attitudes in the British and American forces appear to be significantly different. It would be interesting to know if any American officers resigned on account of the effects of the apparently lawful use of fuel-air explosives and cluster-bombs.\textsuperscript{133} It would seem that the British forces might have a shorter possible target list than American forces, and a lower threshold for what they regard as an unacceptable risk of collateral casualties. Since the price of this attitude may be higher military casualties, one must examine the reaction of the two forces to casualties on their own side.

What emerges quite strikingly is the priority the Americans attach to the avoidance of any military casualties.\textsuperscript{134} This attitude was seen not only in the televised press conferences of commanders, where it could be said to have been necessary for domestic consumption, but it is also found in legal works intended for a military and legal audience.\textsuperscript{135} Whatever the underlying cause of such an attitude, such as the spectre of body bags returned from Vietnam, a link can be traced between that and the attacks which devastated the civilian infrastructure in Iraq, and the use of tank ploughs. Measures to minimize collateral damage are to be taken, but they ‘are not to include steps that would place US and allied lives at greater or unnecessary risk’.\textsuperscript{136} It is suggested that certain other forces, including the British, whilst not prepared to take ‘unnecessary’ risks, are prepared to take greater risks in order to reduce the danger to civilians and civilian objects. This may only be a difference of degree, but the difference in attitude has an immediate impact on the lives of both enemy civilians and combatants. If this diagnosis is correct, it would seem unlikely that agreement will ever be reached on the interpretation of concepts such as ‘proportionality’. If the two military cultures cannot be brought closer together, they must learn to live alongside one another. The lesson for American commanders is that there are things they can require American forces to do which they cannot expect British forces to do. The implications for combined operations need to be addressed urgently.

The final lesson raises issues beyond the scope of this chapter. Could the conflict have been avoided altogether if effective measures had been taken to prevent the arms build-up, either at an early stage or at least when Saddam Hussein indicated his willingness to
use unlawful weapons both internally and internationally? Is the lesson of the Gulf conflict for a potential aggressor that he should wait until he has developed and deployed chemical, bacteriological or even nuclear weapons before embarking on foreign adventures?

These questions of conflict prevention and the problems which arose under the law of armed conflict and the implementation of that law in integrated multinational operations suggest that the cessation of hostilities has left some problems in need of resolution. The Gulf conflict raises questions to which answers need to be found—before the next time.
Chapter 6
Failures in protecting the environment in the 1990–91 Gulf War

Adam Roberts

Damage to the environment arising from the 1991 Gulf War raised many questions about whether such consequences of war can be effectively prevented or limited, and if so, how. This was by no means the first major war to have raised such questions; however, a peculiar conjunction of circumstances meant that it did so in a sharp form. The war happened at a time when there was already great international concern about many environmental issues; it occurred in a region peculiarly rich in oil, a natural resource already notorious for its manifold effects on the environment; its maritime element was largely in an area of sea, the Gulf, which is enclosed and thus especially susceptible to pollution; it saw serious environmental damage—much of it apparently deliberate; and the war was conducted on one side in the name of the United Nations, which has also been deeply involved in various environmental issues. In the wake of the war, there has been renewed concern in the international community with the whole question of environmental destruction in war.

Most, but not all, of the environmental issues were about oil. The oil slicks in the Gulf, the setting on fire of the Kuwaiti oil wells, the coalition air attacks on oil installations in Iraq—all seemed to involve, or threaten, damage of several kinds to the natural environment. Other activities in the war also had environmental aspects, including the dumping of quantities of mines and war material in the desert, the bombing of nuclear installations, and the damage to the water supply in Iraq.

It is not my purpose to offer a scientific judgement on the damage to the environment caused by the 1991 Gulf War. It is particularly hard to assess the precise nature and extent of any damage to the natural environments of the earth’s atmosphere, the waters of the Gulf, and the land in Kuwait and neighbouring regions. Preliminary estimates of such damage have been attempted by others, and suggest that there is scope for disagreement about certain matters, including the extent to which the damage is long-term in character. Further studies will certainly follow. There will then be additional questions to be examined: not least, the extent to which the environmental effects of the war have in turn led to human suffering and death, threats to wildlife, damage to crops, and so on. Such studies will be one necessary aspect of any concerted international effort to consider what is to be done in general about the environmental consequences of war—a matter explored in a preliminary way at the end of this chapter.

What is not in dispute is that the conspicuous damage to the immediate environments of Iraq and Kuwait was, at least in the short term, serious. The retreating Iraqis left Kuwait itself an environmental disaster area on land, sea and air. Much of this damage involved a wanton waste of a precious natural resource, namely oil, and proved very
difficult and expensive to counter. In Iraq, the damage affecting such public services as sewerage and water purification created a threat to the water supply and other services, and thus to the population at large. Beyond these two countries most directly involved in war, the environmental threats of oil slicks and smoke clouds moved across frontiers to wherever the currents and winds took them. They caused damage to waters and on land in neutral states, especially Iran.3

Concern about the environmental consequences of war is not necessarily based on any assumption that the natural environment is something which in its existing state is wholly benign, or incapable of being improved by the hand of man. Impeccably natural earthquakes and eruptions can themselves cause damage, including damage to the environment, on a colossal scale. Nor is such concern based on any assumption that all damage caused by war to the environment is irreparable. Both natural and human agencies may greatly mitigate at least some of the effects of environmental damage.

The events of the war raise the question of what exactly we mean by the ‘natural environment’—to use the phrase which occurs in Additional Protocol I of 1977. The idea that ‘nature’ and ‘man’ are in two separate categories has remained highly influential in this century, for example in shaping policies regarding national parks in the USA and various other countries. However, many aspects of the environment in which we live, especially where land and fresh water are concerned, are an amalgam of the natural and the artificial: and damage to those aspects of our environment may be just as serious as damage to those parts which are nearer to being purely ‘natural’, such as the seas and the atmosphere. In the Gulf War, much damage was inflicted by Iraq on the more purely ‘natural’ environments of sea and air, while the environmental damage by the coalition was principally to the man-shaped environment within Iraq: it would be wrong to exclude the latter from this enquiry.

The environmental consequences of the Gulf War do not have priority over other issues arising from the manner in which the war was conducted. Questions concerned with other matters, such as the treatment of the inhabitants of Kuwait, and of prisoners and hostages, demonstrably involved large numbers of human lives and vast human suffering. We should not be surprised that, in the midst of death and destruction, and daily fear of worse to come in the form of gas, bacteriological or nuclear warfare, the belligerents did not always have as their first consideration the protection of the natural environment over the medium or long term.

The environmental damage in the Gulf War raises classic laws of war issues. The laws of war—aspects of which are sometimes known as international humanitarian law—have traditionally been concerned with limiting certain kinds of military activities which cause death, misery, and destruction to those not directly involved in the war, or which continue to wreak havoc long after the actual war is over. It is partly for this reason that they have been concerned with the protection of civilians, and of neutral countries and property; with the rules against certain uses of weapons (e.g. some types of mines) which are liable to detonate blindly and at the wrong time; and with the prohibitions of unnecessary destruction. Against this background it is entirely natural that the laws of war should be concerned with the environmental aspects of modern war.

The failure to prevent damage to the environment in this war was in marked contrast to a degree of success in preventing the conflict from getting out of hand in certain other respects: many hostages, seized in the early weeks of the Iraqi occupation of Kuwait,
were released before war broke out; Iraq was kept isolated; the war was kept within geographical limits and was brought to a swift conclusion; and gas, bacteriological and nuclear weapons were not used. Why was there so conspicuous a failure over matters relating to the environment?

**WAR AND ENVIRONMENT IN EARLIER WARS AND WRITINGS**

Throughout history, wars have posed severe threats to at least the immediate environment. Scorched earth policies and deliberate flooding, whether offensive or defensive, have had serious effects on cultivable land. Concern about damage to water supplies, orchards, crops and forests can be found in much writing and legal thinking about warfare over the centuries. Early writings on the laws of war, including those of Hugo Grotius, show great concern over devastation caused to land, fields, trees and so on.

If the problem is perennial, the extent and depth of concern about it—the sense in which natural resources are limited, the human environment fragile, and the problem global in character—is something which has clearly grown in the post-1945 period. Geoffrey Best has reflected the common perception that there is a new factor here:

The capacity of war to cause ‘widespread, long-term and severe damage’ to the natural environment constitutes a menace that is historically novel. Methods and means of warfare did not really place the doing of such damage to the natural environment within the reach of belligerents until World War II. What was however within their reach from earliest recorded times was the ability to destroy part of the anthropogenic environment. This history of civilization, past and present, scanned with a view to ascertaining what kinds and degrees of concern may have been shown about belligerents’ religious, ethical or legal responsibilities in this respect discloses: (a) a small but consistent canon of laws and customs aiming to control the impact of hostilities on the anthropogenic environment; and (b) some lessons as to the value of those laws and customs and the value of the whole body of norms relating to warfare of which they form part.

In both World Wars in this century, oil was a commodity of great concern to the belligerents, and there were many cases of destruction of oil installations. However, such destruction was not necessarily seen at the time as an assault on the environment. Thus in the winter of 1916–17, when Romania was invaded by the forces of the Central Powers, the oilfields were destroyed on behalf of the Entente Powers:

Three-quarters of the country had been lost, with all the fertile corn-bearing plains and the oil-fields, by far the most extensive in Europe. Happily, the latter were to yield nothing to the enemy for several months, for Colonel Norton Griffiths, an English member of Parliament, went
round in a car systematically destroying them. Sometimes he barely escaped from enemy patrols, and had often to face the not unnatural hostility of the population; where time was lacking for him to set them on fire, they were put out of action by throwing obstructions down the pipes.7

The war in Vietnam, which ended in 1975, saw massive programmes of defoliation, forest destruction, and attempts at rain-making: these were widely criticized internationally, and contributed greatly to international efforts to tackle environmental aspects of warfare. The US government appears to have recognized that the use of such weapons in international war, outside the territory of a government which acquiesced in it, would be legally questionable. George Aldrich, who from 1965 to 1977 was a Legal Adviser for East Asian and Pacific Affairs in the State Department, has subsequently written:

Even during the Vietnam War, when American armed forces used defoliants on a large scale, the legal advice given by the Legal Adviser to the Secretary of State was that it would be prudent to limit their use to the territories of South Vietnam and Laos, where we had the consent of the Government of the territory, and avoid establishing a precedent for the first use of these novel chemical agents as weapons of war on the territory of either an adversary (North Vietnam) or a neutral (Cambodia). To the best of my knowledge, that advice was followed.8

The Iran-Iraq War of 1980–8 saw extensive environmental damage, some of it resulting from the large-scale destruction of oil installations. There were numerous oil spills in the waters of the Gulf, the worst of which was in the Nowruz field off the coast of Iran in 1983, but none was quite on the scale of the major spill in the 1991 Gulf War. UN Security Council Resolution 540 of 31 October 1983, condemning violations of international humanitarian law in this war, called on belligerents to stop hostilities in the Gulf, and to refrain from action threatening marine life there.

GENERAL INTERNATIONAL LAW AND THE ENVIRONMENT

International norms relating to the protection of the environment can be found in many quite different kinds of framework. There should be no automatic assumption that the laws of war are the only relevant body of law, or the only means of tackling a rather complex set of problems. Indeed, general political statements from the Stockholm Declaration 1972 to the Rio Declaration 1992, and also UN General Assembly resolutions, may be as important as formally binding agreements.

There is a growing number of general multilateral and other treaties relating specifically to the environment. On a wide range of matters, and in relation to a wide range of countries, such treaties, normally applicable in peacetime, may continue to be applicable in wartime as well. Possible examples include the Convention for the Prevention of Pollution of the Seas by Oil of 1954. The Law of the Sea Convention of 1982, not yet in force, contains extensive obligations to protect the marine environment.
Important regional accords include the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution of 1978, signed by many states in the region, Kuwait and Iraq among them: this assisted clean-up operations in 1991. There are also bilateral treaties and arrangements, such as those between Iraq and Turkey on river resources.

Various treaties on a wide variety of other topics may have important environmental aspects, and remain applicable in wartime. Examples are the Antarctic Treaty of 1959, partly motivated by the desire to preserve the fragile ecology of the Antarctic; the Partial Nuclear Test Ban Treaty of 1963, partly motivated by widespread concern about the effects of nuclear testing on the atmosphere and thereby on the food chain; and the Biological Weapons Convention of 1972, which completely prohibits the possession of certain weapons of a type which could seriously harm the environment.

THE LAWS OF WAR AND THE ENVIRONMENT

Despite the importance of other legal approaches, the laws of war, which attracted considerable attention in the Gulf War, are central to any discussion of efforts to control the environmental damage of war. If the environment is not to be ignored completely in the conduct of hostilities, then there is an obvious case for having specific rules relating to the protection of the environment, not just in general, but also in wartime.

What, if anything, do the laws of war say about the environment? Sometimes it is asserted that the laws of war have failed entirely to address this problem: that there is a need for a new international treaty on the subject. Thus, remarkably, the Soviet Minister of the Environment, Professor Nikolai Vorontsov, wrote in May 1991: ‘There was no sound scientific examination of the destruction caused to the environment during the war in Vietnam, no lessons were learned. After the war, no measures on environmental protection in case of armed conflicts were worked out.’

In fact, the provisions of the laws of war regarding the environment, while far from satisfactory, are by no means as lacking as Professor Vorontsov suggested. This is one of the many areas in which the law of war consist of a very disparate body of principles, treaties, customary rules, and practices, which have developed over the centuries in response to a wide variety of practical problems and moral concerns.

Underlying principles of laws of war

In considering what the laws of war have to say about environmental damage, it is necessary to start with their underlying principles, most of which seem to have a bearing on the question of environmental destruction. These principles, though ancient in origin, are reflected in many modern texts and military manuals. They include the principle of proportionality, particularly in relation to an adversary’s military actions or to the anticipated military value of one’s own actions; the principle of discrimination, which is about care in the selection of methods, of weaponry and of targets; the principle of necessity, under which belligerents may only use that degree and kind of force, not otherwise prohibited by the law of armed conflict, which is required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and
physical resources; and the closely-related principle of humanity, which prohibits the employment of any kind or degree of force not required for the purpose of the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources.\textsuperscript{11}

Each of these four principles points strongly to the conclusion that actions resulting in massive environmental destruction, especially where they do not serve a clear and important military purpose, would be questionable on many grounds, even in the absence of specific rules of war addressing environmental matters in detail. When the four principles are taken together, such a conclusion would seem inescapable.

It has been suggested by Richard Falk that there are, in addition, two ‘subsidiary principles’ which ‘seem to be well-grounded in authoritative custom and to have relevance to the array of special problems posed by deliberate and incidental environmental harm.’ These are the principles of neutrality and of intergenerational equity.\textsuperscript{12} The proposition that these are in fact key principles of the laws of war, though it may be unorthodox, is serious. Both these types of consideration inform certain provisions of the laws of war, and relate to attitudes to environmental destruction. However, since these principles do not add greatly to existing law as reflected in the four principles already outlined and in treaties, it is not necessary to pursue the issue here.

There are obvious limits to the value of customary principles as a basis for guiding the policies of states in wartime. As Richard Falk has said, in pessimistic vein, ‘there are extreme limitations associated with a need to rely on these customary principles. Their formulation is general and abstract, and susceptible to extreme subjectivity and selectivity in their application to concrete circumstances.’\textsuperscript{13}

**Treaties on the laws of war**

Can treaty law, with its more precise texts and its formal systems of adherence by states, overcome any limitations of the framework of principles as outlined above? In treaties on the laws of war, several kinds of prohibition can be found which have a bearing on the protection of the environment in armed conflicts and in occupied territories:

1. Many general rules protecting civilians, since these rules also imply protection of the environment on which they depend.\textsuperscript{14}
2. General prohibitions of unnecessary destruction, and of looting of civilian property.
3. Prohibitions of attacks on certain objectives and areas (e.g. restrictions on the destruction of dykes).
4. Prohibitions and restrictions on the use of certain weapons (e.g. gas, chemical and bacteriological).
5. Prohibitions and restrictions on certain methods of war (e.g. the poisoning of wells, or the indiscriminate and unrecorded laying of mines).

The word ‘environment’ does not occur in any treaty on the laws of war before 1977. This does not mean that there was no protection of the environment, but rather that such protection is found in a variety of different forms and contexts. The pre-1977 treaties on the laws of war relate obliquely rather than directly to protection of the environment: they offer general statements of principle, and also some detailed regulations which may on occasion happen to be relevant to the environment.
Thus the St Petersburg Declaration of 1868 on explosive projectiles, in ringing words which were to prove terribly problematic in subsequent practice, declared that ‘the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy’.

Several of the Hague Conventions and Declarations of 1899 and 1907 contained provisions with a bearing on the environment. In contemporary terms, the most important is the Hague Convention IV of 1907 on land war. The preamble refers to the need ‘to diminish the evils of war, as far as military requirements permit’; and it goes on to state, in the famous Martens Clause:

Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.15

In the regulations annexed to the Hague Convention IV 1907, Article 22 states: ‘The right of belligerents to adopt means of injuring the enemy is not unlimited.’ Geoffrey Best has commented: ‘Post-1945 extensions of that principle from its traditional application to enemy persons and properties to the natural environment are no more than logical, given the novel and awful circumstances that have suggested them.’16 Article 23 (g) of the Hague Regulations is relevant to certain instances of environmental damage when it states that it is especially forbidden ‘to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war’. Also in the regulations, Section III (which deals with military occupations) contains many provisions having a potential bearing on environmental protection. Article 55 is the most obvious example, but not the only one:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

It could be further argued that the rules relating to neutrality in war, as contained in Hague Convention V of 1907 (on land war) and Hague Convention XIII of 1907 (on naval war), by requiring belligerents to respect the sovereign rights of neutral powers, prohibit environmental damage seriously affecting a neutral state. This is a typical case in which protection of the environment, even where it is not mentioned in existing law, may nonetheless be a logical implication of such law.

The Geneva Protocol of 1925 on gas and bacteriological warfare provides one basis for asserting the illegality of forms of chemical warfare having a harmful effect on the environment. The Protocol has been the subject of a number of controversies as to its exact scope, and these controversies have included matters relating to the environment. In
1969, following reports of US use of chemicals in Vietnam, a UN General Assembly Resolution (which unsurprisingly did not receive unanimous support) addressed the issue, declaring that the 1925 Protocol prohibits the use in armed conflicts of:

(a) Any chemical agents of warfare—chemical substances, whether gaseous liquid or solid—which might be employed because of their direct toxic effects on man, animals or plants;

(b) Any biological agents of warfare—living organisms, whatever their nature, or infective material derived from them—which are intended to cause disease and death in man, animals or plants, and which depend for their effects on their ability to multiply in the person, animal or plant attacked.17

The four 1949 Geneva Conventions say little about the protection of the environment. They are concerned above all with the immediate and important task of protecting victims of war: prisoners of war; sick and wounded; shipwrecked; and civilians, whether alien internees or inhabitants of occupied territory. However, one of these agreements, Geneva Convention IV (the Civilians Convention) builds on the similar provisions of the Hague Regulations 1907 when it states in Article 53, in the section on occupied territories:

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 co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

The ICRC commentary on the article contains the following assessment on the question of ‘scorched earth’ policies:

A word should be said here about operations in which military considerations require recourse to a ‘scorched earth’ policy, i.e. the systematic destruction of whole areas by occupying forces withdrawing before the enemy. Various rulings of the courts after the Second World War held that such tactics were in practice admissible in certain cases, when carried out in exceptional circumstances purely for legitimate military reasons. On the other hand the same rulings severely condemned recourse to measures of general devastation whenever they were wanton, excessive or not warranted by military operations.18

Article 147 of Geneva Convention IV of 1949, and similar articles in Conventions I and II, confirm that grave breaches of the Convention include ‘extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly’.

The Hague Cultural Property Convention and Protocol of 1954 seeks to protect a broad range of objects, including groups of historic buildings, archaeological sites, and
centres containing a large amount of cultural property. All such property is to be protected from exposure to destruction, damage, and pillage. In many cases, obviously, action which was wantonly destructive of the environment would also risk violating the provisions of this convention.

Environmental matters were addressed by name and directly in two laws of war agreements concluded in 1977. In both cases one important stimulus to new law-making was the Second Indochina War in Vietnam, which had given rise to much public concern about environmental aspects of the war—a concern reflected and reinforced in many studies. Although neither of these treaties was formally in force in the 1991 Gulf War, they provide language and principles which assist in defining and asserting the criminality of threats to the environment.

The first of these two 1977 agreements is the UN Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977. This accord (otherwise known as the ENMOD Convention) was concluded mainly in reaction to the USA’s use of forest and crop destruction, and rain-making techniques, in the Second Indochina war. It deals essentially not with damage to the environment, but with the use of the forces of the environment as weapons. Article I prohibits all ‘hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury’ to the adversary. Article II then defines ‘environmental modification techniques’ as ‘any technique for changing—through the deliberate manipulation of natural processes—the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.’ An authoritative UN understanding which was attached to the text of the Convention already in 1976 provides a non-exhaustive list of phenomena which could be caused by environmental modification techniques: these include, among other things, ‘an upset in the ecological balance of a region’.

The second of these 1977 laws of war agreements touching on the environment is the Additional Protocol I of 1977. This accord, which is additional to the four 1949 Geneva Conventions, contains extensive provisions protecting the civilian population and civilian objects. Article 48, entitled ‘Basic Rule’, states: ‘the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.’

Article 52, on ‘General Protection of Civilian Objects’, similarly provides a framework for protecting civilian objects, and thus has obvious implications for protection of the environment.

In two articles Additional Protocol I deals specifically with the question of damage to the natural environment. (This is distinct from the manipulation of the forces of the environment as weapons, which had been addressed in the ENMOD convention.) Article 35, which is in a section on ‘Methods and Means of Warfare’, states in full (the third paragraph being the most explicit on the environment):

1. In any armed conflict, the right of the Parties to the conflict to choose methods and means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

The second article in Additional Protocol I referring specifically to damage to the environment is in the chapter on ‘Civilian Objects’, which is within the section of the Protocol dealing with protection of the civilian population against the effects of hostilities. Article 55 states in full:

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited.

The ICRC commentary notes that the ‘care shall be taken’ formula in the first paragraph of Article 55 leaves some latitude for judgment, whereas the second paragraph contains an absolute prohibition. In all cases it is clear that the phrase ‘widespread, long-term and severe damage’ excludes a great deal of minor and short-term environmental damage. Bothe, Partsch and Solf say:

Arts. 35 (3) and 55 will not impose any significant limitation on combatants waging conventional warfare. It seems primarily directed to high level policy decision makers and would affect such unconventional means of warfare as the massive use of herbicides or chemical agents which could produce widespread, long-term and severe damage to the natural environment.

The rules regarding the environment in Articles 35 and 55 have produced some rather varied responses. The UK delegation in the negotiations was cool about the inclusion of the clause relating to the environment in Article 35:

We consider that it is basically in order to protect the civilians living in the environment that the environment itself is to be protected against attack. Hence, the provision on protection of the environment is in our view rightly placed in the section on protection of civilians.

In its examination of both Articles 35 and 55, the ICRC commentary considers the meaning of ‘long-term’, suggesting that it refers to decades rather than months. This may exclude much environmental damage. However, the commentary does make it clear that
the term ‘natural environment’ should be interpreted broadly, referring as it does to the ‘system of inextricable interrelations between living organisms and their inanimate environment’. Indeed, the last words of Article 55, paragraph 1, imply such a connection between the environment and humankind. The commentary says:

The concept of the natural environment should be understood in the widest sense to cover the biological environment in which a population is living. It does not consist merely of the objects indispensable to survival mentioned in Article 54...also includes forests and other vegetation mentioned in the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons as well as fauna, flora and other biological or climatic elements.

Article 54, mentioned in the preceding quotation, is one of a number of other provisions in the same chapter of Additional Protocol I which, while not mentioning the environment by name, do in fact prohibit certain forms of military action which are destructive of the environment. Thus Article 54, paragraph 2, states (subject to certain important provisos in paragraphs 3 and 5):

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

Still in the chapter on ‘Civilian Objects’, Article 56 deals with ‘Protection of works and installations containing dangerous forces’. Paragraph 1 (subject to certain provisos in paragraph 2) states:

Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.

This article is qualified by the second paragraph, which in effect says that the protection it offers ceases if the military objective in question is used in regular, significant and direct support of military operations. Despite this qualification, during the 1980s the US government argued that the article gave too great a degree of immunity to dams, dykes,
and nuclear electrical generating stations. A further US criticism was that ‘the provisions of Article 56 purposely use the word “attack” rather than “destroy” (as was contained in the original ICRC proposal) in order to preserve the right of a defender to release dangerous forces to repel an attacker.’ However, the article plainly does not give total immunity from attack. Where hydro-electric generating stations or nuclear power plants are contributing to a grid in regular, significant and direct support of military operations, militarily necessary attacks against them are not prohibited.

Others have suggested that Article 56 did not go far enough, or that it should be interpreted to cover a wider range of works and installations containing dangerous forces than the phrase ‘namely dams, dykes and nuclear electrical generating stations’ might suggest. This latter view does not reflect the negotiating history of Article 56. This particular Article does not cover the question of attacking other kinds of installations containing dangerous forces: for example, factories manufacturing toxic products, and oil facilities. The ICRC commentary indicates that such installations were excluded from Article 56, but may be covered by other articles:

Several delegations wished to include other installations in the list, in particular oil production installations and storage facilities for oil products.

It appears that the consultations were not successful, and the sponsors of proposals in this field finally withdrew them. There is no doubt that Article 55…will apply to the destruction of oil rigs resulting in oil gushing into the sea and leading to extensive damage such as that described in that article. As regards the destruction and setting alight of refineries and petroleum storage facilities, it is hardly necessary to stress the grave danger that may ensue for the civilian population. Extending the special protection to such installations would undoubtedly have posed virtually insoluble problems, and it is understandable that the Conference, when it adopted these important prohibitions, limited them to specific objects.

Much else in the Additional Protocol I has a bearing on the environment. Thus in the chapter on Civil Defence, which seeks to give protection to various measures intended to alleviate the effects of hostilities or disasters, the tasks of civil defence forces are so defined in Article 61 as to include, inter alia, decontamination and similar protective measures; emergency repair of indispensable public utilities; and assistance in the preservation of objects essential for survival.

Given that Additional Protocol I was not binding as a treaty during the Gulf War, can its key rules on the environment be said to reflect customary law? A number of general rules which have implications for the environment, including Article 48 and much of Article 52, are widely accepted as customary law. As to Articles 35 (3) and 55, which specifically mention the environment, Greenwood acknowledges that they have been viewed by Germany and the United States as representing a new rule; he then states: ‘Nevertheless, while there is likely to be continuing controversy about the extent of the principle contained in Article 35 (3), the core of that principle may well reflect an emerging norm of international law.’ As to Article 56, he suggests that there are grounds
for doubting whether the special additional protection it affords to dams, dykes and nuclear power stations has the status of customary law.\textsuperscript{32}

Only one other laws of war agreement refers specifically to the environment: the UN Convention on Specific Conventional Weapons 1981. The preamble repeats the exact words of Additional Protocol I, Article 35 (3), which were quoted in full above; and also recalls a number of other general principles which could have a bearing on environmental damage. Protocol III annexed to the Convention deals with incendiary weapons. Article 2, paragraph 4 of the Protocol states, in a notably weak formulation:

\begin{quote}
It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.
\end{quote}

\textbf{Case law}

In addition to treaties, past cases are an important guide to the law. The Charter of the International Military Tribunal at Nuremberg did not specifically mention the environment, but it did include in its catalogue of war crimes ‘plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.’\textsuperscript{33}

After the Second World War, many cases before national tribunals related to environmentally damaging abuse of natural resources in occupied territories. In respect of one Polish case, the United Nations War Crimes Commission was asked to determine whether ten German civilian administrators, each of whom had been the head of a department in the Forestry Administration in occupied Poland in 1939–44, could be listed as war criminals on a charge of pillaging Polish public property. It was alleged that the accused had caused ‘the wholesale cutting of Polish timber to an extent far in excess of what was necessary to preserve the timber resources of the country’. The UN War Crimes Committee agreed that \textit{prima facie} evidence of the existence of a war crime had been shown, and nine of the ten officials charged were listed as accused war criminals.\textsuperscript{34}

On the other hand, in one post-war case, scorched-earth policies by a retreating occupying power were not ruled to be necessarily illegal. In the case of \textit{USA v. Wilhelm List et al.} (also known as the \textit{Hostages} case), a US military tribunal at Nuremberg found one of the defendants, General Lothar Redulic, not guilty on a part of the charge based on scorched earth. As a precautionary measure against a possible attack by superior forces in the province of Finnmark in northern Norway, he had destroyed housing, communication and transport facilities in the area. The court said that the defendant ‘may have erred in the exercise of his judgement but he was guilty of no criminal act.’\textsuperscript{35} This part of the judgment was intensely controversial in Norway, and was discussed at length in the Storting on several occasions. It was widely felt that these German devastations, which had continued up to 6 May 1945, went far beyond the demands of military realism.
HOW ADEQUATE ARE EXISTING LEGAL PROVISIONS?

It is obviously not the case that international law in general, or the laws of war in particular, are silent on the protection of the environment in wartime. Yet no one could be satisfied with the existing state of legal provisions which in one way or another may bear on environmental damage in war. The existing provisions provoke the question—which became urgent in the Gulf crisis—of what can be done to ensure that an admittedly disparate set of principles and rules is actually accepted, understood, and implemented?

There are many bases of criticism of the existing rules. The provisions are found in too many types of source and in too many agreements; they lack specificity; they rely heavily on the always hazardous process whereby commanders balance military necessity against other considerations; and the means of investigating complaints and punishing violations is not always clear. Much of the pre-1977 law can be said to relate only indirectly to the environment, through its protection of property, whether public or private: whereas some environmental ‘goods’ such as the air we breathe, are not property. Finally, some of the few rules which do exist, especially those in Additional Protocol I 1977 and in the ENMOD Convention 1977, have failed to secure universal assent: this is indicated by the US attitude to the Protocol.

US attitudes to the environmental provisions of Additional Protocol I

Of all the laws of war sources which have been cited, the Additional Protocol I of 1977 might seem to have the clearest and most explicit provisions about damage to the environment. Yet these provisions are not without problems, both as regards their substance and as regards the non-participation of certain important states, especially the USA, in this agreement. US official and non-official thinking on the Protocol is more open than that in other states, and merits scrutiny.

Despite its non-accession to Additional Protocol I, the US government had explicitly recognized, long before Iraq’s invasion of Kuwait, that many of the agreement’s provisions either reflect customary law, or merit support on other grounds. The key question, therefore, is whether the US government takes such a view of the provisions regarding the environment.

When, on 29 January 1987, President Reagan transmitted Additional Protocol II 1977 to the US Senate for its advice and consent to ratification, he said in his letter of transmittal:

we can reject Protocol I as a reference for humanitarian law, and at the same time devise an alternative reference for the positive provisions of Protocol I that could be of real humanitarian benefit if generally observed by parties to international armed conflicts. We are therefore in the process of consulting with our allies to develop appropriate methods for incorporating these positive provisions into the rules that govern our military operations, and as customary international law. I will advise the Senate of the results of this initiative as soon as it is possible to do so.36
Earlier in January 1987, Michael J. Matheson, Deputy Legal Advisor, US State Department, had given a fuller account of US government thinking about Additional Protocol I 1977. He acknowledged that US non-ratification left a gap, and gave some indication as to how this might be filled:

Protocol I cannot be now looked to by actual or potential adversaries of the United States or its allies as a definitive indication of the rules that US forces will observe in the event of armed conflict and will expect its adversaries to observe. To fill this gap, the United States and its friends would have to give some alternative clear indication of which rules they consider binding or otherwise propose to observe.

…in our discussions with our allies to date we have not attempted to reach an agreement on which rules are presently customary law, but instead have focused on which principles are in our common interests and therefore should be observed and in due course recognized as customary law, whether they are presently part of that law or not.36

Mr Matheson went on to list ‘the principles that we believe should be observed and in due course recognized as customary law, even if they have not already achieved that status’. His partial listing of these principles did not include any which deal directly with the protection of the natural environment. Indeed, he indicated that the US administration was opposed to the principle in Article 35 regarding the natural environment, saying that it was ‘too broad and ambiguous and is not a part of customary law’. 38 He was also reported as expressing US opposition to the rule on protection of the environment in Article 55 on the ground that it was:

too broad and too ambiguous for effective use in military operations. He concluded that the means and methods of warfare that have such a severe effect on the natural environment so as to endanger the civilian population may be inconsistent with other general principles, such as the rule of proportionality.39

Matheson and Judge Abraham Sofaer, Legal Adviser, US State Department, also criticized in detail the provisions of Article 56, concerning works and installations containing dangerous forces; as have some subsequent official US writings.40

In the public polemics about whether or not the US should ratify the Additional Protocol I, there has been no systematic and sustained debate about these particular provisions bearing on the environment. George Aldrich has gone so far as to assert that these provisions may be verging on the status of customary law:

While these provisions of Articles 35 and 55 are clearly new law—‘rules established by the Protocol’—I would not be surprised to see them quickly accepted as part of customary international law insofar as non-nuclear warfare is concerned.41
Despite such optimism, the awkward truth is that the US went into the 1991 Gulf War against a background of scepticism, not just about the Additional Protocol I in general, but about its environmental provisions in particular. Further, the initiatives taken to consult allies to determine which of the Protocol’s provisions were generally acceptable had not led to any published results by the beginning of 1991. These facts may have hampered the US from placing much reliance on the Protocol’s environmental provisions.

**APPLICABILITY OF LAWS OF WAR TREATIES IN THE GULF CONFLICT**

From 2 August 1990—the day when armed conflict between Iraq and Kuwait began—many laws of war agreements were, beyond any serious doubt, formally in force as regards the Iraqi occupation and the subsequent war. (The term ‘conflict’ is used here to refer to both the occupation and the war.) Some other agreements were not formally in force.

The following sections show which of the principal states involved in, or directly affected by, the conflict were formal parties to the relevant accords. The positions of fourteen states, chosen somewhat arbitrarily, are considered here: Canada, Egypt, France, Iran, Iraq, Israel, Italy, Jordan, Kuwait, Saudi Arabia, Syria, Turkey, UK, and USA. This is obviously not intended as a complete list: numerous other states, from Australia to Sierra Leone, sent naval, air, or ground forces to the Gulf as part of the coalition effort, or provided facilities or assistance of other kinds, or were involved in the war and its consequences in some other way.

**Agreements in force in the Gulf crisis**

The laws of war agreements under the following three headings were beyond any serious doubt formally in force:

1. **Hague Convention and Regulations on Land Warfare, 1907.** Although by no means all the states involved in the conflict were formally parties to this accord, or to the very similar one of 1899, the Hague Convention and Regulations are widely accepted as part of international customary law, binding on all states. They govern the conduct of occupation forces as well as armed combat. Other 1907 Hague Conventions, especially V, VIII and XIII, were also applicable.

2. **Geneva Protocol on Gas and Bacteriological Warfare, 1925.** All fourteen states listed above were parties to this treaty, which prohibits the use in war of gas, chemical and bacteriological weapons.

3. **The four Geneva Conventions on Protection of Victims of War, 1949.** All fourteen states (and indeed virtually all states in the international community) were parties to these treaties, which govern, respectively: I—wounded and sick; II—wounded, sick and shipwrecked at sea; III—prisoners of war; IV—civilians, especially in occupied territory, and under internment.

In addition, because Iraq and Kuwait are both parties, the Hague Cultural Property Convention and Protocol of 1954 was in force, at least as regards Iraq’s occupation of Kuwait. Although three of the fourteen states listed above were not parties—Canada
(which has not signed at all), and the UK and USA (which have signed but not ratified)—they have observed the convention’s main provisions in practice. As the convention’s relevance to environmental protection is limited, its application in the Gulf War is not pursued here.

**Agreements not fully in force in the Gulf crisis**

The most serious legal problem, so far as the applicability of international rules in the Gulf War is concerned, is that certain key agreements were not fully in force for all parties in the 1991 Gulf conflict. The three most recent laws of war agreements—and the only ones to mention the environment by name— all fall into this category.

The Convention on Environmental Modification Techniques of 1977 entered into force in a general way on 5 October 1978. Of the fourteen countries listed above, only six (Canada, Egypt, Italy, Kuwait, UK and USA) were parties. Four (Iran, Iraq, Syria and Turkey) had signed but not ratified. Four (France, Israel, Jordan, Saudi Arabia) had not signed or acceded at all. It is possible that states parties were still obliged to implement this agreement in the war; but the position regarding non-parties was manifestly unsatisfactory.

The Additional Protocol I of 1977 entered into force in a general way on 7 December 1978. Of the fourteen countries listed above, only six (Canada, Italy, Jordan, Kuwait, Saudi Arabia and Syria) were parties. Again, four (Egypt, Iran, UK and USA) had signed but not ratified, while four (France, Iraq, Israel and Turkey) had not signed or acceded at all. According to its Article 1, paragraph 3, this treaty applies in the situations referred to in Article 2 common to the four Geneva Conventions 1949: in other words, it applies as between states parties, who are also obliged to apply it in relations with a non-party if the latter accepts and applies the treaty’s provisions. In view of this provision, and since neither Iraq nor a significant number of its adversaries was a party, the Protocol cannot be said to have been in force in the Gulf conflict. However, as noted below, certain states not parties to the Protocol (including the US) did make moves towards ‘accepting and applying’ some, but only some, of the Protocol’s provisions in this conflict.

The UN Convention on Specific Conventional Weapons of 1981 was also not formally in force in the Gulf conflict. Indeed, the only one of the fourteen states listed above to have become legally bound by it (through signature and ratification) was France; and France, at ratification of this convention, had only accepted its Protocols I and II—not Protocol III, which is the one which has most bearing on the environment.

Despite the fact that they were not formally in force in this war, these three agreements were potentially relevant to the Gulf conflict in a number of overlapping ways. Firstly, to the extent that some of their provisions are accepted as an expression of customary international law, they are binding on all states. Secondly, many states could in practice, as a matter of policy as much as of formal legal obligation, choose to observe the norms outlined in these agreements; and the language used in these accords may have provided one basis for pronouncements, especially in certain US statements, about policy controlling the use of force in the Gulf.
ICRC statements on applicability of law

From 2 August 1990 onwards, in extensive direct contacts with the governments concerned, and also in press releases, the ICRC repeatedly reminded the states involved in the Kuwait crisis of their legal obligations under the laws of war. The most detailed of these reminders was in a memorandum on the applicability of international humanitarian law, sent to the 164 parties to the Geneva Conventions in mid-December 1990. This reminder contained some statements relevant to the protection of the environment. The main statements were as follows:

The following general rules are recognized as binding on any party to an armed conflict:

— the parties to a conflict do not have an unlimited right to choose the methods and means of injuring the enemy;
— a distinction must be made in all circumstances between combatants and military objectives on the one hand, and civilians and civilian objects on the other. It is forbidden to attack civilian persons or objects or to launch indiscriminate attacks;
— all feasible precautions must be taken to avoid loss of civilian life or damage to civilian objects, and attacks that would cause incidental loss of life or damage which would be excessive in relation to the direct military advantage anticipated are prohibited.

...The ICRC invites States which are not party to 1977 Protocol I to respect, in the event of armed conflict, the following articles of the Protocol, which stem from the basic principle of civilian immunity from attack:

— Article 54: protection of objects indispensable to the survival of the civilian population;
— Article 55: protection of the natural environment;
— Article 56: protection of works and installations containing dangerous forces.

In a press release issued on 1 February 1991, over ten days after the major Iraqi oil spills into the Gulf had begun, the ICRC issued another warning against environmental destruction: ‘The right to choose methods or means of warfare is not unlimited. Weapons having indiscriminate effects and those likely to cause disproportionate suffering and damage to the environment are prohibited’.

THE PROBLEM OF IRAQI COMPLIANCE

A central problem with the application of the law was that Iraq tried to escape its obligations. After 2 August 1990, when the ICRC was seeking to carry out humanitarian
activities in Kuwait, the Iraqi authorities denied that the conflict was an international one. Various ICRC efforts in autumn 1990 to get Iraq to accept its obligations under the Geneva Conventions were unsuccessful. After the beginning of Operation Desert Storm in January 1991, the definition of the hostilities as international does not appear to have been contested by any party, but Iraq was still not forthcoming about its legal obligations. It only began to accept them (for example, in relation to prisoners of war) around the time of the liberation of Kuwait and cease-fire at the end of February 1991.

**PRE-WAR WARNINGS OF ENVIRONMENTAL DAMAGE**

Before war actually broke out on the night of 16–17 January 1991, there was more than adequate warning of possible environmental damage in the event of a war over Kuwait. Iraq consistently threatened to set fire to the oilfields. On 23 September 1990, Saddam Hussein said in a statement that if there was a war, Iraq would strike at the oilfields of the Middle East and Israel. On 23 December, in immediate response to tough comments in Cairo by US Secretary of Defense Richard Cheney, the Iraqi defence minister said in Baghdad: ‘Cheney and his aides will see how the land will burn under their feet not only in Iraq but...also in Eastern Saudi Arabia, where the Saudi fighters will also feel the land burn.’

These Iraqi statements, like the threats to use hostages as human shields, appear to have further solidified international opinion against Iraq. To the extent that this is so, it confirms the complexity and importance of the links between *jus in bello* and *jus ad bellum*.

The scope of the potential environmental threat of a war over Kuwait was heavily publicized in the weeks before the war, but mainly by those arguing that war should be avoided altogether. King Hussein of Jordan gave such a warning at the Second World Climate Conference in Geneva in November 1990. At a symposium of scientists held in London on 2 January 1991 it was suggested that a large proportion of the oil wells had been mined and might be ignited by the Iraqis; that the resulting fires might burn up to three million barrels of crude oil a day; and that oil spilt from damaged wells and pipelines would flow into the Gulf, causing a spill ‘ten to one hundred times the size of the *Valdez* disaster’. (It was apparently assumed that the large spill envisaged would happen as a by-product of general damage to wells, rather than as a result of deliberate Iraqi policy.) Some, including Dr Abdullah Toukan, chief scientific adviser to King Hussein of Jordan, argued that a war in the Gulf would lead to a ‘global environmental catastrophe’, including a ‘mini nuclear winter’. Dr John Cox, calling for a computer simulation (and accepting that it might show that ‘my fears are groundless’) said of the possible effect on the Middle East climate: ‘We must not wait until six months after the fires are burning, and we see 500 million people starving as a result of climate changes, then have scientists asking what caused it all.’ He also suggested that smoke from oil fires could scavenge ozone in the stratosphere, causing an ozone hole over the Indian sub-continent. However, at least one speaker at the symposium, Basil Butler, a managing director of BP, challenged claims that the war would trigger a climate change which would dry up the monsoons in Asia, leaving a billion people to starve. He did not deny that there would be serious local problems: ‘We do have a very major problem on our
hands to deal with well fires in Kuwait if the wells are mined and the heads blown off by the Iraqis.\textsuperscript{51}

The vast scale of the envisaged environmental catastrophe was used by many as an argument against resorting to war at all as a means of liberating Kuwait. Thus, in much of the political debate of the time, to be environmentally concerned was to predict global catastrophe, and to be anti-war; while those who supported the resort to war said little about the environmental aspects of a possible war. This polarization of the debate had a serious consequence. There was little if any public discussion of the means which might be used, if there was a war, to dissuade Iraq from engaging in environmentally destructive acts; and little if any reference to the laws of war as one possible basis for seeking limitations of this kind.

In the weeks before and after the outbreak of war in January 1991, the British government examined the possible environmental impact of massive oil fires. On 4 January the Energy Secretary, John Wakeham, said:

Oil fires of this magnitude would certainly be unpleasant, environmentally harmful and wasteful of energy resources, and if there were a large number it might take over six months to put them all out. But suggestions of a global environmental disaster are entirely misplaced.\textsuperscript{52}

In the last days before the war, President Bush tried to impress upon President Hussein the key importance of certain limits. In a letter which Iraqi Foreign Minister Tariq Aziz refused to accept from Secretary of State James Baker at Geneva on Wednesday 9 January 1991, President Bush wrote:

The United States will not tolerate the use of chemical or biological weapons, support of any kind for terrorist actions, or the destruction of Kuwait’s oilfields and installations. Further, you will be held directly responsible for terrorist actions against any member of the coalition. The American people would demand the strongest possible response. You and your country will pay a terrible price if you order unconscionable acts of this sort.\textsuperscript{53}

**PRE-WAR ROLE OF UN SECURITY COUNCIL**

In the long period between the Iraqi occupation of Kuwait and the beginning of the war, the UN Security Council was unprecedentedly active; but it did relatively little to focus attention on the need to respect laws of war limitations in general; and it did even less about threats to the environment. Security Council Resolution 670 of 25 September 1990, which was basically about sanctions on air transport to Iraq, contained at the end a paragraph in which the Council reaffirmed:

that the Fourth Geneva Convention applies to Kuwait and that as a High Contracting Party to the Convention Iraq is bound to comply fully with all its terms and in particular is liable under the Convention in respect of the
grave breaches committed by it, as are individuals who commit or order the commission of grave breaches.

Clearly this related primarily to the occupation of Kuwait, and did not specifically address the matter of limitations which would apply in any war for the liberation of Kuwait.

Security Council Resolution 674 of 29 October 1990 was the most detailed on humanitarian law issues. After repeating the above-quoted passage from Resolution 670, it demanded that Iraq desist from taking third-state nationals hostage, from mistreatment of inhabitants and third-state nationals in Kuwait, and from any other actions in violation, inter alia, of Geneva Convention IV. It then indicated that certain violations might be punished: it 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’; and it reminded Iraq that it was liable for any loss, damage or injury arising in regard to Kuwait and third states, referring also to the question of financial compensation. However, for all its merits, Resolution 674 did not spell out the principles or rules which would apply in a possible war.

The famous Security Council decision authorizing the use of force—Resolution 678 of 29 November 1990—said nothing at all about laws of war limits: it was the last resolution before the outbreak of war.

Of the many reasons why the Security Council did not address laws of war aspects of the crisis more fully, two stand out. First, the lack of attention to the laws of war in international diplomacy in general, including in the UN. Second, it appears that within UN Headquarters there was a view in autumn 1990 that to make a general statement that the Geneva Conventions were fully applicable in occupied Kuwait would be to imply that countries which had sent troops to Saudi Arabia were in some sense belligerents: it was apparently felt that such a statement might give Saddam Hussein an additional excuse to expel diplomats from Kuwait. Such a chain of argument contained some notably flimsy links, but it is possible that it weighed with members of the Security Council who did not want to get entangled in any avoidable difficulties.54

Was it necessary or desirable for the Security Council to draw specific attention to the applicability of the laws of war to the impending hostilities? It is true that important parts of the laws of war, including the four 1949 Geneva Conventions, are free-standing, and applied anyway—facts which had been pointed out by the ICRC both privately and publicly. There was no formal requirement for the Security Council or any other body to reaffirm the obvious. It might, furthermore, have been difficult to get Security Council agreement even on a very broad and general statement about the applicability of the laws of war: the sheer difficulty of securing the level of agreement that was achieved was already remarkable.

On the other hand, in the circumstances of the time even the obvious could benefit from reaffirmation, and in addition some matters did need clarification and interpretation. In view of Iraq’s cavalier attitude to basic rules, as evidenced for example in the weeks and months after 2 August 1990 by the seizure of hostages, it was obvious that any reminders to Iraqi commanders about limitations in war might need to come from outside. Further, in view of the lack of formal applicability of Additional Protocol I 1977 in this conflict, it could have been helpful if the UN had clarified whether at least some of
its underlying principles and basic rules, such as those contained in Articles 35 and 48, were to be applied. The need to harmonize practices among the many members of the coalition, and to be seen to have done so, heightened the case for some UN statement on such matters. Fears of US sensitivities about the Additional Protocol I might have inhibited some from raising this issue. However, since the US government had itself many years earlier conceded that the US non-ratification of the Protocol left a gap, it would have been reasonable for the UN to have attempted, at least partially, to fill that gap. The obvious forum for such a role would have been the Security Council, though there are precedents from earlier crises for action in this field being taken by the General Assembly, and by the Secretary-General.

THE WAR

Initial coalition policy statements

After the start of Operation Desert Storm on the night of 16–17 January 1991, statements by some coalition governments placed an, albeit limited, emphasis on laws of war issues: but these were mostly of a rather general character, and contained few specific references to the protection of the environment or the avoidance of wanton destruction.

The initial address to the nation by President Bush on the evening of 16 January did specify that the targets which US forces were attacking were military in character, but the speech contained no other indication of the limits applicable to the belligerents under the laws of war. In general, his speeches before and during the war contained remarkably little reference, direct or indirect, to the laws of war.

In remarks made on 16–18 January, Richard Cheney, US Secretary of Defense, and Lieutenant-General Chuck Horner, Commander of the US Central Command air forces, particularly stressed that the bombing campaign would avoid civilian objects and religious centres. Some of their words on this point echoed the words of Additional Protocol I 1977, Article 48, ‘Basic Rule’, cited above.

During the war, the US armed forces appear to have placed much emphasis on operating within established legal limits. General Colin Powell said subsequently: ‘Decisions were impacted by legal considerations at every level. Lawyers proved invaluable in the decision-making process.’

There appear to have been some official American attempts to gag discussion of the environmental effects of the war. On 25 January 1991 researchers at Lawrence Livermore National Laboratory received a memorandum which reads in part:

DOE [Department of Energy] Headquarters Public Affairs has requested that all DOE facilities and contractors immediately discontinue any further discussion of war-related research and issues with the media until further notice. The extent of what we are authorized to say about environmental impacts of fires/oil spills in the Middle East follows:

‘Most independent studies and experts suggest that the catastrophic predictions in some recent news reports are
exaggerated. We are currently reviewing the matter, but these predictions remain speculative and do not warrant any further comment at this time.\textsuperscript{58}

The British government, at the start of Desert Storm, stressed that the coalition forces were operating within a framework of legal and moral restraint. Prime Minister John Major told the House of Commons on 17 January:

\begin{quote}
I also confirm that the instructions that have been given to all the allied pilots are to minimize civilian casualties wherever that is possible, and the targets that they have been instructed to attack are, without exception, military targets or targets of strategic importance.\textsuperscript{59}
\end{quote}

He also said that the government had made clear to Iraq that it expected any captured British troops to be treated as prisoners of war according to international convention, adding that there had been ‘no positive response’ from Iraq.\textsuperscript{60} At the beginning of the war there do not appear to have been any British government statements of a general character about the laws of war as they bear on the environment, but such statements were made in February (see below) in the context of condemnations of Iraqi conduct.

**Iraqi oil crimes**

Soon after the beginning of Desert Storm, the Iraqi forces launched an artillery attack against the Khafji oil storage depot in northern Saudi Arabia, setting it on fire. It began to leak oil into the Gulf on about 22–3 January, causing the first major oil slick of the war. However, in this case at least, it might be argued that this was as much a military target as the oil depots and refineries in Iraq which were hit by the coalition bombing.

A much larger slick was caused—apparently deliberately, by Iraqi forces—by pumping huge quantities of oil into the Gulf from the Sea Island Terminal, a pumping station for the Mina al Ahmadi crude oil tank farm in Kuwait. This spill, which apparently began on about 19 January, was reportedly reduced by coalition forces accidentally setting the terminal ablaze on the night of 25–6 January; and it was eventually brought under control by coalition bombing of the pumping stations at Mina al Ahmadi on 26 January.\textsuperscript{61}

At about the same time, there were also huge spills into the Gulf—again, apparently deliberate Iraqi acts—from five Iraqi tankers moored at Mina al Ahmadi. By 24 January, when air reconnaissance in the area was conducted, these ships were apparently empty, or almost empty, of oil.\textsuperscript{62}

The total amount of oil spilled into the Gulf almost certainly constituted the largest oil spill ever. Estimates at the time of the total amount of oil ranged up to eleven million or more barrels of crude.\textsuperscript{63} By mid-February reports of the scale, movement, and likely damage of the oil slicks were slightly less apocalyptic than had been the case earlier.\textsuperscript{64} The true size of the spill was probably between seven and nine million barrels.\textsuperscript{65}

The total damage done by the slicks was considerable, but will take a long time to assess accurately. By May, over 400 kilometres of the Saudi coast, as well as the southern
Kuwaiti coast, was affected. There was damage to coastal marshlands, to wildlife (over 15,000 birds killed), to coastal flora, to fishing, and to offshore oil operations.\textsuperscript{66}

The massive, indeed in its scale unprecedented, destruction of the oilfields of Kuwait was the most efficiently conducted Iraqi action since the start of the war. It had been carefully prepared. Some oil installations in Kuwait were set on fire by the Iraqis during the first week of the war.\textsuperscript{67} Then on about 21 February, just before the coalition ground offensive began on 23–4 February, Iraq started the programme of systematic destruction of Kuwaiti oil installations, casting a huge pall of smoke across the country. Before Iraqi forces fled from Kuwait one week later, they blew up or damaged virtually all the oil installations in Kuwait. Over 500 wells were set on fire. As to the rate of burn, estimates ranged between over two and six million barrels per day.\textsuperscript{68}

All these Iraqi actions with respect to oil seem to have had little military rationale or value. Kuwait later claimed that the environmental devastation was not the result of military conflict, but ‘the product of a deliberate act that was planned in the very first days of the brutal Iraqi occupation of Kuwait.’\textsuperscript{69} It is possible that the oil slicks in the Gulf were intended to hamper possible efforts at amphibious landings in Kuwait: however, quite apart from the doubtfully relevant fact that (as emerged later) the coalition’s preparations for such landings were a ruse, it is debatable whether the odd slicks created by the odd terminal disgorging oil would in fact have seriously hampered any amphibious landings. The coalition powers managed by various means to avoid oil damage to their ships.\textsuperscript{70} As to the burning of the oil wells, in some cases the creation of huge smoke clouds may have been intended to hamper coalition air operations, especially reconnaissance and ground attack. Smoke palls could achieve little, however, since Iraq’s defence plan was essentially static and predictable, and since the palls quickly lofted to levels high enough to allow aircraft to operate underneath. However, they may have had some effect. As the Pentagon interim report put it:

\begin{quote}
The operational impact of oil fires and smoke on the Coalition forces attacking Kuwait City was mixed. Air support was severely hampered. As direction and strength shifted, surface winds initially complicated then ultimately favoured Coalition forces by blowing from south to north during the ground offensive.\textsuperscript{71}
\end{quote}

The purpose of Iraq’s releasing of oil and destruction of oilfields remains somewhat obscure.\textsuperscript{72} Almost certainly it was less tactical than punitive and destructive: to show that a country losing a war can still do damage, hurt its adversaries and neighbours, and diminish the value of the prize for which the war is supposedly being fought. The fact that only Kuwaiti wells were set alight, and not those on the Iraqi side of the border, confirms this conclusion; as does the fact that explosive charges were used, rather than simple ignition with opened valves.\textsuperscript{73}

The Iraqi environmental destruction was heavily criticized by coalition leaders. Thus on 25 January, as the extent of the Iraqi oil spill into the Gulf was attracting notice, US officials said that the world had never previously had to deal with a deliberate and malicious spill. President Bush said:
Saddam Hussein continues to amaze the world. First, he uses these Scud missiles that have no military value whatsoever. Then, he uses the lives of prisoners of war, parading them and threatening to use them as shields; obviously, they have been brutalized. And now he resorts to enormous environmental damage in terms of letting loose a lot of oil—no military advantage to him whatsoever in this. It is not going to help him at all… I mean, he clearly is outraging the world.74

Richard Cheney, the US Secretary for Defense, accused Saddam Hussein of environmental terrorism, adding: ‘It is one more piece of evidence, if any more were needed, about the nature of the man himself. He is best described as an international outlaw.’75 On 28 January, Michael Heseltine, the British Secretary of State for the Environment, said in a long statement in the House of Commons: ‘Words are inadequate to condemn the callousness and irresponsibility of the action of Saddam Hussein in deliberately unleashing this environmental catastrophe.’76 On 22 February he said in a written answer:

Iraqi action has already led to damage to the environment as indicated by the deliberate release of oil into the Gulf. The Government together with the countries of the OECD has condemned this action as a violation of international law and a crime against the environment.

On the environmental impact of operations by the forces seeking to implement UN resolutions, he said: ‘Environmental factors are taken into account by the coalition forces as far as possible in the planning and conduct of military operations as part of the policy of ensuring that collateral damage from those operations is minimized.’77

On 22 February, as the Iraqis began destroying the Kuwaiti oil installations, and on the eve of the coalition land offensive, President Bush said: ‘He is wantonly setting fire to and destroying the oil wells, the oil tanks, the export terminals, and other installations of that small country.’78 On the same day, in Riyadh, Brigadier-General Richard Neale, Central Command’s deputy director of operations, commented: ‘It looks like he’s carrying out what he said on several occasions. We’ve had a difficult time trying to figure out the motivation for a lot of his actions.’79

The destruction of the oil installations in Kuwait proved to be on the massive scale which some had forecast, the rate of burn-off was actually higher than many had anticipated, and the consequences were serious. The flood of oil from the wells formed lakes and reportedly affected aquifers. The fires involved huge waste of a valuable natural resource. They spewed many gases, including the ‘greenhouse’ gas carbon dioxide (perhaps 3 per cent of the world’s total annual fossil fuel emissions), into the atmosphere. In Kuwait in the months after the war, there was heavy atmospheric pollution, causing an increase in respiratory illnesses, a lowering of regional temperatures, and much damage to the land.80 The smoke was widely reported as having adverse effects in neighbouring countries, including Iran. There were reports of black rain in Turkey, Iran and the Himalayas. However, the harmful effects of the oil fires were mainly regional, and amounted to nothing like the global disaster which some had
forecast. Soot from the fires does not appear to have risen high enough to cause the
global environmental effects which some had feared.81

The Iraqi actions—the discharge of oil into the Gulf, and the burning of the Kuwaiti
oilfields—were plainly contrary to the laws of war. There has been general agreement
that they violated Article 23 (g) of the Hague Regulations, 1907. It is also widely
accepted that they violated Article 147 of Geneva Convention IV, 1949; and also Article
53, which is in the section on occupied territories. Whether the Iraqi actions would have
constituted violations of two conventions which mention the environment—the ENMOD
Convention 1977, and the Additional Protocol I 1977—neither of which was in force in
the Gulf War, is a more contentious matter.

As regards ENMOD, a key question would be whether, to use the language of Article
II, Iraq was ‘changing—through the deliberate manipulation of natural processes—the
dynamics, composition or structure of the Earth, including its biota, lithosphere,
hydrosphere and atmosphere, or of outer space’. It might well be asserted that this was,
rather, a case of the deliberate abuse of man-made installations and artificial processes: of
damage to the environment, but not necessarily damage by the forces of the environment.
The terms of ENMOD, as well as the fact that it was not in force in this war, suggest that
it has limited relevance to the Iraqi actions.82

As regards Articles 35 and 55 of the 1977 Protocol I, there is perhaps more room for
the view that Iraqi actions would have violated these environmental provisions. In its July
1991 Interim Report to Congress, the Pentagon stated that Iraq had committed extensive
and premeditated war crimes, which included ‘unnecessary destruction, as evidenced by
the release of oil into the Persian Gulf and the sabotage of hundreds of Kuwaiti oil wells’.
It stated that these actions ‘could implicate a number of customary and conventional
international law principles’, including from Hague Regulations, 1907 and Geneva
Convention IV, 1949, and further mentioned in its list Articles 35 and 55 of the
Additional Protocol I, 1977.83 However, the Pentagon’s April 1992 Final Report, while
continuing to assert the illegality of Iraqi actions, was much more dismissive of the
Protocol’s relevance, especially in the following:

Even had Protocol I been in force, there were questions as to whether the
Iraqi actions would have violated its environmental provisions. During
that treaty’s negotiation, there was general agreement that one of its
criteria for determining whether a violation had taken place (‘long term’) was measured in decades. It is not clear the damage Iraq caused, while severe in the layman’s sense of the term, would meet the technical-legal use of that term in Protocol I. The prohibitions on damage to the environment contained in Protocol I were not intended to prohibit battlefield damage caused by conventional operations and, in all likelihood, would not apply to Iraq’s actions in the Persian Gulf War.84

This passage is likely to provoke criticism, especially for its characterization of Iraqi
actions and their consequences. Yet the fact that there is scope for debate about the
relevance of the environmental provisions of Protocol I (and also of ENMOD) suggests
the importance of earlier provisions, including from the Hague Regulations 1907 and
Geneva Convention IV 1949: these were a key basis for judging Iraqi actions.
Coalition military actions

Many coalition actions in the crisis had environmental consequences, even if they were on a lesser scale than those caused by their adversaries. Further, some actions which they did not take could have affected the environment. In the months before the war, when UN Security Council sanctions were imposed on Iraq, there were some proposals that Iraq might be defeated by stopping the flow of the Tigris and Euphrates (both of which originate in Turkey): these were not implemented, for reasons which can be guessed but are not definitely known.\textsuperscript{85}

Of all the actions which were taken by the coalition, that which has attracted most attention as regards environmental consequences is the bombing of Iraq. Many objects which were attacked, such as oil storage sites, power stations and factories, provided for the needs of both the armed forces and the civilian population. It must be doubtful whether it is possible to embark on a policy of damaging the military function of such targets without at the same time doing harm to the civilian population and/or the environment; and so it proved in this case. In March 1991, in the immediate aftermath of the war, a controversial report submitted to the United Nations by Martti Ahtisaari, the Finnish head of a special investigative commission, deplored the devastation of Iraq. It noted the destruction of non-military objectives in Iraq: for example, seed warehouses, and a plant producing veterinary vaccines; and it said that ‘all electrically operated installations have ceased to function’, causing shortages and contamination of the water supply.\textsuperscript{86} The damage to facilities serving Iraqi civilian life was serious, and was notably criticized in a report by Middle East Watch.\textsuperscript{87} Some other reports in the aftermath of the war were less negative.\textsuperscript{88} In the present state of the law, a verdict that the bombing policy in general was illegal would be hard to sustain. However, Oscar Schachter’s judgement is worth noting: The enormous devastation that did result from the massive aerial attacks suggests that the legal standards of distinction and proportionality did not have much practical effect.\textsuperscript{89}

The coalition attacks on nuclear facilities in Iraq inevitably raised worries that there might be substantial release of radioactive materials, causing local environmental damage. In the event, any such release appears to have been minor. The question nevertheless remains, which will no doubt be faced in future conflicts, whether attacks on such facilities are contrary to the laws of war. There appears to be no absolute answer. The problem comes closest to being addressed in Additional Protocol I 1977, Article 56, on ‘Works and installations containing dangerous forces’. However, this is of limited relevance because, as noted above, first, it is not accepted as part of customary law; and second, it deals with ‘nuclear electrical generating stations’, but does not appear to address the types of nuclear installations actually attacked in Iraq. Even if the targets had been nuclear electrical generating stations, attack is only prohibited (and then incompletely) ‘if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.’ If attack does take place, ‘all practical precautions shall be taken to avoid the release of the dangerous forces’. These formulae leave much to the judgement and skill of the attackers; while confirming that there are, inevitably, many loose ends left by the negotiators who concluded Additional Protocol I 1977. Clearly attacks on nuclear installations, such as occurred in the 1991 Gulf War, risk very serious consequences, and require very special reasons and precautions: but in the present state of the law it cannot be said that they are always prohibited.\textsuperscript{90}
A strong defence of the coalition bombing policy generally can be made along the lines that it was aimed at targets which had some military relevance, was conducted with unusual precision, and any damage which was outside the proper military purposes of the war was accidental or collateral in character. These points were emphasized by Tom King MP, Secretary of State for Defence, in evidence to the Defence Committee of the House of Commons on 6 March 1991. He stated categorically that water pumping plants in Baghdad had not been a target, though their operations had inevitably suffered from the attacks on electrical power-generating stations; and he said that nuclear reactors were only attacked ‘after the most detailed planning to minimize the risk of any radiation spreading outside the site’. The account of the war in the British defence white paper makes the same point:

There was evidence too that Iraq had been seeking to develop nuclear and biological weapons. The allies therefore placed great importance on deterring Iraq from using any such weapons. Alliance leaders made it clear they would take the gravest view of any Iraqi use of weapons of mass destruction. Production and development facilities were attacked with precision-guided munitions using tactics designed to minimize any risk of contamination outside the sites.

Similarly, the Pentagon’s reports to the US Congress in July 1991 and April 1992 say of the bombing campaign that aircraft and munitions were carefully selected to achieve ‘the least risk to civilian objects and the civilian population’.

Taking the coalition bombing campaign overall, and making full allowance for the inadequate state of current information about its effects, it does appear that such coalition actions as damaged the environment were less wanton and gratuitous than the Iraqi oil crimes in Kuwait, and that some, but only some, significant efforts were made to avoid or reduce certain kinds of environmental damage. However, the allied actions serve as an uncomfortable reminder that prohibiting or reducing the environmental damage of war is not a simple task.

Remnants of war

The dangerous effects of remnants of war have long been a cause of concern, including to the United Nations. Such acts as the laying of mines without keeping careful plans violate basic principles of the laws of war on several grounds. They pose an obvious risk to innocent human life, even after the end of a war, and they may degrade the environment in a lasting way. Moreover, attempts to make the land environment safe again are liable to cost a great deal of money, human effort and lives.

The 1991 Gulf War left the land littered with the remnants of war. There were pools of oil on the frontier with Saudi Arabia, prepared by Iraqi forces to frustrate a coalition invasion; and pools of oil near the destroyed oil installations. Iraqi forces reportedly laid more than 500,000 mines in Kuwait and abandoned quantities of unexploded ordnance. As to the coalition, as many as one-third of its bombs and projectiles reportedly failed to detonate, the soft sand and the use of stockpiled or experimental weapons increasing the failure rate; and many US anti-personnel mines, dropped into the battle area, remained a
lethal hazard afterwards.\textsuperscript{95} Substantial quantities of depleted uranium, which is toxic and mildly radioactive, were left in armour-piercing shells in the desert.\textsuperscript{96}

Some less-publicized aspects of environmental damage were potentially serious. According to some accounts, the movements of armoured vehicles over the desert landscape of Saudi Arabia, Kuwait and Iraq in the months of crisis and war left the desert surface looser than before, and may have increased the likelihood of severe sandstorms.

**ACTION TO PROTECT THE ENVIRONMENT DURING AND AFTER THE WAR**

During and after the war the tackling of major environmental hazards in the whole area of the conflict involved difficult problems of diagnosis, prescription, organization and international co-operation. Not all were handled equally effectively.

There was much action to limit the effects of the oil spills in the Gulf. The US government (apart from its successful bombing on 26 January) took some effective action on an inter-agency basis during the war. A huge containment and recovery effort was made by Saudi Arabia’s Meteorology and Environmental Protection Administration, and by the International Maritime Organization. Under auspices of the UN Environment Programme and the Kuwait Regional Convention of 1978, a special oil clean-up ship, the *Ali-Wasit*, recovered 500,000 barrels of oil from the Gulf. Altogether some two million barrels of oil were recovered.\textsuperscript{97} A serious threat to the world’s largest desalination plant, at Al Jubayl in Saudi Arabia, was effectively countered by booms, nets and skimmers—the one part of the protection and clean-up effort that seems to have been completely successful. The protection efforts concentrated on protecting industrial and desalination plants, rather than environmentally sensitive areas. There is much dispute over the appropriate methods of tackling this and similar disasters.\textsuperscript{98} Overall, while there remains a thick tarry layer in the sands of the Saudi coast, the waters and wildlife of the Gulf appear to have made an impressive recovery, confirming to some observers the remarkable capacity of nature to survive disasters.\textsuperscript{99}

As to the oil fires in Kuwait, there was debate about the adequacy of preparations during the war, by either the US government or the Kuwaiti government in exile, to prepare for putting them out; and afterwards, the US administration seemed to down-play the impact of the fires—perhaps because it wanted neither to seem obsessed about oil, nor to raise any doubts about the wisdom of a war which left such a pall.\textsuperscript{100} After a slow start, work on controlling the oil fires gathered pace: the last fire was extinguished on 6 November 1991. There were inevitably missed opportunities, and many lessons to be learned from this episode so far as future oil fire disasters are concerned.\textsuperscript{101} In 1992 there was criticism of the Kuwaiti authorities for further damaging the wells by rushing to bring them back on stream before they had had time to recover.\textsuperscript{102}

Numerous other aspects of the clean-up operations posed problems. In Kuwait, huge quantities of oil remained on the surface even after the fires were put out. During a period of less than a year following the war, explosive ordnance reportedly killed or wounded some 1,250 civilians, and claimed fifty lives of demolition specialists.\textsuperscript{103}

The aftermath of the war, and in particular the weakness of efforts to monitor and rectify its effects on some aspects of the local environment, confirmed the need for
governments and armed forces to take much more seriously the whole problem of limiting the effect of war on the environment, and putting right the damage that is done.

**POST-WAR LEGAL DEVELOPMENTS**

**The question of Iraqi responsibility**

After the war, the UN Security Council held Iraq responsible for the damage caused by the invasion and occupation of Kuwait. Resolution 686 of 2 March 1991 demanded that Iraq ‘accept in principle its liability under international law 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’. It also required Iraq to ‘provide all information and assistance in identifying Iraqi mines, booby traps and other explosives as well as any chemical and biological weapons and material in Kuwait’.

Resolution 687 of 3 April 1991—the longest ever passed by the Security Council—contained many provisions relevant to the environment. It reaffirmed that Iraq ‘is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait’. Further, stringent measures of disarmament, especially in the chemical, biological, missile and nuclear fields, were imposed on Iraq by that and subsequent resolutions. Iraq was invited to affirm unconditionally its existing obligations under certain treaties, and to ratify the Biological Weapons Convention 1972.

Despite the UN Resolutions, after the cease-fire almost nothing was heard from the coalition governments on the subject of the major war crimes, and the personal responsibility of Saddam Hussein and his colleagues for them. The Security Council Resolutions contained not one word on the subject. Some Iraqis who had been caught in Kuwait at the end of the war were tried there in summer 1991 for various offences in connection with the occupation, but the larger issue of the responsibility of the top Iraqi leadership was flunked by the UN. The question of Iraqi war crimes obviously embraces the whole range of offences by Iraq, not just those relating to the environment; however, the fact that major and wanton environmental damage was apparently going unpunished (apart from the attempt to secure reparations) was serious: an opportunity to spell out, in a clear and forceful manner, the criminal nature of certain Iraqi actions, including wanton damage to the environment, was missed. The Security Council’s failure since the war to address the question of war crimes is all the more striking when one recalls the explicit reference to such crimes in Resolution 674 of 29 October 1990.

The reasons why the war crimes issue was not pursued are serious and need to be understood. Four stand out. First, there was wide agreement in the months before January 1991 that if there was to be a war for the liberation of Kuwait, it had to be a limited war for clearly limited and defined objectives: that being so, the capturing of Saddam Hussein and his colleagues, however criminal their acts, did not easily fit into the scheme of things. Second, there were obvious difficulties in demanding Saddam Hussein’s arrest as a war criminal at the same time as negotiating cease-fire terms with him; and in early March, getting a cease-fire seemed the more important task. Third, there was great
nervousness in Washington, London, and other coalition capitals about pressing any proposal for trials if opinion in countries in the region did not want to go down this road. And fourth, in many coalition capitals there was the hope, publicly expressed from the beginning of the war, that some kind of coup d’état or revolution within Iraq would solve the problem for them.  

However, as a minimum it would have been (and might yet be) possible for an authoritative statement to be made, to the effect that major war crimes had occurred, involving inter alia grave breaches of the Geneva Conventions; that there was personal responsibility for these crimes; and that under the Geneva Conventions any state is entitled to prosecute. Such a statement could have been made by the coalition powers, the UN General Assembly, or the Security Council. It would at least have had the effect of making it clear that Saddam Hussein and colleagues would be exposed to risk of prosecution if they set foot in other countries. It would also have given a little more consistency to the otherwise confusing positions taken by the Security Council.

Development of international law

The Gulf War, like many previous wars, led to much discussion as to whether, and if so how, international law might be developed to address more effectively the problems it had exposed. In particular, there was extensive consideration of the protection of the environment in warfare.

It was widely recognized that one war is too narrow a frame of reference for such discussions. After all, environmental damage in war can take many forms; and non-international armed conflicts must be taken into account. But the war did point to many general problems which needed to be addressed—for example, securing recognition and immunity (whether on the model of ICRC, or civil defence or other relief workers) for individuals and organizations concerned with monitoring and controlling environmental damage in peacetime or wartime—from measuring air pollution to rescuing injured wildlife.

Some of the immediate post-war discussion was centred on proposals for a new international treaty. A possible ‘fifth Geneva Convention’, to address directly the issue of environmental damage in war, was discussed. However, the weight of opinion among governments and international lawyers favoured proceeding by more modest steps, including fuller ratification, exposition, implementation and development of existing law. Resolutions in various bodies were one means of assisting such purposes; they can be a useful way of enunciating general principles, and relating them to particular problems as they arise.

After the war, some saw Additional Protocol I as centrally important so far as the protection of the environment in war is concerned. For example, a consultation in Munich in December 1991, mainly of environmental lawyers, began its final statement with the following recommendations:

1. The Experts Group strongly urged universal acceptance of existing international legal instruments, in particular of the 1977 Protocol…
2. The Group observed that the current recognition that the environment itself is an object of legal protection in times of armed
conflict implies that traditional perceptions of proportionality and military necessity have become obsolete.\textsuperscript{109} Although the Munich meeting also highlighted the importance of customary norms prohibiting devastation, it is doubtful whether it is wise to put such great emphasis on Protocol I, and to go so far in rejecting certain other aspects of the laws of war, including traditional perceptions of proportionality.

The International Committee of the Red Cross was, not surprisingly, a main vehicle for taking forward the question of the effect of war on the environment. The ICRC gave consideration to this in the run-up to the XXVIth International Conference of the Red Cross and Red Crescent, which had been due to be held in Budapest in November 1991, but had had to be postponed.\textsuperscript{110} A draft resolution had set out that the conference, \textit{inter alia}:

\begin{quote}
\textit{calls on} States which have not yet acceded to or ratified the international treaties containing provisions for the protection of the environment in time of armed conflict rapidly to consider becoming party thereto, \textit{encourages} the ICRC, in co-operation with the organizations concerned, to examine the contents, limitations and possible shortcomings of the international rules for the protection of the environment in time of armed conflict and to make proposals in that respect.\textsuperscript{111}
\end{quote}

The UN General Assembly has supported such an approach, and in December 1991 suggested further consideration of the matter in conjunction with the ICRC.\textsuperscript{112} The ICRC then convened a meeting of experts on the protection of the environment in time of armed conflict, held in Geneva in April 1992, and on 30 June submitted a report to the UN General Assembly. This emphasized the need to observe existing law in the field, and the ICRC’s continued willingness to address the issue. It identified a number of areas for further research and action.\textsuperscript{113}

Meanwhile, Principle 24 of the Rio Declaration of June 1992 offered the anodyne formula:

\begin{quote}
Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate in its further development, as necessary.\textsuperscript{114}
\end{quote}

**GENERAL ISSUES AND CONCLUSIONS**

**Need to address the question of environmental damage in war**

‘We won the ground war, we won the air war, but we lost the environmental war.’ This statement by a Kuwaiti woman in late 1991 commands respect.\textsuperscript{115} The 1991 Gulf War saw what were arguably the most serious acts of deliberate environmental destruction of any war in this century. It also showed, in a more general way, how modern war involves
a wide range of hazards to the human and natural environment: the mines and other remnants of war may prove the most serious in this case.

The fact that the Iraqi leadership has not so far been held directly responsible, other than through reparations, for its crimes in this regard only confirms the importance of establishing clearly, in some public and unmistakable way, that such wanton destruction of the environment is a serious war crime. To suggest this does not, of course, imply a belief that war can ever be brought completely within a strict legal framework, or that the world can be made safe for clean wars.

Environmentalists as well as others need to take seriously the question of establishing, or reinforcing, modest but realistic limits as to how far belligerents may go. The tendency of some environmentalists in the weeks before the outbreak of the 1991 Gulf War to forecast utter environmental catastrophe, and to oppose root-and-branch the very idea of war, may have reduced their credibility and effectiveness.

Illegality of Iraqi environmental destruction

In warfare, actions damaging to the environment are likely to constitute violations of a wide range of international agreements and standards. Particularly where they are associated with wanton destruction, not justified by military necessity, such actions are contrary to well established and universally binding parts of the laws of war. Provisions in treaties which were in force in this war, including the Hague Regulations 1907 and the Geneva Conventions 1949, have a strong bearing on the environment, as do the underlying principles of the laws of war, evidence from past practice and trials, and certain customary rules. The environmental provisions in the ENMOD Convention 1977, and in Additional Protocol I 1977, even if not widely accepted as declaratory of customary law, should be seen as supplementing other sources and as covering such special cases as the use of rain-making or defoliation techniques, rather than as constituting the core of the laws of war rules regarding the environment.

There appears to be no serious disagreement with the proposition that much Iraqi action relating to the environment, especially the creation of huge oil slicks and the wanton destruction of oil facilities in the occupied territory of Kuwait, was in direct violation of the existing laws of war. The Iraqi government undoubtedly deserves the lion’s share of blame for the environmental destruction, as it does for so much else in this war. Even if the point had not been stated as authoritatively, clearly and frequently as might have been wished, the Iraqi leaders should not have been in much doubt that the environmental destruction in which they engaged was a violation of international law.

Why did Iraq engage in widespread destruction?

It is not yet entirely certain why Iraq engaged in such action. Various reasons, both military and psycho-pathological, have been advanced to explain Iraq’s wanton acts of destruction. Some elementary considerations deserve mention. The less powerful side in any war is often the side most tempted to resort to desperate expedients, even if those expedients involve an element of self-destruction, and offer no serious hope of turning defeat into victory. The desire to deny a victor the fruits of war, common enough anyway,
would have been reinforced if the Iraqi leadership believed its own propaganda to the effect that it was for the sake of oil that the US went to Kuwait’s rescue.

On a more fundamental level, Iraq’s sense of alienation from international society—the product of a particular and in many ways debatable interpretation of its own history—made matters worse. Iraq (far from alone in this) had not incorporated into its martial ethos or military training the whole range of laws of war provisions to which it was bound by treaty. Further, Saddam Hussein may well have learned a terrible lesson from the Iran-Iraq war of 1980–8. From the international community’s failure to react to the original attack on Iran in 1980, and from its failure to do anything much about Iraq’s use of gas, he may well have concluded that he could ignore international law and institutions with impunity. In addition, the occupation of Kuwait and the subsequent war took place against the background of the Israeli occupation of the West Bank, Gaza, and the Golan Heights—an occupation which was twenty-three years old in the summer of 1990. Rightly or wrongly, many Arabs saw the Israeli occupation as proof of the inefficacy or bias of international legal institutions. This may have contributed to Iraq’s and the PLO’s reckless and thoroughly counter-productive disregard of international legal restraints in the crisis over Kuwait.

**Did the coalition do enough to prevent environmental destruction?**

In general, the coalition governments and their armed forces paid a good deal of attention to laws of war issues, and did take them into account in their diplomatic and military activities. However, significant possibilities of emphasizing the laws of war as instruments for inducing restraint between the belligerents may have been missed, especially in the field of environmental destruction.

There must be a question as to whether, at the start of Desert Storm in January, there should have been a clear public statement from the coalition concerning which international agreements, provisions and principles relating to the laws of war were beyond question in force. Such a statement was especially desirable, as Iraq needed reminding of its obligations; and different participants in the coalition were in some cases bound by different treaties, so there were possibilities of inter-allied confusion.

In particular, it is remarkable that the coalition powers apparently did not take further the warning against destruction of Kuwait’s oilfields and installations which was contained in President Bush’s letter to Saddam Hussein which had been rejected at Geneva on 9 January 1991. It may be that on this, as on other matters relating to the 1991 Gulf War, much important activity was not in the public domain and will only emerge slowly and belatedly. The Pentagon’s Interim Report said:

> Means to deter or restrict Saddam’s capability to inflict environmental damage were limited. Assessments weighed whether aerial bombardment by the Coalition of key Kuwaiti facilities prior to Iraqi sabotage might cause more damage than it prevented or provoke the Iraqis to embark on an even more widespread campaign.116

This leaves it unclear how much consideration, if any, was given to the possibility of a serious effort—by major statements, by broadcast and by leaflet—to spell out in advance
to all levels of Iraqi officers the criminality of setting fire to oil wells out of vengeance, the personal responsibility they would bear if they participated in such acts, and the possibility of a tough response by the coalition if Iraq persisted in such destruction. Of the many leaflets dropped by the coalition powers on Iraqi forces, none discouraged environmental destruction.

There is bound to be some scepticism as to whether a clearer enunciation of the law, coupled with statements on the consequence of violating it, would have stopped Saddam Hussein in his environmentally destructive tracks. After all, the rules on the treatment of inhabitants of occupied Kuwait, and on treatment of prisoners of war, were perfectly clear, but this had not stopped Iraq from cruelly mistreating such people and ignoring some of the most basic provisions of the Geneva Conventions, 1949. There can be no certainty that a stronger effort to impress on the Iraqi government or Iraqi officers the illegality of environmental destruction would have worked: but it might have been worth trying.

The basic problem of inducing Iraqi restraint in the matter of environmental damage was in some ways similar to the problem of preventing Iraqi use of gas and chemical warfare. Both issues involved international legal standards. Both also raised the questions of how to actively deter criminal Iraqi action; and of how to ensure that Iraqi commanders at all levels were fully aware of their personal responsibility, and liability, for any violations.

The coalition powers did make a serious and successful effort to dissuade Iraq from resorting to gas and chemical weapons. On the basis of the succinct prohibition of gas and chemical warfare in the Geneva Protocol of 1925, they confirmed the illegality of resorting to such means, and adopted a strong deterrent posture, repeatedly threatening severe retaliation if such weapons were used. They took a similar line regarding nuclear and biological weapons, with special emphasis on destruction of Iraq’s capacity. In respect of the environment their efforts do not appear to have been so consistent or successful. During this crisis, at least until the point where Saddam Hussein’s environmental threats began to be carried out on a large scale, there were few authoritative statements on the illegality of massive environmental damage.

There are several possible explanations for what appears to have been a failure of the coalition governments to make serious efforts to dissuade Iraq from wanton environmental destruction. One has to do with the state of the law. In some countries, including the US and UK, it is possible that there were some residual elements of doubt as to whether such destruction was unambiguously against the written laws of war as they were in force in the Gulf, especially bearing in mind that none of the three laws of war treaties mentioning the environment by name was technically in force in this war. At all events, there was no short and undisputed text to be cited. It did not help that the coalition leader, the USA, had in the preceding years expressed criticisms of the Additional Protocol I 1977 in general, and also, occasionally, of its environmental rules in particular. Nor did it help that the matter was generally discussed in terms of a threat to the environment, rather than in the legally safer terms of wanton destruction.

The second possible explanation has to do with the urgency of other claims on the attention of the coalition governments and armed forces, especially of course those of the US. They were concerned above all with more immediate threats: with the danger of gas, biological or even nuclear warfare, which threatened the lives and welfare of their troops;
with the nightly Scud missile attacks on Israel and Saudi Arabia—in the former case posing the risk of the war getting out of hand; with mistreatment of their prisoners; and with the ever-present possibility of terrorist attacks beyond the region. It is not surprising, even if it is regrettable, that environmental hazards, whose effects would be slower to develop, and which did not pose a threat to the coalition’s prosecution of the war, did not feature so prominently in governmental decision-making. Allied governments might have been especially reluctant to get into a confused and dangerous process of threats and reprisals in respect of environmental damage, wanting perhaps to reserve their retaliatory threats as counters to more immediately worrying Iraqi actions. This raises the disturbing possibility that in war it is always likely to be so: there will always be more pressing issues than long-term protection of the environment. Often in life, the important yields to the urgent.

A third possible level of explanation is that of the military mind-set. Military staffs simply lack the training and habit of mind to consider environmental damage as a major issue to be addressed in the planning and conduct of war. In the light of the 1991 Gulf War and other recent wars, any such mind-set would need to change.

The character of the debate about the overall justification for the war may also have played a part in the failure to prevent environmental destruction. In the weeks and months before the outbreak of war in January 1991, environmental hazards had been raised as a reason for not resorting to war at all, rather than as a reason for trying to achieve some restraint in the conduct of the war. Almost all of those expressing concern about environmental hazards had failed to make specific proposals of a kind which might have helped to limit any war which did occur. Further, it so happened in this war that issues which were environmental, idealistic and green (avoid fouling up the air and the waters) were also materialist and capitalist (avoid destruction of the oilfields and installations): the coalition governments, anxious to demonstrate to their domestic and international critics that this was not just a war for oil, may have been inhibited about placing repeated emphasis on such issues.

**Failure on laws of war issues at the United Nations**

The UN did little, both before and during the war, to spell out in a clear and comprehensive way the laws of war rules which applied to the Iraqi occupation of Kuwait, and which would apply to any war between the coalition and Iraq. This was true, as indicated above, of the Security Council; of the Secretariat; and also of the General Assembly, whose work on laws of war matters during this particular crisis (in marked contrast to some other conflicts) was practically non-existent.

There was no formal obligation on any part of the UN system to spell out publicly how the laws of war would apply in this occupation and conflict. The difficulties of doing so in any detail are obvious. Others, including the ICRC, could and did perform this task. Yet there is bound to be an argument that this omission by the UN was serious, especially so far as environmental issues were concerned. Iraq had already made environmental threats by September 1990: an authoritative clarification of the existing law (or at least its broad principles) by an international body representing governments could have been helpful.
The UN will need to conduct a careful post-mortem of its handling of several issues in this crisis. One key problem may prove to be, not so much the alleged US dominance of the UN, but rather the absence of clear ideas at UN Headquarters as to what kind of role the UN could have had—and the absence of serious attention there to laws of war issues, including those bearing on the environment.

Additional Protocol I 1977 after the Gulf War

The experience of the 1991 Gulf War raises questions about the desirability and adequacy of the provisions of this accord, and about whether it should be ratified by those states which have hitherto held back. These questions are numerous and complex: only a few relating to the environment are mentioned here.

Of the three agreements which mention the environment, all concluded in 1977 or after, Additional Protocol I is the most important overall, and the most relevant to the facts of this war. However, Articles 35 and 55, with their specific provisions on the environment, would have been of limited relevance even if the treaty had been in full force. It is not necessary to seek authority from these articles to assert the illegality of the particular oil-related crimes committed by Iraq in occupied Kuwait. The Iraqi actions were wanton destruction rather than a method of warfare; they fail tests of military necessity and proportionality.

Does Additional Protocol I, in Articles 35 and 55, establish too high a threshold for environmental damage? As noted earlier, the Pentagon’s final report went so far as to question whether the huge environmental damage inflicted by Iraq actually constituted those ‘methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment’ which are prohibited in the Protocol. Certainly the requirement that environmental damage must be ‘long-term’, if this continues to be measured in decades, will limit the utility of the Protocol’s environmental provisions. Indeed, in many situations other provisions of the Protocol, including those protecting civilian objects, probably have more relevance to environmental protection. It is not surprising that in these circumstances there have been suggestions that the terms ‘widespread, long-term and severe’ in the Protocol ‘belong to earlier concepts of environmental protection’ and need to be reinterpreted or revised.118

If Additional Protocol I had been in force, would the general coalition war effort have been hampered? A considered US or UK military evaluation of this question is much to be desired and would expose a wide range of problems. The war undoubtedly threw into relief certain weaknesses in the Protocol. For example, the prohibitions on reprisals in Articles 51–6 are so sweeping that there is bound to be a question concerning whether powers should rule out in advance almost all right of reprisal when they are fighting an adversary with so little regard for legality as Saddam Hussein: however, as far as environmental issues are concerned, the prohibitions on reprisals may not be a problem, as it is hard to know what reprisals are appropriate in respect of environmental damage. The provisions of Article 54, on protection of objects indispensable to the survival of the civilian population, could have been cited in criticism of some coalition bombing actions in Iraq: no bad thing, some would say, if it clarifies restraints on belligerents, and assists an informed debate about the principles of targeting. As regards Article 56, on protection of works and installations containing dangerous forces, the position is perhaps simpler:
despite a few interpretations to the contrary, and for the reasons cited earlier, this article does not place a prohibition on attacks on the kinds of nuclear installations actually hit by the United States in the course of the war. Overall, the events of the war suggested the relevance and utility of many of the general principles and detailed provisions of Additional Protocol I.

After the experience of this war, those powers that have not already done so have again to address the question of ratification of the Protocol. The question of ratification needs to be reconsidered by the UK and US governments anyway—with Germany’s ratification in February 1991, eleven out of NATO’s sixteen members are parties to the Protocol: it is not desirable for the alliance to carry on with a majority of members bound by this agreement, but five members (France, Portugal, Turkey, UK, and USA) not so bound. Problems regarding particular provisions are serious, but some at least could be tackled, as they have been by many NATO member states, by making reservations at the time of ratification, rather than by not ratifying at all.

It is virtually certain that some states, including the USA, will remain unwilling to ratify the Protocol. In that event, there will be a need for the USA and its allies to fill the gap by giving what has long been promised but never delivered, ‘some alternative clear indication of which rules they consider binding or otherwise propose to observe’. Despite the impressive work done in the crisis to bring the laws of war to bear on the actions of the US and coalition forces, the war did highlight the gap in US policy towards the laws of war which was already evident. If the gap cannot be filled by ratification, then the ‘alternative clear indication’ which is needed will have, among other things, to address matters relating to the environment.

**Proposals for a new convention on war and the environment**

The events of the 1991 Gulf War do suggest that the apparent absence of a simple, formally binding, set of rules about the impact of war on the environment did not help matters. There are, therefore, many serious arguments for some attempt at codification. Yet there is bound to be a question as to whether a new treaty is both desirable and possible. The existing laws of war do say a lot, indirectly and directly, that bears on damage to the environment: clear and authoritative exposition of this is needed just as much as new legislation.

Negotiation for a new agreement on the environment could be hazardous. It could run into fundamentally intractable problems (of which there have already been foretastes in other negotiations) about defining the natural environment; about defining damage to it; about working out exactly which environmentally damaging acts are forbidden; about distinguishing between intentional, collateral, and completely unexpected damage to the environment; about whether certain kinds of destruction, including even scorched earth policies, might be permissible in certain circumstances, including perhaps to a defending state within its own national territory; and about establishing exactly what military-related activities could be permitted in any specially protected environmentally important areas. The question of nuclear weapons would inevitably be raised, and it would probably be as hard as ever to bring such weapons within the framework of the laws of war. Other questions would be hardly less awkward. The powers which took part in the coalition in the 1991 Gulf War, for example, are not in any position, or mood, to assert that
absolutely all destruction of oil targets is impermissible. There have already been indications that the US is sceptical about a new accord.\textsuperscript{120}

In any case it is quite possible that broad statements of principle already enshrined in many existing accords from 1907 to 1977 are more useful than would be an array of more detailed rules—for such rules are always vulnerable to the passage of time. Indeed, an examination of existing law and practice suggests that, so far as the environment is concerned, there is always a need for interpretation of rules and principles in the light of new circumstances; and this process is always likely to involve an extraordinarily difficult balancing process.

### Other possible courses of action

The undoubted difficulties in the idea of a new convention do not necessarily kill it, but they do suggest that other approaches may be more profitable. Some of the deficiencies in existing law and practice may be best addressed by other means: through authoritative statements and resolutions by international bodies interpreting existing law; and through changes in attitudes and procedures regarding environmental matters.

On the national level, revision of military manuals is overdue in many countries (in some cases having been held up by delays in ratification of Additional Protocol I 1977), and provides an important means of securing the implementation of basic rules regarding the environment. Rules of engagement—another vital, if usually secret, link between the laws of war and the conduct of armies in the field—also need to take specific account of environmental issues.

The role of the media also merits closer consideration. In the major countries involved, laws of war issues were treated very unevenly, and sometimes inaccurately.\textsuperscript{121} There was little if any serious press discussion of laws of war issues relating to the environment. In the public mind, the illegality of extreme environmental destruction was not as clearly established as it might have been.

Overall, the Gulf conflict showed that the laws of war are an essential, if flawed and sometimes neglected, part of the framework of international relations. It also confirmed that they have limitations, and that their implementation has more. The difficulties which arose in the Gulf conflict, especially in matters relating to the environment, suggest that the main problem lies in ensuring that the law which exists is adequately understood, widely ratified, sensibly interpreted, and effectively implemented. The law’s purposes, principles, and content, need to be properly incorporated into the teaching of international law and relations; into military manuals and training; and into the minds and practices of political leaders, diplomats and international civil servants.

Any wars in future decades and centuries are likely to be in areas where there are high chances of the environment being affected. This is mainly because economic development results in the availability of substances (oil, chemicals, and nuclear materials being the most obvious examples) which can very easily be let loose on the all-too-vulnerable land, air and water on which we depend, and which are liable to be discharged by accident or by design; because some parts of the natural environment are becoming more constricted and fragile due to peacetime trends; because much of the environment in which we live (especially water supplies) depend on the smooth running of an infrastructure easily disrupted by war; and also because some weapons (nuclear
weapons being only the most extreme case) may themselves have terrible effects on the environment. For all these reasons, the environmental effects of war, dramatized by the 1991 Gulf War, are likely to remain a serious problem. Even if it can never be completely solved, the problem needs to be tackled within a laws of war framework, and more consistently than it was in the Gulf crisis of 1990–91.
Chapter 7
Naval operations in the Gulf

Captain Shaun Lyons, RN

INTRODUCTION

The planning and conduct of maritime operations in the Gulf from August 1990 to April 1991 demonstrated, inter alia, the correlation that exists between the theory of international law and the practical application of such theory in terms of day-to-day naval deployments and operations. Not only must governments, of course, carefully analyse and justify the legal basis for their actions, but those who have the responsibility for transmuting such decisions into directives and rules of engagement must understand the framework within which they are working. This chapter will examine some of the legal issues that arose in the maritime context during the Gulf action. Where appropriate the legal arguments and government interpretations will be reviewed and the pragmatic consequences for the planners and operators discussed. While mainly concerned with the British perspective and Royal Navy activity, the actions and decisions of allies and others will be examined where appropriate.

The Royal Navy has had a long association with the Gulf region, maintaining a presence there, at times both ashore and afloat, over a long period of years. The Royal Navy’s shore base in Bahrain, HMS Jufair, closed at the end of 1971, but since then naval forces afloat have been deployed to the area from time to time. Since the start of the Iran-Iraq conflict in 1980 the Royal Navy has maintained a continuous presence in the region in the form of the Armilla patrol. In recent years this patrol has consisted of three destroyers/frigates backed up by afloat support vessels of the Royal Fleet Auxiliary. The principal purposes of the Armilla patrol have been, and remain, to reassure and, if necessary, protect the safety of British merchant shipping in the Gulf area and the only government statement as to the rules of engagement in force for this long-standing patrol is, bearing in mind the policy of the British government not to release details of such rules, naturally bland:

The rules of engagement are intended to avoid escalation, although the varied nature of potential threat and the possibility of surprise attack are recognized and the inherent right of self-defence of Royal Navy ships or British merchant vessels under their protection, is not circumscribed or prejudiced.

At the beginning of August 1990 the Armilla patrol comprised HM Ships York, Battleaxe and Jupiter, supported by RFA Orangeleaf. HMS York and RFA Orangeleaf were on station in the Gulf while HM Ships Battleaxe and Jupiter were on stand-down visits to Penang and Mombasa respectively. By April 1991 a total of thirty-seven Royal Navy
ships and Royal Fleet Auxiliaries, together with three naval air squadrons, had been deployed in support of the Gulf operations.\textsuperscript{5}

**SANCTIONS AND THEIR ENFORCEMENT**

**The framework**

The Iraqi invasion of Kuwait on 2 August 1990 prompted a speedy response from the UN Security Council in the form of Resolutions 660 (condemnation of the invasion) and 661 (imposition of economic sanctions), adopted respectively on 2 August 1990 and 6 August 1990.\textsuperscript{6} Resolution 661 imposed sanctions on Iraq by ordering the prevention of all economic activity that would facilitate the import of Iraqi goods into member states and the export of goods from member states to Iraq. The only exception to these comprehensive sanctions was for ‘supplies intended strictly for medical purposes and, in humanitarian circumstances, foodstuffs’.\textsuperscript{7}

On 8 August 1990 the British government announced that, in response to a request from Saudi Arabia, British forces would be sent to the area to defend the Gulf region from further Iraqi military action.\textsuperscript{8} New directives were given to the Armilla patrol group (all of which were in the Gulf by 12 August 1990) including instructions to ‘monitor shipping passing to, from and within the Gulf; to develop an assessment of ships, particularly tankers, breaking the sanctions imposed by the Security Council’.\textsuperscript{9}

With effect from 9 August the British government passed two statutory instruments under the United Nations Act 1946, s. 1 to give effect to Resolution 661.\textsuperscript{10} These Orders forbade both the unlicensed supply of UK goods to Iraq and Kuwait and also the unlicensed importation into the UK of goods originating from Iraq or Kuwait. The orders also provided that no British ship should be used for the carriage of any such goods and gave the powers that would enable the Royal Navy to enforce these prohibition on British registered merchant ships.\textsuperscript{11} These powers included the right to board and search suspected ships, to prevent the continued voyage of any such ship and the ability to divert and take these ships into any port.

By 12 August the United States viewed Article 51 concerning collective self defence as a legitimate basis for enforcing the sanctions imposed by the Security Council.\textsuperscript{12} This determination was reached as a result of a request from the legitimate government of Kuwait for support for the enforcement of the UN economic sanctions.\textsuperscript{13} Mr Baker (US Secretary of State) said ‘Let’s not use the word blockade. Let’s just say we have the legal basis for interdicting these things’.\textsuperscript{14} The following day Mr Waldegrave (Minister of State at the Foreign Office) stated that the Emir of Kuwait had asked Britain for assistance under Article 51 of the UN Charter\textsuperscript{15} and that ‘If there is evidence of sanction-busting the Navy will take the necessary steps’.\textsuperscript{16} He further stated:

The United Nations has imposed economic sanctions. What Kuwait has asked us to do is to make sure that the economic weapon is effective and that Article 51 gives us the right to do that and we are accepting that request.\textsuperscript{17}
Britain used the term ‘monitoring’ rather than ‘interdicting’; this is consistent with the orders given to the Armilla patrol (see above) and the reported questioning by HMS Jupiter of the Cyprus-registered tanker Gloria also appears to fit this pattern. The US government announced on 16 August 1990 that naval interdiction by US forces was authorized from that date, and on 17 August the Article 51 justification was enshrined in the Special Warning No 80 issued by the United States Department of the Navy. This stated at Paragraph 1:

In response to requests from the legitimate Government of Kuwait and in exercising the inherent right of collective self defence recognized under Art. 51 of the UN Charter, United States forces will, in co-operation with regional and allied forces, conduct a maritime operation to intercept the import and export of commodities and products to and from Iraq and Kuwait that are prohibited by UN Security Council Resolution 661.

At Paragraph 6 the warning stated that ‘Failure of a ship to proceed as directed will result in the use of the minimum level of force necessary to ensure compliance.’

On 19 August 1990 US warships (USS Reid and Bradley) fired across the bows of two Iraqi tankers (Baba Gurgur and Kahanakin) en route toward the northern Gulf.

On 25 August 1990 Resolution 665 was adopted by the Security Council. Without so stating in plain terms, the Resolution nevertheless gave the coalition forces the power to impose the embargo by force if this became necessary. The somewhat orotund formula employed called upon:

those member states co-operating with the government of Kuwait which are deploying maritime forces to the area to use such measures as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation [of Resolution 661].

Thus, from 25 August 1990 allied maritime operations in support of the strict enforcement of the sanctions were carried out not as an exercise of the right of collective self defence under Article 51 of the UN Charter, but pursuant to resolutions based upon Article 41 of the UN Charter.

Theoretical considerations

If governments decide to take action to enforce sanctions, why does it matter on which basis they justify their actions? Obviously, for a variety of reasons, it is important that governments, especially those which purport to uphold the rule of law, should have a demonstrably sound legal basis for their actions but, beyond that, the basis that they choose has military and practical consequences. The legal arguments during the Gulf crisis over sanctions enforcement may, very simplistically, be said to have consisted of three interrelated questions: Did the embargo amount to a blockade? Was it legal to enforce the sanctions and embargo as a measure of collective self defence under Article
51 of the UN Charter? Was it necessary for the Security Council to give approval to such an operation?

**Blockade, Article 51 and Resolution 665**

The trade sanctions imposed and the embargo on the export and import of goods did not amount to a blockade. While the techniques of enforcement of the embargo closely paralleled those of the customary international law doctrine of blockade, this term of legal significance was not applied to the action by those party to it, nor by the UN Secretary-General. That the sanctions were imposed under Article 41 of the UN Charter was argued both at the time and subsequently, when reviewed academically. This perception is important for, were the embargo to have amounted to a blockade, then it could be argued that this demonstrated that the Security Council had exercised its powers under Article 42 of the UN Charter to take such measures ‘as may be necessary to maintain or restore international peace and security’. And, if this were so, then it could be further argued that the right to take measures of collective self defence under Article 51 would have lapsed because such self defence measures are only permitted ‘until the Security Council has taken measures necessary to maintain international peace and security’. However, such an argument is specious. Under Article 51, rights of self defence may be exercised ‘until the Security Council has taken measures necessary to maintain international peace and security’. This concept must import considerations of time and effectiveness, for until whatever measures taken have actually had the effect of maintaining international peace and security, the self defence rights must remain extant. Thus, even if measures had been taken under Article 42, rights of self defence under Article 51 would still be exercisable until the measures were effective. Further it is wrong to argue that there is any inevitable nexus between the taking of Article 42 measures and the extinguishing of Article 51 rights of self defence. The proposition that Resolution 661, in imposing these sanctions, was not drawn under Article 42 of the UN Charter was much strengthened by the wording in the preamble of that Resolution where the following clause was included: ‘Affirming the inherent right of individual or collective self defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter.’

The unequivocal position of both the United States and British governments was that action taken in self defence in support of the UN sanctions was perfectly proper and legal. This view was not universal, and the announcement and implementation of this enforcement action led to a ‘lively debate at a closed emergency session of the Council’. While the view of the United States and Britain did not change, the formal authority of the Council for such an operation was sought and granted under Resolution 665.

It may thus be said that it was never seriously considered that the embargo operation was a blockade. Accordingly, the planner did not have to contemplate whether or not the traditional doctrines of blockade applied. Even if the embargo had been characterized as a blockade and it had been accepted that this was therefore a measure under Article 42 of the UN Charter, the law would not have been clear; the applicability of the traditional doctrine of blockade and the law of neutrality to such a UN enforcement measure is a
difficult and uncertain area of law. In the event, the practical problems associated with such a blockade did not require resolution.

**Collective self defence under Article 51 of the UN Charter and collective action under Security Council mandate**

The powers given by the Orders in Council\textsuperscript{28} enabled the Royal Navy to have confidence that they could deal with the breaches of the embargo involving British merchant vessels; that they could anticipate being able to cope also with American flag ships. But what could be expected of other nations? In theory at least there should have been little problem. The terms of Resolution 661 imposing the sanctions should have been binding upon all member states of the UN.\textsuperscript{29} Indeed, the Resolution ‘Calls upon all States, including States non-members of the United Nations, to act strictly in accordance with the provisions of the present resolution’ (emphasis supplied). Each state was expressly required to enforce the provisions of Resolution 661 upon its own shipping, and breaches of the sanctions should have been minimal; nevertheless it was possible that there would be occasions when the full powers of implementation would have to be employed.

For at least a short period (from 16 August 1990 until the adoption of Resolution 665 on 25 August 1990) the monitoring and interception of shipping by Kuwait’s allies was conducted under a legal justification of collective self defence. Once again the planner would be entitled to expect widespread co-operation from states, but needed to identify the legal basis for interference with the normal freedom of commerce upon the sea. If the interdiction took place as an exercise of self defence under Article 51 of the UN Charter, the theoretical legal basis upon which such action might be founded is of interest. There is a large body of international opinion that says that once an international armed conflict exists then all the law of maritime conflict, including the right of visit and search by belligerents, comes into play.\textsuperscript{30} This view is not unchallenged, and in any event does not affect the situation applicable during the short period before Resolution 665 was adopted. That there was an international armed conflict between Iraq and Kuwait was not in dispute, but the British government took the view that such a state of armed conflict did not exist between the UK and Iraq, and also that the UK was thus not a belligerent. Kuwait had requested the UK to exercise such rights of collective self defence as were necessary to ensure that economic measures designed to restore Kuwaiti rights were effectively implemented. As Mr Waldegrave said on 13 August 1990: ‘What the Kuwaitis are asking us to do is to reinforce the economic weapon which was put in place under the Security Council Resolution.’\textsuperscript{31}

In a different context during the protracted international armed conflict between Iran and Iraq, Britain regarded herself as an impartial third party state, not involved in the conflict, and acknowledged only limited rights of the belligerents to exercise visit and search of British merchant shipping. When the British merchant ship *Barber Perseus* was intercepted by the Iranian navy in January 1986 the British government said:

The United Kingdom upholds the general principle of freedom of navigation on the high seas. However, under Article 51 of the United Nations Charter, a state, such as Iran, actively engaged in an armed conflict, is entitled in exercise of its inherent right of self defence to stop
and search a foreign merchant ship on the high seas, if there is reasonable ground for suspecting that the ship is taking arms to the other side for use in the conflict. This is an exceptional right: if the suspicions prove to be unfounded and if the ship has not committed acts calculated to give rise to suspicion, then the ships' owners have a good claim for compensation for loss caused by delay.32

This statement and its inherent implications appear to indicate a limitation on the traditional belligerent right of visit and search. Visit and search, at least in this instance, would now seem to be exercised as a part of the rights of self defence under Article 51 of the UN Charter and thus should meet the requirements of necessity and proportionality.33 While, perhaps, too much can be made of this statement, which was special to the circumstances giving rise to it, the legal stance it indicates is entirely compatible with the view expressed by the British government during the Kuwait crisis that Article 51 self defence rights would permit monitoring and, if necessary, the interception of shipping in the Gulf in support of the UN sanctions.34

From 25 August and the adoption of Resolution 665 the embargo was enforced and naval operations were conducted under the authority of resolutions adopted under Chapter VII of the UN Charter. This meant that, regardless of national interpretations of the law, a common legal umbrella was at hand to give authority and cover for the allied actions. It was an umbrella that provided, in addition, widespread political harmony and a greater degree of certainty to the planner.

**Neutrality**

One issue lies behind all the questions so far canvassed and gives rise to different national interpretations of the modern status of the traditional doctrines of maritime conflict. This issue is the uncertain effect of the United Nations Charter on the law of armed conflict and, particularly, the law of armed conflict at sea. If war is now prohibited,35 can the status, rights and duties of belligerents and neutrals still be effective? If there is no war, can there be neutrality? Are those third party states not involved in an international armed conflict automatically impressed with the status, rights and duties of neutrals, or are they in a condition of ‘non-belligerency’?36 Is the answer the same in conflicts of differing intensity and scope? If the action is an enforcement action under UN authority, can any state (particularly a state which is a member of the UN) claim neutral status?37

It is beyond the scope of this chapter to attempt to answer these questions. They are posed to give a flavour of the background against which operations were planned and conducted and also to highlight the fact that during the Gulf conflict one country, Iran, with an important geographical, political and religious influence, did indeed use terminology in its public statements that indicated the adoption of such a stance.38 However, no clear statement of, or official adoption of, neutrality was ever made.
Practicalities

Following the publication of Special Warning 80, the USA and its allies conducted maritime operations to monitor and, if necessary, intercept shipping in order to prevent breaches of the embargo. The measures that were envisaged and the degree of force permitted to enforce them were not stated. Clearly warships would need to question merchant vessels and, if not satisfied with the replies, would need to board and search them in order to verify their cargoes, identities and destinations. The power to divert and detain a ship in a nominated port might also be required. If, as a result of either questioning or search, a ship was found to be in breach of the embargo measures then the diversion of the ship either back to her port of departure or to some other port would be necessary.

Given that the Royal Navy and the US Navy could feel confident in their mutual ability to deal with each other’s shipping, what could be done to merchant ships of other countries? Did the exercise of collective self defence allow them to go beyond ‘monitoring’ by questioning? If it did, how much force could be used? If they wished to visit and search a foreign merchantmen, was it necessary to have a prior agreement with the flag state or should permission be sought on an individual basis when the need arose? Could interception operations be conducted in the territorial seas of the regional coalition partners who formed the majority of the Gulf littoral states? Could they be conducted in the territorial seas of a ‘neutral’ state (Iran) and in the Iranian Advisory Zone?

The answers to such questions are not to be found solely in legal reasoning. It would also be quite wrong to pretend that detailed and protracted analysis of the underlying legal theories occupied the minds of planners. The limitations and uncertainties inherent in this area of the law of armed conflict were accepted and practical solutions sought. Common sense, diplomacy and negotiation came to the fore. Where doubt still existed after Resolution 665, states were asked for their views on matters; and, where necessary, for their permission or agreement to a course of action. In the British experience, none of the questions caused an insuperable practical difficulty, and it is fair to say either that the envisaged difficulties did not arise or that prior negotiation and agreement had removed the problem. That on this occasion the uncertainties in the law were overcome in their practical application should not lead to an underestimate of the practical difficulties that might arise in a different set of circumstances. If enforcement operations of this kind become more commonplace, clarification of the rules may be required, perhaps by the Security Council itself.

The use of force and rules of engagement

Given the proper reluctance of the British and other governments to release details of rules of engagement, it is necessary to examine known incidents to determine what shape the directives and rules on the use of force may have taken. Given the bland statement on the Armilla rules of engagement already quoted, it is possible to speculate sensibly on how further developments may have taken place. Following the invasion and the subsequent requests for assistance, the Royal Navy found itself engaged in collective self defence measures with maritime allies. It seems sensible to postulate that whatever
measures were permitted for the self defence of British warships and merchant ships would now be extended to cover the defence of allied ships. Some degree of co-ordination of rules between allies is necessary for safety and for inter-operability purposes. Quite simply, maritime forces operating in relatively confined waters, with a common purpose and in mixed nationality groups cannot afford room for misunderstanding and differing operational procedures. Even if the rules of engagement differ in detail there must be a broad similarity of purpose and method and a clear appreciation of such differences as do exist.

Particular directives and rules of engagement would be required for the embargo enforcement operations. Some concept of the degree of consultation and co-operation is given in British Joint Commander’s despatch where tribute is paid to the ‘close cooperation...in the Multi-national Maritime Force’ and which mentions that ‘the various naval commanders met...to develop the military modus operandi’. It is clear that the United States permitted at an early stage (before Resolution 665), the use of warning shots and this was also included in British rules of engagement as was shown on 7 October 1990 when:

in close consultation with the Ministry of Defence,...the next level of the rules of engagement [were implemented]..., which permitted the firing of shells across the bows of the vessel. Despite this measured escalation in the use of force, the Al Wasitti refused to co-operate and Royal Marine boarding teams from HM Ships Battleaxe and London were inserted by helicopter.

The passage of the Joint Commander despatch from which this extract is quoted shows three things. First, the Ministry of Defence was consulted before warning shots were fired, second, that there was a planned and measured escalation of force and third, that this boarding, like the majority of all boardings, was carried out by small groups of warships comprising ships of two or three different nationalities. The requirement for similarity of objectives and rules and for mutual understanding cannot be more aptly demonstrated. In order that the overall level of the use of boarding and the possibility of the use of force can be placed in perspective, it is instructive to note that between 25 August 1990 and 11 April 1991 the Royal Navy challenged a total of 3,171 merchant ships and participated in thirty-six boardings. The embargo enforcement operation was a great success: ‘no merchant ship reached Iraq through the Gulf without being stopped and inspected’.

International criminal jurisdiction

While the degree of force used by coalition servicemen in the conduct of visit and search operations and also on their own personal self defence could be governed by rules of engagement, what protection did they themselves have against the possibility of personal violence directed against them? In dealing with this question it matters not whether they are operating under a collective self defence operation or one of enforcement under UN authority. Consider the example of personal violence to a British serviceman at the hands of an Iraqi merchant ship crew member or members which results in serious injury or
death. In the circumstances of a boarding at sea, particularly the boarding of an uncooperative or even actively hostile ship, such an outcome is not unlikely.

If the violence took place on the high seas, then sole jurisdiction for the offence of violence would lie with Iraq as the flag state of the ship on which the offence took place. While the offender may be temporarily in British control there would be no jurisdiction to try him. ‘Ships shall sail under the flag of one state only and...shall be subject to its exclusive jurisdiction on the high seas.’46 Were the incident to take place in the territorial waters of a third party state, then that state could exercise its criminal jurisdiction if it considered that the ‘consequences of the crime extend[ed] to the coastal state ...[or] if the crime [was] of a kind to disturb the peace of the country or the good order of the territorial sea’.47 If the coastal state chose not to exercise its jurisdiction, then the matter would revert to Iraq as upon the high seas. Finally, if the violence was carried out in the internal waters of a coastal state, following, say, the detention of an Iraqi vessel in a nominated port, then the coastal state would have jurisdiction. If the coastal state chose not to exercise this jurisdiction then Iraq would be able to exercise hers. Thus the rather unsatisfactory situation existed where Britain would have had to rely upon the criminal jurisdiction of Iraq and the actions of Iraqi administrators for the trial and, if appropriate, punishment of an Iraqi national who might have killed or injured a British serviceman in the exercise of his duties.48

THE LIBERATION OF KUWAIT

The politico/legal debate

Once Resolution 665 had been adopted and once the maritime operation to enforce the embargo had been set up, the attention of governments, the world press and the academic community turned to the debate on the legal basis required for direct action should this become necessary in order to eject Iraqi forces from Kuwait. Need the maritime planner or operator be concerned with this? And, if so, what are the differences that would be discernible according to the legal basis chosen?

Before dealing with these questions it is sensible to rehearse the debate, albeit briefly. The position of the British and American governments was simple. If the sanctions did not work then none of the resolutions passed prevented action being taken as an exercise of the inherent right of collective self defence, and nor was there any requirement for further resolutions to authorize the use of force.49 Resolution 661 had specifically affirmed this right of self defence and it was argued that the actions taken under this resolution and also under the authority of Resolution 665 did not constitute a bar to the exercise of rights of collective self defence under Article 51. Such rights existed until some measures were taken that did in actuality restore international peace and security.50 Others felt that further authority from the United Nations was necessary, either because they took the contrary view of the Security Council resolutions or because they believed that there was an overriding political necessity to obtain a clear mandate for this further use of force. It is not necessary to explore the detailed validity and content of these arguments for the purposes of this chapter. The debate itself was overtaken by the adoption of Resolution 678 on 29 November 1990, which authorized:
member states co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement Security Council Resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.

Despite the lack of any mention of the use of force this resolution was clearly recognized as authorizing the use of force, and this has not been seriously disputed since. It has been disputed whether this resolution authorized enforcement as a collective measure by member states or whether it authorized or was approving of an exercise of the right of self defence by member states. The British government’s view was that the action was taken under the authorization of Resolution 678 which itself was drawn under Chapter VII of the UN Charter. The consequences for the military planner following from the legal basis for action are set out below.

**Practicalities**

To narrow the area of consideration it is accepted that whatever the legal basis on which open hostilities were to be conducted, certain matters would not alter. Thus the application of the Geneva Conventions (but not the 1977 Additional Protocol I which had not been ratified by the UK, USA or Iraq) was never in doubt. Nor indeed was there any doubt that the customary laws of war would be obeyed by the coalition forces. However, the basis on which third party states would be treated, at least in theory, would depend upon the legal basis that applied. As examined earlier in this chapter, if the action was one of collective self defence then, as far as the law of neutrality can be held to apply in international armed conflict of this nature, states that did not take part in the conflict could hold themselves out as neutral. If, on the other hand, this was an enforcement action in support of the Security Council resolution, then no member state could hold itself aloof through neutrality, at least to the extent that its claimed neutrality hindered or ran contrary to the achievement and imposition of the Security Council resolutions which would be binding on it.

The difficulties caused by this choice were less important in the actual conflict than in the period of tension that preceded it. It is perhaps not surprising that when hostilities actually started the problems either disappeared or became more easily resolvable. If the action was one of self defence then operations could be conducted on the high seas and in the territorial seas of the belligerents. The territorial sea of neutrals would be inviolable. If, on the other hand, the action was taken in support of resolutions adopted under Chapter VII of the UN Charter then the high seas could, of course, be used and there also would be a presumption that the territorial seas of all member states could be used for the operation. Of course, in the particular and confined circumstances of this conflict the problem was not large and in practical terms easily resolved. Whichever was the basis for action the coalition partners could rely upon the territorial waters of the regional coalition partners being open to them, and the only difficulty came in considering the position of Iran. Here again, despite the possibility of there being two different legal bases for action, the planner when faced with the situation in which a state purports to remain aloof and to
keep its territory inviolate\textsuperscript{53} cannot theorize. He must deal with the situation as he finds it and consider carefully whether he must, or need, use the area of sea in question. While the problem did not arise in practice, the potential for difficulty raised by the possibility of such a declaration of neutrality must be recognized and examined. The circumstances of this conflict are unlikely to recur in exactly the same form, and such a question may in a future conflict have genuine strategic and tactical significance and effects.

**Rules of engagement**

Once open hostilities commence rules of engagement are, to some degree, easier to frame than in periods of tension or transition to war. In essence, they become very much rules of targeting and rely upon the customary rules of warfare that will apply regardless of the cause and justification of the conflict. Nevertheless, the need for as great a degree of similarity of rules as possible in a multinational force is paramount in conditions of combat. The problem was simplified in the Gulf conflict by the fact that rules of engagement, for surface warships, were largely a ‘two-navy’ only problem. Only ships of the Royal and United States Navies took part in offensive maritime operations and, because these two experienced NATO allies share a wealth of common operating and procedural experience, ‘full integration with the predominant USN’ took place including ‘the transfer of tactical control of a number of [Royal Navy] ships to USN Task Group Commanders’.\textsuperscript{54} Such a close degree of co-operation cannot be achieved without a marked similarity of directives and rules of engagement.

**Medical ships and aircraft**

The Royal Navy has recent experience in the declaration and operation of hospital ships and aircraft. The success of the medical services and arrangements during the Falklands conflict including the innovative use of the ‘Red Cross Box’ is well documented and reflects credit on both belligerents and the ICRC.\textsuperscript{55} Consideration was given to the need for a hospital ship in the Gulf. Wider, non-legal issues such as the availability of larger, equally effective facilities ashore, the likelihood of the need for separate Royal Naval dedicated sea-borne facilities when set against the threat at sea and the presence of a large allied sea-borne medical capability (including a number of conventional, designated hospital ships) were all part of the deliberations. Legal and tactical considerations combined to produce a medically well-equipped ship (RFA \textit{Argus}) without the specific protection against attack afforded to hospital ships under the Second Geneva Convention of 1949. However, because she was not designated a hospital ship, \textit{Argus} had freedom of tactical employment and movement and was able to carry defensive weapons for her self-protection and to operate under the allied defence umbrella.

Two extracts from the Joint Commander’s despatch\textsuperscript{56} illustrate the dual role that RFA \textit{Argus} and her embarked helicopters played in the operation:

> As the campaign progressed, the Primary Casualty Reception Ship, RFA \textit{Argus}, was stationed close enough to the forwardmost ships to balance timely medical and airborne logistic support against acceptable risk, and was escorted by SNOME’s Flagship, HMS \textit{London}, for added protection.
against air attack. It was from this position that the RFA Argus was able to provide immediate medical assistance to the casualties sustained when USS Tripoli suffered mine damage.

The contribution of the Sea King helicopters embarked in the RFAs... and Argus was vital in transporting high-priority items to frontline units as they advanced.

Fitted out with a hospital facility of some 100 beds, with room for expansion, RFA Argus, whose normal role is that of aviation training ship, was able to provide a close degree of medical support without surrendering her ability to carry out important logistical support roles. The legal restrictions by which a designated hospital ship ensures her specific protections did not apply to RFA Argus.57 Clearly, this hybrid role allowed the maximum use to be made of scarce resources both afloat and airborne. For each nation and for each conflict the balance of advantage and disadvantage of deploying a primary casualty reception ship or a hospital ship will be different and must be carefully weighed.

The maritime forces of Iraq

It was stated earlier that rules of engagement in time of open conflict largely concern targeting. The warships of an opposing belligerent are always a legitimate target and whatever the legal basis for the action in the Gulf this would not change. It is noteworthy that Resolution 678, in common with other of the preceding resolutions, addresses the matter of international peace and security in ‘the area’. This imported a geographically imprecise limitation on the manner in which the ‘means necessary to...restore international peace and security in the area’ (Resolution 678) could be exercised. Although the point did not arise in practice, for the maritime planner it signalled that the full exercise of the customary law rights of prosecution of warfare at sea would not extend to regions remote from ‘the area’. Once hostilities started, Iraqi warships could be attacked on sight; if captured they could be converted into HM ships or put to any other purpose, having become the property of the Crown at the time of capture. But what of Iraqi merchant shipping? It must immediately be said that in the circumstances of this conflict the problem was not significant. However, if the action were one of collective self defence and it was therefore held that the traditional law of maritime armed conflict held sway, it could be argued that Iraqi merchant shipping would be subject to all the doctrines of law, including Prize. On the other hand, it could be argued that this would only be so if such techniques were a necessary and proportionate measure of self defence. If the action were to be characterized as an enforcement action under UN mandate these measures would be unlikely to be considered as consistent with the purposes of enforcement. In the event it was plain that any Iraqi merchant vessels that did fall into allied hands could easily be detained in like manner to the sanctions enforcement process and could, without hindering the allied prosecution of the operation, be held for a subsequent decision on their final disposal.
Mine warfare

The greatest threat to our ships was posed by mines. Evidence of the scale of Iraqi mine stocks was well known from our involvement in clearance operations after the Iran/Iraq war, and we fully expected a very large number of both moored and more sophisticated ground mines to be laid in preparation for this war.58

During the embargo operations the mine threat, though ever present, did not loom large in military considerations. However, once hostilities started matters changed rapidly. The main Iraqi minefield was laid in the shape of a crescent running most of the length of the Kuwaiti coast. It was a mixed field consisting of lines of ground mines and two lines of buoyant mines. In addition to this main minefield, two other separate fields were laid.59

A large number of floating mines were encountered;60 it is not clear whether these were deliberately launched in the path of allied forces or whether, through a combination of material failure, incompetence and inexperience, they represented those that broke free from the established fields. That these mines were a potent danger is evident, and the strikes on uss Tripoli and uss Princeton were ‘a stark reminder of the danger posed by a weapon which is widely available and often extremely effective and which can be laid… by a relatively unsophisticated enemy’.61 Whether these mines came to be free-floating by deliberate or chance agency, it is clear that they contravened the Hague Convention VIII of 1907 by failing to render themselves harmless within one hour of breaking loose from their moorings or from the Iraqi loss of control over them.62 After the cease-fire, information about the location of the minefields was supplied by the Iraqis.63

CONCLUSIONS

The concluding remarks in the dispatch of the British Joint Commander included the following:

Since the formation of the North Atlantic Treaty Organization in 1949, most of our forces have been trained for war as part of a large international alliance. However, since the Korean War, actual hostilities involving British forces have all been outside the NATO area and, Suez apart, conducted either alone or with Commonwealth allies. Operation Desert Storm/Granby has proved that disparate forces can fight together effectively under a coalition flag.

The accuracy and value of that statement is unimpeachable. While any attempt to develop the definitive academic or theoretical legal lessons to be drawn from the Gulf experience
would be over-ambitious, from the military point of view it is possible to venture a series of simple, even trite, statements:

1 Governments must establish with clarity the legal justification for their actions.
2 Different justifications may, through the operation of international law, have different military consequences.
3 It is prudent therefore for allies to have the same justification.
4 Rules of engagement flow from the application of international law to individual sets of circumstances, and it is prudent for allies to have the same understanding of what the law is.
5 It is possible for NATO, and other, nations to operate successfully outside the well-known, tried and trusted NATO procedures, but close consultation is required.
6 Where nations may not share identical views on the minutiae of the law, it is still possible, provided the differences are understood, to operate together safely and successfully.

Perhaps, expansively, it is permissible to offer one final, rather generalized observation. The confused state of the law of armed conflict at sea is common ground amongst governments, the academic community, maritime lawyers and navies. That this confusion need not necessarily hamper the prosecution of naval operations has been demonstrated. Nevertheless, in a world where the spread of the ability to take offensive maritime action is alarmingly rapid, it is in the interests of all nations to seek clarification of the law. If this is not achievable, a wider understanding of the causes of the confusion would be as valuable.
Chapter 8
The wounded and sick

Hilaire McCoubrey

In any armed conflict the wounded and sick are amongst the most immediately obvious victims of hostilities. It was for this reason that, following the experiences of Henry Dunant in the aftermath of the Battle of Solferino in 1859, the battlefield wounded were the focus of the first international humanitarian treaty *stricto sensu*, the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 1864. The subsequent development of international humanitarian, or ‘Geneva’, law has involved, broadly, an expansion of categories of protected persons.¹ In the present context these now include, in addition to the wounded and sick in land warfare, the wounded, sick and shipwrecked at sea, including airforce personnel baling out over the sea, prisoners of war in need of medical attention, and civilian casualties, together with those charged with their care.

A number of serious problems, actual and potential, arose in the treatment of the wounded and sick in the 1990–91 Gulf conflict. Particular issues were associated with four successive phases of the conflict, and also the period afterwards:

1 During the Iraqi occupation of Kuwait looting of medical equipment and general disruption of medical services had a dramatically adverse impact upon patient care in the territory.
2 The preliminary coalition bombardment of Iraqi targets produced a considerable number of casualties, raising serious questions of humanitarian relief in the context of economic sanctions.²
3 The final, and brief, land offensive for the liberation of Kuwait raised the prospect of serious organizational difficulties in receiving potentially very large numbers of casualties, possibly including victims of chemical or bacteriological attacks. Fortunately this ultimate horror did not occur and the brevity of the land conflict itself greatly reduced the extent of the problems encountered.
4 The ultimate mass surrender of the Iraqi forces occupying Kuwait entailed significant problems in the reception of large numbers of prisoners, many of whom were in poor medical condition.
5 The medical dangers arising subsequently in Iraq.

The legal issues arising are here conveniently considered in this broad sequence.
GENERAL PROVISION FOR THE WOUNDED AND SICK IN
ARMED CONFLICT

Modern international humanitarian provision for the wounded and sick in international armed conflict is found primarily in the four Geneva Conventions of 1949. Further provision is made by Additional Protocol I 1977 to the Geneva Conventions of 1949, but this is highly controversial. Difficulties have arisen primarily from provision for a broadening of entitlement to ‘combatant’ status and the ‘internationalization’ of certain prima facie non-international armed conflicts; and from the fact that the states involved in the Gulf conflict were not party to the Protocol. Of the four Geneva Conventions of 1949, Convention I provides for the wounded and sick in land warfare, Convention II makes provision for the wounded, sick and/or shipwrecked at sea, Convention III sets out general protection for prisoners of war, including their medical treatment, and Convention IV, in the course of rather circumscribed provision for civilians, deals with civilian medical services. Additional Protocol I 1977 expands, inter alia, the 1949 medical provision both generally and, most notably, in respect of civilian medical services. Its medical provisions are considered largely uncontroversial and may in many cases be accepted as affording a useful gloss upon well-established law, but the Protocol itself cannot be considered to have been binding in the conflict under consideration.³

The fundamental principles are simple enough, even if their application may not be so. The wounded and sick in hostilities who are or have, by surrender, made themselves hors de combat are entitled to standards of treatment summarized by Article 12 of Geneva Convention I 1949, which requires that

They shall be treated humanely and cared for by the Party to the conflict in whose power they may be, without any adverse distinction founded on [irrelevant discriminatory] criteria. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited;…they shall not wilfully be left without medical assistance and care nor shall conditions exposing them to contagion or infection be created.

Only urgent medical reasons will authorize priority in the order of treatment to be administered.⁴

Similarly, personnel and institutions charged with their care are entitled to respect and protection so long as they are not employed in activities harmful to the enemy.⁵ Subject to what has been remarked above, it is worthy of note that the 1949 provisions are elaborated by Articles 10 and 11 of Protocol I Additional to the 1949 Geneva Conventions 1977. Article 10 (2) requires that

In all circumstances [the wounded and sick]…shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.
Article 11 of the Protocol then adds further specific medical requirements, in particular:

(1) The physical or mental health and integrity of persons who are in the power of the adverse Party…shall not be endangered by any unjustified act or omission…. [I]t is prohibited to subject [them]…to any medical procedure which is not indicated by the state of health of the persons concerned and which is not consistent with generally accepted medical standards which could be applied under similar medical circumstances to …nationals of the Party conducting the procedure.…

(2) It is, in particular, prohibited to carry out on such persons, even with their consent:
   (a) physical mutilations;
   (b) medical or scientific experiments;
   (c) removal of tissue or organs for transplantation, except where these are acts justified in conformity with…paragraph 1.

(3) Exceptions to the prohibition in paragraph 2 (c) may be made only in the case of donations of blood for transfusion or of skin for grafting, providing they are given voluntarily…the therapeutic purposes…consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.

(4) Any wilful act or omission which seriously endangers the health or integrity of any [protected] person…and which either violates…prohibitions in paragraphs 1 and 2 or fails to comply with paragraph 3 shall be a grave breach of this Protocol.

(5) [Protected] persons…have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.

(6) …[E]ach Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned or otherwise deprived of liberty….

This is admittedly a very considerable expansion upon the 1949 provisions and one which must in the circumstances be treated with some caution. However, most, if not all, of the material set out here may reasonably be considered a persuasive gloss upon the unequivocally binding prescription made in 1949. These medical requirements amount to a basic code of medical ethics. References to ‘generally accepted medical standards’ are necessarily somewhat vague but refer essentially to the norms of medical practice accepted across the spectrum of civilized countries. This, amongst other benefits, excludes reliance upon possibly questionable local standards adopted in any given place. In general it may be accepted that the standard of medical conduct set by international humanitarian law is one of patient-centred care designed for the professionally conceived benefit of the patient and, so far as exigencies of communication and consciousness admit, with his or her consent. Subject to this fundamental demand, the standards are of course necessarily applied in the light of the measures practically possible in the actual circumstances, which, in a field hospital, may well fall far short of those expected in a modern western teaching hospital. As an example, it would clearly be unacceptable to use
contaminated medical equipment in treatment—or rather to fail to take adequate precautions in their use. This would anyway involve potential ‘exposure to...infection’ within the meaning of Article 12 of Geneva Conventions I and II 1949. On the other hand, where immediate blood transfusions are required in an endeavour to save the lives of the seriously wounded, a risk, which may be vanishingly small, of donated blood being infected, e.g. by the Aids virus, may be unavoidable and here it would in the given context be manifestly unreasonable to suggest that any culpable dereliction had occurred. Naturally, if one is in fact considering an advanced ‘home’ territory facility, different and higher expectations might properly be entertained.

Article 15 of Geneva Convention 11949 requires Parties to armed conflicts without delay, [to] take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.

This requirement is naturally subject to the dictates of practical possibility. In naval warfare, for example, it has become well established that this duty is considerably curtailed in that a warship is not required to be placed at objectively perceived risk of hostile action in order to engage in rescue work. This would apply to any warship but perhaps most particularly to submarines engaged in humanitarian endeavours upon the surface. The same general point may also, of course, be made in respect of non-protected land and air units.

Civilian and military wounded and sick under the care of their own medical services are of course the responsibility of the relevant municipal authorities. They themselves and the institutions sheltering them are not, however, legitimate targets for hostile attack.

In a territory under hostile occupation it is the duty of the occupying power, so far as possible, to maintain medical services and not to divert them from civilian use without making appropriate alternative provision. In addition to the general provision for the wounded and sick, safeguards are set out for the medical care of prisoners of war.

The principle and standards thus stated are in themselves both simple and clear, but their application in the course of hostilities naturally raises severe practical difficulties which commonly require immediate resolution by medical or other personnel in the field. Potential and actual difficulties at various levels were illustrated during the Gulf conflict, and a number of serious questions arose for consideration.

MEDICAL ISSUES IN OCCUPIED KUWAIT

The effective occupation of Kuwait was completed within some fourteen hours of the invasion on 2 August 1990, and serious disruption of medical services in the Emirate commenced from an early stage thereafter. Two principal legal issues require consideration, first the effects of the looting of medical equipment and secondly the general dislocation of medical services for other reasons during the occupation.

It is clear that some looting was done by individual Iraqi soldiers, especially in the later stages of the occupation when the discipline of the occupying forces would seem to...
have collapsed. The extraordinary assortment of Kuwaiti goods found abandoned along the Iraqi line of retreat to Basra serves as an adequate demonstration of this. The looting of medical equipment, however, represented a different and arguably more serious phenomenon. The complex technical equipment which was removed from the three principal hospitals in Kuwait City was hardly of a type, or size, to be attractive to the random looter and it seems clear that these removals were carried out in execution of a centrally directed policy and were not a manifestation of ‘mere’ undisciplined depredation. A Kuwaiti doctor from the Dar al-Shifa hospital in Kuwait City who escaped to Tehran in November 1990 was reported to have confirmed the ‘official’ nature of much of this looting: ‘To understand the position in Kuwait City one must understand the systematic nature of the destruction. This is the rape of a country by bureaucracy’.

Perhaps significantly, this report also stated that at this early stage of the occupation the Iraqi troops themselves were relatively well disciplined. This general account accords with comments made by deserters from the Iraqi armed forces on reaching Turkey. One such soldier was reported as admitting that he had assisted in the removal of incubators from the maternity unit of a Kuwaiti hospital from which the parents had been ordered to remove their babies, this being evidently an act of policy. A yet more serious colouring was given to these allegations by the report issued by Amnesty International on 19 December 1990. This report was concerned with the generality of human rights abuses in the occupied territory but included a claim of ‘compelling evidence’ that after removal of incubators from the Kuwaiti hospitals, some three hundred babies had been left to die. One doctor interviewed by Amnesty International claimed to have assisted in the burial of seventy-two of the corpses.

An occupying power is vested with a limited authority to requisition civilian medical facilities in the occupied territory. Geneva Convention IV 1949 provides by Article 57 that:

The Occupying Power may requisition civilian hospitals only temporarily and only in cases of urgent necessity for the care of military wounded and sick, and then on condition that suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation.

…the material and stores of civilian hospitals cannot be requisitioned as long as they are necessary for the needs of the civilian population.

In no way could the removal of incubators from maternity units be thought to have been ‘urgently necessary’ for the treatment of military wounded and sick. Even if some bizarre ‘military necessity’ could be advanced in support of such action, the apparently good evidence for the death of a large number of infants is sufficient to establish prima facie a very serious violation of the Fourth Geneva Convention.

Geneva Convention IV 1949 also imposes upon an occupying power the duty to maintain, so far as possible, medical services within the occupied territory. Article 56 of the Convention requires that:

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the co-operation of national
and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, ... Medical personnel of all categories shall be allowed to carry out their duties.

The emphasis is added. This requirement implicitly recognizes the interaction of complex factors governing the provision of medical services in the difficult circumstances of hostile military occupation. A broad duty of maintenance is imposed upon the occupying power as the *de facto* authority within the territory, but in the performance of this duty there will inevitably arise substantial practical difficulties resulting, *inter alia*, from the disruptions of the armed conflict itself and the need for a level of co-operation from the local medical authorities, which can by no means be assumed; these problems are implicitly recognized. Such a recognition of the obvious clearly does not, however, authorize actual looting of or attacks upon medical facilities or their personnel. The expectation of the co-operation of local medical organizations and personnel may also reasonably be taken to suppose that the occupying power itself does not take unnecessary steps tending to frustrate such co-operation or to render it ineffective.

It is clear that in Kuwait a major disruption of medical services took place, even beyond the immediate impact of the looting of medical equipment, as a result of the large-scale flight of vital personnel from the territory. One poignant illustration of the consequences was given in television reports at the time of the liberation showing young patients in a mental institution who had apparently to all intents and purposes been abandoned in insanitary conditions and neglect. The immediate motivations for flight would naturally have varied, and the sheer discomfort of life in an occupied territory no doubt played a substantial part; however, in many cases more sinister causes may be discerned. One doctor who fled from Kuwait stated that he had been impelled to flee when another hospital worker, seeking advantage, had denounced him to the occupation authorities as a resistance activist.¹⁶ Such occurrences are not of course unusual in circumstances of military occupation, but in Kuwait it may be argued that the problems were exacerbated by tensions inherent in the pre-conflict social structure of the Emirate. Much labour was undertaken by an under-privileged non-citizen under-class, and this was the case at the basic level of the medical services; a number of the medical staff as such were also non-citizens. The situation bred resentments which severely exacerbated the problems inherent in the face of belligerent occupation; it also appears to have inspired savage reprisals against certain sections of the population after the expulsion of the Iraqi forces. The pre-existing situation and its consequences were not of course the fault of the Iraqi occupation authorities. However, whilst an occupying power cannot be held responsible for the disruptive effects of internal tensions in the occupied territory, it is clearly responsible if there is the imposition of a regime intended to manipulate and maximize the consequences of the situation. The Second World War analogy can be argued greatly to have been over-played during the Gulf conflict, but some of the more drastic consequences of the policy of ‘Iraqization’ pursued in Kuwait do raise rather obvious comparisons with the Nazis and with practices within Germany itself and the ‘Greater German Reich’ at that time.¹⁷ Some useful analogies may be drawn from the specific issue of ‘grudge informers’ in the context of political ‘terror laws’, upon which a considerable jurisprudence developed in post-1945 (West) Germany. In German cases the jurisprudence was largely founded upon an analysis of procedural abuses even upon the
face of the laws concerned, but it was established that those improperly applying and those, for malicious personal reasons, invoking such laws might subsequently be held liable for the consequences even though such actions had been not only condoned but encouraged by the state authorities at the material time. Those who made malicious use of repressive ‘Iraqization’ regulations and those, including members of the occupation authorities, who were formally responsible for such abuses of process, may be argued to have prima facie cases to answer in this respect. In the immediate context of military occupation a balance must ultimately be drawn between the duty of the occupying power to maintain medical services ‘to the fullest extent of the means available to it’ and the unavoidable disruption consequent upon armed conflict. The general quality of the regime imposed by Iraq upon Kuwait strongly suggests that ‘the fullest …means’ were not employed for the maintenance of medical services in the territory, but beyond this it would perhaps be unwise to go. It may be added that the duty to maintain medical services may be argued to extend in appropriate cases to the supply of qualified personnel to make good absences of local staff, but in the immediate case the difficulties experienced by the Iraqi medical services themselves, especially during the coalition aerial bombardment, may reasonably be contended to have precluded any such relief action.

After the liberation of Kuwait the government of the Emirate announced a massive reparations claim against Iraq for the devastation of the territory, including the looting of property. The United Nations intends that reparations should be derived from Iraqi oil revenues although, granted the shattered condition of the Iraqi economy itself, the effectiveness of this scheme remains at the time of writing (1991) open to some question. This aspect is discussed fully in Chapter 13. In August 1991 a resumption of Iraqi oil sales was permitted, in a relaxation of economic restrictions, in part with a view to the settlement of claims. Iraq objected strenuously to this arrangement. There would certainly seem, however, to be a strong potential claim for the physical return, inter multis alios, of looted medical equipment over an appropriate time-scale.

**Treatment of casualties during the coalition air offensive**

The aerial bombardment of the Iraqi military infrastructure by coalition air forces prior to the brief land offensive for the liberation of Kuwait inevitably inflicted a large number of casualties, military and civilian. Civilian casualties were classified under the singularly distasteful jargon phrase ‘collateral damage’ which, although not invented therein, gained wide currency during the Gulf conflict. The modern jus in bello of course forbids calculated attacks upon both civil and military hospitals and medical facilities. There is no evidence of any such calculated and manifestly unlawful attacks being perpetrated during the coalition aerial bombardment; severe difficulties arose rather from the indirect consequences of infrastructural damage—including notably to the transport and sewerage systems. The consequential problems included not only the severe disruption of medical services as such, but also the increased pressure upon them resulting from the dangers of epidemic disease generated, e.g., by disruption of water and sewerage services.

The primary obligation of health care provision for the nationals and residents within a given state falls of course upon the national authorities of that state. However, internationally two major issues arose in this situation. The first was the question of
methods and means of warfare, in particular the question of discrimination in targeting and the extent of the margin of permissibility of incidental damage and injury. The question of collateral medical damage forms a part of the broader aspect of the methods and means of warfare, which is considered elsewhere. The second and quite distinct issue arising was that of humanitarian medical relief in the context of continuing economic sanctions against Iraq, and this too is considered as an issue in its own right. The latter issue continued in general long after the period of the hostilities as such. At the G-7 meeting of major industrial nations held in London in July 1991 the question of humanitarian relief was energetically debated, including the issue of the extent to which relief could safely be channelled through the Ba‘ath authorities in Baghdad to its intended humanitarian destination. These issues, although fundamentally important in their context, fall largely beyond the scope of the present discussion. One sadly missed opportunity does, however, require comment. Geneva Convention IV 1949 provides by Article 15 that:

Any Party to…[an armed] conflict may…propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons without distinction:

(a) Wounded and sick combatants or non-combatants; …

In the context of this median stage of the Gulf conflict, such an agreement would have had obvious advantages not so much in the avoidance of assaults upon hospitals—for which there is no evidence—but for the avoidance of incidental effects. In practice there would be major complications in establishing satisfactory procedures of verification and mutual trust in the avoidance of abuse, and in the context of the Gulf conflict these might reasonably have been anticipated to have been especially severe. Article 15 does, however, make reference to the possible intermediation of ‘some humanitarian organization’ and the International Committee of the Red Cross might have been able to play a constructive role here if so invited by the parties, meaning in particular the Iraqi government. Sadly this was not done, and whilst such an agreement would not have obviated entirely the effects of infrastructural disruption upon medical services, it could have mitigated them to some degree. The lesson to be derived here is perhaps political rather than legal, but the importance of political will in the effective, or otherwise, implementation of international humanitarian law is a factor which should never be under-emphasized.

PREPARATIONS FOR RECEPTION OF CASUALTIES IN THE LAND OFFENSIVE

The final land offensive for the liberation of Kuwait was mercifully more brief than had been anticipated by many commentators, and the more apocalyptic predictions of the numbers of casualties were therefore not (at least from the point of view of the coalition forces) realized. Nevertheless, the initial fears were both serious and well-founded. They fell into two broad sectors. The first lay in the potentially very large numbers of
casualties arising from ‘conventional’ combat. The second and, in one sense at least, more problematic factor lay in the potential necessity to cope with victims of chemical and/or bacteriological assaults.

As is the case for civilian wounded and sick, the duty to provide medical assistance for its own military casualties remaining under its own jurisdiction will fall primarily upon the authorities of the state concerned. Geneva Conventions I and II of 1949, of course require medical provision for captured and wounded or sick enemies, but even here the requisite medical provision is not quantified other than in terms of vague ‘adequacy’. The summary of basic standards of medical care set out by Geneva Convention I 1949, Article 12 does not seek to specify the levels of medical provision which are required. The reason for this omission is made manifest by Article 10 (2) of Protocol I Additional to the 1949 Geneva Conventions 1977, specifying, under the heading of ‘protection and care’, that the wounded, sick and/or shipwrecked ‘shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition’.

Again, this provision was not strictly applicable during the Gulf conflict but may nonetheless reasonably be taken into consideration as an interpretive gloss. For the present purpose, the key words are ‘to the fullest extent practicable’. The demands made upon military medical services in the course of an armed conflict may be enormously variable, and highly unpredictable, in both volume and type. The land campaign during the Gulf conflict illustrated the point very clearly. The potential medical demands ranged from the relatively limited ‘conventional’ casualties in fact inflicted to the overwhelming horror of mass chemical or bacteriological casualties which, for a variety of reasons, were avoided.

Difficulties of prediction do not, however, avoid the general duty of preparation for the provision of medical facilities expected to be adequate in the known and reasonably anticipated circumstances. Indeed, the lamentable official failures in this respect in mid-nineteenth century conflicts such as the Crimean and Franco-Austrian Wars played a key role in the generation of modern international humanitarian law.

During the Gulf conflict, detailed preparations were made for the reception of potentially very large numbers of combat casualties. In the United Kingdom calls were made for volunteers to swell the personnel of the Royal Army Medical Corps, both for service in the Gulf area itself and also to release other personnel for such service by taking their place in home military medical establishments. Although substantial, the response was less than had been hoped for and it was reported that medical reservists were to be called up in support. These endeavours were duplicated in the territories of other coalition powers. In addition to military medical provision by the coalition powers themselves, medical support was supplied by powers not otherwise directly involved in the conflict. Sweden, for example—notwithstanding its constitutional neutrality, provided a £5m. battalion hospital under the command of the medical director of the Swedish armed forces. Considerable controversy inevitably arose over the despatch of a small group of Japanese medical staff to the Gulf in September 1990. Post-war military issues have been intensely sensitive in Japan, symbolized by the abolition at the end of the Second World War of the former Imperial Japanese Navy and its replacement by the accurately named and much reduced Japanese Maritime Self-Defence Force, with equivalent measures for the Japanese land and air forces. Any implication of re-
militarization touches raw political nerves in Japan, and it was strongly emphasized that the Japanese medical contingent sent to the Gulf would not be sent to the battle front or otherwise directly involved in the conflict itself.

Military medical assistance to belligerents by neutral powers will always raise highly sensitive issues, especially by reference to potential compromises of their neutral status. Some forms of medical aid explicitly do not have such an effect, however. In view of the self-evident difficulties of rescue in armed conflict at sea, Article 21 of Geneva Convention II, 1949 provides that:

The Parties to the conflict may appeal to the charity of commanders of neutral merchant vessels [etc.]…to take on board and care for wounded, sick or shipwrecked persons…. They may, in no case, be captured on account [thereof]…but, in the absence of any promise to the contrary, they shall remain liable to capture for any violations of neutrality they may have committed.

In the absence of large-scale combat between naval forces this question did not arise per se during the Gulf conflict, but the provision in question emphasizes the obvious point that permitted neutral medical assistance in armed conflict does not operate as a general dispensation from the requirements of the law of neutrality. Actions going beyond what is permitted may well involve a violation of neutrality and entail the consequences thereof.25 In land conflict direct assistance to the military medical services of a belligerent power may be rendered by a neutral Red Cross, Red Crescent or other relief society ‘with the previous consent of its own Government and with the authorization of the Party to the conflict’.26 Such direct assistance by the armed forces medical branch of a neutral power to the military medical service of a belligerent in armed conflict would, however, be seriously problematic as an involvement in the conflict. In the Gulf conflict the situation of constitutionally neutral Sweden was interesting in so far as a military field hospital was made available. The military action taken against Iraq following the invasion and occupation of Kuwait might have found at least two legal bases. In so far as any state subjected to military aggression has a right of self-defence under Article 51 of the United Nations Charter, Kuwait was of course entitled to defend itself and, at least in the early stages of the given situation, arguably to seek military assistance from friendly powers. Ultimately, however, the action to liberate Kuwait from Iraqi occupation was explicitly undertaken under the United Nations aegis, in effect as an international policing action. Such United Nations authority does not of course operate as a ‘dispensing power’ in relation to the effects of the jus in bello,27 but as an action by, or at least on behalf of, the general world community it may at the very least fairly be taken to have legitimated a broad measure of humanitarian intervention by the state authorities of countries not otherwise involved, such as Sweden or indeed Japan.

The treatment of the wounded and sick in armed conflict inevitably raises a number of difficulties in the practical application of canons of medical ethics. The basic standards of humane treatment are summarized by Article 12 of Geneva Convention 11949 and, subject to the comments made above, Article 11 of Additional Protocol I 1977. In the absence of ethical abuses as such, for which there was no evidence in the conflict in
question, the most serious and indeed unavoidable practical difficulty lies in the
determination of priority in the treatment of patients.

The basic criterion of selection is usefully summarized by Article 10 (2) of Additional
Protocol I of 1977, here cited subject to cavets expressed above, but this brief statement
covers a number of potentially very difficult medical decisions. In practice the facilities
of a military field hospital will inevitably be limited in terms of the medical technologies
which can be made immediately available, certainly in comparison with a modern
(Western) city hospital. In all probability some patients who might be saved in such an
urban facility will be beyond the help of a field facility. It would seem manifestly
irrational that patients who might be saved there should be placed at risk whilst tragically
doomed attempts are made to save those beyond the scope of the facility, even though
their condition will, ex hypothesi, be medically more serious. Common sense and
international law concur that this is not demanded. Obviously medical technology which
is not reasonably available cannot rationally be demanded as a means of treatment. It
must, however, strongly be emphasized that acceptance of the realities of medical care in
armed conflict does not legitimate simple refusal to make reasonable medical facilities
available or the culpable neglect of patients in need of ‘care’. Subject to this most
important caveat, the proper conclusion would seem to be that every effort should be
made to save patients who can be saved whilst humanitarian aid and pain relief, but
certainly not euthanasia, should be afforded to those who cannot, without prejudicing the
prospects of those who may be assisted by lengthy and manifestly doomed attempts to
save hopeless patients. Colonel Kaj Mollefors, the commanding officer of the Swedish
hospital in the Gulf Conflict, made the point succinctly in his quoted statement that:

Obviously, those who have no chance of survival will be treated after
those who have a chance of survival…. But, however badly a patient is
hurt, even if he is dying, he will be properly cared for, [and] made
comfortable.28

This must be approved as an eminently reasonable statement of basic principle.

The inevitable shortcomings of field hospitals raise the question of the availability of
home medical establishments, especially in the context of the possibility of rapid air
transport of some seriously wounded or sick patients. In the United Kingdom it was
intended that casualties should be brought by air from military hospitals in the Gulf and
Cyprus to selected hospitals in each of the fourteen regional health authorities.29 To take a
specific example, arrangements were made to fly wounded and sick personnel to the East
Midlands Airport near to Castle Donnington, for conveyance by ambulance to regional
facilities including, inter alia, Derby Royal Infirmary.30 It was generally intended that the
major burden would be carried by the advanced facilities of teaching hospitals, but in the
early stages fears were expressed that the resources of the National Health Service would
be overwhelmed. Plans were also reported to have been made for three thousand beds to
be made available in the United Kingdom for the treatment of any United States Service
personnel wounded in the Gulf conflict, at ‘mothballed’ US military hospitals at Little
Rissington, Bicester and Nocton Hall.31 In the same report, the Health Secretary William
Waldegrave was stated to have informed the British House of Commons that British
burns casualties from the conflict might have to be sent to European hospitals if the
British National Health Service was overwhelmed by the medical need. Subsequently, however, greater confidence was expressed in the likely adequacy of the immediately available medical resources. Hospital arrangements as such may be illustrated by reference to the measures taken at Manchester Royal Infirmary. Eighty out of 600 beds were made available for Gulf conflict casualties, with general preparatory planning taking into account lessons learnt from civil disasters such as the Kings Cross underground station fire and the Hillsborough Stadium disaster. Welfare and counselling services were also prepared, both for the casualties themselves and for their families. One other important question was raised by a quoted comment made by Dr Morton at the Manchester Royal Infirmary:

> We have been told that the casualties we will receive will be British…. [T]hey may not [however] be able to identify the people they are putting onto the planes. But if they are American, European or even Iraqi, we will treat these patients as our own.

The doctor’s statement is of course straightforward and correct so far as the ultimate treatment of all patients is concerned—whatever their nationality or allegiance in the conflict. It will be recalled that Geneva Convention 1949 provides by Article 12 that ‘Only urgent medical reasons will authorize priority in the order of treatment to be administered.’ An interesting question arises, however, in so far as a criterion of nationality might be advanced for selection for treatment in ‘home’ medical facilities, granted its exclusion for obvious reasons as a general criterion for priority in medical treatment. Such a criterion of prioritization would be unequivocally unlawful within a field hospital and as between patients within any medical institution in military service, but whether the same principle would apply to long distance transport to hospitals in the home territory of a belligerent power is more open to question. The Manchester expectation that they would on the whole be dealing with repatriated British wounded and sick may fairly be considered reasonable. What, however, of the foreign, or even enemy, patient in the hands of a belligerent who cannot be saved through immediately available facilities but who might be saved by facilities available in the home territory of the power concerned? If transportation is a practical possibility, which of course it may not be, this might be argued to fall within the concept of the provision of care ‘to the fullest extent practicable’, which is usefully advanced by Article 10(2) of Additional Protocol I 1977, certainly in cases where such action would have been taken for the benefit of a national of the belligerent power in question. The 1949 provision does not make this requirement explicit, although it is arguably implicit in the general standard set out, and whilst it can in the present context be accepted as a general interpretive gloss, it would be difficult to argue that it could be extended quite so far in the present instance. Ultimately this question will turn upon issues of fact and degree in given cases, and in particular upon the actual practicality of the beneficial aid prospectively to be rendered.

It may be remarked in parenthesis that the political controversy surrounding the reorganization of the British Health Service at the time of the Gulf conflict reflected to some extent upon the planned military medical provision. There is, however, no
evidence that this raised serious questions in the context of the practically required level of provision.

The most difficult potential medical problem in the Gulf conflict lay in the possible necessity to care for victims of chemical or biological attacks. Notwithstanding the clear unlawfulness of chemical and biological warfare under the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare 1925, the known capacity and willingness of the Ba’ath government for at least chemical warfare, demonstrated in the 1980–8 Iran-Iraq War and against the Kurdish minority in Iraq itself, amply justified medical preparations for such an appalling eventuality. United Nations investigations after the conclusion of the Gulf conflict seemed also to demonstrate advanced preparations in Iraq for biological warfare, including, possibly, anthrax weapons. During the conflict fears were entertained in particular of the deployment of anthrax, cholera, typhoid or yellow fever as biological warfare agents. Amongst the coalition American and British troops were issued with protective clothing and respirators in preparation for chemical or biological attacks, and a programme of inoculations against likely biological agents was commenced in advance of the commencement of the land offensive for the liberation of Kuwait. However, it was reported that insufficient vaccine was available for the protection in this fashion of all personnel in the area.\textsuperscript{37} The treatment of casualties suffering from dangerously infectious diseases would have presented very serious practical problems, and it was reported that anthrax victims in particular might not have been returned to the United Kingdom for treatment. Instead they would have received immediate treatment in isolation facilities in British bases in Cyprus, it being suggested notably that, ‘it has been judged too perilous to transfer sick victims suffering from potentially highly infectious diseases back to Britain. One source said: “We can’t admit it, but that is what we will have to do”’.\textsuperscript{38}

The sensitivities of this question are of course manifold. Some of the agents potentially used in biological warfare are indeed highly infectious, which is of course why they might be so employed. The precautions necessary in the treatment of any highly infectious disease would properly be taken, both for nationals of the power affording the treatment and for non-nationals, including enemies. It should in particular be borne in mind that Geneva Convention I 1949 provides by Article 12 \textit{inter alia} that ‘nor shall conditions exposing [the wounded and sick]…to contagion or infection be created.’ Although not drafted with such a situation precisely in mind, this requirement would clearly cover exposing personnel protected by Geneva Convention I 1949 to risk of infection by diseases such as anthrax. The question of transference to medical facilities in the home territory of the responsible power, discussed above, would of course arise in an especially sharp form in the context of biological warfare.

It should finally be remembered that once launched, biological weapons would tend by their nature to be indiscriminate in their broadcast of contagion and, bearing in mind the likely inadequacy of the protection supplied to Iraqi personnel themselves, the possibility of enemy troops suffering from the effect of their own weapons would have been strong. Such persons would have been entitled to humanitarian medical care in accordance with normal principles, whatever outrage might have been felt in the particular circumstances. Fortunately the horror of chemical and bacteriological warfare did not occur and the matter remained one of academic speculation so far as the Gulf conflict was concerned.
MEDICAL PROVISION UPON THE IRAQI SURRENDER

Prisoners of war in a sick or wounded condition upon capture are entitled to medical care under Geneva Convention I 1949 and once placed in a permanent prisoner of war camp, medical facilities are required to be provided under Geneva Convention III 1949, Articles 29–32. The speed and scale of the ultimate Iraqi surrender posed a number of problems, but these did not particularly impinge upon medical issues. The primary ‘medical’ issue in this context was one of malnutrition, and it was clear that many of the surrendering Iraqi troops had been on inadequate rations for some time before. This, however, falls more within the ambit of general humanitarian treatment of prisoners of war than of medical care *stricto sensu.*

MEDICAL QUESTIONS IN POST-CONFLICT IRAQ

The severe damage done to Iraqi infrastructure by the conflict, and most particularly by the aerial bombardment, had severe ‘collateral’ medical implications. This is not to say that assaults were mounted upon hospitals and medical facilities as such; any such action would, of course, have been unequivocally unlawful. The dangers resulted rather from indirect consequences of disruption to supply routes and transport facilities in particular, as well as damage to the more general urban structure. The most serious fears were expressed in early 1991 in a report of the concerns felt by the World Health Organization about conditions within Iraq:

> [T]he combination of disrupted water and food supplies and the sewage systems create the risk of epidemics. Cholera, typhoid and hepatitis—the classic diseases of poor countries—and overcrowding, worsen in these conditions. In weakened people who may be undernourished, diseases like measles and influenza become serious complaints, with the old and young particularly susceptible.

The disastrous post-First World War influenza epidemic in the United Kingdom affords stark historical illustration of precisely this point in a context of much simpler deprivations. To this end the World Health Organization prepared five stores of drugs and medical supplies in Iran, Jordan, Saudi Arabia, Syria and Turkey, for use as soon as health workers were admitted to Iraq. These fears were re-emphasized after the conclusion of hostilities in a joint report issued by the UN Children’s Fund, Unicef and the World Health Organization. The Iraqi Red Crescent made an urgent appeal for assistance, and in particular for food and medical supplies. These problems arose during the armed conflict and refer primarily to the question of the legitimacy of means and methods of warfare adopted; subsequent relief falls more with the remit of general humanitarian assistance. The most serious questions arising in this area were those of relief supply in the context of continuing economic sanctions against the Ba’ath regime in Iraq. These, however, fall for consideration under other headings of discussion.
CONCLUSIONS

At the outset of the Gulf conflict serious fears were held of very major organizational and scientific difficulty in treating the casualties. These included the anticipated scale of potential casualties, based perhaps to some extent upon the experience of the 1980–8 Iran-Iraq War with all the qualified but all too real parallels which may be drawn between that conflict and the mass infantry slaughter of the First World War. Scientifically there was also the problem of potential chemical or biological warfare casualties. The medical problems which actually arose in the Gulf conflict were of course very serious for the men and women in fact injured during its course, but the total numbers of the wounded and sick were, fortunately, much less than had reasonably been feared at the outset. This of course was especially the case in relation to the land offensive for the liberation of Kuwait, but the peoples of both occupied Kuwait and Iraq itself paid a heavy price, in medical and in other terms, for Iraqi aggression against the Emirate. A number of major issues in the application of provision for the protection of the wounded and sick did in fact arise in practice. Many more clearly demand discussion as prospects which, fortunately, did not become actual in this particular conflict. One never wishes to predict the possibility of future armed conflict, but the experience, actual and prospective, of the Gulf conflict offers significant lessons for the *jus in bello*. These relate to the practice of medicine in armed conflict, both as to battlefield wounded and in relation to the reasonable expectations of the inhabitants of occupied territories. In relation, perhaps, to some of the ultimate horrors of modern military technologies the experience of preparation and anticipation in the light of current international legal provision was of value. Whether these preparations would in practice have proved adequate remained a matter for speculation, but the doubts expressed about the possible impact of a need to treat large numbers of such casualties upon general health administration raised issues of considerable importance for future planning. It is to be hoped that that experience will remain ‘academic’, but the issue both in law and practice must nonetheless seriously be considered. The issues raised by the Gulf conflict are therefore matters of prime actual and potential importance and, in the present context, well merit consideration and discussion.
Chapter 9
Prisoners of war in the Gulf area

Peter Rowe

INTRODUCTION

In some respects, the Gulf conflict was similar to the Falklands War of 1982. Both campaigns were of fairly short duration and depended on encouraging as many surrenders of the enemy forces as possible. This led to British forces holding large numbers of prisoners of war for very short periods only. Indeed, in the 1982 War healthy prisoners of war were repatriated before the end of hostilities, largely as a result of the very unfavourable weather conditions existing on the Falkland Islands at the time of the year. The Gulf conflict produced disproportionate numbers of prisoners of war on each side; some 86,000 Iraqis and forty-seven members of coalition forces of whom twelve were British—seven RAF aircrew and five Army.

This chapter will consider principally the treatment of coalition forces in the hands of Iraq and of Iraqi prisoners of war held by British armed forces, although reference to other nationalities is made where information is available.

PRISONER OF WAR STATUS

Article 4 of Geneva Convention III of 1949 includes as prisoners of war:

persons belonging to one of the following categories, who have fallen into the power of the enemy; (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

Although the Article encompasses a number of other classes of person entitled to this status, the Gulf conflict was concerned principally with members of the armed forces falling into Iraqi or coalition hands. A number of legal issues were involved over the question of prisoner of war status, which are discussed below.

Captured aircrew

From the time that aircraft were able to bomb targets in areas containing a civilian population, captured aircrew have often faced great difficulties in securing treatment in accordance with international law. Following the Second World War a number of war crimes trials were conducted by Allied powers at which military and civilian defendants were convicted of offences involving captured aircrew, committed shortly after their
capture, and which, in effect, denied the aircrew prisoner-of-war status. Japan declared that captured aircrew would be treated as war criminals and placed on trial, whilst in the Vietnam War prisoner-of-war status was officially denied to captured aircrew by the North Vietnamese.

Shortly after the commencement of the air campaign Iraq declared that captured aircrew would only be treated as prisoners of war if the coalition forces admitted that they had been captured. This was, without doubt, contrary to Article 4 Geneva Convention III of 1949. It has been seen that Article 4 grants prisoner-of-war status to members of the armed forces of a Party to the conflict. Even had Iraq claimed that captured aircrew had committed war crimes in the bombing campaign, Article 85 provides that prisoners of war prosecuted under the law of Iraq for crimes committed prior to capture would remain entitled to the benefits of the Convention, and thus to prisoner-of-war status. Concern over the treatment of captured aircrew and recognition of their military value led to a number of missions with the object of recovering aircrew who had ejected from their aircraft.

Members of special forces

Tribute is paid by Air Chief Marshal Sir Patrick Hine, the joint commander of Operation Granby, to the work of the special forces, which ‘developed into the largest and most significant UK [special forces] operation since 1945.’ He described their function as follows:

operating in their classic strategic role they carried out long-range information reporting and offensive action missions in support of the overall allied campaign…. In [the] course of the operation the [special forces] had to close with the enemy and there were many individual acts of outstanding bravery.

Some were captured. Were they entitled to prisoner-of-war status? To a large extent what follows is purely conjectural as the methods used by these special forces have not been, and are unlikely to be, fully disclosed.

Since the special forces were an integral part of the armed forces, their members would be entitled to be treated as prisoners of war on capture. To achieve their objective special forces will normally have to operate in some form of disguise, and the question that may be posed is whether they would, in these circumstances, forfeit their status as prisoners of war on capture. There is a well-established principle that forces may employ ruses to deceive their enemy. Thus, the use of camouflage, mock operations, the siting of dummy tanks (of which there was some evidence) and aircraft in strategic locations are all examples of the lawful ruse. However, a combatant who disguises himself as a civilian blurs one of the fundamental distinctions in the laws of war, namely, that between the lawful combatant and the civilian, who may not take part in military operations nor be the subject of attack. It was largely for this reason that the Privy Council in Mohamed Ali v. Public Prosecutor (1968) decided that members of the armed forces in Indonesia, who, during an armed conflict between that country and Malaysia, committed acts of sabotage in territory under the control of opposing forces,
dressed in civilian clothes, were not entitled to be treated as prisoners of war on capture. The consequence of this approach is that a member of the armed forces who engages in combat while wearing civilian clothes becomes an ‘unprivileged belligerent’ and can be tried under domestic law for crimes, such as murder, that he is alleged to have committed.

An added danger run by members of the armed forces who disguise themselves in civilian clothes is that they will be considered to be spies. A person ‘can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.’ A spy is not entitled, upon capture, to be treated as a prisoner of war; he may therefore be placed on trial for the act of spying. Mohamed Ali was not a spy since he was not endeavouring to obtain information, but to blow up a particular target in Singapore.

One of the objectives of the special forces was described as ‘the identification of targets for air attack.’ Given that such targets were chosen with care to avoid incidental loss of civilian life or property that would be excessive in relation to the direct military advantage of attacking the target, it seems clear that to achieve this objective as much information as possible is needed. To some extent this may be obtained through satellite observation or by intelligence gathered from other sources, such as from those who constructed buildings, but direct information from those on the ground may outweigh these other sources. It would be difficult to escape the conclusion that a member of the special forces who was disguised as a civilian in order to obtain this information would be considered to be a spy if captured, with the consequence that he would not be entitled to be treated as a prisoner of war. It may be suggested that the laws of war are now out of step with current thinking on this issue. A clear distinction may be drawn between a member of the armed forces of a state who disguises himself as a civilian in order to seek information concerning purely military matters with a view to obtaining a military advantage and one who acquires information that, if passed on, would ensure the avoidance of incidental loss of life to civilians and their property. The latter should not, it is suggested, be treated as a spy. Had information been secured from a member of the special forces on the ground that the Amiriya bunker was being used by civilians as a shelter from bombardment, it is unlikely that such an attack would have taken place.

A further form of disguise that may be worn by members of special forces is the wearing of the enemy’s uniform. The Hague Regulations of 1907 forbid the ‘improper use of a flag of truce, the national flag or the military insignia and uniform of the enemy.’ This does not, however, result in forfeiture of prisoner-of-war status upon capture, unlike the combatant who wears civilian clothes, it does not result in civilians being placed at risk of attack. It may amount to a war crime if the uniform is worn while engaging in an attack against the enemy.

Deserters

Article 4 of Geneva Convention III provides that ‘Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy’ (emphasis supplied). The 1929 Convention had used the term ‘captured’, but the words emphasized above are considered to bear a wider
meaning and would clearly cover ‘the case of soldiers who became prisoners without fighting, for example following a surrender.’ A strict interpretation of the phrase ‘fallen into the power of the enemy’ would lead to the conclusion that it only covered cases where soldiers came into the power of their enemy involuntarily, either through their own decision following their inability to fight any longer or through the decision of their commander, whom they are required to obey. This may be contrasted with the situation where Iraqi soldiers often undertook perilous journeys in order to find coalition forces to whom to surrender. Had they fallen into the power of the enemy? One objective of the coalition forces was to encourage as many desertions by Iraqi forces as possible prior to the land offensive. This was achieved by continuous bombardment of Iraqi positions and the dropping of leaflets encouraging desertion. It seems clear that, while in UK hands, all deserters were treated as prisoners of war, and this strict interpretation is not adopted in practice. This conclusion is consistent with the policy of coalition commanders of encouraging desertion among Iraqi forces and is, perhaps, of particular significance where an enemy is comprised mainly of conscripts and is at a distinct military disadvantage to its adversary. These conditions were met in the Gulf War, since the Iraqi forces in Kuwait could make little military response to the coalition bombardment of their positions by air or by land. (See p. 195 below).

**Gurkha soldiers**

During the Falklands conflict in 1982 the Argentine government alleged that the deployment of Gurkha battalions as part of the British forces was contrary to international law since these soldiers were mercenaries. Even had the Additional Protocol I to the Geneva Conventions been applicable to the Gulf War, the Gurkha soldiers who took part would not have been considered as mercenaries and therefore outside the category of those entitled to prisoner-of-war status. The main reason for this is that the Gurkha Rifles are an integral part of the British Army.

**Kuwaiti resistance**

Shortly after Kuwait was occupied on 2 August 1990 it became clear that a resistance movement was operating in the territory and the question that might be posed is whether members of the resistance were entitled to be treated as prisoners of war if captured by Iraqi forces. Article 4 of Geneva Convention III provides an affirmative answer if the organized resistance movement fulfils the following four conditions: it must be commanded by a person responsible for his subordinates; its members must wear a fixed distinctive sign recognizable at a distance; they must carry their arms openly; and they must conduct their operations in accordance with the laws and customs of war. If these conditions were complied with those who resisted the Iraqi occupation by taking up arms were entitled, upon capture, to be treated as prisoners of war. Similarly, Iraqis captured by the resistance were also entitled to this status. Where these conditions were not met, those who offered resistance would have been styled as *francs-tireurs* and could have been dealt with under the occupier’s laws that had been imposed upon Kuwait. The evidence would suggest that no such distinctions were drawn and that the Kuwaiti population was dealt with without regard to international law.
British Aerospace staff

The deployment of Tornado aircraft was made possible due to ‘the exceptional [Royal Saudi Air Force] repair and maintenance facilities in-theatre staffed by British Aerospace’. Had Iraqi forces invaded Saudi Arabia also, some of these British Aerospace civilians might have been captured. They would have been entitled to prisoner-of-war status, since they would clearly have been authorized by the Saudi armed forces to act in the way they did, and, indeed, should have been provided with identity cards for this purpose.

Journalists

The Secretary of State for Defence told the Defence Committee in 1991 that ‘there were not far short of one thousand journalists and correspondents in Saudi Arabia and adjoining areas.’ Journalists who are authorized by the armed forces which they accompany are styled as war correspondents and are provided with an identity card. Upon capture they would also be entitled to be treated as prisoners of war. Approximately seventy British journalists were authorized by the Ministry of Defence. Those who travelled to the Gulf region and did not accompany any of the individual armed forces would not have been so entitled.

Once a person has committed a belligerent act and has fallen into the hands of the enemy, doubt might arise as to whether he is entitled to prisoner-of-war status. This must be decided by a competent tribunal. It is left to each state to determine the form of competent tribunal to employ for this purpose. By British law this is governed by the Prisoner of War Determination of Status Regulations, 1958, under which a board of inquiry may be convened for this purpose. Largely due to the fact that prisoners of war were kept for such a short period, these provisions were not activated in the Gulf region, although there was one case where a prisoner of war challenged his status, claiming that he was a fireman who was visiting a relative in the front line when he was captured by British forces. This claim did not come to light until the day before he was due to be transferred to US forces (see below), and his claim was subsequently notified to the US authorities on transfer. Since his status as a prisoner of war was in doubt it might be queried whether he could be transferred under Article 12 of Geneva Convention III. Neither were the 1958 Regulations activated in respect of some Iraqi citizens in the UK who claimed to be members of their own armed forces, since there was no evidence that they had committed a belligerent act, although ordinary boards of inquiry were established to determine their status.

THE TREATMENT OF PRISONERS OF WAR

Prisoners of war are entitled to the treatment laid down in Geneva Convention III from the moment they fall into the power of the enemy until their final release and repatriation. It is important to note that an allegation made by the detaining power against a prisoner of war of having committed a war crime prior to capture will not deprive him of this status and thus entitle the detaining power to treat him in a way which is at variance with the Convention. The detaining power may wish to charge a prisoner
of war with having committed, prior to capture, a war crime, but the latter remains entitled to the treatment laid down in the Convention.

Article 13 of Geneva Convention III lays down the general principle of humane treatment as follows:

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the detaining power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention... prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited.

Similar wording to the latter part of this Article was contained in the 1929 Geneva Convention concerned with the protection of prisoners of war, and was subsequently considered by a United States Military Commission in 1946 in the trial of Lieutenant Maelzer. The accused was ordered by the commander-in-chief of German forces in Italy to hold a parade of Allied prisoners of war through the streets of Rome. Two hundred American prisoners of war were paraded through the streets under armed German escort. The report of the case indicates that

the prosecution witnesses (some of whom were American ex-prisoners of war who had taken part in the march), [alleged that] the population threw sticks and stones at the prisoners, but, according to the defence witnesses, they threw cigarettes and flowers. The prosecution also alleged that when some of the prisoners were giving the ‘victory sign’ with their fingers the accused ordered the guards to fire. This order was not carried out.

A film was made of the parade and a large number of photographs appeared in newspapers under the heading, ‘Anglo-Americans enter Rome after all... flanked by German bayonets.’ The accused was convicted and sentenced to a term of imprisonment of ten years, reduced to three years by higher military authority. There are no reasons given in the report for the finding of guilt and it must therefore be assumed that the prosecution witnesses were believed by the court when they said that the population threw stones and sticks at the prisoners of war and that the order was, in fact, given by the accused to fire upon them. Suppose, however, that the only evidence against the accused was the act of parading the prisoners of war through the streets with ample protection from German soldiers to protect them should the population, who had gathered to watch, been minded to offer any threat to them. Could Maelzer have been convicted of exposing the prisoners of war to ‘public curiosity’? It would seem necessary to consider his motive in acting in the way he did. It was clearly for propaganda purposes—‘to bolster the morale of the Italian population in view of the recent allied landings, not very far from the capital’. It is suggested that this is the crucial point and would have resulted in the same finding by the court. There would, however, be a considerable difference if the
In the United Kingdom and the United States, considerable anxiety was expressed over the video recording of statements made by coalition aircrew prisoners of war. Even if it be assumed that the facial injuries displayed by the men concerned were the result of ejecting from their aircraft and not from any violence offered by the Iraqi authorities, it is difficult to accept that the statements were made voluntarily. It might be remembered here that Article 13 requires the detaining power to protect prisoners of war against ‘acts of violence or intimidation’, and there would therefore appear to be a case to answer on the part of Iraq.

There were many photographs taken of prisoners of war, and the issue was raised as to whether the mere fact of publishing a photograph would expose the prisoner to ‘public curiosity’. The International Committee of the Red Cross thought so, which led to US protests over their interpretation of Article 13. The Commentary gives the reasoning behind this part of the Article as being to protect the prisoner’s honour. According to this view, any photograph which showed the identity of a particular individual prisoner of war would be an infringement of the Convention, while photographs taken at a sufficient distance from which individuals could not be identified, would not. Early concern over this view of Article 13 led to photographs of prisoners of war being taken from behind, but later on clearly identifiable photographs were published. Why publish such photographs at all? One reason expressed during the war was that if the photographs showed prisoners of war being well treated it would encourage Iraqi soldiers to surrender and thus make victory with fewer casualties more certain in the projected land war. A factor that had to be taken into account by military commanders was the possible danger to the families of the photographed prisoner of war, especially where there was a suspicion by the Iraqi military authorities that the soldier had deserted. As time went on and the numbers of Iraqi prisoners of war increased dramatically, this became less of a consideration. It is suggested that the mere fact of photographing a prisoner of war with a view to its publication would not breach Article 13. Indeed, it might be valuable in itself in showing that that particular individual is alive and is a prisoner of war, a fact from which his next-of-kin might take some comfort. It would amount to a breach, however, if it showed the prisoner of war being held captive in a humiliating way. This must go beyond the mere fact of capture. So, the photographs of the Royal Marines captured by the Argentinians at Port Stanley in the early part of the Falklands War showing them lying face down while being searched for weapons would not, it is suggested, breach Article 13. If they had been forced (prisoners of war having no means to defend themselves against the capturing troops) to do something that was not part of the normal function of being a soldier even on capture, such as to remove all their clothes, this might infringe the Article.

The physical ill-treatment of prisoners of war is clearly a breach of Article 13 and it may amount to a grave breach of the Convention under Article 130 which isolates certain acts under this label. These include wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health. There were a number of war
crimes trials following the Second World War for the improper treatment of prisoners of war.56 There is a considerable body of evidence to show that Iraq did not treat the prisoners of war under its control within the terms of the Convention.57 Article 17 adds that:

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.

A prisoner of war need therefore give to his captors only his name, date of birth and armed forces number. Flight Lieutenant Waddington described his interrogation in the following passage:

Sometimes they’d beat me to the stage where I’d go unconscious. Then I’d come round and they’d ask me another question and beat me up again—blows to the head, the back and the legs. A couple of times they tried to hit my dislocated arm but of course it was in plaster so it didn’t really affect me that much.58

It was reported that captured members of the SAS had ‘their finger nails pulled out.’59 There were also suggestions that Iraq would place prisoners of war near potential targets to deter coalition air attacks, to use them as ‘human shields’. This is specifically prohibited by Article 23 of Geneva Convention III, which states that:

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.60

It was reported on 30 January that an allied pilot had been killed by allied attacks after being used by Iraq as a human shield to protect Iraqi installations.61 The British government protested to the Iraqi ambassador, who was summoned to the Foreign Office to be told that Iraq was in breach of its international obligations under Articles 19 to 23 of Geneva Convention III.62

Prisoners of war must be interned only in premises located on land, and not in penitentiaries. Such premises must afford ‘every guarantee of hygiene and healthfulness’63 and be as favourable as those for the forces of the detaining power billeted in the same area.64 Articles 26 to 31 of Geneva Convention in lay down basic rules relating to food rations, clothing, including footwear, hygiene and medical inspections. The account by Flight Lieutenants Waddington and Stewart illustrates how far short Iraq fell in its obligations to its prisoners of war. Waddington recounts that it was after the cease-fire was announced that ‘They gave me some sandals, which was the first time I’d had anything on my feet except some plastic bags which I’d found in my cell…. We were allowed to wash for the first time in six weeks.’65
Geneva Convention III anticipates that female prisoners of war may be captured and sets out the different treatment that should be accorded to them on account of their sex.\textsuperscript{66} It has been estimated that some 30,000 women were stationed with American forces in the Gulf;\textsuperscript{67} two were captured and taken as prisoners of war.

Iraq refused to allow the International Committee of the Red Cross to visit prisoners of war it held, and was thereby in breach of Article 126 of Geneva Convention III. Nor did it notify the International Committee of the prisoners it held (a breach of Article 122) or permit prisoners to send a capture card to their families and to the Central Training Agency in Geneva (Article 70). These matters are considered below, and in Chapter 11 Michael Meyer discusses a number of possible explanations for Iraq’s refusal to permit the International Committee of the Red Cross to perform its mandate.

**THE TREATMENT OF IRAQI PRISONERS OF WAR**

The experience of the Falklands War had shown that very large numbers of prisoners of war might be taken within a short space of time. In the Gulf it was part of coalition policy that desertions from the Iraqi army be encouraged. *The Times* reported that

> Thousands of leaflets have been dropped by allied aircraft warning the soldiers in the front line that the time is approaching for a massive attack on their positions. The leaflets advise them in Arabic to run for safety, leaving their equipment behind.\textsuperscript{68}

It was anticipated that large numbers of prisoners of war would be taken; it was probably not foreseen that they would amount to over eighty thousand,\textsuperscript{69} of whom about five thousand passed through British hands.\textsuperscript{70} The bombing of the Iraqi positions in the desert had to be conducted in such a way as to provide for a lull from time to time, to enable Iraqi soldiers to come forward and to surrender.\textsuperscript{71} The problem appeared, however, to be so large that it was reported as having an effect on the military advance towards Kuwait.\textsuperscript{72}

It was reported that the coalition forces would treat Iraqi prisoners of war ‘strictly by the book’;\textsuperscript{73} the book being Geneva Convention III. There is, however, no choice open to the armed forces of a state taking prisoners of war. No reprisals are permitted against them.\textsuperscript{74} It would have been contrary to the Convention had coalition forces set aside part of it, even if the purpose in so doing was to encourage Iraq to abide by it in respect of the prisoners of war it held.\textsuperscript{75}

The threat of use of chemical weapons by Iraq was a continuing one\textsuperscript{76} and it led to protective equipment being supplied to all coalition forces personnel. Had such an attack been made any Iraqi prisoners of war would have been unprotected and it was, for this reason, that they had also to be supplied with gas masks\textsuperscript{77} and other protective equipment. It also illustrated the enormous logistical problems faced by coalition forces in the event of large numbers of enemy forces surrendering within a very short space of time. Prisoners of war must be evacuated as soon as possible after their capture so they are out of danger, and they must not be unnecessarily exposed to danger while awaiting evacuation from the combat zone.\textsuperscript{78}
The original British plan was for all prisoners of war to be transferred from the forces holding them to the British prisoner-of-war camp, called ‘Maryhill’, situated north of Al Qaysumah. It was so sited to be close to an airfield and two field hospitals. For logistical reasons it proved necessary at times to use US transport to move some prisoners of war from the battlefield as soon as possible and, with the concurrence of the International Committee of the Red Cross, these prisoners were transferred directly to a US prisoner of war camp, although they were tagged and subsequently registered to show that they were, in fact, British prisoners, a matter discussed below.

Prisoners of war are also entitled to the medical attention required by their state of health. It had been anticipated that large numbers of casualties might result from the war and that these would include Iraqi prisoners of war. In fact, sixty-nine Iraqi prisoners of war were treated in medical facilities organized by UK forces. Similarly, the religious rights and duties of prisoners of war are to be respected; they are to have complete latitude in the exercise of their religious needs. The food offered to prisoners of war should take account of their habitual diet and they should, as far as possible, be associated with the preparation of their own meals. It was perhaps fortunate that in Saudi Arabia food supplies could be obtained that would accord with Muslim law. Special tinned food, prepared under Muslim law, was obtained from France for the British prisoner-of-war camp.

The Convention requires the detaining power to make an advance of pay to prisoners of war, and indicates how much this should be. The object of this provision is to ‘enable prisoners of war to improve their lot during captivity’. It is not a payment to prisoners of war by the detaining power but is considered as an advance from their own state and is recoverable from it at the end of hostilities. It was reported that Iraqi prisoners of war held by British forces would be given an advance of their pay at the rate of £3 per day. No deductions are permitted by the Convention from this sum and it was therefore intended that prisoners of war would be able to use the money to purchase items additional to those, such as food, clothing, etc. that are required to be provided by the detaining power. In the event, no payments were made to Iraqi prisoners of war in the Gulf region by the British authorities, although an agreement had been made with the Saudi authorities that all pay matters would be dealt with by them once the prisoners reached Saudi hands (as they would do by the transfer arrangements discussed below).

Apart from officers, prisoners of war may be compelled to work, although they may not be compelled to engage in work of an unhealthy or dangerous nature, such as the clearing of mines. They may, however, volunteer to do such work. The detaining power may wish to accept such an offer, since mines may have been laid without being recorded and the prisoners of war may be the only ones who know of their location. During the Falklands War Argentine prisoners of war volunteered to assist British officers mark the outer limits of minefields. Junod records that ‘although there was no compulsion, one incident associated with the dangerous nature of these operations did occur [when ammunition exploded] after which the British no longer requested the voluntary assistance of the Argentine prisoners of war.’ For prisoners of war held at the Maryhill prisoner-of-war camp there were no formal work parties, although some prisoners of war were used to erect tentage which had blown down in a storm and they were encouraged to assist in minor works around the camp.
Questioning of prisoners of war is permitted by Article 17, but they may not be threatened, insulted or exposed to unpleasant or disadvantageous treatment of any kind if they refuse to answer. It was essential to ensure that Arabic speakers were on hand, not only for the purpose of questioning prisoners but in assisting with the notification procedures of the International Committee of the Red Cross. The Defence Committee of the House of Commons was informed that altogether 93 Arabic speaking service personnel were deployed in the Gulf...and at the end of January 78 Kuwaiti civilians resident in the UK volunteered to serve in the Gulf to assist British forces.

In the Maryhill prisoner-of-war camp a number of Kuwaiti interpreters (who had been commissioned into the Kuwaiti armed forces) were provided but were spread thinly throughout the prisoner-of-war guard force and were under the command of two British officers who were Arabic speakers. The fact that interpreters were spread thinly had a direct effect on the speed at which prisoners of war could be registered, but assistance was also forthcoming from English-speaking Iraqis.

The provision of sufficient interpreters had also been a problem in the Falklands War. In the Fourth Report from the Defence Committee it is reported that


It soon became clear that with such large numbers of prisoners of war the individual members of the coalition would have to co-ordinate their activities. In fact, only four states, the US, UK, Saudi Arabia and France were designated as holders of prisoners of war. Following evacuation from the combat zone, prisoners were held in transit camps for short periods before being transferred to US forces and, in turn, being transferred to Saudi Arabia. The British Secretary of State for Defence explained:

We are processing them as fast as we can and we are then passing them on to the rear formation, which in our case, as we are part of the 7th US Corps, is actually on to US forces.... They do, of course, remain our responsibility as the capturing force but in the military structure that is the arrangement that we have made.

Agreements between the states concerned were drawn up. That between the UK and the US was signed on 31 January 1991 and is set out in full in Appendix 1. The agreement between the US and Saudi Arabia was signed on 15 January and provided that

all prisoners of war captured by US forces would be transferred as promptly as possible to Saudi custody; both states would remain responsible for the proper treatment of such prisoners; prisoner-of-war status could not be changed without the agreement of both states; access to all prisoner of war camps by US personnel was assured; and release and
repatriation of prisoners of war would be a matter for joint approval of the two governments.\textsuperscript{99}

This procedure is in keeping with Article 12 of Geneva Convention in although in fact more onerous on the transferring state whose obligations under the Article only revive if the receiving state fails to carry out its obligations under the Convention, whereas the agreements actually drawn up assume joint responsibility.\textsuperscript{100}

As a safeguard to prevent the disappearance of prisoners of war whilst in captivity, to provide some comfort to their families and to notify their own state, a prisoner of war is entitled to send a capture card to the Central Tracing Agency in Geneva and to his family. Means are to be provided by the detaining power to enable this to be done within a week of arriving at a camp, even if it is only temporary, or on transfer to another camp.\textsuperscript{101} The completion of these capture cards proved difficult for two main reasons: first, the very large numbers of prisoners of war arriving at a transit camp at one time and secondly, the difficulty over language, both of which are discussed above. However, capture cards were provided by the International Committee of the Red Cross in both English and Arabic and were completed by each prisoner at the time of registration. These cards were then passed to the International Committee of the Red Cross representatives in Riyadh, along with correspondence cards to their families.

In addition, a detaining power is required to establish an information bureau for prisoners of war and to pass on detailed information to the Central Tracing Agency in Geneva.\textsuperscript{102} Judge Aldrich commented that

> information with respect to all prisoners of war who went through US custody was transmitted from the field to a National Prisoner of War Information Center established in the Pentagon. From there, [it was sent] by facsimile to the International Committee of the Red Cross Central Tracing Agency in Geneva. This information included names, ranks and serial numbers. Whenever available, other identifying information, such as dates, as well as places of birth and names and addresses of next of kin were included.\textsuperscript{103}

It should be noted that a prisoner of war is not required to supply information beyond that specified in Article 17, i.e. his name, rank, date of birth and serial number. An individual Iraqi prisoner of war who wished to withhold information about his family fearing that some form of detrimental action may be taken by the Iraqi authorities against them would still be required to supply the information to the detaining power under Article 17 but could refrain from sending a capture card or correspondence to his family. The International Committee of the Red Cross has confirmed that ‘Most of the deserters refused to fill in a capture card, fearing for the safety of their families if the Iraqi authorities found out that they had deserted.’\textsuperscript{104}

Whilst in British custody prisoners of war were subject to the Prisoners of War (Discipline) Regulations 1958,\textsuperscript{105} the object of which is to provide for the maintenance of discipline amongst prisoners of war and to incorporate into English law a number of detailed obligations contained in Geneva Convention III. The regulations enable a prisoner of war to be tried by a prisoner-of-war court-martial\textsuperscript{106} for an offence committed
after he has been captured. An Iraqi prisoner of war who, while in British custody, assaulted another prisoner would be liable to be dealt with by such a court-martial or by disciplinary proceedings. Where it is suspected that a prisoner of war has committed, prior to capture, a grave breach of any of the 1949 Conventions he may be tried by a prisoner-of-war court-martial for this offence. Since prisoners of war spent only a limited time in British custody it was not possible to screen those suspected of such acts and subsequently to place them on trial. Both the Falklands and the Gulf Wars show that prisoners of war, captured by British forces, are likely to be held for short periods only and that the opportunity to place an individual on trial for a grave breach is unlikely to materialize. In addition, the difficulty in ensuring that he obtains a fair trial and is able to secure sufficient evidence to make out his defence would appear to be overwhelming. It is, however, permissible to retain a prisoner of war, after the end of hostilities, in order to try him for a grave breach or other war crime.

**REPATRIATION**

In keeping with Article 118 of Geneva Convention III, which requires that prisoners of war ‘be released and repatriated without delay after the cessation of active hostilities’, Resolution 686 of the Security Council adopted on 2 March 1991 demanded that Iraq cease hostile actions by its forces…and… Arrange for immediate access to and release of all prisoners of war under the auspices of the International Committee of the Red Cross and return the remains of any deceased personnel of the forces of Kuwait and the Member States co-operating with Kuwait pursuant to Resolution 678 (1990).

The British Prime Minister stated in the House of Commons that ‘the immediate release of prisoners of war, including our airmen, must be part of any ceasefire.’ This should be compared with the position following the Argentinian surrender on 14 June 1982 in the Falklands war. Most Argentinian prisoners of war were released nine days after the surrender but pending indications that hostilities had definitely ceased, we retained 593 selected prisoners until 14 July…primarily the repatriation of these particular prisoners would, because of their specialist skills or their seniority, have greatly enhanced her ability to conduct further military operations against us.

By 6 March 1991 the Secretary of State told the Defence Committee that ‘we have received the release of three British prisoners of war, who are now in Cyprus; we have now received a further nine, six RAF and three Army … That leaves us with five RAF and three Army still missing.’ All forty-seven coalition prisoners of war held by Iraq were handed over to the International Committee of the Red Cross. In the early days of the repatriation process Iraq apparently experienced difficulty in providing transport to enable it to receive the return of its prisoners of war and refused to
accept a batch of about five hundred on 11 March. By 19 March 1991 the International Committee of the Red Cross had repatriated some 1,499 Iraqi prisoners of war; by 22 April this figure had risen to 63,456 Iraqi prisoners of war, and by June it had registered over 82,000 Iraqi prisoners of war and supervised the repatriation of more than 66,000 of them. A number of Iraqi prisoners of war expressed an unwillingness to be repatriated, thereby raising the problem of whether they had the right not to be returned to their own country. Article 118, outlined above, seems to impose an absolute requirement on the detaining power, who ‘shall’ release and repatriate prisoners of war without delay. Whether this Article required a detaining power to repatriate unwilling prisoners of war, or whether it merely required the repatriation of those who wished to return to their own country was a subject that became prominent at the conclusion of the Korean War, with North Korea taking the former view and the UN Command the latter.

It is clear that the International Committee of the Red Cross has taken the view that forcible repatriation would be ‘contrary to the general principles of international law for the protection of the human being’. It was reported in The Times that the International Committee of the Red Cross had indicated that ‘no Iraqi prisoners of war would be repatriated against their will’. This was also the view, certainly, of the Secretary of State for Defence, to whom figures of between 75,000 and 175,000 Iraqi prisoners of war who would be likely to refuse repatriation had been indicated.

Whilst in the Maryhill prisoner-of-war camp, three Iraqis expressed a wish not to be repatriated to Iraq at the end of hostilities. They were interviewed by a British Army lawyer who explained to them the procedure that would be adopted by the International Committee of the Red Cross representatives when they were transferred to the Saudi authorities, via a US prisoner-of-war camp. On transfer to the US the names of these three individuals were notified to the International Committee of the Red Cross. Subsequently, representatives of the International Committee of the Red Cross interviewed all Iraqi prisoners of war who expressed an unwillingness to return to Iraq and took the view that they should be considered as refugees and warned them of the difficulty in finding a country of asylum. On 26 April King Fahd of Saudi Arabia offered to ‘take in 50,000 Iraqi refugees and prisoners of war including army deserters’.

The process of repatriation was described by the International Committee of the Red Cross as follows:

The prisoners were brought by bus from their camps to the frontier [Juddayadat Arar], grouped in sections specially set up for them and taken one after another to Arabic-speaking delegates who asked them: ‘Do you agree to return to Iraq?’ Persons answering yes had their identity card stamped by the ICRC. Persons answering no or hesitating were discreetly taken to one side for a detailed interview without witnesses. If they confirmed that they did not want to be repatriated they were sent back to the camp.

Repatriation started at 8 a.m. and 8 p.m. [the ICRC worked round the clock] by batches of 2,500 POWs. A senior Saudi Arabian officer and senior Iraqi officer were present during the whole operation.... An ICRC
delegate inspected each man’s POW identity card, which was used for their repatriation…. The withdrawal of the card showed that the POW had been repatriated.

The final procedure was the preparation of hand-over certificates showing the total number of prisoners of war placed in the hands of the International Committee delegates and the total number handed over to the Iraqi authorities.124

CONCLUSION

The 1991 Gulf War resulted in the largest number of prisoners of war being taken by coalition forces since the Second World War, and it proved to be a severe test of the workings of Geneva Convention III of 1949. Given that the tendency of modern conventional warfare is the direct encouragement of surrender by enemy armed forces, especially where these forces are composed of conscripts, a great deal of attention has to be paid by military planners to the problems of taking and dealing with prisoners of war. This was required, to a considerable extent, in the Gulf War but the lessons learned from it are likely to suggest that those issues affecting prisoners of war are as much a priority in the planning stage as is the choice of military methods and means of attack or defence.
Chapter 10
Civilians in occupied territory

Hilaire McCoubrey

With the possible exception of prisoners of war, few of the victims of armed conflict are placed under such intense subjection to the enemy as civilians who find themselves in occupied territory and therefore under enemy administration. That the *jus in bello* should seek to protect civilians placed in this situation is both inevitable and desirable, but the task presents significant difficulties upon a number of levels. There is first the inescapable issue of the criteria for the application of the rules and principles adopted: what, in short, actually constitutes an occupation? Once this has been resolved there arises the question of the nature, and limits, of the authority of the occupying power. To what extent will it have a legislative capacity within the territory, and what measures may it legitimately take to protect the security of its forces? These basic questions may further be complicated where the territorial extent of the occupation is open to doubt, or the occupying power itself claims to wield *de jure* authority therein. In any event there arises the question of the extent of the liability of the occupying power for what may be termed ‘private-enterprise’ depredations by individual members of the occupying forces. Some of these issues found sharp illustration in the 1990–91 Iraqi occupation of Kuwait.

Following the Iraqi invasion on 2 August 1990 the effective subjugation of the territory of the Emirate was completed within about fourteen hours. As it happened the extent of the subjugation was precisely that of the national territory of Kuwait, and the Emir and his government were immediately driven into exile in Saudi Arabia. If the practical extent of Iraqi control was not in doubt, the nature of that control was deliberately muddied by the claim of the Ba’ath government in Baghdad that Kuwait had become Iraq’s nineteenth province, on a background of rather dubious historical assertion. The claim to have incorporated Kuwait within metropolitan Iraq was followed by a brutal policy of ‘Iraqization’, much of which blatantly defied the requirements of the *jus in bello* in relation to an ‘occupation’ and the demands of human rights in any situation.

Beyond this a number of particular delicts were committed, some of which are considered below under other specific headings, but which included widespread looting, both official and unofficial. The legal practical problems of a hostile alien administration rarely end with liberation and did not do so here, nor were they confined to difficulties arising as between Kuwaitis and the Iraqi military administration. Accusations of collaboration and reprisal against those suspected are a common part of the aftermath of hostile domination, seen to a considerable extent after the termination of Axis occupations at the end of the Second World War. The phenomenon was marked in Kuwait after its liberation and perhaps gained in bitterness from the inter-communal tensions within the Emirate which to a large extent tended to be reflected.
These issues readily suggest the divisions into which a legal analysis of the Kuwaiti experience of Iraqi occupation will fall. This arrangement will generally be followed in the present discussion, subject to the inevitable caveat that no schematic formula can be permitted to become a straitjacket to the detriment of the material to be presented.

**THE APPLICATION OF THE LAW OF BELLIGERENT OCCUPATION**

For the purposes of the laws of armed conflict, a territory is generally held to be under a military occupation and therefore subject to the rules and principles of the *jus in bello* applicable to occupations when a hostile external military authority is in fact imposed upon it. Article 42 of the Hague Land Warfare Regulations of 1907 provides that ‘Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to territory where such authority has been established and can be exercised.’ Common Article 2 of the four Geneva Conventions 1949 adds, in the specific context of international humanitarian, or ‘Geneva’, law that the Conventions apply in all cases of total or partial occupation, ‘even if the said occupation meets with no armed resistance’. In Kuwait there was a degree of armed resistance to the Iraqi invasion, but the disparity in size between the opposing forces meant inevitably that resistance was neither prolonged nor effective at that time.

The essentially factual definition of ‘occupation’ offered by the *jus in bello* clearly avoids many of the difficulties which would be attendant upon the application of more technical criteria of identification; it does not, however, by any means obviate all of them. In the immediate context the major definitional difficulty lay in the refusal of Iraq to recognize that it was in fact operating a regime of military occupation within Kuwait. The Iraqi claim to have incorporated Kuwait within its territory as a nineteenth province cannot seriously be contended to have excluded the application of the law of occupation to the Emirate, even though Iraq thereafter did not consider the territory to be ‘occupied’. It is an established doctrine of modern public international law that military aggression is not now a legitimate means of acquisition of title to territory, by reason of the illegitimacy of resort to aggressive force which lies at the root of the post-1945, and indeed post-1928, *jus ad bellum* or, as some prefer, *jus contra bellum*. As M.N. Shaw remarks:

*Conquest, the act of defeating an opponent and occupying all or part of its territory, does not of itself constitute a basis of title to the land. It does give the victor certain rights under international law as regards the territory, the rights of belligerent occupation, but the territory remains the legal possession of the ousted sovereign. Sovereignty as such does not merely by conquest pass to the occupying forces, although complex situations may arise where the legal status of the territory occupied is, in fact, in dispute prior to the conquest.*

In certain circumstances force has been admitted as a form of retrospective ‘self-defence’ in support of a territorial claim and a *prima facie* ‘conquest’ has thus conferred, or rather...
confirmed, a claim to sovereignty. The most notable example was the Indian seizure of Goa in December 1961, when Indian forces invaded and occupied the Portuguese enclaves of Goa, Danao and Diui. India argued in effect that since the territories were under a colonial domination which had not been rescinded it had the right to end the situation by force as an act of self-defence against historical colonial aggression. Despite much dispute the UN Security Council did not agree to treat the Indian action as unlawful, and Portugal finally recognized Indian title in 1974.

This incident is used in support of a form of ‘historical’ self-defence, but no such claim can readily be maintained to have been set out by Iraq in respect of Kuwait. As N.D. White comments:

\[\text{T}he\ validity\ of\ the\ Iraqi\ claim\ to\ Kuwait\ is\ not\ important\ [in\ the\ context\ of\ the\ invasion],\ for\ international\ law\ recognises\ that\ the\ acquisition\ of\ territory\ by\ use\ of\ force\ is\ unlawful\ no\ matter\ that\ the\ state\ using\ force\ believes\ it\ has\ sovereign\ rights\ over\ the\ territory.\]

Certainly a unilateral declaration of title could hardly be argued to be sufficient in itself to displace the requirements of the *jus in bello* as regards occupation, unless the law is to be reduced to the most voluntary of prescriptions. In his major analysis of the subject, Adam Roberts remarks that some commentators raise doubts as to whether there is much merit in trying to define exactly what an occupation is, when one knows that in practice States will often disagree about the application of this label to particular situations. Might it not be more useful, as Michel Veuthey suggests, to think rather in terms of basic humanitarian rules which apply to all situations, irrespective of arid academic distinctions and definitions? 

The defect with such a view may be argued to be that circumstances of belligerent occupation do create circumstances of peculiar difficulty for which particular regulation is demanded and the application of such a protective regime *ex hypothesi* demands some concept of ‘occupation’. As Roberts himself states after the citation of these doubts, in any event ‘[t]he core meaning of the term is obvious enough’. He suggests that ‘belligerent occupation’, in effect the occupation of territory by an enemy armed force, may be defined with some useful clarity:

When the term ‘belligerent occupation’ is used in its strict sense, its key distinguishing characteristics are that it is (a) by a belligerent State, (b) of territory of an enemy belligerent State, (c) during the course of an armed conflict, and (d) before any general armistice agreement is concluded. However, the term is often used more broadly to cover wartime occupations of neutral territory; occupations following armistice agreements; and even occupations after the end of active hostilities.

The Iraqi presence in Kuwait resulted from an aggressive use of military force which was unequivocally condemned by the United Nations Security Council and consisted
precisely in the *de facto* but ultimately illegitimate administration which is contemplated by the law of belligerent occupation. Its facts appear clearly to have satisfied the basic criteria of identification set out by Treaty provision and reflected in Roberts’ comprehensive formulation cited above. The logical conclusion can only be that the Iraqi military presence in the Emirate was indeed a belligerent occupation *stricto sensu* to which the relevant norms of the *jus de bello* were applicable.

Although the factual criterion of identification in the application of the law of belligerent occupation to a large extent avoids difficulties of technicality, the facts upon which the criterion itself rests are not necessarily easily established. The statement of Article 42 of the Hague Land Warfare Regulations of 1907 that ‘Territory is considered occupied when it is actually placed under the authority of the hostile army’ leaves open a considerable ‘grey area’ in which the factual control of given territory may remain unclear. In the Gulf conflict this particular problem did not arise because the swiftness of the Iraqi military invasion left little room for doubt upon the question of actual control over the territory.

**GENERAL PRINCIPLE OF OCCUPATION ADMINISTRATION**

An occupying power, having imposed itself through armed force, is not *prima facie* a legitimate governing authority within the terms of modern public international law, even if its ‘authority’ might at some later stage become ‘legitimized’ through the operation of other processes. Its administrative capacity as an occupying power for the time being is therefore *de facto* rather than *de jure*, and in certain respects is severely limited in scope. The scope of the authority of an occupying power is usefully summarized by the Hague Regulations of 1907. Article 43 emphasizes the basic point of the *de facto* nature of the occupation authority and provides that:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

This in essence represents an authority of necessity, as the sole repository of force the occupant—in an almost uniquely close approximation to the very limited Austinian concept of ‘sovereignty’—has the basic duty to maintain public order but does not thereby gain the right to impose its own, alien, legal order in an act of quasi-annexation. The extent of an occupant’s legislative authority would appear thus to be limited, by reference to a criterion of ‘absolute prevention’, to the unavoidable dictates of its own security. Professor Rowe remarks in this context that:

> [The occupant] becomes administrator rather than sovereign and this implies that his law-making powers are more limited. It was certainly the intention of those who framed the Hague Convention that the occupier’s law-making powers could be exercised only where it was a matter of military necessity that they should and not merely where the occupier
considered it expedient to do so. An occupier could not, for instance, introduce his own laws into the territory that he occupied unless those laws related solely to the needs of his army.\(^9\)

This image of a limited administrative power of necessity is re-emphasized by Geneva Convention IV, 1949, Article 64, which provides that the penal laws of an occupied territory should remain in force unless they constitute a threat to the security of the occupying power or an obstacle to the application of the Convention itself. The second paragraph of the Article adds that:

\[
\text{The Occupying Power may…subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.}
\]

This provision usefully indicates the general nature of the necessity which may admit the use of \textit{de facto} quasi-legislative powers, but the question of the criterion of ‘absolute prevention’ by reference to the 1907 formulation remains a matter of importance and of some difficulty. The matter has received judicial consideration in past wars. An example may be seen in \textit{Ville d’Anvers v. Germany} (1925)\(^{10}\) arising from the First World War German occupation of Belgium. Riots took place in Belgian cities, in particular in Antwerp, against actual or suspected German nationals. Belgian law, by a decree of 10 \textit{Vendemiaire an IV},\(^{11}\) provided for civil action for damages in such a situation including potential liability of municipalities for public violence directed against persons or property. The occupation authorities issued a decree which deprived the Belgian civil courts of jurisdiction in such cases and instituted instead Tribunals under German control which, in the particular case, made a much harsher award of damages against the city of Antwerp than would otherwise have been expected. The Belgo-German Mixed Arbitral Tribunal determined that in the circumstances the occupying power was not ‘absolutely prevented’ from applying the local municipal law and that the change had been dictated solely by its convenience, being therefore unlawful. Subsequently the award of damages which had been made was revised downwards. In the \textit{Chevreau claim} (1931)\(^{12}\) British forces in Persia (Iran) during the First World War had seized and deported Chevreau, a French citizen, on grounds of suspected espionage. It was accepted that the neutral status of Persia during the First World War did not preclude the British authorities in the country from holding a position of belligerent occupancy. France, however, argued that the deportation could only have been supportable in the context of a state of martial law. The Arbitrator rejected the contention and concluded upon this point that the requirement of the Hague Land Warfare Regulations of 1907 by Article 43 that laws in force in the occupied territory must be respected ‘unless absolutely prevented’ is excepted where the occupying forces act properly within the parameters of a right of self-defence. Schwarzenberger describes this interpretation as equivalent to ‘a restrained definition of the necessities of war’\(^{13}\) and goes on to support a narrower view of the exception of
absolute prevention as concording with the general nature of exception clauses and finding support in the view of the Belgo-German Mixed Arbitral Tribunal in Milaire v. Germany\textsuperscript{14} that Article 43 is intended to protect the inhabitants of the territory through the imposition of restraint, rather than to confer privileges upon the Occupying Power.\textsuperscript{15} The capacity of the occupying power may reasonably be taken to be ultimately a \textit{de facto} capacity of necessity which relates to the security needs of the occupying forces, a point emphasized by Geneva Convention IV of 1949, Article 68, which urges leniency in cases of offences committed solely to harm the occupying forces where injury to life or limb, grave collective peril or serious property damage is not inflicted. It is further stated that:

> The death penalty may not be pronounced against a protected person unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance.

There is evidently some room for debate upon the precise nature of the dictates of security and the criterion of ‘absolute prevention’, but it can hardly be doubted that in many past instances occupying powers have purported to exercise ‘legislative’ powers far beyond any reasonable notion of a capacity of necessity. The attempt to create a ‘Greater German Reich’ in occupied territories during the Second World War affords an especially stark, or rather extensive, historical example, but in lesser degree the phenomenon is far from uncommon, especially where the conflict originated in some form of territorial dispute. During the 1982 Anglo-Argentine Falklands conflict the Argentine claim that the Falkland Islands were part of Argentine territory carried with it the clear implication of the imposition of Argentine law. The limited extent to which this was actually done appears, however, to have carried much less brutality than was the case in Second World War instances, or, indeed, in the Iraqi occupation of Kuwait here under consideration.

One final point requires to be made in the immediate context of discussion. Unless the prior local law was so abominable as to constitute in itself a violation of norms of public international law—as for example, in the case of some aspects of Nazi law abrogated in the 1945 Allied occupation, or in respect of the neo-genocidal enactments of the Khmer Rouge regime of Pol Pot in Cambodia (then Kampuchea) overthrown by Vietnam, the quality of that law is not as such in question. It was much emphasized in the Western media during the Gulf conflict that Kuwait itself did not have a strong democratic tradition. The point immediately in question, however, is not whether other powers might find the local ‘legitimate’ regime politically attuned with their own aspirations as such, but rather whether an occupying enemy power has the right to impose its own regime upon the territory. In any event, in this case the change could not readily be regarded as an overall improvement.

In conclusion upon the authority of an occupying power, there would seem clearly, and indeed inevitably, to be a legislative power of necessity, but one for the exercise of which a credible case requires to be available. The foundation for this power is in essence one of maintenance of order by a \textit{de facto}, if self-imposed, governing authority coupled with the self-evident need to protect the security of the forces of an occupying power in hostile territory. This power manifestly does not constitute a legitimate means of ‘back-door’ annexation through the imposition of the occupant’s own laws and administrative
procedures without good cause. Naturally if an occupation becomes in some fashion legitimated subsequently the position will change, but belligerent occupancy as such confers only an extremely limited capacity of government.

In relation to administration the *jus in bello* requires that so far as possible the local administration should be retained although, for obvious reasons, that possibility might in practice be severely limited. Geneva Convention IV of 1949 provides by Article 54 that:

The Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.

The second paragraph of Article 51 of the Convention forbids compulsory labour except on work necessary for the needs of the occupying forces, public utility services, or the food, clothing, transportation or health of the population. None of these extend to participation in military operations or the security of premises at which compulsory labour is being performed. Article 54 is stated not to prejudice the application of this provision. In general, therefore, local officials should retain their status but may not be forced into work, which might be seen as ‘collaboration’ by their compatriots, against their conscience, except pursuant to the exigencies of what may loosely be termed ‘public safety’.

The position of public officials in occupied territories is not of course easy. On the one hand they may feel that by remaining in office they might succeed in mitigating the severity of the occupation regime for their fellow nationals. On the other hand, they may thereby be led imperceptibly into the assistance of enormities for which they will share responsibility, quite apart from the serious question of the implications of the local municipal law of treason. The painful experiences and aftermath of the occupation of France during the Second World War graphically illustrates the point as, in a slightly different sense, does that of the Vichy regime. The problem of vengeance upon those seen, with varying rectitude, as having collaborated with the enemy was also a matter of importance and concern following the liberation of Kuwait.

If it is accepted that the power of an occupant is in essence a *de facto* and limited authority of necessity, there remains nonetheless the question of the nature and extent of the obligation owed by the inhabitants of the territory of the occupying power. The imposition of ‘obligation’ is an identifying characteristic of ‘law’ in various senses. As the modernizing positivist H.L.A. Hart remarks, The most prominent general feature of law…is that its existence means that certain kinds of…conduct are no longer optional, but in some sense obligatory’. The nature of the ‘obligation’ associated with law is, however, far from simple, and may be contended to involve a number of loosely associated elements. Without entering into the realms of jurisprudential speculation, elements of actual or potential coercion, formal intra-systemic status and, at a remove and especially associated with ‘naturalist’ legal theories, moral claim may, *inter alia*, readily be discerned. The weight, if any, to be accorded to all or any of these varies widely as between the schools of legal theory, but it may also be added that the formal norms of public international law, although also positive law, add a further external element by reference to which municipal law may be evaluated. The quasi-legislative capacity of a
belligerent occupant implies in most cases, though not all, the simplest forms of coercive ‘obligation’, or in Hartian terms ‘obliging’, deriving from the hostile exercise of military power approximating to the crudest possible form of simple ‘command’ legal theory. In so far, however, as the community itself has a vested interest in the maintenance of order, a function exercised pro tem by the occupying power as the repository of force, the ‘obligation’ associated with their administration may be contended to go somewhat beyond this in certain respects.

The historical arguments advanced for a form of allegiance, simple or temporary, owed to a belligerent occupant are manifestly incompatible with the modern structure of the relevant parts of the jus in bello. The Hague Regulations of 1907 provide very simply by Article 45 that ‘It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.’ This would seem to dispose bluntly of any notion of a formal or absolute allegiance owed to a belligerent occupant. To some extent it is possible to contend, and it has been so contended, that since the jus in bello concedes, as it clearly does, at least a limited authority of necessity to a belligerent occupant there is imposed upon the population an obligation deriving from public international law itself. This model was attacked by Major Richard R. Baxter in his detailed review of the subject. He commented that:

There is a strong tendency in modern law, and, it is submitted, a correct one, to deny that there is any duty of obedience founded on any legal or moral obligation with which international law concerns itself. The occupying Power’s ability to enforce respect for its legitimate interests is not a creation of the law. It springs instead from superior military power and from factual capacity to compel obedience. International law suffers the occupant to legislate, but it will not lend its authority or its assistance to the enforcement of such legislation.

One might enter into debate upon some of the particular emphases of the statement, but this model of a recognition of capacity founded upon the fact of superior force—in distinction from any form of de jure authority—surely concords exactly with the factual criteria by which an occupation is identified in the modern jus in bello. Baxter also concluded, upon the same logic, that the traditional concepts of ‘war treason’ and ‘war rebellion’ have become thoroughly outdated. He commented very reasonably that The law must take as its starting-point the fact of military supremacy and then set forth to place limits of reasonableness on the occupant’s factual capacity to control those who live within the area he holds.

This analysis, founded upon a limited right of self-protection rather than a duty of obedience, has much to commend it so far as the measures taken by a belligerent occupant to protect its own interests and security are concerned. A complication may, however, be argued to arise in so far as the belligerent occupant administers provisions of the prior law of the territory under occupation. It will be recalled that the Hague Land Warfare Regulations of 1907 require by Article 43 that an occupying power ‘shall take all the measures in his power to restore, and ensure, so far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.’
In thus assuming a function *in loco gubernatorii* an occupying power acts, so to speak, in the place of the legitimate sovereign authority. To the extent that the laws of the community itself are maintained they may be said to retain their original claim even if they are temporarily administered by a *de facto* and *prima facie* illegitimate authority. To take a crude example, it would surely not be a defence to a charge of murder, unconnected with the hostilities, before a court in a territory liberated from occupation to establish that the crime had been committed during the occupation. In contrast, the ‘special’ enactments of the occupant will presumably endure only so long as the occupation itself. One may reasonably conclude that the obligation attaching to the normal laws of the territory which are maintained in their proper function will be unaffected by the fact of occupation, subject to contrary demands of public international law, for example in relation to basic human rights.

The special enactments imposed by the occupant in its own interests rest, however, simply upon adverse military force and, subject to the maintenance of the integrity of the community itself, any associated ‘obligation’ will be precisely coterminous with the practical ability of the occupant to enforce its will.

**IRAQI OCCUPATION ADMINISTRATION IN KUWAIT**

On Wednesday 8 August the Ba’ath Revolutionary Command Council in Baghdad announced a ‘comprehensive and eternal merger’ between Iraq and Kuwait, displacing the provisional military government installed at the time of the invasion after less than one week.

The provisional government duly proclaimed its desire that ‘the hero Saddam Hussein…be our leader and protector.’ It has been remarked above that such a unilateral annexation in the absence of any meaningful external legitimation is not legally effective and does not set aside the norms of the *jus in bello* which are applicable in the given situation. Thus, notwithstanding the Iraqi treatment of Kuwait as its nineteenth province, the Emirate remained a territory under belligerent occupation. Despite this, a brutal policy of ‘Iraqization’ was followed from the earliest stages of the occupation which, even in separation from the issues of economic and material depredation, raised disturbing questions.

At one level Kuwait was rigorously forced into a state of union with Iraq. A clear symbol of this was the abolition of the Kuwaiti dinar and its replacement by the Iraqi dinar at an artificial exchange rate of 1:1 (the immediate pre-invasion rate having been 12:1 in favour of the KD). Economically as well as politically this was a most damaging move and, as one report at the time put it,
Such an absorption of currency at an absurdly and artificially favourable rate of exchange amounted, quite apart from its aspect as a manifestation of unlawful annexation, to a seizure of private and public assets without compensation upon a huge scale.

The Hague Land Warfare Regulations of 1907 provide by Article 46 that ‘private property can not be confiscated’, with certain specific exceptions set out elsewhere. Article 53 adds, inter alia, that ‘An army of occupation can only take possession of cash, funds and realisable securities which are strictly the property of the State….’ The de facto seizure of wealth represented by the enforced devaluation manifestly contravened these prohibitions in practice. In September 1990 the Iraqi Economic Commission announced 6 October as the date by which possession of the former Emirate currency would be illegal.23

Other significant aspects of bureaucratic ‘Iraqization’ include the compulsory replacement of Kuwaiti by Iraqi identity cards, with a deadline of 25 November 1990, and the similar replacement of Kuwaiti by Iraqi vehicle registration papers, number plates and driving licences.24 These policies all made manifest the determination of the Ba’ath authorities to force through an unlawful process of absorption; if this were not a sufficient cause for concern, the brutal means of its implementation—considered below—were yet more so.

A paradox of the Iraqi occupation of Kuwait may be found in the contrast between the rhetoric (and to some extent practice) of annexation, and the details of the occupation administration. In the very early days of the occupation, in September 1990, it was reported that ‘So far as anybody is in charge of running Kuwait, it is the local Iraqi military command, whose main interest is securing its conquest against outside attack.’25 As such this is, naturally, a legitimate concern for a belligerent occupant. A similar view might prima facie be taken of a report by the same journalist that ‘The…Iraqi authorities have…had difficulty establishing bureaucratic machinery in Kuwait although staff are being seconded from ministries in Baghdad for three week tours.’26

Failure to establish an effective permanent administration in an occupied territory is perhaps hardly in itself a cause for complaint from the perspective of the jus in bello. The nature of the ‘failure’, however, is more problematic. It will be recalled that the Hague Land Warfare Regulations of 1907 require a belligerent occupant to ‘take all measures in his power to restore, and ensure, as far as possible, public order and safety’ in the occupied territory.27 This the Iraqi occupation authorities in Kuwait appear not to have done. The background to the Iraqi invasion is not central to the present discussion, but the assets of oil-rich Kuwait would certainly seem to have been, at the very least, one of the major incentives. The image which emerges of the Iraqi occupation is one of ruthless exploitation rather than administration, one presented early on by Patrick Cockburn for The Independent in September 1990:

Driving is dangerous because nobody has moved wrecked or abandoned cars. Rubbish is not collected. Sewage is put in black plastic bags, dumped on the sand between houses and set alight…. By not introducing effective civil government, Baghdad has ensured…collapse…. Pessimists say …Iraq wants Kuwait to return to its nineteenth century status under the Ottoman Empire—that of a town south of Basra.28
A basic policy of economic exploitation for the benefit of metropolitan Iraq was evident, and maintenance of regular civil administration in Kuwait was a very low priority. In the Iraqi occupation administration there may arguably have been seen a seemingly paradoxical combination of excess and inadequacy from the perspective of *jus in bello*. The purported annexation and the forcible extinction of all outward signs of Kuwaiti nationality far exceeded any ‘rights’ of belligerent occupancy but, equally, unconcern with the maintenance of normal life in the Emirate territory fell far short of the standards sought to be maintained by the laws of armed conflict.

**RESISTANCE AND REPRESSION**

The forces of an occupying power are inevitably concerned with the requirements of self-protection and security and the factually inevitable consequences are, within limits, recognized by the applicable norms of the *jus in bello*. Reference has been made above to the ‘legislative’ capacity of necessity of an occupant in relation to security and measures for enforcement, coercive and judicial, are also both recognized and constrained. Where regulations are made by an occupying power, *inter alia*, ‘to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and…of the establishments and lines of communication used by them’ it is likely that local courts will not be trusted to try cases involving their violation. Accordingly Geneva Convention IV 1949 provides that ‘the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.’

This provision seems to make certain, possibly unwarranted, assumptions about the quality of adjudication in the legal system of the occupying power itself but subsequent Articles impose requirements not only of due process but also of leniency in specified types of case. The requirement of due process is set out in some detail by Articles 71 and 72 of Geneva Convention IV 1949. The opening paragraph of Article 71 summarizes the basic requirement: ‘No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial.’ The term ‘regular trial’ is quantified by requirements that defendants be promptly informed in a language comprehensible to them of the charges they face and then be tried as quickly as possible. Article 72 adds the rights to present evidence and call witnesses, to be assisted by counsel—who may be provided by the protecting power, if any, or, with the consent of the accused, the occupying power if the defendant does not or cannot make a personal choice. The defendant may also be assisted by an interpreter unless he or she freely waives this facility.

Article 71 also requires that the protecting power, if any, be informed of all cases potentially carrying serious penalties and of other cases if it so requests. Representatives of the protecting power also have the right to attend trials of persons protected by Geneva Convention IV of 1949 (basically civilians), unless it has, ‘as an exceptional measure, to be held *in camera* in the interests of the security of the Occupying Power’ as permitted by Article 74, in which case the protecting power must be so informed.
These requirements reflect a balance between the legitimate security concerns of an occupying power and what may loosely be termed the human rights of the inhabitants of the occupied territory. They raise again, tangentially, the question of the ‘authority’ of the occupying power. Acts of resistance to an occupier are in most cases inevitable and may well be conceived as a patriotic duty; they are also hostile actions which within the parameters of the *jus in bello* an occupant has the ‘right’ to repress. Indeed the exercise of the *de facto* legislative power conceded by the second paragraph of Geneva Convention IV 1949 will in all probability primarily be directed to that end.

The factual and limited nature of the authority of an occupying power, symbolizing the near-obsolescence of concepts such as war rebellion, is again emphasized by modern treaty reference to offences of resistance. Geneva Convention IV of 1949 requires that occupation courts ‘shall take into consideration the fact that the accused is not a national of the Occupying Power’. Also, sentencing must be proportionate, and capital sentences may be pronounced against persons protected by the Fourth Convention only on conviction upon charges of espionage, serious sabotage against military installations and intentional offences occasioning the death of one or more persons, and then only if such offences were capital under the previous law of the territory. Specifically,

The death penalty may not be pronounced against a protected person unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance.

It should be emphasized here that persons engaging in military action who fall within the definition of a legitimate ‘combatant’ could not anyway, subject to other requirements of the laws and customs of armed conflict, be treated as criminal upon capture by an occupying adversary.

In the Iraqi occupation of Kuwait an immediate complication arose from the Ba’ath refusal to recognize the situation as one of belligerent occupation to which the *jus in bello* was applicable. Although without juridical effect, this had a major impact upon the practical conduct of the occupation, and in view of the long history of brutal repression within Iraq the brutality of the treatment of civilians in the territory was hardly surprising, if no less distressing for that. As Professor Rowe remarks, ‘The danger point for the inhabitants has traditionally been where the occupying forces have felt themselves to be insecure from attack or where for economic reasons the inhabitants have been exploited by the occupier.’ The exploitative nature of the Iraqi presence in Kuwait stood in this ‘tradition’ from the beginning and the atrocious nature of the regime imposed in the territory of the Emirate amply justified this view.

Early reports of atrocities in occupied Kuwait tended to be played down in the West for reasons that are less than wholly clear, although resistance to a military response to the invasion was undoubtedly a factor in forming some sections of opinion. However, as further evidence of brutal repression emerged from refugee statements and an Amnesty International report issued in October 1990, the situation prevailing in Kuwait became all too evident. An enormous range of very minor acts, even of ‘passive resistance’, such as possession of a portrait of the Emir or of the Kuwaiti national flag, were made into capital offences. The infliction of the extreme penalty for such minor acts would have
flatly contravened the imperatives of leniency set out by Geneva Convention IV 1949. Nor was this by any means the full scope of the internal crisis. A group of British businessmen and a Kuwaiti doctor who emerged from Kuwait gave graphic details of the brutality of the repression to the All-Party British Parliamentary Committee on Human Rights at the end of February 1991. The details are harrowing but merit citation in view of a continuing tendency to minimize the horrors of the occupation regime. The doctor, named only as ‘A’, reported that his British-born brother had been imprisoned for some time with a large number of other men and that torture was routine in the place of detention.

Screams would be heard…. When these people returned, they would be maimed, burnt, bleeding and often dying. The methods of torture were broken bottles being inserted into the anus, burning with cigarettes over various parts of the body, drilling holes in the tibia with an electric drill, smashing teeth and gouging eyes.35

An Irish business consultant reported that a friend saw five teenage boys and one aged eight or nine savagely beaten and then shot outside the Al-Jahra hospital. A British bank worker saw three children, their father and grandfather summarily shot in front of the mother and grandmother because two US passports had been found in their house.36 More instances could be given, but those set out above will suffice.

The unlawfulness of such action from the perspectives of both the humanitarian jus in bello itself and the general law of human rights hardly requires further comment.37 Following this press conference Sir Bernard Braine MP was reported as expressing the telling opinion that ‘Iraqi atrocities …were in danger of being forgotten against Saddam Hussein’s carefully controlled television pictures of Iraqi civilian casualties’.38 Sir Bernard’s concern remains valid at the time of writing, some seven months after the end of the conflict. Sheikah Latifah Fahed Al-Sabah, the wife of the Crown Prince of Kuwait, also received reports tallying closely with this savage image.39 The vicious response to even the most minor manifestations of disaffection from the occupation regime in no way concorded with the limited permissions contained within the jus in bello or reflected even any credible security concern; it represented simply a terror regime. One returns to the basically exploitative nature of the Iraqi invasion of Kuwait, and neither a genuine desire of ‘unification’ nor the requirements of belligerent occupancy can account for what occurred so well as this.

**LOOTING AND EXACTIONS UNDER OCCUPATION**

Historically looting has been a commonplace of belligerent occupation and has been a major concern of the jus in bello for much of the twentieth century. The Hague Land Warfare Regulations provide bluntly by Article 47 that ‘Pillage is formally forbidden’. More detailed provision is added, including restraints upon exactions other than the traditionally conceived pillage and looting. The Hague Regulations of 1907 themselves provide by Article 48 that if the occupant collects taxes it must do so, so far as possible, in accordance with the former rules of assessment and will then be bound to defray
administrative expenses to the same extent as would the legitimate government. Under Articles 49 and 51, any other levy may only be for the needs of the army or administration in the territory, and may be collected only under the written authority of the commander-in-chief; receipts must then be issued upon collection. Article 50 forbids general financial penalties to be inflicted for the acts of individuals. Under Article 52 requisitions in kind may only be demanded for the needs of the army of occupation, and then only in proportion with the resources of the country and not involving the inhabitants in any obligation to take part in military operations. Payments should be made in cash or, at least, a receipt given and the amount due paid as soon as may be possible. This latter concession was not, of course, intended as a ‘jam tomorrow’—in Lewis Carroll’s sense—cover for non-payment. It has been commented that state cash, funds and realizable securities may be taken over by the occupant, but Article 55 adds that:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Municipal property and that of religious, charitable, educational, artistic or scientific institutions is deemed ‘private’ for this purpose, and their seizure or wilful damage as well as that of historic monuments or works of art or science is forbidden by the 1907 Regulations. These restrictions are reinforced by later provisions. Geneva Convention IV of 1949, Article 53, forbids destruction of real or personal property, whether state or private or in social or co-operative ownership, unless ‘rendered absolutely necessary by military operations’. ‘Military necessity’ is invariably a difficult concept in operation, and the addition of qualifications such as ‘absolute necessity’ do not appear to be open to precise definition: it may properly be interpreted as requiring at least a particularly overwhelming demand; perhaps Jean Pictet’s idea of ‘impossibility’ of compliance with the prima facie applicable norms comes close to categorizing the standard in question.

Apart from what might be termed simple looting there has also been a long history of removal of art treasures from occupied territories. To this day ‘missing’ treasures looted during the Second World War continue to be found in sometimes extraordinary locations, or in all too many cases remain unlocated. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, requires, inter alia, that belligerents ‘prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property’. Calculated destruction is of course in one sense an even worse scourge than looting in this context. The Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict 1954 adds requirements of prevention of the export of cultural property from occupied territories and also that any state party to the Protocol should take into custody any cultural property imported into its jurisdiction from a territory under occupation. Both Iraq and Kuwait are parties to the 1954 Convention and Protocol. Looting and destruction took place on a wide scale in Kuwait, both officially organized and individually, the latter element being strikingly demonstrated by the extraordinary range of Kuwait goods found abandoned along the Iraqi army’s line of
eventual retreat from the Emirate. The official element has been commented upon to some extent above and is discussed in Chapter 8 in its particularly damaging medical dimension. Kuwaiti art and cultural treasures also suffered, in clear violation of the 1954 restrictions. Fortunately part of the very significant collection of Islamic antiquities and art held in the Dar al-Athar al-Islamiyyah museum had been despatched on a world tour a week before the invasion. However, it was reported by the director of the museum, who escaped to Jordan, that she had seen many items from the museum being loaded for transport to Baghdad.\footnote{Reporters visiting Kuwait City after the liberation found that mass destruction of cultural objects had been perpetrated. Robert Fisk stated that ‘one walks…through the smoking embers of the National Museum fired by the Iraqis…[o]r the still burning library of the Seif Reception Palace…. Outside the museum, Kuwait’s collection of historic wooden boats had been burnt to cinders.’\footnote{In the same report Fisk commented also upon the scope and variety of the general looting and destruction which had taken place during the occupation.}} The destruction and looting was of course part of the same pattern which led to the ‘scorched earth’ tactics adopted in the later stages of the occupation, including the release of an oil slick into the waters of the Gulf and the firing of the Kuwaiti oilfields (see Chapter 6). Again, no ‘military necessity’ could have justified such actions, and the violation of the \textit{jus in bello} was flagrant.

**FORCED RECRUITING**

One of the ultimate exactions from the inhabitants of an occupied territory perhaps lies in forcing them to serve in or with the occupying forces. Geneva Convention IV 1949 provides by Article 51 that ‘The occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.’

Genuinely voluntary, and uninduced, enlistment is permissible from the perspective of the \textit{jus in bello}, although highly problematic from a municipal viewpoint. Again the Second World War affords examples, notably in the case of people who greeted Axis forces as liberators from Stalinism and who served in their ranks subsequently, perhaps to discover the illusory nature of their choice in due course. Large numbers of these people who were returned to Stalinist control after 1945 suffered death as the consequence.

Persistent evidence emerged from Kuwait that attempts were made to force Kuwaiti men of military age into service in the Iraqi forces, including in some cases minors. It may be remarked in parenthesis that Protocol I Additional to the 1949 Geneva Conventions of 1977 provides by Article 77 (2) that:

\begin{quote}
The Parties to…conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.
\end{quote}

Unfortunately the problem of the child soldier has been all too obvious in some modern armed conflicts\footnote{And persistent reports were made of their inclusion in attempts at forced}
recruitment in Kuwait. The extent of actual recruitment appears to have been very limited in the event, although a number of ‘disappearances’ were reported amongst those resisting.

**THE AFTERMATH OF OCCUPATION**

Practical legal difficulties do not come to an end with the termination of an occupation. Savage reprisals against those known, or suspected, to have collaborated with the occupier frequently follow. In so far as the persons concerned are nationals of the state in question the issue would, of course, fall within the law of human rights, and especially questions of due process, rather than in the sector of the *jus in bello*. The laws of armed conflict would, however, cover foreign civilians found within the territory as a result of the conflict and also, in a rather different context, any question of trials of prisoners of war for alleged violations of the *jus in bello* during the occupation.\[^47\] After the liberation of Kuwait, international concern was expressed about the harshness of the treatment meted out to some of the Palestinian residents of the territory, in particular. The International Committee of the Red Cross itself warned Kuwait and its allies that arbitrary reprisals against, *inter alia*, the Palestinian population of Kuwait would be unlawful.\[^48\] The matter falls outside the question of the occupation *stricto sensu*, but illustrates pointedly the continuation of certain of the associated problems far beyond the duration of the belligerent occupation itself.

**CONCLUSIONS**

In any armed conflict civilians are inevitably very vulnerable to injury and harm, whether as a result of the accidents of hostilities or, indeed, calculated attack. This was clearly the case in the Gulf War in a number of ways. The civilian population who were obliged to remain in Kuwait during the Iraqi occupation clearly experienced extraordinary brutality at a personal level and harsh exaction upon economic and general levels. The *jus in bello* manifestly failed to protect them from any of this, even though much of what was done was very clearly unlawful. This raises the inevitable question of whether the law of belligerent occupation serves any useful purpose. The answer here advanced is that it does. The setting out of norms of expected conduct reinforces in itself the expectations of the community and defines the external position of a community member which chooses to defy them. This is by no means without adverse consequences, both in terms of the obstruction of the normal conduct of international relations of a state and possibly more directly. In the case of the Iraqi invasion and occupation of Kuwait the consequences were obvious in the form of the coalition military action. Subsequently it has been planned in part to attach Iraqi oil revenues for the securing of compensation for the damage done to and in Kuwait, a matter which is considered in Chapter 13. Ultimately the occupation of Kuwait adds another sorry chapter to the already long and sanguinary history of harsh occupation, emphasizing in particular the additional dangers arising where the occupant does not consider itself an ‘occupier’. The object lessons, some of which are set out above, emphasize both the continuing importance of the relevant
moderating norms in modern armed conflicts and the need for the international community to employ the various means at its disposal to press for compliance where this seems doubtful. In short, the questions raised are truly those of enforcement and maintenance, and the lesson which will go out from the 1990–91 Gulf War will be in that sense a matter for historical rather than immediate analysis. The law itself is relatively clear upon the majority of the matters arising, and the present instance of violation, gross as it admittedly was, perhaps serves to highlight the extent of its derogation from standards now accepted as the civilized expectation. That is a pale comfort indeed to those who suffered under the occupation regime but is, perhaps, a more positive pointer for the future.
Chapter 11
The role of the International Red Cross and Red Crescent Movement: problems encountered

Michael A. Meyer

The International Red Cross and Red Crescent Movement met with a number of obstacles during the Gulf crisis. Several of these will be discussed below. However, they should be seen in the context that before and during the hostilities, the Movement received support from the overwhelming majority of states, and in particular, the International Committee of the Red Cross (ICRC) was allowed to fulfil its mandate under the Geneva Conventions of 1949 by the members of the coalition.

MISUNDERSTANDING OF THE ROLE OF THE ICRC

The role of the ICRC during the Gulf crisis was at times misunderstood, and this was not confined to one side.

Attack by Mrs Thatcher

On 21 August 1990, Prime Minister Margaret Thatcher, in her first public comments on the Gulf crisis for fifteen days, ‘attacked’ the ICRC for not taking adequate action to protect foreign nationals in Iraq and Kuwait. Mrs Thatcher said that ‘it was as long ago’ as 8 August that European countries and the US collectively asked for help. She added: ‘We went again on 10 August and repeated the request and we are deeply disappointed that action has not yet been taken. The International Committee of the Red Cross can do this, of course, under their Charter.’ The cartoon by Colin Wheeler of The Independent newspaper, shown below, was published the next day.

The ICRC did not react officially to Mrs Thatcher’s criticism. However, ICRC officials were quoted in the press as being ‘stunned’. They also explained that the ICRC can only act in a country with the authority’s permission and that it had been in constant touch with the Baghdad government and with the various countries concerned since the day of the invasion. It was noted that a senior ICRC official had very recently flown to Iraq to
seek ‘to open the way for direct Red Cross assistance’ to foreign civilians in Iraq and Kuwait.8

Later on 21 August, the Foreign Office Minister William Waldegrave met Mr Cornelio Sommaruga, President of the ICRC, in Geneva. One newspaper described Mr Waldegrave as being ‘clearly discomfited by the Prime Minister’s comments’.9 The Minister said that

he had conveyed to Mr Sommaruga Britain’s frustration and anger in the face of mistreatment of its citizens, in clear contravention of the Geneva conventions [sic] protecting civilians in wartime, and asked the ICRC to redouble its efforts to gain access to them.

Mr Waldegrave said ‘he was confident the ICRC would do its utmost to secure access to Westerners’.10 The next day, having returned to London, Mr Waldegrave was quoted, under the headline ‘Red Cross attack backed’, as endorsing Mrs Thatcher’s criticism of
the ICRC, ‘whose job it is’, according to one newspaper, ‘[to] monitor the Geneva
conventions [sic] and visit prisoners of war to ensure they are treated properly’. Mr
Waldegrave stated that Mrs Thatcher ‘expressed the country’s feelings of frustration,
which I shared, that nothing appeared to be happening. I went to the ICRC to explain the
British government’s feelings. I now understand that the ICRC have to do their
diplomacy in secret.’

A different newspaper, under the headline ‘No evidence to justify Thatcher attack on
Red Cross’, suggested that it had been the ICRC’s insistence on its impartiality, in the
context of the Gulf crisis and the worldwide backing for the UN resolution on sanctions,
which had provoked Mrs Thatcher’s scorn:

It is understood that she has been particularly angered by the alacrity with
which the [ICRC] has fulfilled its mandate to assist on the exchanges of
prisoners of war between Iraq and Iran, while failing to secure access to
foreign nationals or to safeguard their security following the…invasion
[of Kuwait].

This same article said that ‘[t]he Red Cross has argued that it has done all in its power to
secure such access. It also points out that it can take no action without the agreement of
all sides in a conflict.’

The same day, an editorial stated that ‘in her press conference [on 21 August], Mrs
Thatcher was right…to urge prompt action by the [ICRC] on…behalf [of the westerners
held hostage in Iraq and Kuwait].’

The criticism of the ICRC by Mrs Thatcher, and to a lesser extent by Mr Waldegrave,
showed a lack of understanding of the limits on ICRC action. Although the ICRC has
specified rights under the Geneva Conventions 1949, including the right to visit civilian
internees (such as certain foreign nationals held in Kuwait), nevertheless, as a practical
matter, it can only exercise this right with the consent of the authority concerned.
Similarly, under the ICRC’s own Statutes (perhaps Mrs Thatcher’s ‘Charter’), the ICRC
‘may take any humanitarian initiative which comes within its role as a specifically neutral
and independent institution and intermediary’. Again, however, whilst the ICRC may
offer its humanitarian services, it remains dependent on the agreement of the authority
concerned to translate its offer into concrete action.

The criticism of the ICRC may also have reflected a misunderstanding of the legal
position of the foreign nationals in Iraq and Kuwait. Generally, the British and other third
party nationals in Kuwait at the time of the invasion and occupation, and arguably, those
forcibly transferred from Kuwait to Iraq after the occupation, were protected persons
within the meaning of Geneva Convention IV and therefore, the ICRC had a right under
that Convention to intervene on their behalf. However, British and other third party
nationals in Iraq at the period of the invasion and occupation, some of whom were
ultimately held at strategic sites, were not protected persons within the meaning of
Geneva Convention IV and therefore, the ICRC had no express right to intervene under
that Convention to offer them protection. As already mentioned, the ICRC received
many demands from the UK and other governments to help their nationals in Kuwait and
Iraq at that time. Regardless of the status of the individuals concerned under Geneva
Convention IV, and their corresponding rights to protection by the ICRC, Iraq would not give the ICRC access to them.

The ICRC acts according to principles of discretion and confidentiality; it is strictly neutral and impartial, acting solely in the interest of the victims. Although the ICRC immediately categorized Iraq’s invasion of Kuwait as an international armed conflict, and issued clear pronouncements on the applicable law before and during the hostilities, generally, the ICRC refers to legal provisions only in so far as it will help the victims. This may mean their seeking an agreement with a government to permit the ICRC to provide humanitarian protection and assistance without, however, setting out the international legal basis for ICRC action or requiring de jure recognition by the government of the applicable law and the ICRC’s rights thereunder. For such reasons, the ICRC is often able to bring humanitarian protection and assistance to victims of armed conflicts throughout the world, regardless of the strict legal position.

During August 1990 and later, the ICRC worked unceasingly to gain access to the victims of Iraq’s invasion of Kuwait. Although such contacts with the Iraqi government ultimately failed, they had more chance of success being conducted according to the ICRC’s usual method of quiet diplomacy and pragmatism.

The storm that broke out in the British media was quickly over. Mrs Thatcher, in her usual way, seemed successfully to echo the frustration of the British public over the retention of British and other foreign nationals by Iraq. It was surprising that her feeling of helplessness expressed itself in an attack on the ICRC. However, this may have been a ‘back-handed compliment’, reflecting the British government’s view of the ICRC’s reputation and capabilities. It also revealed a misunderstanding of the ICRC’s role and of the practical implementation of the Geneva Conventions, as well perhaps as of the applicable law. The media, thwarted as they were at that time of a shooting war, made do with the war of words between the ICRC and the Prime Minister. The British Red Cross received a number of critical communications, and tried to explain the practical limitations on ICRC action.

The repatriation of the prisoners of war between Iraq and Iran was woefully overdue. Following its invasion of Kuwait, Iraq needed to try to patch-up relations with its neighbour, hence the sudden decision to exchange prisoners of war after great delay. Again, the ICRC, which has no express role in such exchanges under Geneva Convention III, was only able to assist in these operations with the agreement of both authorities.

Although Mrs Thatcher’s criticism was unfortunate, and was an extra and unnecessary pressure or concern for the Red Cross and Red Crescent Movement at a time when it needed support, the effect was not long-lasting. It provided a worthwhile opportunity for the British government to have a frank exchange of views with the ICRC, which seems to have prevented later misunderstandings. It also helped to explain to the British public the limits on ICRC action. One can only conjecture on its effect on President Saddam Hussein: did it make him feel more kindly to the ICRC; or strengthen him in his resolve to refuse their entreaties for access to the foreign nationals; or enable him to regard the ICRC as weak; or perhaps it had no effect at all?

During the armed conflict, government officials of the coalition states remonstrated with the ICRC over some of their press statements, feeling perhaps that they were too neutral or even-handed. In Parliament on 31 January 1991, the Secretary of State for Defence, Mr Tom King, in response to a request to press the [ICRC] rather harder to
speak out robustly about what it knows to be the correct conditions [of prisoners of war], so that the relatives of [British POWs] can be assured...that the ICRC is [doing all it can]”, replied ‘we are bringing to bear all possible pressure and influence on the ICRC.’ However, without doubt, the most serious misunderstanding, and disregard, of the ICRC’s role occurred with respect to Iraq.

IRAQ’S INTRANSIGENCE

Despite repeated representations by the ICRC, Iraq refused to permit the organization access to Kuwaiti and other coalition prisoners of war until after the end of the conflict, and to the civilian population in occupied Kuwait, among other war victims. Why was this so?

There are a number of possible explanations for Iraq’s refusal to permit the ICRC to fulfil its humanitarian mandate. First, there is the legal argument: in the Iraqi view, Kuwait was a province of Iraq and therefore the Geneva Conventions 1949 did not apply there. Second, there is the cultural argument: the Geneva Conventions may be seen as a western document and therefore, irrelevant or anti-Islam. Similarly, the ICRC itself might have been viewed as a western institution, belonging to a state which was not neutral in the controversy. Third, and perhaps most importantly, there is realpolitik: Iraq calculated that it was not in her interest to respect the Conventions. Some possible reasons for this include: a wish to maintain harsh treatment and conditions in occupied Kuwait; fear of exposure of violations of international humanitarian law; concern that ICRC visits to prisoners of war would reveal their location; and distrust of the ICRC, with whom it had dealt during the Iran-Iraq War of 1980–8 and with whom it continued to have relations in its aftermath. What can be done to deal with such situations in future?

Will to apply international humanitarian law

The ICRC made every reasonable effort to maintain a dialogue with Iraq. However, in accordance with its principle of impartiality, it refused to act only to assist the civilian population in Iraq; the ICRC insisted that it be allowed to help other victims, notably civilians in Kuwait, as well. Moreover, as will be discussed later, approaches from different components of the Movement may have influenced the behaviour of the Iraqi authorities; could they find a Red Cross body other than the ICRC whose humanitarian objectives were less comprehensive and more in line with Iraqi interests? For whatever reason, the ICRC failed to inspire Iraq’s confidence. In this, the ICRC was not alone: the United Nations also failed in its efforts to encourage Iraq to respect international law, with the result that armed conflict ultimately proved necessary.

Common Article 1 to the four Geneva Conventions 1949 makes implementation of those treaties a co-responsibility of all the states parties, so that even if such states are not themselves involved in an armed conflict, they cannot say that breaches of the Conventions are not their concern. This obligation ‘to respect and to ensure respect’ could be developed and used regularly and more imaginatively in practice. The Geneva Conventions themselves provide mechanisms to ensure their application, such as the system of Protecting Powers. Additional Protocol I 1977 introduces the International
Fact-Finding Commission (Article 90). Mobilization of the media, and through it, of public opinion, can also be helpful. But in the end, regardless of these and other measures, the concept of national sovereignty, as shown during the Gulf crisis, can be an insuperable obstacle to the application of international humanitarian law. It is a challenge to states and to the Red Cross and Red Crescent Movement to seek ways to ensure implementation of international humanitarian law, even in the most extreme situations. As the ICRC has observed, perhaps in the new international climate, new ways can be discovered.26

**RELATIONS WITH THE UNITED NATIONS**

Although Iraq’s refusal to permit the ICRC to perform its traditional functions before the end of hostilities was the biggest obstacle confronted by the institution, another difficulty which may have more long-term effects concerns the relationship between the ICRC and the United Nations, and more specifically, between the Geneva Conventions and international humanitarian law on the one hand, and the UN Charter and Resolutions of the Security Council on the other.

On 6 August 1990, the UN Security Council adopted Resolution 661 which, to secure Iraq’s immediate and unconditional withdrawal from Kuwait and to restore the authority of the legitimate government of Kuwait, decided

> that all states shall prevent, *inter alia*, the sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products…but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait.27

> By this same Resolution, the Security Council also decided ‘that all states shall not make available to the Government of Iraq or to any…undertaking in Iraq or Kuwait, any funds or any other…resources and shall prevent their nationals and persons within their territories from removing …or otherwise making available to [the Government of Iraq] or to any such undertaking any…funds or resources and from remitting any other funds to persons or bodies within Iraq or Kuwait, except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs.’28

Specific measures to implement the economic sanctions prescribed in Resolution 661, including authority to take steps to halt all inward and outward maritime shipping, were adopted by the UN Security Council in Resolution 665 of 25 August 1990.29

In the light of such Resolutions, the ICRC warned that an embargo depriving the Iraqi people of all imports of food would not be a legal means of warfare.30 The restrictions embodied in the Resolutions fell below the humanitarian standards set out in Article 23 of Geneva Convention IV. This article provides, *inter alia*, that each contracting state, whether or not a party to the conflict, must permit the free passage of all consignments of
essential foodstuffs for children under age fifteen, expectant mothers and maternity cases.\(^{31}\)

Resolution 666 of the Security Council, adopted on 13 September 1990, modified the stringencies of the earlier Resolutions.\(^{32}\) However, it ‘emphasized that it is for the Security Council, alone or acting through the [so-called Sanctions] Committee, to determine whether humanitarian circumstances have arisen’.\(^{33}\) The Resolution also directed the Committee to bear in mind that foodstuffs should be provided through the United Nations in co-operation with the [ICRC] or other appropriate humanitarian agencies and distributed by them or under their supervision in order to ensure that they reach the intended beneficiaries.\(^{34}\)

In practice, the ICRC never asked the Sanctions Committee or the Security Council about whether it could import humanitarian items into Iraq. The ICRC only notified them of such actions, acting on the basis of Article 23 of Geneva Convention IV and of Article 70 of Additional Protocol I.\(^{35}\) When ICRC convoys entered Iraq from Iran during the hostilities, it was important for the ICRC to act pragmatically and openly. The ICRC also wished to avoid a debate on whether there is a hierarchy of norms of international law, contrasting the Geneva Conventions with the UN Charter and Resolutions of the Security Council.\(^{36}\)

In future, the international community will need to harmonize the political and legal positions concerning the use of civilian food deprivation as a method of warfare.

The ICRC was correct to maintain its independence as a strictly humanitarian, neutral and impartial institution, with a mandate to perform certain tasks under the Geneva Conventions of 1949. Yet, also looking to the future, the ICRC should and will be prepared to participate in closer co-ordination of humanitarian aid, such as with the UN, without, however, compromising its independent status and special mandate under international humanitarian law.\(^{37}\)

**TENSIONS WITHIN THE RED CROSS AND RED CRESCENT**

So far, this chapter has concentrated on the ICRC, which is quite natural, given that institution’s recognized role during armed conflicts. However, the Red Cross and Red Crescent Movement is composed not only of the ICRC, but also of national Red Cross and national Red Crescent societies, and of the International Federation of Red Cross and Red Crescent Societies (‘the Federation’). Together, these three components constitute a worldwide humanitarian movement; in pursuing their common mission, they are guided by seven Fundamental Principles, including humanity, impartiality and neutrality. Although each component is independent, they co-operate with each other, and their respective roles are set out most notably in the Statutes of the International Red Cross and Red Crescent Movement 1986.\(^{38}\)

Like most organizations or families, the members of the Red Cross and Red Crescent do not always agree. Even when the roles of members are clearly laid out, such as in the Agreement between the ICRC and the Federation of 1989, differences can still arise, for
example, because a situation can be categorized in more than one way, or because components have different priorities.

The situation can be further complicated when provisions of the Geneva Conventions or of UN Security Council Resolutions, although mentioning the ICRC by name, also give other impartial humanitarian organizations the opportunity to undertake certain humanitarian tasks for the benefit of victims of armed conflicts, subject to the consent of the parties concerned. If the ICRC cannot operate in a particular situation, then why not let the Federation or a National Society do so? After all, is not the Movement’s main concern to assist the victims; does it really matter which component of the Red Cross and Red Crescent takes action?

These are difficult questions, and at present, the Movement has no agreed answers. In the early stages of the Gulf crisis, it was reported that the ICRC and the Federation were engaging in separate negotiations with the Iraqi authorities. The ICRC felt that this was undermining its own efforts to obtain access to all the victims of the conflict. The Federation, being composed of national societies from every region of the world, had its own perspective and believed that it could have helped the ICRC gain access to the victims, even if this meant initiating a Federation relief operation, followed then by ICRC protection activity.

National societies from Arab countries also believed that if given the chance, they could have helped to clear the way for the ICRC to gain a sympathetic hearing in Baghdad.

At a time when the ICRC was unable to gain access to occupied Kuwait, or to assess the food situation in Iraq, the Sanctions Committee of the UN Security Council authorized the shipment of food by India and the then Soviet Union on condition that the shipments were accompanied by officials of the respective national societies, who, in cooperation with the embassies of those countries, supervised the distribution of foodstuffs in Kuwait and Iraq.

Later, individual national societies sent teams to Iraq, to bring medical assistance, comforts and family messages to their citizens held there as ‘guests’ (hostages), when the ICRC was failing to gain access to them.

On 13 September, following a request by the Iraqi Red Crescent, the Federation agreed to supply medicines for the most vulnerable groups of civilians in Iraq. The Federation’s Secretary-General said that ‘Medicines are not subject to UN sanctions, but we shall make every effort to establish real need and to see that supplies reach their intended destination.’ Several national societies had previously expressed an interest in making supplies available, and following a visit by a Federation medical delegate to work out distribution and monitoring, a consignment of drugs donated by the Red Cross Societies of Denmark, The Netherlands and Sweden, was sent in November, through the Jordanian Red Crescent. At the same time, the ICRC was maintaining its position that a humanitarian solution was required to help all the persons in Kuwait and Iraq requiring protection and assistance.

This picture of apparent rivalry and confusion should not be overstated. Overt rifts were soon healed. On a formal level, the ICRC and the Federation issued a statement on ‘their common understanding concerning their respective roles and responsibilities in the affected countries’ on 15 September. Moreover, a Memorandum of Understanding between the two institutions was signed on 16 January 1991 creating a framework for
international action by the Movement under the general direction of the ICRC. Under this document, the ICRC assumed responsibility for specific tasks conferred on it by the Geneva Conventions and the Statutes of the Movement, in particular in the fields of protection, tracing, dissemination and relief actions in the conflict zone. The Federation, and under its co-ordination, national societies, assumed specific actions in non-conflictual areas, such as for refugees, displaced persons and wounded evacuated from the conflict zone. The ICRC also agreed to invite the Federation and national societies to undertake specific relief actions within the conflict zone whenever possible.

On an operational level, there was also success. For example, in August and September 1990, the ICRC, the Jordanian Red Crescent and the Federation co-operated in establishing reception and first aid centres near the Iraqi-Jordanian border to assist the some 750,000 civilians of different nationalities who fled Kuwait and Iraq following the invasion. The Jordanian Red Crescent, the Federation and the national societies of the countries of origin of these people, such as Egypt, Pakistan, the Philippines, Syria and Yemen, worked with organizations outside the Movement, such as the International Organization for Migration (IOM), to facilitate their repatriation and reintegration into their home societies. During the conflict, national societies provided much needed material and other assistance to the ICRC, including medical personnel, field hospitals and funds. The Federation was represented on the ICRC’s special Task Force for the Gulf Region.

The Red Cross and Red Crescent Movement as a whole had integrated operations during the conflict, which undoubtedly helped the victims. On 25 March 1991, at the request of the Federation, the framework for action agreed under the Memorandum of Understanding of 16 January was terminated. This was probably as a result of the end of the international conflict and, at least in the view of the Federation, the end of a need for entrusting the general direction of Red Cross/Crescent action to a specifically neutral and independent institution. Following a dispute over a Federation appeal for Iraq, a new Memorandum of Understanding between the ICRC and the Federation was signed on 8 April 1991. Since then, co-ordination of Red Cross and Red Crescent action in the Gulf region has continued, to the benefit of the affected populations.

**PROBLEMS FACED BY THE BRITISH RED CROSS**

The British Red Cross experienced several difficulties. First, there was uncertainty about its relations with the Order of St John, another of the officially recognized Voluntary Aid Societies under Article 26 of Geneva Convention I. By virtue of a 1951 Agreement between the two bodies, when war occurs, the Order, in effect, joins with the British Red Cross to form a ‘British Red Cross Society War Executive’. The Red Cross takes precedence because of the world-wide network of the Red Cross and Red Crescent Movement, which can provide very important contacts during wartime, and because of the restricted use of the Red Cross designation and emblem. However, the Order understandably did not wish to give up its separate identity, and therefore, it insisted on interpreting ‘war’ as meaning officially declared war, rather than an armed conflict or enforcement action involving British forces such as that which occurred in the Gulf.
Eventually, both bodies agreed to form a joint ‘Voluntary Aid Society Emergency Executive’, but to continue to use their separate emblems and to fund-raise separately. Their personnel were on standby in the UK to assist the military with casualties from the conflict. Joint operations rooms were set up nationally and at county level to enable swift action to be taken. Ten welfare officers from the two organizations were working outside the country alongside the medical services of the Army and the Royal Air Force.

The Gulf crisis demonstrated that the British Red Cross lacked sufficient medical and nursing personnel to carry out its duty as a Voluntary Aid Society to act in support of the medical services of the armed forces. There are historical reasons for this, dating from the establishment of Britain’s National Health Service. The Society is still considering ways to rectify this problem.

British Red Cross personnel were unable to join Red Cross/Crescent teams in the region because of the UK’s involvement in the conflict as a co-belligerent. This raised the question of the present-day viability of voluntary aid workers on or near the battlefield as proposed by the founder of the Movement, Henry Dunant, in his book *A Memory of Solferino*, and as accepted in Geneva Convention I and its predecessors. Consequently, the British Red Cross focused its efforts on giving cash and kind to help International Red Cross/Crescent actions. It also was very active in spreading knowledge both of the Geneva Conventions 1949 (for which journalists showed an insatiable appetite) and of the work of the ICRC, and it assisted several government departments and the armed forces in implementing the United Kingdom’s obligations under international humanitarian law.

Finally, the British Red Cross encountered a problem which faces many national Red Cross and national Red Crescent societies: it is expected to be neutral on the right side. The British Society provided advice and assistance to the families of Iraqi prisoners of war and civilians detained by the UK authorities. Many of these families faced anxieties about finances and accommodation, and insecurity about their immigration status. They also did not know where the person detained had been taken. The British Red Cross, in work involving fifteen of its branches, acted as the main channel of communication between the prisoners and their families, as well as supplying reassurance and practical guidance. 49 There was an initial lack of understanding among the public of the neutral role of the Red Cross in relation to such people, which the Society was able to combat.

At the same time, the Society helped to give moral support to the families of British service personnel, in particular of prisoners of war and of those missing in action.

**FEARED CONTROVERSY OVER THE EMBLEM**

**Background**

‘Red Cross’ is not only the name of an international movement or organization: it is also the name of an emblem with a special significance under public international law.

The red cross emblem, being a red cross on a white ground, is the internationally agreed symbol of protection during armed conflicts. It is used as a sign of neutrality and immunity, enabling the wounded and sick, and those who care for them, to be respected, even on the battlefield. The emblem is principally the distinctive sign of the medical
services of the armed forces. It identifies medical units and establishments, such as ambulances and hospitals, as well as the personnel and material attached to them, including doctors, nurses, chaplains, stores and equipment.\(^{50}\)

The red cross emblem was adopted as the protective sign of military medical personnel in the original Geneva Convention on the Amelioration of the Condition of the Wounded in Armies in the Field of 1864.\(^{51}\) The reasons for this are not entirely clear, but the rationale usually given, and indicated in successive versions of the Geneva Wounded and Sick Conventions since 1906, is that the emblem was chosen as a compliment to Switzerland, being the reverse of the colours of the Swiss flag. Switzerland was deemed worthy of such recognition as the national state of the promoters of the Geneva Conventions (who also founded what has become the Red Cross and Red Crescent Movement) and also because the Swiss government convened the diplomatic conference which led to the 1864 Convention. Whatever the origin of the emblem, its purpose was to be the visible manifestation of the protection accorded by the Geneva Convention to persons and objects. The red cross emblem was intended to be a universal symbol, appealing to all, representing impartial aid to wounded soldiers, regardless of the side to which they belong. It certainly was not intended to be identified with any particular religion or religious belief.\(^{52}\)

However, in many countries where the predominant religion is Islam, the red crescent emblem, being a red crescent (facing east or west) on a white ground, is substituted for that of the red cross. There are historical and cultural reasons for this. The divergence dates back to the Serbo/Russian-Turkish war of 1876 when soldiers of the then Ottoman Empire mistook the emblem of the red cross for the badge of the Crusaders: this threatened the protective value of the red cross emblem and led Turkey to use the red crescent emblem in its place.\(^{53}\) The red crescent emblem was first formally recognized by states in the Geneva Wounded and Sick Convention of 1929,\(^ {54}\) it has equal status with the red cross and, since 1986, has been included in the name and sign of the International Red Cross and Red Crescent Movement.\(^ {55}\)

Historically the ICRC has discouraged the use of additional protective emblems, fearing that a multiplicity of signs would undermine the universality of the red cross and weaken its efficacy, thus risking the immunity to which the wounded and medical personnel should be entitled.\(^{56}\) At the same time, however, it was important for the Geneva Convention and its successors to achieve universal acceptance. In practice, whereas the use of two protective emblems has not usually been a difficulty during armed conflicts, the existence of two signs has not been a unifying factor within the Red Cross and Red Crescent Movement.\(^ {57}\)

**The legal position**

Article 38 of Geneva Convention I 1949 stipulates that the emblem of the red cross on a white ground should be the emblem and distinctive sign of the Medical Service of the armed forces. Subsequent provisions in Geneva Convention I and in the three other Geneva Conventions of 1949 make it clear that the use of only one emblem is envisaged.\(^ {58}\)

Article 38 also provides that in the case of countries which already use the red crescent on a white ground in place of the red cross emblem, that emblem is also recognized by
Geneva Convention I. Thus, according to the Convention, those states which had adopted the red crescent emblem before 1949 could continue to use it as an accepted sign for the Medical Service of their armed forces, but it implies that after 1949, the red crescent emblem should not be so used by any other countries. The object of this was to try to limit the number of exceptions to the red cross emblem. In practice, however, a number of new states which had not existed in 1949, and one state which did so exist, have adopted the red crescent emblem, apparently without opposition from the other states parties to Geneva Convention I.

**Concern for local sensibilities**

The foreign troops sent to Saudi Arabia following Iraq’s invasion of Kuwait in August 1990 needed to be sensitive to the local religious customs. Islam, of the Sunni variety, is the predominant religion; the main sect there, the Wahhabis, who have a long association with the Saudi royal family, have strict rules, including the forbidding of tobacco and alcohol. Newspaper reports indicated that Christian emblems were banned, even the wearing of crucifixes being heavily discouraged.

In these circumstances, it was very important that the presence of coalition forces from Europe and North America should not result in charges of ‘Western degeneracy’, leading to the collapse of the coalition and possibly to the destabilization of the Kingdom. Concern about use of the red cross emblem must be seen against this background.

**Legal questions**

**Change of emblem**

Initially, it appears that British forces were advised by the Saudi government that they would not be allowed to use the red cross in Saudi Arabia; specifically, they were refused permission to display red cross flags and stickers on their medical centre and medical vehicles and told to use the red crescent emblem instead. This gave rise not only to the practical problem of locating or having manufactured sufficient quantities of flags, stickers and other items bearing the red crescent emblem, but also to an interesting legal question: can the medical services of armed forces, which has been using the red cross emblem, replace the red cross emblem with the red crescent emblem?

Although Article 38 of Geneva Convention I could be interpreted as requiring medical services of armed forces which use the red cross emblem to continue to do so, nevertheless, no provision within the Geneva Conventions deals specifically with this question. There are reasons in support of maintaining the red cross emblem, such as that both the red cross and the red crescent provide equal protection and should be considered as neutral in every respect, and therefore, a decision to change emblems may be said to undermine this equality and neutrality. On the other hand, the object of using the red cross or the red crescent emblem is to protect medical personnel and objects, and thereby, to protect the sick and wounded, in the event of armed conflict. A technical breach of Article 38 which enhances the possibility of such protection, although not ideal, could be said to be in keeping with the humanitarian spirit and purpose of the Geneva Conventions 1949, and thereby, from a practical view, be acceptable.
In the event, none of the medical services of the armed forces involved in the Gulf conflict seems to have changed their previous practice and used a different emblem. If they had, other necessary considerations would have been the relevant national legislation on use of the emblem; the effect of such a change on public opinion at home, and the views and practice of their coalition partners; it also would have been prudent to notify the adverse party.

**Use of both emblems**

A second legal question was whether or not medical units and establishments could be marked with both protective emblems? Concern existed that wounded soldiers from countries which use the red crescent emblem might not recognize the red cross emblem. The views of the Saudi authorities and concern about whether Iraq would respect the red cross emblem were additional factors.

The Geneva Conventions provide for the use of one emblem at a time. The view could be taken that both the red cross emblem and the red crescent emblem are universal symbols, and therefore, it is not only illegal but also unnecessary and potentially detrimental to the integrity or status of either emblem for both to be displayed simultaneously by the medical services of an armed forces. Also, from a practical view, a combination of two emblems is much less visible from a distance than a single sign, thus decreasing the protective value of the marking or display. Moreover, in situations where there is intolerance with respect to either the red cross or the red crescent, one wonders whether the two emblems used together would be more readily accepted.

Again, however, the view could also be taken that the strict application of legal provisions must not obstruct solutions capable of ensuring the achievement of the objectives laid down in those provisions, when circumstances so require. By this reasoning, a double emblem, or the display of both emblems, could be used if it proves to be the most effective way of protecting persons and property covered by the Geneva Conventions.

In practice, it seems that the only circumstances in which medical units of the British armed forces displayed both emblems was when they were involved in a joint medical unit with the Saudis, when both the red crescent and the red cross flags were displayed.

**Policy for the medical services of the British armed forces in the Gulf War**

The Gulf situation presented some unusual circumstances for use of the protective emblems prescribed under the Geneva Conventions. Although various proposals were made before the beginning of hostilities, the policy adopted for the medical services of the British armed forces seems to have been that medical units were required to display the red cross emblem as normal; they also had the option to display both the red cross and the red crescent emblem; however, they were unable to display the red crescent emblem alone. In practice, during the hostilities, it appears that only the red cross emblem was used, with the exception of the joint medical facilities run with the Saudis when both flags were displayed.
Other armed forces

United States forces did not use the red crescent or a double emblem, and neither did the medical services of other coalition members which normally use the red cross emblem. Similarly, medical services of armed forces which usually use the red crescent emblem made no change, with the exception of the joint Saudi-British medical units mentioned above.

ICRC

The ICRC used its customary red cross emblem. At one point, low-level Saudi customs officers refused the passage of ‘books’ (actually copies of the texts of the Geneva Conventions 1949 and their Additional Protocols 1977) displaying a red cross. However, the problem was solved after a few days and ‘regular’ copies of the Conventions and Protocols were distributed without any problem.

Appraisal

Although there was concern about the use of the red cross emblem in Saudi Arabia, in the end, the red cross emblem continued to be used in most circumstances, the only exception being the joint medical facilities of the British and the Saudis when both the red cross and the red crescent emblems were displayed. There were no reports of abuse of either emblem; all the parties to the conflict appear to have respected the protective significance of both distinctive signs. This practice might be interpreted as helping to reaffirm the acceptance of both the red cross and the red crescent emblems as universal symbols of protection and of neutrality. The exception made by the joint British-Saudi medical units could be considered as being an attempt by the states concerned to ensure that the humanitarian object of the Geneva Conventions was attained, although sensitivity to local sensibilities may well also have been a factor. The red cross emblem, in particular, seems to have emerged strengthened by the Gulf War, having been accepted for its true meaning in an area which uses the red crescent.

GENERAL EVALUATION

The main obstacles to Red Cross and Red Crescent action during the Gulf crisis may be considered to be misunderstanding or lack of knowledge; disregard for international humanitarian law, based on notions of national interests or sovereignty, and within the Movement itself, perhaps a lack of flexibility, of sensitivity and of selfless co-operation. It is still too early to tell if international humanitarian law has been weakened by Iraq’s disregard or strengthened by its reaffirmation in Resolutions of the Security Council and its application in practice by the Coalition forces. The fact that Iraq complied with the law after the end of hostilities can be interpreted to support both contentions, especially when considering its apparent disregard for the application of Common Article 3 in the internal conflicts following the Gulf War. The holding of an International Conference of the Red Cross and Red Crescent, involving representatives of the
components of the Movement and of the states parties to the Geneva Conventions, could be important in giving renewed backing both to international humanitarian law and to the Red Cross and Red Crescent.\(^7\)

A Study on the Future of the Movement, approved by a statutory body of the Red Cross and Red Crescent in November 1991, may also help to improve cohesion and co-ordination among the components, and enable the Movement to face the challenges of a changing world.\(^1\)

Despite the difficulties during the Gulf crisis, the ICRC safeguarded its long-term credibility by maintaining its strict neutrality, independence and impartiality. It maintained a dialogue with all the parties to the conflict, and as far as possible, undertook protection and assistance activities. The Federation and national societies also performed vital humanitarian service. During the period of the conflict, Red Cross and Red Crescent action was properly co-ordinated and directed solely to assisting the victims, in accordance with the Movement’s ideals and mission. To that extent at least, it may be said that the Red Cross and Red Crescent ‘had a good war’.
Chapter 12
Liability for war crimes
Françoise J.Hampson

As for the Geneva Convention [sic], I think it should be done away with at once. It has never been adhered to and to solemnly lay down rules for war merely adds credence to the notion that killing is some sort of manly sport.
(Beryl Bainbridge, London Evening Standard, 21 February 1991)

INTRODUCTION

On 25 September 1990, following the occupation of Kuwait, the United Nations Security Council confirmed the liability of Iraq and individual Iraqis for grave breaches of Geneva Convention IV of 1949 and invited states to collect substantiated information about grave breaches and submit it to the Security Council. The claim of international law is that, irrespective of the lawfulness of the resort to armed force, during an armed conflict or military occupation rules of law regulate the conduct of parties to the conflict. The United Nations and its members were asserting that both individuals and the state could be held responsible in international law for the violation of those rules.

The origins of the idea are respectably ancient but the most famous recent example of proceedings based in violations of the laws of war are the Nuremberg and Tokyo War Crimes Trials. The court martial of Lieutenant William Calley for his part in the My Lai massacre suggests that what is at issue can properly be described as law, and not merely as victors’ justice masquerading as law.

This chapter will consider what is meant by ‘war crimes’ and who can be held legally responsible for such actions. Acts alleged to have been committed in three different situations will be considered, with a view to establishing whether they constitute war crimes. The first situation is the Iraqi occupation of Kuwait; the second, the action of the Iraqi forces during the course of hostilities between them and the coalition forces, and third, the actions of the coalition forces themselves. Finally, brief consideration will be given to the desirability and/or practicability of subjecting those accused to trial either by a domestic court or by an international tribunal, created for the purpose.

‘WAR CRIMES’

Article 6 (b) of the Nuremberg Charter defined war crimes as ‘violations of the laws or customs of war’. This distinguished war crimes in the strict sense of the term from other concepts such as crimes against humanity or crimes against peace. The latter were
included in the charges laid against some of the defendants in the Nuremberg Trial. Such charges can aptly only be laid against the political leadership of a state. This chapter will be concerned with war crimes only in the strict sense.

‘Violations of the laws and customs of war’ potentially cover a very wide range of different types of violations. At the lowest level, the commandant of a prisoner-of-war camp is technically in violation of Geneva Convention III if he fails to display a copy of the Convention in the language of the prisoners. Further up the scale is the use of a weapon that causes ‘unnecessary suffering or superfluous injury’ to a small number of enemy combatants, or an attack against a relatively insignificant military objective during which fifty civilians are killed. At the top of the scale would be a wilful attack on civilians or on a hospital. All these represent, or may represent, violations of the laws or customs of war, but are they ‘war crimes’?

It is necessary to distinguish between two discrete issues. The first is the definition of war crimes and the second is the consequences which flow from the characterization of an act as a war crime. It is submitted that, whilst all violations of the laws or customs of war are war crimes, the consequences vary depending on the type of war crime involved. There are at least three different types of war crimes. There are first ‘grave breaches’ of the Geneva Conventions of 1949. Then there are ‘serious breaches’ of the Geneva Conventions and of other applicable laws and customs. Finally, there are minor breaches of the rules. These three groups are distinguished not merely by the quality of the action involved and the numbers affected, but by the legal consequences which flow from the actions.

‘Grave breaches’

This is a technical term applied to certain breaches of the Geneva Conventions of 1949 and Protocol I of 1977. It, therefore, does not apply to breaches of the Regulations annexed to Hague Convention IV of 1907, however serious the violation in terms of the suffering caused or the number affected, unless the action is also a ‘grave breach’ of the Geneva Conventions. It similarly does not apply to violations of other rules, whether found in treaties or customs.

The actions defined as ‘grave breaches’, in the four Conventions at least, have two things in common. They must be performed wilfully or, at the very least, intentionally and against the different groups of ‘protected person’ protected by each Convention. The actions can constitute a grave breach where only one person is affected by them, but the mental element required is likely to mean that the act forms part of a practice which, in turn, means it is likely to affect many people at one time or to be repeated. Article 11 (4) of Protocol I extends the concept by expressly applying both to certain wilful acts or omissions, while Article 85 includes conduct forming part of the hostilities.

The High Contracting Parties to the Geneva Conventions are under an obligation ‘to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed’ a grave breach of the Convention. They are also obliged ‘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 nationality, before its own courts.’ It can hand over a suspect for trial by another party. In other words, there is no need for a connecting factor between the suspect and the country
in which he is made to stand trial. Furthermore, the state will be in breach of its obligations if it does not ensure that its courts have jurisdiction in such circumstances.  

‘Serious’ violations of the Geneva Conventions

As a term of art, the concept of a ‘serious violation of the Conventions or of... Protocol [I]’ is found in Article 90 of Protocol I of 1977, where the recently established International Fact-Finding Commission has jurisdiction to ‘enquire into any facts alleged to be a grave breach...or other serious violation’ of the Conventions or Protocol.  

The Geneva Conventions themselves divide breaches into ‘grave breaches’ and ‘all acts contrary to the provisions of the present Convention other than the grave breaches’ as defined. The obligation with regard to other breaches is merely that parties ‘shall take measures necessary for the suppression of all acts contrary to the provisions’ of the Conventions. Whilst this may include legislative provision enabling the state to punish alleged offenders, it is more clearly directed to preventive measures and to putting an end to conduct and activities which are contrary to the provisions of the Conventions. This suggests that the obligation is primarily concerned with the state’s actions in relation to those over whom it has control at the time, notably its own forces.

It has been suggested that ‘since the grave breach provisions encompass all the more serious war crimes, it seems likely that, in future, war crimes trials will be limited to grave breaches’. In the Gulf conflict, however, serious war crimes were committed which did not amount to grave breaches. If states wish to ensure that any party can punish such violations, it is necessary to define punishable war crimes more broadly than as ‘grave breaches’. It may nevertheless be thought inappropriate to institute criminal proceedings in relation to every violation of the laws or customs of war. In that case, some formulations such as ‘serious violations’ may need to be adopted, or Starke’s proposal that punishable violations should be limited to acts condemned by the common conscience of mankind by reason of their brutality, inhumanity or wanton disregard for property rights unrelated to reasonable military necessity.

Other violations of the laws or customs of war

As seen above, High Contracting Parties are obliged to take measures necessary for the suppression of all acts contrary to the Geneva Conventions, even if they represent neither ‘grave breaches’ nor ‘serious violations’. The obligation is that of the state. The Conventions do not provide for an internationally recognized personal criminal responsibility in such cases. In implementation of its obligations, the state is likely to make such acts punishable under its criminal law, or subject to disciplinary proceedings or criminal sanctions under military law.

Similarly, the state is held responsible for breaches of other treaties dealing with belligerent rights. Under the 1907 Hague Convention IV, for example, ‘A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.’ This is reinforced by the stipulation that ‘Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.' State responsibility is tortious or delictual in character, not criminal.
This suggests that any violation of the laws or customs of war may be a ‘war crime’, in the sense of an internationally recognized wrong. ‘Grave breaches’ of the Geneva Conventions and ‘serious violations’ of the laws or customs of war entail individual criminal responsibility and state responsibility for an international delict. Other violations of the laws or customs of war only entail state responsibility, but this is without prejudice to the right of the state to punish the individuals concerned if the action was in breach of national criminal or military law. 19

It is necessary to mention briefly another feature of the law relating to individual criminal responsibility. An alleged ‘serious violation’ or ‘grave breach’ is usually claimed to have been carried out by a small group within the armed forces. Armed forces are characterized by their rigid command structures. 20 Those alleged to have committed a ‘grave breach’ may claim that they were ordered to do so. Conversely, it may be argued that their commanders knew what was going on and did nothing to prevent it. These situations raise the following questions: is there a defence of ‘superior orders’? What is the scope of the obligation of a commander; in particular, is he criminally liable where either he knew of the commission of a grave breach and did nothing to prevent it or where he did not know but ought to have known of a likely commission of a grave breach?

Given the limitations of space, it is necessary to proceed by way of assertion, rather than discussion. The British position on the question of superior orders seems to have changed during the course of the Second World War. 21 At the outset, it was recognized that superior orders could constitute a defence. By the end of that war and by the time the Nuremberg Tribunal was sitting, superior orders did not constitute a defence but might be relevant in mitigation of sentence. The individual is required not to obey orders which are patently illegal. 22 That appears to be the current position. 23

The question of command responsibility was a central issue in the Yamashita trial. 24 On the basis of that case, it would appear that a commander is responsible for grave breaches of which he had knowledge or of which he ought to have had knowledge. The former may present problems of proof on the facts, but the latter also raises a variety of legal difficulties. It could be argued that a commander should only be responsible where the facts were of sufficient notoriety or involved breaches on such a scale that alleged ignorance of the violations must, in effect, have been wilful. At the other end of the spectrum, a commander could be held responsible for failing to institute effective mechanisms to prevent violations and to ensure that any possible breach was reported to him.

The provisions of the Geneva Conventions on criminal responsibility only require proceedings to be brought against those who commit grave breaches or who order their commission. Nevertheless, the obligation of states to ‘take measures necessary for the suppression of all acts contrary to the provisions’ of the Conventions and to disseminate the provisions of the Conventions, particularly in programmes of military instruction, and to ensure that those who, in war, will have ‘responsibilities in respect of protected persons’ are instructed as to the legal provisions, all suggest that there is an obligation to prevent violations. That requires the institution of effective mechanisms to enable a commander to take action where there is a risk of violations. 25

The situation is clarified in Additional Protocol I. The treaty, which was not applicable during the Gulf War since neither Iraq nor the US or UK were formally parties to it,
makes it clear that responsibility can result from a failure to act. Under Article 86, superiors are not absolved from responsibility if

they knew, or had information which should have enabled them to conclude in the circumstances at the time [the subordinate] was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Article 87 of the Protocol goes on to spell out the duty of commanders ‘to initiate such steps as are necessary to prevent violations and to initiate disciplinary or penal action in the case of alleged violations’. It is submitted that Protocol I is, in this respect, merely reiterating the essence of the requirements of customary international law, as reflected by the *Yamashita Case* and the investigation into the *Sabra and Shatilla Camp Massacre* and which is contained, by necessary implication, in the Geneva Conventions themselves.

It is now possible to examine the three situations which arose in the conflict in the Gulf, with a view to determining whether war crimes were committed and, if so, of what type.

**THE IRAQI OCCUPATION OF KUWAIT**

The Geneva Conventions became applicable between Iraq and Kuwait on 2 August 1990. It is submitted that the relevant provisions of Hague Convention IV also became applicable on that date by virtue of the *de facto* conflict and subsequent occupation.

**Protected persons**

Most of the protection afforded by the Fourth Geneva Convention applies to ‘protected persons’. These are persons ‘who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.’ This definition means that Kuwaitis, foreigners and stateless Palestinians who were long-term residents of Kuwait were ‘protected persons’.

British citizens in Kuwait were ‘protected persons’. The British citizens in Kuwait at the time of the invasion included military personnel seconded for service with the Kuwaiti armed forces as military advisers. They were not part of the Kuwaiti armed forces. In those circumstances, and assuming that they did not take a direct part in any hostilities against Iraq, they would not qualify as prisoners of war; they would have to be treated as ‘civilians’ and protected persons under Geneva Convention IV. They were eventually allowed to return to the United Kingdom before the outbreak of hostilities.

‘Protected persons’ deported to Iraq retained that status whilst in the power of that same belligerent. They could only lose that status by ceasing to be within its power, either by returning to their home state or by coming into the power of a different, non-belligerent, state.
The status of British citizens who were at all times in Iraq is less clear. They became ‘protected persons’ upon the outbreak of hostilities on the night of 16/17 January 1991, but a question remains as to their status between 2 August 1990 and the outbreak of hostilities. Article 4 of the Fourth Geneva Convention goes on to provide that ‘nationals of a neutral State..shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.’ The United Kingdom did not break off diplomatic relations with Iraq until January 1991. On the one hand, they could be said to have been nationals of a neutral state in the territory of a party to the conflict (not occupied territory) with which their home state had diplomatic relations. On the other hand, it could be argued that the United Kingdom did not have ‘normal’ diplomatic representation in Iraq in that period, or that the Convention became applicable once the United Kingdom was identified as a government ‘co-operating with the Government of Kuwait’.

Under Geneva Convention IV, the most important provisions concerning protected persons include:

1. The right to humane treatment and protection from violence and of the honour of women (Article 27).
2. Protected persons may not be used to render areas immune from military operations (Article 28).
3. Protection from reprisals and from punishment for offences they have not personally committed (Article 33).
4. The taking of hostages is prohibited (Article 34).
5. Individual or mass forcible transfers and deportations of protected persons to the territory of the occupying power or to any other country are prohibited (Article 49).
6. The right to leave the territory of the power in whose hands they are (Article 35) or occupied territory (Article 48). The only restrictions on their right to leave are those which may be imposed if their departure would be contrary to the national interests of that power (Article 35) but, if so, there must be proper procedures and the restrictions cannot be exercised in an arbitrary manner.

The prohibition of the taking of hostages in Geneva Convention IV is absolute. It has been argued that it was previously lawful, in certain limited circumstances, to take and kill hostages and reprisal prisoners in occupied territory. Article 34 of Geneva Convention IV was specifically designed to put an end to the practice of the two World Wars when hostages ‘were imprisoned, often put in solitary confinement, deported and in many cases executed without previous warning or trial’.

In connection with the prohibition on using protected persons to render areas immune from military operations, Pictet explains that it was designed to prevent the belligerents from ‘compelling civilians to remain in places of strategic importance (such as railway stations, viaducts, dams, power stations or factories), or to accompany military convoys, or again, to serve as a protective screen for the fighting troops’.

The taking of protected persons as hostages, and their unlawful confinement, are grave breaches of the Convention, as is wilfully causing death, injury or suffering to a protected person. Using them to render certain areas immune from military operations might be regarded as evidence of ‘wilfully’ causing any resultant harm. An order to perform an action which amounted to a grave breach might be regarded as patently illegal.
In examining the conduct of Iraqi forces in Kuwait towards protected persons, it is important to treat allegations with some caution, however well attested they appear to be. It was alleged that babies were left to die when their incubators were looted. Physicians for Human Rights (UK), however, found no evidence of such looting. It has been reported that the young woman who gave alleged eye-witness testimony to a US Congressional hearing was in fact the daughter of the Kuwaiti Ambassador to the USA. There is, nonetheless, considerable evidence of acts in breach of Geneva Convention IV having been perpetrated against protected persons.

The holding of certain foreign nationals against their will as hostages is a grave breach of the Convention, both in itself and probably as unlawful confinement. Their transfer to Iraq was also a grave breach. Certain male hostages gave accounts of being held at chemical weapons and other armaments factories and nuclear centres. This represents a breach of Article 28—probably a grave breach—as unlawful confinement. There were complaints of unprovoked punching of hostages by guards. This would be a breach of Article 27 of Geneva Convention IV, though probably not a grave breach. The wife of a member of the British military liaison team in Kuwait complained that she had been indecently assaulted by an Iraqi soldier. That would be a violation of the same provision. Whether it was a grave breach would depend on the nature of the assault. For the most part, Europeans and Americans were not treated badly, but there are allegations that Filipino and Indian women were raped as a matter of routine.

The Kuwaiti ambassador in London alleged that Iraq had forcibly conscripted into its forces Muslims from other nations such as Egypt, Yemen and Sudan. An occupying army is forbidden to conscript into its ranks the inhabitants of occupied territory, for they cannot be forced to swear allegiance to a hostile power: to do so is a grave breach of Geneva Convention IV. The same is true of those with enemy nationality who are protected persons and who are in the territory of a belligerent state. Conscription of foreigners in Kuwait or of those taken from Kuwait to Iraq between 2 August 1990 and 16/17 January 1991 and of foreigners in Iraq who were protected persons after that date was therefore unlawful. Egypt contributed to the coalition forces, but Sudan and Yemen did not. After the start of the hostilities, Egyptians in Iraq would have become protected persons, and if any had been conscripted into the Iraqi forces before that date, Iraq would have been obliged to release them. Any conscription of Egyptians after the start of the war would have been a grave breach.

As far as the treatment of the Kuwaitis themselves was concerned, media reports suggested that there were summary executions of Kuwaitis, as well as the torture, beating, and deportation of Kuwaitis, some as hostages. Other reports spoke of the killing of 200–50 Kuwaitis in retaliation for allied bombing raids and even of the forcible removal of blood and organs from Kuwaitis. The reports include evidence of eye-witnesses.

**Property rights under belligerent occupation**

Property, both public and private, was looted and destroyed on a massive scale. ‘Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly’ are grave breaches of Geneva Convention IV (Articles 53 and 147). Pillage is prohibited. Medical supplies and foodstuffs cannot be
requisitioned, except for the use of the occupation forces, and then only if the requirements of the civilian population had been taken into account.\textsuperscript{61} International law does provide for requisition, but within strict limits.\textsuperscript{62} An army of occupation can take possession of certain moveable property belonging to the state, but only if it can be used for military operations (Article 53 of Hague Regulations, 1907). Educational, artistic and scientific property is to be treated as private property for these purposes (Article 56). Transport and ‘all kinds of munitions of war may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made’ (Article 53).

An explanation, if not an excuse, may be found for certain of the seizures. If Kuwait was to be treated as the nineteenth province of Iraq, one might expect to find the imposition of Iraqi currency.\textsuperscript{63} The same reason appears to have been proffered for the seizure of certain medical equipment.\textsuperscript{64} Some of the food and drink seized in warehouses in Kuwait seems to have made its way to Baghdad.\textsuperscript{65} The UN-imposed sanctions regime severely restricted the flow of such supplies from other sources.

It is nevertheless submitted that the scale and thoroughness of the appropriation of property raises a presumption of the unlawfulness of any particular seizure:\textsuperscript{66}

Several big 20-wheel trucks were required to empty [the National Bank of Kuwait]…the big Matana shopping centre required ten days’ continuous looting before it was emptied of everything. The soldiers clearly had orders to clean out all the personal computers they could find, but they tended to throw them into the backs of the big lorries they used and many of them must have been broken.\textsuperscript{67}

On occasion, more care was taken, as with ‘all the equipment and records from the Institute for Scientific Research. This, they said, had been done intelligently, overseen by men who were themselves scientists.’\textsuperscript{68}

It would appear that the Iraqis engaged, as official policy, in organized pillage. At a lower level, soldiers, on their own and in groups, looted whatever they could obtain. The former was clearly a matter of policy, decided upon at a high level. In the case of the latter, there were a number of executions for looting.\textsuperscript{69} There is, however, no evidence of any systematic attempt having been made to prevent looting by soldiers for their own gain.

There is one area where destruction and laying waste of property does at least raise an issue of ‘military necessity’. A belligerent occupant can invoke the justification of military necessity even where the use of force which resulted in the occupation was unlawful. Iraq might argue that, in so far as it was responsible for them, the oil spillages into the Gulf were intentional and designed to inhibit a feared amphibious landing. The American forces were apparently deployed in such a way as to make that threat a real one. In similar vein, the Iraqis could try to argue that setting fire to the oil wells in mid-February, when it feared the launch of the land operation, was designed to make target identification more difficult. It certainly appears to have had that effect.\textsuperscript{70}

It is submitted, however, that it is not enough to show that wanton destruction of the Kuwaiti oil facilities could have been justified as ‘rendered absolutely necessary by military operations’. It is also necessary to show that that was in fact the reason for the
It is far from clear that that was the case. Even if it were to be held that there was insufficient evidence to determine whether damage to the oilfields and oil installations was a grave breach of Geneva Convention IV as unlawful and wanton destruction, that still leaves open the possibility of it being a breach of customary law rules relating to indiscriminate warfare.

One of the difficulties of the grave breach provision in Geneva Convention IV is its reference to ‘extensive destruction and appropriation of property… carried out unlawfully and wantonly’ (emphasis supplied). In so far as criminal responsibility only attaches to acts of a wholesale character, it will be difficult to bring proceedings against alleged individual offenders. It should not inhibit proceedings against those who were in command of forces responsible for such wanton damage and destruction.

The economic and other losses which resulted from the invasion of Kuwait were severe. Hundreds of thousands of foreign workers suddenly returned to their home countries, where there was no work for them. In addition, their home country was deprived of their foreign currency remittances. Foreigners and Kuwaitis alike lost their possessions, and the economic infrastructure of Kuwait was devastated. The Security Council addressed this issue promptly. The object was to set up a compensation scheme, funded out of controlled Iraqi oil sales, whereby individuals, companies and Kuwait itself could obtain financial redress against Iraq. It is not clear whether the scheme is based on breaches of the *ius in bello* resulting in financial loss. In so far as Iraq is required to compensate Kuwait for the seizure of militarily useful, moveable state-owned property, Iraq is being penalized for conduct which was lawful under the *ius in bello*. Whilst the wholesale destruction wrought by the Iraqi forces leaves little room for sympathy, it is submitted that compensation in such a situation is inappropriate. It is, in effect, punishment for the unlawful resort to armed force. The frustration at not being able to try Saddam Hussein personally for the waging of aggressive war, crimes against the peace and crimes against humanity does not justify penalizing the Iraqis for the resort to armed force, as opposed to breaches of the *ius in bello*.

The law on war crimes envisages delictual proceedings against the state for breaches of its obligations under the *ius in bello* and criminal proceedings against those responsible for grave breaches and, probably, other serious violations of the laws or customs of war. There is substantial evidence of the perpetration of grave breaches and serious violations of Geneva Convention IV and the law and custom of war regarding belligerent occupation at both the level of the individual soldier and much higher up the chain of command. It is not known whether the Iraqis have brought such criminal proceedings. The coalition forces have not, so far as is known to the author, had the opportunity to do so, beyond a limited number of trial of Iraqis by Kuwait.

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**THE CONDUCT OF IRAQI FORCES AND THE CONDUCT OF HOSTILITIES**

The relative passivity of the Iraqi forces in relation to the coalition forces means that only a limited range of issues need be considered in this context. The obligations of the Iraqi
forces towards persons and property protected under Geneva Convention IV of 1949 have been discussed above. The potential liability for war crimes being considered here concerns alleged violations of Geneva Convention III in relation to coalition prisoners of war held by Iraq, the use of allegedly treacherous tactics and of allegedly unlawful weapons.

Prisoners of war

A Yemeni student at Baghdad University is reported to have said that he witnessed Iraqi civilians beating and stabbing to death an American pilot whose aircraft had been shot down over Baghdad and that, although the Iraqi police intervened, they were too late to save the pilot.\(^76\)

Whilst the law on aircrew parachuting from aircraft is uncertain, the position is clearer in respect of the pilot who has landed.\(^77\) Under customary law, he cannot be attacked if he surrenders, but he can be attacked if he tries to escape or shoot at his would-be captors. It was reported that the Iraqi government was offering rewards for the capture alive of enemy pilots.\(^78\) Whatever the motive may have been, such an offer might be expected to encourage civilians to hand over enemy pilots, rather than attack them. To that extent, the policy would appear to be lawful.

Under Article 1 of the Hague Regulations of 1907, civilians are not permitted to take a direct part in hostilities. The question then arises whether, and to what extent, civilians can be liable for war crimes and whether attacks on airmen not seeking to escape or resist arrest amount to a war crime. It is submitted that civilians can be tried in such circumstances.\(^79\)

Following capture, the Iraqi authorities failed to notify the ICRC or the national authorities of whom they were holding or to allow the ICRC access to them or allow the prisoners of war to send a capture card to their families.\(^80\) Assuming such failures to be deliberate, they would constitute a serious violation but not a grave breach of Geneva Convention III (Article 70). Such breaches are normally put right by diplomatic intervention or through the good offices of the ICRC.

Whilst the prisoners of war were being held, there was concern that they were being ill-treated. Later reports indicated that RAF officers, although given medical treatment for their injuries caused during ejection, had complained of being beaten, mainly during interrogation, but also by guards, with clubs and heavy duty wire cables and of being placed in solitary confinement in prison cells.\(^81\)

Article 13 of Geneva Convention III sets out the basic standard of treatment of prisoners of war. They must be humanely treated. Acts or omissions causing death or seriously endangering the health of prisoners of war are a ‘serious breach’ of the Convention. Prisoners of war are also to be protected against acts of violence and intimidation.\(^82\) Article 17 of the Convention deals with the interrogation of prisoners of war. They are only required to give their name, rank, number and date of birth. They must not be subjected to physical or mental torture, nor to any form of coercion to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted or exposed to any unpleasant or disadvantageous treatment of any kind. A grave breach will have been committed if the treatment causes ‘great suffering or serious injury to body or health’ of a prisoner of war (Article 130 of
Convention III). Non-derogable human rights law is also applicable to the treatment of the prisoners of war. They may not be subjected to torture, cruel, inhuman or degrading treatment or punishment.\textsuperscript{83}

Captured coalition airmen were shown on Iraqi television condemning, in response to questions, the allied war against Iraq. Parading coalition airmen on television was a breach of Article 13 of Geneva Convention III, which provides that ‘prisoners of war must at all times be protected, particularly against…public curiosity.’\textsuperscript{84} It was not, however, a grave breach.\textsuperscript{85} It could be argued that the retransmission on British and American television of the Iraqi television coverage was also a breach of Article 13.

When interviewed by the BBC, the Iraqi ambassador to Paris is reported to have said that captured airmen would not be treated in accordance with the third Geneva Convention until the coalition admitted their losses.\textsuperscript{86} The practice of attaching conditions to the treatment of prisoners of war in accordance with the Convention would be a breach of several Articles of Geneva Convention III.\textsuperscript{87} Breaches of those provisions do not in themselves constitute grave breaches.\textsuperscript{88}

On 30 January 1991, Iraqi radio announced that an allied pilot held as a prisoner of war had been killed in an air raid on the Ministry of Industry in Baghdad.\textsuperscript{89} There is a requirement that prisoners of war be evacuated to camps far enough from the combat zone to be out of danger and not be unnecessarily exposed to danger while awaiting evacuation.\textsuperscript{90} If the prisoner had been held at the Ministry with the intention of causing his death, that would probably constitute a grave breach.\textsuperscript{91} In the circumstances, it might be difficult to prove a grave breach, but the violation might be regarded as sufficiently serious to warrant trial as a war crime.

**Treachery**

Commentators have pointed to two specific examples of allegedly perfidious episodes. Whilst ruses, such as deception and ambushes, are legitimate, treachery and perfidy are prohibited. The latter involve ‘acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law…with intent to betray that confidence.’\textsuperscript{93}

The Pentagon’s Interim Report refers to an incident in which Iraqi soldiers waved a white flag and laid down their weapons. The patrol which went forward to accept the surrender was fired upon by other Iraqi forces in buildings on either side of the street.\textsuperscript{93} It is not clear if those other forces knew that another group had indicated an intention to surrender. The white flag only binds those using it.\textsuperscript{94} It is not certain that the episode represents a treacherous abuse of the white flag.

It has been suggested that there was a treacherous request for quarter in Saudi Arabia, which is probably a reference to the engagement at Al Wafra when Iraqi tanks advanced with their gun barrels to the rear, indicating an apparent intention to surrender when in fact going into the attack.\textsuperscript{95} Reversal of gun barrels is not recognized as being of legal significance in international treaty law, unlike the white flag of truce. It is not clear that there is an internationally recognized practice that gun barrels to the rear indicate an intention to surrender, unless accompanied by other factors.
Unlawful use of weapons

The law on the conduct of hostilities applicable in the Gulf conflict is to be found in the Hague Conventions of 1907 and customary international law. Since the Geneva Conventions of 1949 do not regulate this area and Protocol I of 1977 was not applicable as treaty law, any breaches of the rules on the conduct of hostilities cannot constitute ‘grave breaches’, in the technical sense. They may nevertheless represent serious violations.

The law of naval warfare is in urgent need of updating, revision and clarification.96 The treaty text applicable to the laying of mines at sea dates from the early years of the century. Article 1 of Hague Convention VIII prohibits the laying of ‘unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them’ and of ‘anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings’. Two United States ships were damaged by free-floating mines. It is not clear whether the presence of free-floating mines was the result of equipment failure or incompetence, or was intentional. After the close of hostilities, the Iraqi authorities informed the coalition forces of the location of the minefield. There may be sufficient evidence to initiate war crimes proceedings for an alleged serious violation of Hague Convention VIII.97

The Iraqis used Scud missiles against Israel and Saudi Arabia. The weapons are indiscriminate and therefore can only lawfully be used against military targets of considerable size.98 Their use against Israel was unlawful. The apparent lack of any specific target suggests that the Israeli population at large was being targeted and possibly terrorized. This represents a serious violation of the principle of distinction. The use of Scud missiles against targets in Saudi Arabia raises more difficulties. The greatest casualties of the war due to a single event, as far as the American forces were concerned, occurred when a Scud missile struck an army barracks at Dharan.99 That attack was probably lawful, given the size of the base and the relatively low risk of civilian casualties. The attacks against Saudi Arabian cities by means of the missiles would appear to have been unlawful.

Damage to and destruction of oil wells

Whilst the norms of treaty law which deal expressly with the risk of environmental damage were not applicable, the prohibition of wanton and unnecessary destruction expressed in Article 147 of Geneva Convention IV of 1949 was applicable. Such destruction constitutes a grave breach of the Convention.

It is possible, however, that the actions were designed to serve military purposes, such as the frustration of an amphibious landing or to make more difficult the conduct of air operations. Nevertheless, given that certain of the wells were detonated or set on fire as Iraqi forces withdrew, at a time when no further military advantage would accrue, it would appear that a case could be brought alleging serious violations of Article 23 (g) of the Regulations annexed to Hague convention IV of 1907 and grave breaches of Geneva Convention IV of 1949.100
Certain actions, those involving the treatment of one person by another, involve primarily the responsibility of the individual and, as a subsidiary issue, command responsibility. In the case of actions relating to the conduct of the conflict, those primarily responsible are those who give the orders and who are highly placed in the chain of command. Whilst this does not exonerate those executing the orders, any trials which do take place should also be of those in positions of authority.

**THE CONDUCT OF THE COALITION FORCES**

**Prisoners of war and protected persons**

Amongst the coalition partners, apparently only the United Kingdom saw the need to ‘intern’ enemy civilians and alleged prisoners of war. It did not claim to be ‘interning’ them, however, but detained them under the Immigration Act 1971, pending the making of deportation orders. The ICRC visited both groups, a fact which rather calls into question the grounds used in domestic law to justify the detentions. The conditions of detention of the alleged ‘prisoners of war’ appear to have been in conformity with Geneva Convention III. A matter of some controversy, in all but two of the cases, was their characterization as members of the Iraqi armed forces. In the case of the civilian detainees, their initial conditions of detention were of questionable legality, and the sufficiency of the grounds for their detention of even more doubtful legality. Furthermore, they did not have access to a tribunal affording the necessary guarantees in order to challenge their detention.

Grave breaches of Geneva Convention IV include unlawful confinement of a protected person and wilfully depriving a protected person of the rights of a fair and regular trial as prescribed in the Convention.

Prisoners of war captured in the field appear to have been treated in conformity with Geneva Convention III, and there is some evidence of the coalition forces having gone out of their way to give the Iraqi forces the opportunity to surrender. Careful arrangements had been made to register the prisoners of war and to provide for their needs. The principal problem appears to have been the sheer numbers involved. They flooded the system for evacuation and transfer to the Americans and then the Saudis. (The capturing state remains responsible for the treatment of prisoners of war, even following such a transfer.) The prisoners of war were repatriated very quickly at the close of hostilities, the ICRC interviewing prisoners briefly to ensure that they were not being repatriated against their will.

One possible area of difficulty concerns the televising of Iraqi combatants surrendering. The situation was very different from the televising of captured coalition aircrew. In that case, the event was staged and was designed to humiliate. In the case of surrendering forces, the television cameras were recording events as they happened—they were not staged for the benefit of the cameras. The sight of a prisoner of war prostrating himself to kiss the boots of his captor was a powerful image. It would help if this area of the law were clarified. One way forward would be to prohibit the televising of individually recognizable prisoners.
Conduct of hostilities

Other chapters have examined the lawfulness of the coalition targeting policy and the manner in which it was executed.\textsuperscript{106} The principal issues appear to concern the targeting of government ministries and the Ba’ath party headquarters, of electricity generating facilities, of retreating Iraqi forces and the proportionality of the continued attacks against the infrastructure which also served civilian needs. None of those actions involved ‘grave breaches’ of the Geneva conventions of 1949. However, they may have involved serious violations of the laws and customs of war.

It would be possible to add to the list. For reasons explored elsewhere, it is believed that the tragic death toll at the Amiriya bunker/air-raid shelter was not a violation of the laws and customs of war, unless it can be shown that the American forces were not entitled to rely on the intelligence they claimed was available to them.\textsuperscript{107} If pressure exists to try someone for the attack, the authorities might be best advised to allow such a trial to proceed, not only to establish that they have nothing to hide but also to confirm that the laws and customs of war are binding on all parties.

CLASSIFICATION OF ALLEGED VIOLATIONS

The attempted classification of alleged violations of the laws and customs of war is tentative, subjective and incomplete.\textsuperscript{108} The allegations to date tend either to be general or to relate to single incidents about which only partial information is currently available. Nevertheless, it is necessary to attempt to classify the alleged violations on account of the different legal consequences attached to each type. It will be recalled that grave breaches and serious violations of the laws and customs of war can be tried as war crimes, and that alleged perpetrators of the first category of violation must be so tried.

1 Grave breaches include:

— the torture or unlawful killing of protected persons, including summary executions, killing by way of reprisals, killing where death is the obvious result of the act in question, and the killing of aircrew who have surrendered;
— the taking of protected persons as hostages, their unlawful confinement and the unlawful deportation from occupied territory of protected persons;
— compelling protected persons or prisoners of war to serve in the forces of a hostile power;
— the beating of prisoners of war during interrogation and by guards.

2 Grave breaches, if great suffering or serious injury to health results, include:

— assaults, including indecent assaults, on protected persons;
— the holding of protected persons or prisoners of war at strategic sites;
— the holding of prisoners of war in solitary confinement and the failure to accord prisoners of war the treatment laid down in Geneva Convention III unless certain conditions are fulfilled.

3 Grave breaches, unless the actions were justified by military necessity, include:
— the destruction of oil installations and other widespread destruction of and appropriation of property in Kuwait.

Where, under points 2 and 3 above, the acts do not constitute ‘grave breaches’, they may nevertheless be triable as serious war crimes, depending on the circumstances.

4 Serious war crimes not amounting to grave breaches: 109

— direct attacks on civilians or the civilian population;
— indiscriminate attacks causing excessive loss of life or injury to civilians;
— unlawful method of employment of sea mines.

5 Other violations of the laws and customs of war:

— subjecting prisoners of war to public curiosity, looting of property on an individual basis.

Security Council Resolution 674 included reference to Iraq’s accountability for its war crimes and invited states to collect reliable information regarding such war crimes. 110 The United States mobilized two reserve component Judge Advocate international law detachments to collect information on war crimes; one of the two detachments was deployed to the Kuwaiti theatre of operations. 111

As part of the cease-fire process, Iraq was required to accept a compensation scheme for those who had suffered loss as a consequence of the invasion of Kuwait. 112 The fund was to be financed from revenues generated by controlled oil sales; the remainder was to be spent on meeting the needs of the Iraqi population. This may have addressed in some measure the delictual responsibility of Iraq.

WAR CRIMES TRIALS

As soon as the Iraqi authorities began moving foreign hostages to installations of strategic value, the Americans decided to record all offences committed against American and coalition nationals. 113 The Department of State secured the incorporation of provisions on Iraq’s accountability and an invitation to states to collect information on Iraqi war crimes into Security Council Resolution 674. 114 Mrs Thatcher and her government warned the Iraqi forces that they would be held personally responsible for their actions. 115 President Bush issued similar warnings. 116

Iraqis taken prisoner in Kuwait were screened and questioned to determine whether they might have participated in the commission of war crimes. 117 Whilst certain Iraqis are said to have been tried in Kuwait, it is clear that very many have not been so tried (see Chapter 6). In particular, Saddam Hussein has not been put on trial. This raises three issues: first, the possible mechanisms for holding individuals responsible for war crimes; second, the practical difficulties involved in this instance and, third, whether or not there ought to be war crimes trials.

The primary responsibility for enforcing the rules lies on domestic tribunals, criminal and military. Where individual members of the armed forces disobeyed orders, such trials may take place. They are most unlikely to happen where the acts alleged to constitute war crimes were part of the prosecution of the war. This is no less true of the coalition forces
than of Saddam Hussein’s Iraq. The courts of other countries may have jurisdiction, depending on their rules of jurisdiction. Every state which has ratified the Geneva Conventions is obliged to ensure that its domestic courts can try the alleged perpetrators of ‘grave breaches’ of the Conventions. A state whose national was the victim of a ‘grave breach’ or serious violation of the laws and customs of war might seek the extradition of the alleged offender, but that is dependent upon the extradition arrangements between the requesting and requested state. It is unlikely to be of any assistance in bringing alleged offenders to justice in the case of the Gulf conflict. The other possibility would be some form of international tribunal. Two precedents exist: the international military tribunals of Nuremberg and Tokyo, and the over two thousand trials recorded by the United Nations War Crimes Commission, which were conducted by national military courts, usually in occupied territory. There is clearly, then, no lack of bases on which war crimes jurisdiction could be exercised.

These are, however, very considerable practical difficulties. No international tribunal currently exists with criminal jurisdiction over individuals. The first problem is which court(s) should try the offences? The second is what law would determine the procedure, the rules of evidence and the substantive offences? Certain of the charges in the Nuremberg Trial, notably crimes against peace and crimes against humanity, can most appropriately be laid against political leaders. A charge involving the alleged commission of a war crime, on the other hand, can be laid against the person responsible, irrespective of rank. The defendants should reflect that pattern of responsibility. There is an appearance of unfairness, bias and of victors’ justice unless the defendants include persons from both sides and of every rank. That, however, would require an independent international system of prosecution.

Given the difficulties in prosecuting people for war crimes, it is appropriate to ask whether other adequate mechanisms exist. There is the possibility of civil liability on the part of the state for breaches of international law: that is expressly provided for in Article 3 of the fourth Hague Convention of 1907. Following the First World War, huge reparations were demanded from Germany. The Second World War allies had learnt their lesson and sought rather to bind Western European states with ties which would prevent the rivalries which had twice in half a century wrought such devastation. The United Nations has not only imposed mandatory sanctions on Iraq, which remain in force while allowing for humanitarian supplies, but has also designed a scheme for the compensation of those who suffered loss from the invasion and occupation of Kuwait. This may meet certain needs, but the advisability of such a scheme can be called into question.

It should also be remembered that delictual and criminal responsibility fulfil different functions. Compensation implies that A is responsible for the injury suffered by B but that they are the only parties with an interest in the matter. Criminal responsibility expresses the unacceptability of the conduct in the eyes of the whole community. It is the condemnation and punishment that takes priority, not the meeting of the claim of the injured party. The murders, rapes and looting which took place in Kuwait and the other serious violations of the laws of war may be thought to call for something more than, or other than, compensation.

A half-way house may exist, involving the condemnation by bodies whose task it is to monitor compliance with human rights commitments. As a member of the United Nations, Iraq is subject to the scrutiny of the United Nations Human Rights Committee.
That body lacks the attributes necessary for a ruling with moral or legal authority. It is not a court or tribunal. It does not hear the evidence on both sides or allow the defendant to cross-examine witnesses. Above all, it is a body composed of the representatives of states, acting as such. Any condemnation of Iraq would be tainted by political selectivity and partiality, as was the Commission’s failure to address Iraq’s use of gas against the Kurds at Halabja.122

Iraq has also ratified the International Covenant on Civil and Political Rights, Article 40 of which requires Iraq to submit periodic reports on what it has done to secure and promote the rights listed in the Covenant. The reporting mechanism is designed to lead to a dialogue between the UN Human Rights Committee and the state; it is not an appropriate forum for the condemnation of war crimes. It would, however, be entirely proper for the Committee to ask Iraq, when next it submits a report, what measures it took to ensure compliance by its forces with its obligations under the laws and customs of war. The killing of civilians and the serious ill-treatment of prisoners of war is as much a breach of human rights law as of the law of armed conflict (Articles 4, 6 and 7 of the Covenant). If the international community wants to express its condemnation of serious violations of the laws and customs of war and wants to punish the offenders, some form of independent and impartial tribunal must hear the cases. Anything less deprives the condemnation of its authority.

Ought there, then, to be war crimes trials? They are fraught with legal and moral problems, as well as practical difficulties. A trial implies norms of applicability throughout a jurisdiction, in this case the world. If the trial is supposed to uphold the rule of law, this requires not only fair procedures but that as many alleged offenders as possible are put on trial. It must be possible to bring proceedings against the coalition forces. Anything less smacks of victors’ justice.

To be weighed against these elements are three factors which probably do point to the need for a trial. First, the coalition claimed to be fighting a ‘just war’. The coalition may be argued to have a duty to allow its claim to be judged by international law.123 Second, as is evidenced by the political diversity of the coalition, Saddam Hussein’s offences and those of his forces were not merely ‘political’. In the case of breaches of the laws and customs of war, those responsible are not to be punished on account of the unlawfulness of the cause for which they fought. Their offences were more fundamental than that. Their offences were against ‘the laws of humanity and the dictates of the public conscience’.124 Their actions represented an assertion that might is right and the denial not only of law but, more importantly, of the possibility of effective legal constraints on conduct. It is for this reason that all states have the obligation to try any alleged perpetrators of grave breaches, including their own nationals.125

This leads to the third argument. A war crimes trial which is recognized to be conducted in a fair and impartial manner has an educative effect. The Nuremberg trial reminded forces everywhere that there is no defence of superior orders. If no trials, or only an insignificant number, take place after the Gulf conflict, it will be difficult for those forces which insist that their members respect the rules to ensure such compliance within their own ranks. It should not be forgotten that those forces actually saw for themselves what had been done to Kuwait and the Kuwaitis. Those who are currently law-abiding need to see the law enforced in the interests of their own future conduct, as much as for the punishment of those found to have broken the law. We also, in a sense,
become accessories to crimes whose condemnation we do not secure owing to our own inaction.

Can a procedure be designed which will be recognized as fair throughout the world, including the Arab and Muslim world? Can any war crimes trial be regarded as fair if Saddam Hussein is not one of the defendants? Can a world replete with serious local conflicts as the old order collapses afford not to try those who are alleged to have violated the most fundamental rules of human behaviour?126
Chapter 13
Reparations and state responsibility: claims against Iraq arising out of the invasion and occupation of Kuwait

Lady Hazel M. Fox, QC

INTRODUCTION

The Security Council, by its imposition of economic sanctions on Iraq and by the action of the coalition forces under its authorization in evicting Iraq from Kuwait, has provided a new and bold application of UN procedures in accordance with the UN Charter to achieve compliance with international law. The consensus of the five permanent members of the Security Council offers fresh opportunities for the United Nations to become the global peace-keeping organization originally envisaged in the Charter. In that process, opportunity also exists to establish principles of international law relating to compensation for war damage. The Security Council announced in Resolution 674 of 29 October 1990, and repeated in Resolution 687 on 2 April 1991, that ‘Iraq was liable under international law for any direct loss, damage or injury as a result of Iraq’s unlawful invasion and occupation of Kuwait.’ Acting on a report made by the Secretary-General of the United Nations dated 2 May, the Security Council, by Resolution 692 of 17 May 1991, established a Compensation Commission for the processing, determination and payment of claims and a fund into which Iraq is to contribute a determined proportion of the value of its oil exports and out of which the claims are to be paid. By Resolution 705 (1991) this proportion has been determined at 30 per cent.

On the face of it, then, it remains only for the UN Compensation Commission to apply international law and to make compensation to claimants who have suffered loss by reason of Iraq’s unlawful conduct. But major hurdles stand in the way of such a process: the enormity and variety of the claims for damages caused by Iraq, the absence of clear rules of international law relating to settlement of war damage claims, Iraq’s obstruction and the combination of the role of judge and prosecutor in the task undertaken by the UN Compensation Commission.

It is proposed, first, to give a brief summary of the facts relating to the damage caused by Iraq, second, to examine the procedural and substantive requirements of international law relating to war damage claims, and third, by reason of the wide margin of choice which the application of these requirements allows, to indicate the conflicting roles which the Security Council may be called on to play. The discussion will in the main be limited to settlement of claims arising for damage suffered by the civilian population in breach of the 1949 Geneva Convention IV.

As to terminology, the term ‘reparation’ in the broad non-technical sense is used to describe all measures and procedures by which a state, which has violated an
international obligation in favour of another state, makes, or is made to make, good the
damage it has caused to that state. In its narrow technical sense, it covers the three
methods by which pecuniary or material and non-pecuniary or moral damage is made
good—by restitution in kind, financial compensation and satisfaction.

THE ENORMITY AND VARIETY OF DAMAGE CAUSED BY IRAQ

The facts
By its invasion of Kuwait, Iraq caused damage to Kuwait and its nationals and also to
third states and their nationals. At the request of Kuwait, a UN Mission, led by Mr
Abdulrahmir A.Farah, visited Kuwait from 16 March to 4 April 1991 and submitted two
reports to the UN Secretary-General on the damage caused by Iraq to Kuwait and its
nationals. The mission reported that, before 2 April 1990, Kuwait was a society
characterized by a highly capitalized urban infrastructure, with a population of 2.1
million, of whom about 800,000 were Kuwaiti citizens, and with a per capita income of
about US$14,700. When it visited in March 1991 it found ‘a country where the electric
power, telecommunications and transportation systems had been wrecked, government
buildings and other public institutions heavily damaged and most official records and
equipment either destroyed or looted.’ The firing of more than 600 oil wells ‘brought
unprecedented catastrophe to the economy and environment of Kuwait’—a 70 per cent
decrease in Kuwait’s gross domestic product (GDP) between early August 1990 and late
February 1991, and pollution of the atmosphere and of the marine environment by the
flow of crude oil into the Persian Gulf.¹

Mr Farah’s report on loss by death and ill treatment of the civilian population, contrary
to the Fourth Geneva Convention was only interim and contained no figures.² However,
he reported that two-thirds of Kuwaiti nationals sought refuge abroad and three-quarters
of the labour force (over one million made up of OECD and Arab/Asian nationals) had
been obliged to leave the country. For the estimated 200,000 Kuwaitis remaining, normal
life was disrupted, health services downgraded, education at a halt and the civilian
population was subjected to stringent measures to suppress resistance, with loss of life,
detention, deportation, ill treatment, expropriation and destruction of property and
reprisals and collective punishment. For a detailed analysis of the breach of international
law by Iraq in respect of these activities, see Chapter 10.

As regards damage incurred by third states and their nationals, some twenty-one states
have sought assistance from the UN Sanctions Committee for special economic problems
arising from compliance with the Security Council Resolution 661 for economic
sanctions against Iraq.³ A report of the UK House of Commons Foreign Affairs
Committee identifies the crisis as causing ‘for the developing countries of the region, a
double blow’, first from the impact of the rise in price of oil and second the loss of
remittances by expatriate workers. The main victims were Jordan, which lost over 25 per
cent of GNP; Yemen which lost over 10 per cent, and Egypt, nearly 3 per cent’.⁴ In its
Resolution 674 the Security Council invited states to collect relevant information
regarding their claims and those of their nationals for ‘restitution or financial
compensation by Iraq’ (para. 9), and the UN Compensation Commission set up under Resolution 692 (1991) has issued claim forms for individuals, corporations, governments and international organizations.5

Other heads of damage were incurred by third states. On 9 April 1990, the diplomatic community in Kuwait was informed of the ‘acceptance by Iraq of Kuwait’s request for unity’ and that all diplomatic and consular missions should close by 24 April. From that date services to diplomatic and consular missions were cut off, diplomats who stayed on were interned in their premises and on occasion forcible entry was made into specific missions, that into the French mission being particularly notable.6 Iraqi aerial attacks by Scud missiles caused loss of life, personal injuries and material damage and disruption of normal life in the territories of Saudi Arabia, Israel and Syria. The pollution of the atmosphere by burning oil wells and of the Gulf waters by crude oil affected states other than Kuwait. The United States, Saudi Arabia, United Kingdom and other allies incurred the costs of the military operations Desert Shield and Desert Storm undertaken to protect Saudi Arabia and to evict Iraq from Kuwait.7

Set against such loss, and as part of the general factual context, must be placed the humanitarian needs of the people of Iraq in the aftermath of the war. A report to the UN Secretary-General in August 1991 noted that the food, health and nutrition situation in Iraq was critical, with widespread shortages of medicine. The maintenance of food supply and sanitary measures were stated to be ‘absolutely necessary to prevent full scale famine and major human disaster developing in the country’.8

Scope of damage in Resolution 687

Paragraph 16 of Security Council Resolution 687 (1991) is drafted in the following terms:

The Security Council…acting under Chapter VII of the Charter of the United Nations…

16. Reaffirms that Iraq without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait.

This paragraph constitutes the terms of reference for determination of Iraq’s liability; it, along with the rest of Resolution 687, was accepted by Iraq as a condition of the ceasefire.9 It imposes three clear limitations on the scope of damage recognizable by the UN international process: debts of Iraq prior to 2 August 1990 are excluded (this is further discussed under exhaustion of local remedies below); a causal link is required, as the ‘loss, damage and or injury’ is to occur ‘as a result of Iraq’s unlawful invasion and occupation of Kuwait’ and the damage is required to be ‘direct’. No definition of ‘direct’ is given, it being left to the UN Compensation Commission to provide guidelines. The first guidelines for expediting the processing of urgent claims were published by the Commission on 2 August 1991 and have proved controversial.10
In two respects, however, Resolution 687 expressly extended the scope of damage: the specific mention of ‘environmental damage’ would seem to allow, at the very least, claims by the Kuwaiti government for clean-up costs in relation to burning wells and ‘the depletion of natural resources’ appears to contemplate, over and above claims for loss of profits on oil production during the period of Iraqi occupation, the capital loss of a state asset.

**PROCEDURE FOR CLAIMS SETTLEMENT**

**Presentation of claims in time of peace**

It is the practice of governments when they have claims against each other, to settle them directly by negotiation or lump-sum settlement, or to refer them either to a mixed tribunal composed of representatives of the two countries or to some form of third party settlement, mediation, conciliation or adjudication, either by the International Court of Justice, other established tribunal or specially instituted arbitral tribunal with members drawn from third state nationals and chaired by a national of a third state.\(^1\)

Claims for loss suffered by nationals as a result of government action cannot usually in international law be presented to the wrongdoer state directly by the individual claimant. They are required to be espoused by the state of which the claimant has nationality. Where the alleged wrong has taken place within the jurisdiction of the wrongdoing state the rule of exhaustion of local remedies applies, under which the state is afforded the opportunity to remedy the wrong under its own legal system before the claim is proceeded with at the international level. However, where the wrong is committed outside the state’s jurisdiction, or the local remedies are manifestly futile or ineffective,\(^1\) the claimant is entitled to seek the immediate diplomatic protection of the state of which he has nationality. That state has the discretion whether to espouse a national’s claims and, if it does so, may seek to obtain settlement by diplomatic means, direct or through international forums.

The plea of local remedies requires consideration in respect of claims to be made against Iraq. As will be seen below, claims of injured nationals are to be presented to the UN Compensation Commission in consolidated form by states. The adoption of such a procedure—consolidated claim by the state, determination by an international commission and lump sum payment to the claimant state—appears to substitute an international procedure for any local exhaustion of remedies. As this procedure, along with liability for the damage caused, has in principle been accepted by Iraq as a condition of the establishment of a truce, it would seem that Iraq has waived any requirement that local remedies be exhausted. In any event it is questionable whether any such requirement operates in respect of most of the international obligations which are likely to be invoked against Iraq.

The applicability of the local remedies rule to international obligations may be framed in different ways. On one formulation it is only where an international obligation, in the terminology employed by the International Law Commission’s Rapporteur on State Responsibility, is one of ‘result’, that a state is given an opportunity to discharge its obligations, to invoke the local remedies rule and to produce a result different from that
aimed at in the obligation but treated as equivalent in effect. Thus the international minimum standard of treatment of aliens is treated as an obligation of result, permitting the wrongdoer state the opportunity by giving a remedy and compensation in its own courts to provide an alternative performance of its initial obligation. The obligations arising under the UN Charter, Vienna Conventions and Geneva Convention IV are not of this character; they impose ‘obligations of conduct’ upon the state party and allow it no last opportunity to rectify initial failures to perform the obligation.

A second formulation of the local remedies rule sees it as only applicable to acts committed within the jurisdiction of the state where local remedies are to be exhausted. Any claim in respect of acts committed in Kuwait or third states would not be acts within the jurisdiction of Iraq; acts committed in Kuwaiti territory are in international law acts committed within Kuwait’s jurisdiction; any attempted exercise of jurisdiction by Iraqi officials within Kuwaiti territory is unlawful by reason of the act of aggression on which it is based.

Even were Iraq’s claim to the territory of Kuwait to be well-founded, which it is not, the attempt to exercise it by force on the territory of a recognized state and member of the United Nations remains illegal and provides no basis for Iraqi exercise of jurisdiction.

These arguments strongly support the inapplicability of exhaustion of remedies to the UN Claims Commission procedures. It is, however, also to be noted that any resort to local remedies in Iraqi courts, claiming loss sustained as a result of the acts of President Saddam Hussein’s army and civilian authorities in Kuwait, is likely to be ineffective or manifestly futile; it would be a bold Iraqi judge who made a ruling that President Hussein’s administration is to compensate Kuwaiti victims, even if such a legal remedy exists in Iraqi law. An Iraqi lawyer would no doubt confirm the ineffectiveness or futility of such a resort.

A more probable resort to local remedies may be made by victims who bring claims against Iraq in the courts of third states, particularly in countries where external Iraqi assets are frozen (some such assets are believed to be in the United States, Sweden and Switzerland.) The UN Secretary-General anticipates this problem in his report, in which he states that the UN Compensation Commission cannot be an organ with exclusive competence to consider claims arising from Iraq’s unlawful invasion and occupation of Kuwait. He recommends that the Commission should enact guidelines to deal with the likelihood of parallel actions on the international level in the Commission and on the domestic level in national courts, and in particular to ensure that the aggregate of compensation awarded by the Commission and national courts does not exceed the amount of the loss.

**Iran-US Claims Tribunal**

The settlement machinery worked out to resolve the Iran-US dispute relating to the US hostages in Teheran provided an advance on these traditional methods for settlement of claims. It offers a useful precedent to the Security Council in the present case. In 1979 Iran had considerable external assets, and these were frozen when the US embassy staff were seized in Teheran. As part of the settlement reached in the Algiers Accords of 1981 which secured the release of the hostages, an Iran-US Tribunal was established to which the claims of the nationals and governments of each country against the other country
might be directly presented for determination, and there was also provided a Security
Account, funded initially by $1 billion of Iranian assets frozen in the United States, out of
which awards made by the Tribunal in favour of US nationals could be made. The
existence of this account greatly simplified effective enforcement of the Tribunal’s
awards but the reference of all claims, however small, to individual adjudication and the
composition of the three member panels of the Tribunal—an Iranian, a US and a third
state judge, with the third state national presiding—resulted in lengthy hearings with
opportunity for the Iranian judges to delay proceedings; so much so, that the Tribunal
was not able to complete its task within ten years and the smaller outstanding claims were
eventually settled by direct agreement between Iran and the United States.¹⁸

**Peace treaties relating to war damage**

The procedures for settlement of claims described above have been applied to questions
of reparation of war damage, but generally only in relation to claims for loss from
individual nationals of belligerent or neutral states and in an ancillary manner to the
peace treaty which decides the broad issues of policy, usually in accordance with the
victor state’s wishes, leaving only the details of individual claimants’ entitlement to be
determined by reference to legal standards by the designated tribunal.¹⁹ Often, however,
the onerous provisions of the peace treaty are subsequently modified in operation by
reason of economic constraints in the defeated country and the need to rehabilitate the
defeated state into the international community.

In parallel to procedures for the nationals of the victor state to claim war damage, the
peace treaty is likely to provide for reparation for war damage directly suffered by the
victor state: one usual provision is the restitution of property seized during the war—thus
after the Second World War the Tripartite Claims Commission on which France, UK and
USA were represented, supervised the return of monetary gold which Germany had taken
from occupied countries.²⁰ another provision may require reparation in kind—gold, ships
of the merchant fleet, external assets and patents belonging to Germany were seized after
the First World War,²¹ and after the Second World War reparations in kind were exacted
by the dismantling of German industries, deliveries taken from German current
production and the use of German labour in Allied countries.²² Indirect methods may also
be employed; under threat of having their own external assets frozen by the victorious
allied forces, Switzerland and Sweden released, after the Second World War, enemy
assets held in these neutral countries to German owners who paid a lump sum to the Inter
Allied Reparations Agency set up by the Paris Reparations Agreement 1946.²³

**Special procedures of Hague and Geneva laws of war**

As regards breaches by the military authorities of the rules of war, a notional direct
remedy is provided in Article 3 of the 1907 Hague Convention IV (re-enacted in the 1977
Geneva Additional Protocol I, Article 91). Article 3 provides that: ‘A belligerent party
which violates the provision of the said Regulations shall, if the case demands, be liable
to pay compensation. It shall be responsible for all acts committed by persons forming
part of its armed forces.’
The meaning of this Article is not clear. The *travaux préparatoires* relating to the 1977 Geneva Additional Protocol I and the ICRC Commentary appear to construe the re-enactment in Article 91 as giving a right to compensation to a state party to an international armed conflict against another belligerent state for violation of the rules of war; and as making available such a right for any violation, whether on a large scale, such as aerial bombardment, or small scale, such as an individual soldier’s act of brutality, and whether unlawful as totally prohibited, such as the use of chemical weapons, or lawful on grounds of military necessity as permitted by the rules of war, such as requisition of transport for military operations (Hague IV, 1907, 53 (2)). Kalshoven, however, in a recent article, after analysis of the text and earlier *travaux préparatoires*, holds that Article 3 of Hague Convention IV of 1907 originally gave ‘the individual victims a right to claim compensation for war damages directly from the responsible state’; in his view this individual right of compensation covered harm done to enemy or neutral civilians by persons belonging to the land armed forces, whether in their capacity as members of that force or acting on their own account (and hence was wider than the attribution rules in the draft articles on state responsibility of the International Law Commission referred to below); but he considers it to be limited to compensation for small-scale events and for damage caused by action which was militarily necessary. Requiring, as it does, direct application by the claimant to the defaulting state, it raises no difficulty relating to exhaustion of local remedies. Whatever the correct interpretation of Article 3 may be, it is agreed by Kalshoven and other commentators that the procedure has very rarely been resorted to. Its dependence on evidence of the military authorities alleged to have committed the wrongful acts, and the futility of recourse to national courts where even the most impartial rarely give an effective remedy for acts done by armed forces abroad, led them to admit that any indemnification has in state practice been left to settlement by the terms of the peace treaty after the war.

In reaching this assessment of the inefficacy of the remedy of compensation in the laws of war, one should not overlook the additional sanction of war crimes. Whilst breaches of the rules of war relating to protection of the persons and property of civilians may go largely uncompensated, Article 147 of the 1949 Geneva Convention IV lists as grave breaches acts against protected persons amounting to ‘wilful killing, torture or inhuman treatment…wilfully causing serious injury to body or health…extensive destruction and appropriation of property’; Article 146 requires the Contracting Persons to enact legislation necessary to provide effective penal sanctions, to search for and to bring persons alleged to have committed such grave breaches before its own courts. It is not too far fetched to consider punishment of the individual offenders in the armed forces who caused the damage as a form of satisfaction to the injured civilian, though it falls short of financial compensation for the loss suffered.

To sum up this section, international law has established general procedures for settlement of claims between states in time of peace. Some of these procedures have been adopted in the settlement of war claims, but reparation after a war, so far as state practice in the First and Second World wars goes, is largely dependent on the terms and implementation of the peace treaty. The laws of war provide specific remedies for their breach, but so far as payment of compensation goes, the machinery amounts to little more than the diplomatic espousal of claims.
None of the procedures operate in isolation from the political situation out of which they arise and from other measures taken in parallel to adjust the relationship between the claimant and wrongdoer state. This should be borne in mind in relation to compensation procedures adopted by the United Nations; they too must take account and in part be tailored to the other measures undertaken against Iraq to return it to a position of a law-abiding state.

**UN Claims Commission for Iraqi damage resulting from the invasion of Kuwait**

In reaching a decision on the manner of presentation of claims against Iraq, the United Nations has clearly drawn on international claims procedures, and in particular the Iran-US experience. It remains to be seen whether it can avoid the one-sided approach of lump-sum settlements imposed in peace treaties by victor states.

The Security Council sought the assistance of the Secretary-General on how to implement its intention to set up a Fund out of which compensation by Iraq was to be paid and a Commission to operate it. This he provided in a detailed and thorough report of some twenty-nine paragraphs. By Resolution 691, the Security Council established the Fund and Commission on 17 May in accordance with Part 1 of that report and it seems likely that this important report will be a constant reference point in future developments relating to UN claims procedure.

As outlined above, the Security Council had available broadly three possibilities for the handling of claims for loss, injury and damage arising out of Iraq’s invasion and occupation of Kuwait: to leave claimants to pursue their remedies through national courts, to set up an international tribunal to which claimants might present their claims directly, or to use the diplomatic espousal of claims whereby individual states would present consolidated claims on behalf of themselves and their nationals. The first course was impractical, since it depended on Iraq’s co-operation and the second one impracticable by reason of the tens of thousands of small claims from individual nationals of many countries which were likely to be made—‘a task which could take a decade or more and could lead to inequalities in the filing of claims disadvantaging small claimants’. The present case is not simply a bilateral settlement, as with the Iran-US case, but involves a co-ordination of claims from nearly a third of the international community. On these grounds the Security Council, on the proposal of the Secretary-General, has opted for the third course, identifying a twofold role for the UN Compensation Commission: a political role to establish guidelines on the manner of filing, processing and payment of claims, and an operational role for the commissioners in the implementation of claims that are presented and the resolution of disputed claims.

**Processing and payment of claims**

Consolidated claims will be filed by each individual government on its own behalf and on behalf of its nationals and corporations in accordance with its own internal procedures, practice and legal system. In exceptional circumstances involving very large and complex claims, such as that of the Kuwait National Oil Co., the Commission may allow the claim to be individually filed and presented. Claims under US$100,000 under the expedited
procedure are to be presented by 1 July 1993, other claims over that amount by 1994. Legal aid to ensure adequacy of representation for countries of limited financial means is recommended. Payment of compensation will be exclusively to governments who will be responsible for the appropriate distribution to individual claimants; priority of payment to Kuwait is envisaged and, as the value of claims approved is likely to exceed the resources of the Fund, guidelines of the Commission will be required to determine which, if any, claims shall be paid in full, and whether percentages should be paid. It is proposed that unsatisfied portions of the claims remain as outstanding obligations.

The Fund

In providing for a Fund to be contributed to by Iraq, taking into account its payment capacity and the needs of its economy, the UN has tried to profit from earlier experience. Financial sums as reparation after the First and Second World Wars were exacted from Germany, but not in the amount originally intended. The Versailles Treaty of 1919 recognized from the first that ‘the resources of Germany are not adequate…to make complete reparation for all loss and compensation’, but nevertheless the amounts demanded were extremely onerous. Allied forces occupied German territory west of the Rhine and bridgeheads on the right bank of the Rhine as ‘a guarantee for execution of the Versailles Treaty by Germany’, and in 1923 France occupied further territory in the Ruhr after the Reparations Commission had made a finding (which Britain voted against) of international violation by Germany of her obligations under the reparations scheme. The amount and modalities of payment of German reparations became the object of tough bargaining between the Allies and Germany in numerous conferences, and led to the Dawes and Young Plans. The matter was complicated by the existence of inter-Allied war debts, the difficulties under municipal law of transferring title of previously owned German assets and the economic crisis of 1931.

After the Second World War the Western Allies soon disagreed with the Soviet Union as to the amount and means of exaction of reparations. The Allied Control Council’s plan for the dismantling of German industries was soon scaled down, as the Western Allies were unwilling to make further transfers of equipment to the Soviet Union and were anxious to aid the economic recovery of Germany. In the Bonn and Paris agreements of 1952 and 1954 relating to Germany, although the issue of reparations was kept open, France, UK and USA waived their right to exact reparations from current production.

In the present situation the oil exports of Iraq were early recognized as a source from which compensation might be paid. Drawing on the Iran-US experience where awards made by the Tribunal were able to be paid out of the Security Account, the Security Council sought to establish a similar Fund to provide compensation for the damage caused in Kuwait; it required the Secretary-General to suggest an appropriate level of Iraq’s contribution to the Fund based on a percentage of the value of oil exports from Iraq taking into account probable levels of future oil export revenue of Iraq, the amounts of military spending and arms imports in the past, the service of Iraq’s foreign debt and the needs of reconstruction and development in the country.
Although Iraq accepted as a condition of the cease-fire the establishment of the Fund, in a letter from its Permanent Representative to the UN it opposed any immediate contribution; it has requested a five-year moratorium on payment of compensation in order to repair the damage sustained by Iraq in the intense aerial bombardment by the coalition—damage ‘ignored by the Security Council though many times more than the damage suffered by other countries’—and to meet the basic humanitarian requirements of the Iraqi people. The Iraqi representative maintains in his letter that the proposed proportion to be exacted by the Security Council amounts to giving the Council powers of disposal over the oil resources of the people of Iraq and constitutes the realization of another US objective, namely the smashing of OPEC and its right to control its oil resources and to determine levels of oil production.

Despite these representations, acting on the proposal of the Secretary-General, the Security Council in Resolution 705 of 15 August 1991 unanimously adopted a level of 30 per cent, although also deciding to keep the figure under review. By Resolution 706 of the same date, the Security Council (with Cuba voting against and Yemen abstaining), authorized the lifting of economic sanctions so as to permit the export of up to 1.6 billion US dollars worth of Iraqi oil.

The Secretary-General emphasized in his report that ‘the financial viability of the Fund, its capacity to meet the compensation claims as well as the size and organization of the secretariat’ (para. 14) depended on ensuring payment by Iraq into the fund, and that such payment in turn depended on co-operation by Iraq and strict supervision of oil exports from Iraq. Iraq’s post-war evasive conduct in relation to compliance with its disarmament obligations is not encouraging; experience of other peace treaties suggests that the extraction of compensation from an unwilling state is an ever-increasingly difficult task. As market conditions normalize, pressures will build up to return to Iraq control of its oil revenues; short of taking over the running of the Iraqi economy, the Commission, even with the Security Council behind it, is likely to have a full-time task in obtaining resources from Iraq to finance the Fund.

**SUBSTANTIVE LAW**

The enormity of the claims involved and the potential width of Iraq’s liability raises starkly the fundamental issue: does international law grant full compensation for all losses resulting from a wrongful act? From the brief survey of procedures set out above by which compensation for war damage is recoverable, it will be apparent that in practice the scope of recovery is determined either by agreement of the states in their lump-sum settlements or the terms of their reference to the arbitration tribunal, or unilaterally by the victor state with subsequent modification by reference to the capacity to pay of the defeated state and the general desire to restore peaceful relations and rehabilitate the offending state into the international community.

The task of the Security Council may, therefore, be more one of establishing terms of reference which are fair both to claimants and to Iraq, than of application of specific rules of law. The need in the Kuwait situation may well be more for guidelines of exclusion of liability than for rules of entitlement.
The level of recovery in international arbitration is largely dictated by the terms of reference given to the arbitration tribunal and is often motivated by the need to assuage outraged national feelings. As with municipal courts, the amount of individual awards may be at a higher level than that applied in settlements achieved directly by negotiation between the parties, as in lump-sum settlements.\textsuperscript{38} It is, therefore, likely that the standard of compensation in international law derived from international arbitral practice will be a high one. It may prove an impractical one for application to a great number of claims. In approaching substantive international law of damages it is, therefore, suggested that the standard of international law derived from arbitral practice will be too inclusive for the purpose of achieving any settlement of claims against Iraq. At most we can expect international law to provide general principles for treatment of claims, rather than specific guidance as to which claims are to be excluded.

**Rules of state responsibility**

The rules of state responsibility govern the consequences of an internationally wrongful act. These principles of state responsibility offer guidance as to the consequences of the internationally wrongful acts committed by Iraq and the nature and extent of the remedies available. A word of caution in approaching this branch of international law is advisable, however. The topic of state responsibility remains, in some of its aspects, a highly controversial one, and one where few rules of general application have yet been accepted without challenge. This controversial nature of the topic is well illustrated by the work of the International Law Commission on state responsibility, a topic which it has been engaged in studying for over forty years without producing any finalized code.\textsuperscript{39}

The difficulties encountered by the ILC relate in the main to the topic of reparation in its broad sense—that is to the legality and scope of measures such as reprisals, sanctions, termination or suspension of reciprocal obligations, self-defence when employed by the aggrieved state or third states in consequence of internationally unlawful acts by another state.\textsuperscript{40} They are initially less apparent in the treatment of reparation in its narrow sense, that is the compensation for material loss, by restitution in kind and financial compensation (or what the civil lawyers call reparation by equivalent), and compensation for moral loss, such as insult to the honour and dignity of the state, by the remedy of satisfaction, as for instance by formal apology or declaration of liability by a court. However, even here, as already indicated it is difficult to consider restitution in kind and compensation in isolation from the measures taken to restore relationships between claimant and wrongdoer states.\textsuperscript{41}

In this narrower field, the starting point remains the general principles of reparation for international wrong enunciated by the Permanent Court of International Justice in the *Chorzow Factory* case. The Court stated in its Judgment No. 8:

\begin{quote}
It is a principle of international law that breach of an engagement involves an obligation to make reparation in an adequate form. Reparation is therefore an indispensable complement of a failure to apply a Convention and there is no necessity for this to be stated in the Convention\textsuperscript{42}
\end{quote}

and further in the later Judgment No. 13:
The essential principle contained in the actual notion of an illegal act… is that reparation must, as far as possible, wipe out all the consequences of the illegal act and establish the situation which would, in all probability have existed if that act had not been committed. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.43

Some difference of view prevails as to whether restitution is to be made of the status quo before the wrongful act or ‘of the situation which would have existed if the act had not been committed’.44 The latter test permits recovery for loss sustained during the continuance of the wrongful activity and for loss of profits (lucrum cessans).45 Where the act which causes the damage is itself prohibited, the latter and higher standard of compensation is generally, however, agreed to apply.46

International law differs from English common law in according, at least in theory, primacy to restitution in kind as a remedy.47 Such restitution may take a material form such as the restoration or repair of the property unlawfully seized, or a legal form, by the repeal or annulment of the wrongful decree by the wrongdoer state’s legislature, executive or judiciary.

The principle of the *Chorzow Factory* case sets an extraordinarily high standard of compensation—‘to wipe out all the consequences of the illegal act’, qualified only by the limits of possibility. By giving primacy to restitution, however, it does identify a more restricted remedy which must first be employed. Whilst such a remedy may be largely non-existent in a municipal court situation—the burglar has long-since disposed of the stolen property—on the international plane it can be more effective both for the victim and the wrongdoer state. It involves both parties in an exercise of picking up the bits and restoring relations.

Some restitution in kind has taken place in Kuwait. Resolution 687 provides for some material restitution referring to ‘the return of all Kuwaiti property seized by Iraq’, ‘the search…for those Kuwaiti and third country nationals still unaccounted for’ and ‘the repatriation or return of all Kuwaiti and third country nationals or their remains present in Iraq on or after 2 August 1990’. By arrangements for demarcation of the international boundary between Kuwait and Iraq and a future UN guarantee of its inviolability, Resolution 687 itself set in train legal restitution of the international boundary.

On 18 August 1991 Kuwait announced that all £422 million of solid gold bullion taken from Kuwait had been returned by Iraq.48 Resolution 706 of the Security Council authorizes payment, out of the first permitted oil export earnings of Iraq, of the full costs, incurred by the United Nations, of facilitating the return of all Kuwaiti property seized by Iraq.

Nonetheless, financial compensation is likely to be the main method by which reparation is sought for the damage suffered; both the ILC rapporteurs Riphagen and Arangio Ruiz, in summarizing the view of jurists and the practice of arbitral tribunals, concede that financial compensation is usually the more important remedy, because restitution is generally impossible or inept.49
The rules of state responsibility provide some general guidance as to the nature of this remedy. Foremost is a distinction advanced between direct and indirect loss. There is widespread agreement on the part of jurists and arbitral tribunals that financial compensation should be restricted to direct damage; the Security Council’s resolutions echo this requirement of direct loss stating, ‘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.’

Classification of damage

The Secretary-General in his report at paragraph 23 provides some preliminary classification of the damage suffered by type of loss, by whom incurred, and by size, and suggested governments should use these categorizations when filing their consolidated claims. Categorized by type of loss, the damage may be (a) loss of life or personal injuries; (b) damage to property (which may be subdivided into (i) damage to moveables (ii) to inmoveables, and (iii) to business interests, arising from breach of contract, loss of profits, or other economic loss; (c) environmental damage; (d) damage due to depletion of natural resources; (there may clearly be some overlap of categories as with (b) damage to property and (d) depletion of natural resources). Categorized by whom incurred the damage, the claims may be by (e) governments (f) by individual nationals and (g) corporations.

Such a categorization, however, does not of itself distinguish which types of damage are direct and which indirect. Some criteria to distinguish direct loss is particularly necessary in respect of war damage because as shown in the description given earlier of the consequences of Iraq’s action after 2 August 1990 in Kuwait, it can be all-embracing and produce devastating adverse effects. The consequences of a war involving invasion and belligerent occupation can be likened to the widening ripples made by a pebble thrown into a pool: first, during the period of military operations and occupation, physical damage to persons and property is caused from acts of war and from acts of the aggressor state’s authorities to control and secure the occupied territory; second, economic loss occurs from seizure of property and disruption of business life as a result of such military operations and occupation. During the period of fighting and military occupation the defending state and its allies incur extraordinary costs of waging war to defeat the aggressor state and expel it from the occupied territory. More remote from the initial acts of war, are events and consequences after the war, thus military costs may continue—in the First World War costs of maintenance of prisoners of war, relief payments and pensions to servicemen or dependants, and servicing of war loans were all claimed as war damage from Germany—economic loss may also continue for the invaded country and its nationals from interrupted trade—in Kuwait’s case destruction of oil installations and refineries will prevent, for several years, earnings from oil exports at the pre-war level—and from a reduced economy and a polluted environment.

Criteria for directness of loss

The rules of state responsibility offer little clear guidance on the criteria of direct loss. Indeed in one widely held view the phrase ‘direct’ loss appears to be little more than a
tautology—devoid of meaning other than to signify loss which the particular arbitrator allows as recoverable. The Arbitrator, Parker, in the *War Risk Insurance Premium Claims* stated ‘the distinction sought to be made between damages which are direct and those which are indirect is frequently illusory and fanciful and should have no place in international law.’ This view was confirmed by the third Rapporteur to the International Law Commission’s work on state responsibility in its second phase; after a comprehensive survey of arbitration awards and state practice Arangio Ruiz concluded:

> Whatever is meant by ‘indirect’ damage in certain municipal legal systems, this expression has been used in international jurisprudence to justify decisions not to award damages. No clear indication was given, however, about the kind of relationship between event and damage that would justify their qualification as indirect.

A virtual admission that the issue was at large was the Secretary-General’s acknowledgement that there can be no verification of claims and evaluation of losses until a determination had been made whether the loss was direct and as a result of Iraq’s unlawful invasion and occupation of Kuwait. Following his recommendation the Governing Council of the UN Compensation Commission has attempted some detailed guidelines regarding what constitutes such direct loss, for the guidance of claimants as well as the commissioners.

Some arbitrators and writers have proposed more specific tests to determine the directness of recoverable loss. There is fairly wide agreement that compensation should be restricted to damage causally connected with the wrongful act, that the wrongful act must be the predominant cause of the damage and that it must not be caused by external factors or the act of a third party or of the claimant itself. These propositions relating to causal connection are well illustrated by the decisions of the three-man arbitral tribunal in the *Mazuia and Nautilaa Claims*, where Germany was held liable to compensate for personal injuries sustained and loss to property by reason of its destruction in 1914 by a German military force which wrongly attacked Portuguese border posts in the Portuguese West African colonies of Mozambique and Angola. Commercial losses subsequent to the destruction of the border posts, and military costs incurred in subduing the tribal unrest which followed the German attacks, were not held by the tribunal to be recoverable from Germany.

Sometimes both the civil law criterion of causality as well as the common law test of predictability have been employed to determine whether loss is connected to the wrongful act. The joint report of US and British commissioners in respect of German losses sustained following military activities, in the *Samoa Claims* employed both criteria:

> the effect of these rules is that the damages for which a wrongdoer is liable are the damages which are both in fact caused by his action, and cannot be attributed to any other causes, and which a reasonable man in the position of the wrongdoer at the time would have foreseen as likely to ensue from his action.
In the present circumstances these criteria provide some help in identifying heads of war damage which are too remote or indirect to be recoverable. In particular, they probably confine recoverable damage to physical injury to the person or property and to immediate out-of-pocket expense, and exclude more remote economic loss resulting from changed trading conditions such as loss of profits, business or employment and depreciations in value of property or currency. However, without some specific terms of reference to restrict their application, they appear still to be too comprehensive.

The element of calculated deliberate aggression by Iraq would necessarily seem to widen the responsibility for the consequences resulting from its act. Thus it seems difficult to exclude the Allies’ costs of waging the war, or economic losses of the state of Kuwait and its business community as not caused by or reasonably predictable as a consequence of a planned invasion and occupation of Kuwait. Whilst a reasonable person presumably did not anticipate Iraq’s action of 2 August, given its occurrence, few reasonable people would not have foreseen much of the physical and economic damage which resulted. The intent with which a state commits a wrongful act, here the deliberate invasion of Kuwait, may effect the proximity and causal connection of damage to the wrongful act. The relevance of fault and bad faith (dolus) is yet another controversial issue in state responsibility, many modern writers contending that, in respect of the acts of an artificial entity like a state, the degree of control by the state of the individual who actually commits the wrong, and not the subjective state of mind on the part of the state, is the essential requirement. Where, however, as in the invasion of Kuwait there is deliberate intent at the highest level of command to obliterate a state and to convert it into a province of the invading state, the presence of such deliberate malice may establish causation, serving to link a remote act with the unlawful act and thereby increase the damages.

The sum total of the above rules applied to the damage, caused by Iraq in Kuwait to that state and its nationals and to third states and their nationals, is that none of the general criteria normally applied by the rules of state responsibility taken by themselves, without limiting terms of reference or linking to specific international obligations, will serve to exclude as irrecoverable any of the heads of damage claimed against Iraq.

Breaches of specific international obligations

The rules of state responsibility proving too abstract and inclusive to limit the heads of damage, a better approach may be to turn to the individual obligations breached by Iraq and to find in them restrictions on the scope of consequences attributable to Iraq.

The multitude of relationships disrupted by Iraq may be classified into a number of substantive obligations. In Resolution 674 of 29 October 1990, the Security Council demanded that Iraq’s authorities and occupying forces immediately ceased and desisted from such acts that ‘violated the decisions of this Council, the Charter of United Nations, the Fourth Geneva Convention and the Vienna Convention on Diplomatic and Consular Relations and international law.’ The Security Council thus identified a number of international obligations which Iraq had violated.

In many cases these international obligations provide their own procedures and remedies for breach. For instance, breaches of diplomatic and consular law entitle the aggrieved state to restrict or withdraw immunities afforded to diplomatic and consular
agents of the wrongdoer state. Breach of the UN Charter and non-compliance with Security Council decisions exposes a member state of the United Nations to all the UN enforcement procedures including, as has already occurred in the present case, the imposition of economic sanctions by all other states against the wrongdoer state. As discussed above, the Hague and Geneva Conventions also provide for compensation and punishment of grave breaches. Given the very disparate nature of the sources of law referred to for these various obligations, it seems inevitable that a claim for damage will be related to the specific obligation breached, and that each obligation and the manner of its breach will play a decisive part in the determination of Iraq’s liability to pay compensation. By applying a requirement that the loss claimed be causally connected and proximate to the commission of the prohibited act, it should be possible to work out restrictions on the amount of damage recoverable.

Obligations under the laws of war

In this section the obligations in respect of damage to the person and property of civilians under the rules of war will be considered. In the next section the relevance of these rules in determining responsibility for an illegal use of force contrary to Article 2 (4) of the UN Charter will be considered.

The limited right of the belligerent to cause damage is set out in Article 22 of the 1907 Hague Regulations: ‘the right of belligerents to adopt means of injuring the enemy is not unlimited’. In pursuance of this general limitation, the 1899 and 1907 Hague Conventions imposed some restraint on the waging of war in relation to the protection of the person and property of private civilian persons and some restriction on the conduct of war relating to public property in the protection which is afforded to religious and similar buildings and to the ‘capital’ derived from public property. The 1949 Geneva Convention IV considerably enlarged and particularized the restraints relating to respect for civilian persons, and introduced a general prohibition on the destruction of property, whether of a private or public nature.

It can, therefore, be said that under the rules of war, obligations arise in respect of certain types of damage; by reference to the Hague and Geneva provisions the type of damage envisaged can be categorized and an appropriate tariff of compensation worked out.

Rights of the person

Thus as regards rights of the person the Hague Regulations provide some protection against excesses of violence, detention, and captivity of the inhabitants of countries occupied by the military. Article 46 of the Hague Regulations requires ‘Family honour and rights, the lives of persons…as well as religious convictions and practices’ to be respected. Article 27 of the 1949 Geneva Convention IV repeats this requirement and it is further elaborated in that section in prohibitions against use of protected persons as shields (Article 28), hostages (Article 34) or for reprisals (Article 33 (3)). Further discussion of these matters is to be found in Chapter 10.

Building on these obligations, it would seem possible for the UN Compensation Commission to indicate guidelines as to the level of compensation to be awarded for each type of breach. In his interim report to the UN Secretary-General referred to earlier, Mr
A. Farah appears to have begun such a process, and it is taken a stage further in the guidelines of the Governing Council of the UN Commission. On this basis it might, therefore, be possible for claims to be filed and verified by reference to the specific abuse of these protections which any particular individual has suffered. Periods of detention should be recorded along with breach of Article 31, which prohibits the exercise of physical or moral coercion, and of Article 32, which prohibits the taking of any measures so as to cause physical suffering or extermination of protected persons; murder, torture, corporal punishment, mutilation, medical experiments and other measures of brutality being specifically mentioned. In addition to these general prohibitions in Section 1, regard should be had to the specific sections of the 1949 Geneva Convention IV on the treatment of aliens, protected persons in occupied territories and the regulation of internment.

In view of the number of individuals involved, the difficulties of verifying the details of each case, and the repetition of like offences by Iraqi personnel, a standard award for each type of breach might be the most flexible method. This type of approach has been adopted in lump-sum agreements made relating to claims by prisoners of war and war victims. Mixed Commissions have also from time to time adopted a sum per day to compensate for periods of detention, this being particularly appropriate where the claimant has been prevented from earning his livelihood by reason of the detention.

In addition to bringing the claim under a particular provision of the Hague Regulations and Geneva Conventions, the claimant will have to establish his identity and nationality, that the act amounting to breach was committed by a member of the Iraqi armed forces or other official for whom responsibility can be attributed to Iraq, and that the claimant himself in no way caused his own damage or loss.

Rights to property

The same type of limited exercise could also be conducted in relation to the provisions relating to protection of property. The state of affairs prior to the Hague Conventions when a belligerent could appropriate all public and private enemy property has long been obsolete. In place there exist a number of restraints on the belligerent’s rights to take and dispose of property. They vary according to whether the property is public or private, moveable or immoveable, by reason of its character and the purpose for which it is used and whether located in territory under attack or occupied by a military force. Broadly, more protection is afforded to private than public property, to property in occupied territories than that on the battlefield, and so far as public property is concerned, to that in use for humanitarian, religious or cultural purposes.

Here, as with rights of the person, it should be possible to categorize damage by reference to the provision breached. So far as property on the battlefield is concerned, the customary rule of war is that all public enemy property, including not only weapons, munitions and equipment, but also cash, transport and any other public property of value, may be seized and appropriated as war booty. So far as private enemy property is concerned, transport and military papers may be taken as booty but other private enemy property such as letters, cash, jewellery found upon prisoners of war must not, according to Article 18 of 1949 Geneva Convention III, be taken from them, and according to Article 16 of 1949 Geneva Convention I, belligerents are bound to collect and transmit to each other all articles of a personal nature found on the battlefield or on the dead.
In the Kuwaiti conflict, these rules probably have little relevance for claims against Iraq; they may have more relevance to the seizure by Kuwaiti and other coalition forces of military equipment abandoned by the Iraqi army in its flight from Kuwait City and the detention of Iraqi prisoners of war. This raises the question, discussed below, whether in the circumstances of illegal aggressive war the rules of war apply equally to both aggressor and defender state forces and, if the rules do apply to the allied forces, whether some opportunity in the UN compensation procedure should be provided to raise claims for breach of international obligations by allied forces.

Of more immediate relevance are the provisions protecting private property in occupied territories. Respect for private property is required by Article 46 of the Hague Regulations 1907. Pillage of private property is formally forbidden (Article 47), it cannot be confiscated (Article 46 (2)) and requisitions in kind and services are not to be demanded ‘except for the needs of the army of occupation’ and receipts are to be given and payment made (Article 52). However, means of transport and for transmission of news and all kinds of munitions of war may be seized in any event, even if they belong to private persons, but ‘must be restored and compensation fixed when peace is made’ (Article 53). Penalties are prohibited in respect of acts for which a person cannot be regarded responsible (Article 50) and levies for money contributions, other than taxes previously in force (Article 48), shall only be ‘for the needs of the army or the administration of the territory in question’ (Article 49).

One difficulty which may arise for claimants relying on these provisions, may be the difficulty of proving that any requisition or seizure of private property was made by members of the armed forces rather than by the civilian authorities of Iraq. Article 3 of the 1907 Hague Convention IV renders the belligerent party responsible for all acts committed by persons forming part of its armed forces. However, the scope of the 1949 Geneva Convention IV is wider; many of its restraints concern activities of civilian authorities such as internment procedures, conduct of hospitals and prohibitions relating to the occupying power, rather than the army. For breaches in respect of these matters it can, therefore, be assumed that the belligerent is answerable for the acts of his civil authorities. The prohibition against pillage and collective penalties is repeated in the 1949 Geneva Convention IV (Article 33) and reprisal against private property of protected persons is forbidden (Article 33 (3)). In addition, the 1949 Convention IV sets out specific prohibitions against the requisition of foodstuffs and medical supplies (Article 55(a)); it allows the temporary requisition of civilian hospitals (Article 57 (1)) but prohibits the requisition of their matériel and stores. The needs of the civilian population are to be specifically taken into account.

More important, probably, than these provisions, is the general prohibition in Article 53 against destruction by the occupying power of real or personal property belonging individually or collectively to private persons or the state. This provision provides a basis for claims for destruction of private villas, motor vehicles, public buildings and other objects or installations by Iraqi officials. Looting of such objects by Iraqi individuals for their own purposes is pillage; here the individual as well as the occupying power permitting such pillage may be liable. In disposing of claims made under these provisions, a tariff system would again seem advisable. Mr Farah in his report gives a ‘conservative average figure of $15,000 per dwelling unit’.
Obligation under Article 2 (4) of the UN Charter

The previous section has set out the obligations of belligerents in respect of the person and property of civilians under the rules of war on the assumption that they regulate the question of reparation by Iraq. But is an illegal aggressor, identified by the UN Security Council, entitled to plead military necessity to a claim for destruction of property or uncompensated requisition or seizure? Is not such a state, by reason of the use of illegal force against the territorial integrity and political independence of another state contrary to Article 2 (4) of the UN Charter, responsible for all the consequences of its waging of war, including acts within the requirements of military necessity?

This issue involves the harnessing in conjunction of rules relating to the legality of war, *jus ad bellum* with the humanitarian rules of war, the *jus in bello*, which apply equally to belligerents for the duration of the armed conflict. In the present case where the military action of the allies was authorized (though not conducted) by the United Nations, a further element of collective law enforcement is present. This problem, whether an illegal aggressor should enjoy the benefit of the rules of war, has been much debated, particularly at the instigation of the International Committee of the Red Cross. It was exhaustively discussed by the Institute of International Law in its sessions at Neuchâtel (1959), Brussels (1963) and Zagreb (1971).\(^71\) After much controversy, the principle of equality of application of the rules of war was confirmed for the duration of armed conflict involving an aggressor, even where forces under the command of the United Nations were engaged in a law enforcement exercise. A resolution of the Institute to this effect was adopted at Zagreb in 1971.\(^72\) In the present conflict, therefore, Iraqi armed forces were expected to act and could assume that allied forces would act in accordance with the rules of war: the coalition forces accepted throughout that the rules of war applied to the Gulf conflict. The laws of war, accordingly, apply to individual members of Iraq’s army including President Saddam Hussein himself: such protection as the laws of war provide for members of the armed forces of belligerent states applies to members of the Iraqi armed forces and also leaves them exposed to charges of grave breaches under the 1949 Geneva Conventions.

The Institute of International Law was, however, also unanimous that the equal application of the rules of war in time of armed conflict did not determine the issue of reparation for war damage after the war.

Mr J.P.A. Francois, the Rapporteur, sought to give effect to this unanimity by including in the 1963 draft Resolutions a provision drafted in the following terms: ‘la responsabilité de l’agresseur pour les conséquences de son agression en matière de reparation financière reste entière, même s’il s’est conformé aux droits des belligerents quant à la façon dont il a fait la guerre’. It was not, however, adopted, running into opposition from various members including Dr Jenks who said:

The question of post-war reparations raises so many economic as well as legal questions that I am inclined to think that the Institute would do well to avoid including in the Resolution a provision which may be redolent of 1919 rather than contemporary problems.\(^73\)
The question is, therefore, much less directly addressed in the final 1971 Zagreb Resolution of the Institute for which Paul de Visscher was the Rapporteur. Article 7 provides:

Without prejudice to the individual or collective responsibility which derives from the very fact that the party opposing the United Nations Forces has committed aggression, that party shall make reparation for injuries caused in violation of the humanitarian rules of armed conflict. The United Nations is entitled to demand compliance with these rules for the benefit of its forces and to claim damages for injuries suffered by its forces in violation of these rules.74

The intention of Article 7, though not as fully spelt out as in the earlier draft, seems clear. A state which has been determined by the United Nations to be an aggressor is liable for injuries caused in violation of the humanitarian rules of armed conflict, as well as for reparation for damage caused by the act of aggression. The rules of war are, therefore, relevant in the determination of the aggressor state’s liability in that they particularize the minimum of obligations relating to the civilian population which the aggressor state by waging war incurs. In addition the aggressor state is responsible for the consequences of waging a war of aggression: whereas a lawful belligerent might be able to reduce the extent of such responsibility by showing that damage from military operations was caused as a result of military necessity, it would seem such a plea is not available to the aggressor. He cannot rely on wartime military necessity. The Resolution of the Institute of International Law says nothing as to the standard of reparation to be applied to the aggressor. It would seem that, if he cannot rely on the special conditions of war to exonerate him, his responsibility to other belligerent states, their nationals and the nationals of third states it is to be determined by the standard of international responsibility in time of peace; and in relation to injuries suffered by civilians, particularly for requisitioned property for which no payment was made, that economic loss, in addition to physical injury to the person or property, is recoverable on the lines already discussed in pp. 275–7 above.

This leaves unresolved the question of whether the aggressor state is by reason of its aggression responsible for all damage caused by other belligerents in the course of military operations taken in self-defence. Or is the rule of state responsibility qualified by equality of application of the rules of war or some general international law principle of reciprocity and fair treatment? In a compensation procedure, expressly held under international law, do the rules of war in their equal application to allied forces as to those of the aggressor render the former liable for compensation for damage to life or property of civilians caused beyond the requirements of military necessity?

A simple application of the rules of causal connection would seem to rule out any claim (or counterclaim before the UN Compensation Commission) by Iraq itself for damage suffered by reason of the conduct of coalition military operations. Any damage sustained by Iraq, even if caused by coalition military operations for which there was no military necessity, is attributable to her own deliberate conduct in illegally invading and occupying Kuwait. But should not a process of international law envisage the possibility of claims for war damage by nationals of the defeated state? One answer may be to apply
a rule of collective responsibility by which nationals of a delinquent state are deprived of their individual remedy by reason of the wrongdoing of the state. This, however, runs counter to the humanitarian objectives of the rules of war which aim to regulate the conduct of all belligerents. On such a view, damage inflicted in contravention of the rules of war by the military forces of any belligerent state should be recoverable by a member of the civilian population, regardless of whether he is a national of the victor or of the defeated state. Even, however, if this be accepted as the correct position in law, it may prove difficult in practice to apply it to the circumstances in which the war was conducted. The Gulf War has shown how difficult in practice is the separation between military targets and civilian objects, and the applications of a principle of proportionality whereby all reasonable precautions are taken to minimize civilian casualties. In this context, the burden of proof to establish the excessive or illegal nature of the act causing the damage is likely to be a difficult one to discharge where the action taken by the belligerent state is in response to an unlawful act of the state of the claimant national.

State practice provides little support in favour of such even-handedness; the issue is a difficult one both in theory and practice. The UN Compensation Commission might be well advised, without compromising the abstract principle of reciprocity, to sidestep its application in the present situation. They might enact a guideline that the commissioners in assessing damages in any particular claim may take into account any conduct on the part of the coalition forces which affects the claim.

The discussion of substantive law in this section is abbreviated, unavoidably, by constraints of space, but it is hoped that enough has been said to show that the rules of state responsibility provide general guidance to the UN Compensation Commission as to its approach to international law, yet require further particularization in order usefully to distinguish as recoverable direct loss from indirect loss. Linking these rules of state responsibility to specific international obligations of Iraq offers a more specific method. By construing these obligations, applying the rules of causation and a tariff for identified heads of damage, the commissioners should be able to arrive at a fair award. The position of Iraqi civilians who claim to have suffered personal injuries or loss of property from excesses of coalition military operations remains a delicate matter. Whilst guidelines may exclude the issue from the UN Commission’s competence, politically some measure acknowledging Iraqi civilians’ entitlement to equal humanitarian treatment may be advisable. It may be that humanitarian relief or international agencies funded by the United Nations or individual states would constitute such a political gesture; a possible alternative is the allocation of a specified amount of Iraq’s oil revenues for distribution by the relevant Iraqi authorities to claimants whose claims have been duly authenticated.

**CONCLUSION**

As demonstrated above, no clear rules of international law govern war damage. But if a UN process for settlement of compensation is to be justified as one made in accordance with international law, it must be one subject to established principles of law. Foremost among these is the independence, impartiality and objectivity of the process by which the claims are adjudged. To preserve these qualities the Security Council cannot act as lawmaker, prosecutor and judge. It must distance itself from the process.
No one can be a judge in his own case. In its Advisory Opinion on *The Administrative Tribunal of the ILO* the International Court of Justice stated, 'The principle of the equality of the parties follows from the requirements of good administration of justice.'\(^7\) The UN Secretary-General in his report (paragraph 26) envisaged that Iraq would be ‘informed of all claims and have the right to present its comments to the Commissioners within time delays to be fixed by the Governing Council or the panel dealing with the individual claim’. Yet Iraq itself has no Commissioner, and the final decision on any appeal on law from the Commissioners is to be by the Governing Council of the UN Compensation Commission.

As a minimum, the position of Iraq must be safeguarded with special attention to the observance of rules of natural justice. The universality of UN membership and of the mandatory compliance required from such members to the Security Council’s decision for economic sanctions in a theoretical sense ranges all states on the opposite side from Iraq. Yet, it should be possible to find states who can continue to adopt a generally neutral stance—for instance, UN member states who have suffered no loss by reason of the Iraqi invasion of Kuwait. From them should be drawn the Commissioners to determine the claims; one such member might be appointed as a kind of ‘protecting state’ to take responsibility for the protection of Iraq’s interests.\(^7\) Iraq has violated international law and it is essential with the assistance of a friendly state that she be brought back as a fully rehabilitated member of the international community. For example, Iraq might be encouraged to take a more active role in the negotiation of compensation. There is no reason why, under the supervision of the Commission, it should not agree terms of lump-sum agreements with individual states. The direction in Article 36.3 to distinguish legal disputes from questions of fact should be observed; appeal on questions of law from the panels of commissioners should either be dealt with finally by a legal qualified Board of Commissioners, or be referred by request from the Council for an advisory opinion of the International Court of Justice.

The Governing Council of the Compensation Commission should at the earliest opportunity state its intention to dispose of the claims in accordance with principles of international law. As a beginning it should in broad terms identify these principles as impartiality, fairness, and observance of the rules of natural justice, and uniformity (others will emerge as it carries out its task) and undertake to observe them in the drawing up of guidelines and terms of reference for the panels of commissions. In the Secretary-General’s report and the earlier sections of this chapter, a considerable number of issues have been identified as arising in the process of compensation. The Security Council has already placed on record that the process of settlement of claims will be determined by international law. It is for the Commission to state the general principles of international law by which it will be guided and to ensure that each stage of the settlement of claims is conducted by reference to such principles.

The Secretary-General at an early stage in the development of the Iraq-Kuwait conflict drew the attention of the members of the Security Council to the true nature of the process in which the United Nations was engaged. He stated:

> the settlement must be in accordance with international law, not the legalized will of the victor…. The way of enforcement is qualitatively
different from the way of war…what it demands from the party against whom it is employed is not surrender but the righting of the wrong.\textsuperscript{79}

A great opportunity exists to shape a fair and just method of compensation for war damage in accordance with international principles. It is for the United Nations to take it.
Part II
The Gulf War 1990–91 in English law
Chapter 14
Prisoners of war in the United Kingdom

Colonel Gordon Risius

INTRODUCTION

Of the tens of thousands of Iraqi soldiers taken prisoner by coalition forces during the Gulf conflict, virtually all entered captivity in the traditional manner, surrendering to advancing troops on the battlefield. In most instances Geneva Convention in provided adequate guidance on their treatment. However, thirty-five of their comrades also came to be treated as being subject to the Convention in unusual, possibly unprecedented, circumstances in the UK, thousands of miles from the battlefield. In their case the Convention did not always resolve problems concerning their treatment.

The purpose of this chapter is to outline the circumstances of the internment of these thirty-five Iraqis as prisoners of war, and to discuss some of the legal issues involved in their detention, including the determination of their status as members of their country’s armed forces and the authority under English law for internment them.

It is not intended to discuss international legal considerations outside the law of armed conflict, such as the impact, if any, of the European Convention on Human Rights or the International Covenant on Civil and Political Rights. Nor is it proposed to deal, except in passing, with the short period prior to internment as prisoners of war, when the individuals concerned were being detained by the civil authorities under the Immigration Acts (see Chapter 15).

OUTLINE OF EVENTS

On 18 January 1991, very shortly after the outbreak of hostilities in the Gulf, the Ministry of Defence were informed that two Iraqi students, being held at Pentonville prison under paragraph 2 (2) of Schedule 3 to the Immigration Act 1971, were believed to be serving Iraqi military officers, both of the rank of lieutenant-colonel. They were handed over into military custody as prisoners of war and held briefly at military barracks in London, before being transferred on 26 January to Rollestone Camp on Salisbury Plain, which had just been converted to a prisoner of war camp. There they were joined later the same day by a further thirty-three Iraqi students who had likewise been detained by the civil authorities under immigration powers; deportation action had been initiated against all thirty-five when the Home Secretary had personally decided that their presence in the UK was not conducive to the public good for reasons of national security because they were believed to be members of the Iraqi armed forces. However, doubts regarding the status
of four individuals resulted in boards of inquiry being convened. After the boards of inquiry had completed their work and had made recommendations, three of the four were released, while the prisoner of war status of the individual in the remaining doubtful case was confirmed. He and his thirty-one fellow prisoners of war continued as internees at Rollestone Camp until 6 March 1991, when they were released immediately following the cessation of active hostilities in the Gulf.

**APPLICABILITY OF THE GENEVA CONVENTIONS OF 1949**

Although all four 1949 Geneva Conventions applied from the outset of the Gulf crisis on 2 August 1990, at least between Iraq and Kuwait and, to a limited extent, other states whose nationals were caught up in the crisis, they did not enter fully into operation as between the UK and Iraq until the early hours of 17 January 1991, when hostilities between those two countries commenced. Iraqi nationals in the UK at that time accordingly found themselves ‘in the hands of a Party to the conflict of which they [were] not nationals’, and thus became persons protected by Geneva Convention IV (‘the Civilians Convention’), unless protected by one of the other three Conventions, in which event the Civilians Convention had no application.

Whether any of the other Conventions was applicable was a question of fact, not a matter of discretion for the UK authorities. In the case of Geneva Convention III relating to prisoners of war (hereafter ‘the Convention’), the question was whether any Iraqis in the UK came within Article 4, which provides so far as is relevant that ‘Prisoners of war…are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a Party to the conflict…’ (Article 4A (1)).

Since the thirty-five Iraqis were plainly in the power of the UK as one of Iraq’s enemies in the Gulf conflict, the answer lay in whether they were currently members of Iraq’s armed forces.

The Convention does not define what is meant by the phrase ‘Members of the armed forces’. According to Pictet, the drafters of the Convention considered whether a ‘more exact definition’ was needed (e.g. whether a distinction should be drawn between combatants and non-combatants), but concluded that any attempt to do so might result in undesirable restriction. Whether a person is a member of a country’s armed forces must depend, therefore, on the law and practice of the country concerned, on the basis that

> It would seem to be generally accepted that a State has the exclusive right to determine the method of recruitment of its armed forces…[and]… to determine the composition of its armed forces, whether they be regular, part-time volunteer or militia troops.

There is normally no doubt little difficulty in determining that those captured in the course of fighting, wearing uniform and carrying weapons and military identity cards, are members of their country’s armed forces. They would be likely to be either regular soldiers or alternatively reservists or part-timers called up into full-time service. At the other extreme, few would seriously suggest that a country’s entire adult population
constituted its armed forces, even though all adults may be liable, at least in theory, to conscription. But what of those in between these two extreme positions, for example ex-regular soldiers with an unexpired reserve liability? Can they properly be regarded as members of their country’s armed forces, and if so, at all times, or only when called up? What if a reservist receives his call-up papers but decides to ignore them? Authority in this area is lacking, and in the absence of evidence of the law and practice of the state concerned, it is suggested that relevant considerations might include the following: prior military service; reserve liability; the continued use of rank; the receipt of military pay; the receipt of call-up papers; current subjection to military law and discipline; and the individual’s own views regarding his status. None of these individually would necessarily be conclusive, but taken together they might point either to military or civilian status.

PRISONERS OF WAR

It is understood that at no stage did either of the two lieutenant-colonels dispute his current membership of the Iraqi armed forces, and there was no reason to doubt such membership. They were therefore plainly prisoners of war and subject to the Convention, and the British authorities accordingly had to decide how to deal with them within its terms. Although prisoners of war (at least those not seriously sick or wounded) are traditionally interned for the duration of hostilities, the practice is not mandatory in view of the terms of Article 21, which provides merely that ‘The Detaining Power may subject [prisoners of war] to internment’. For practical purposes there are only two alternatives to internment, namely local release and repatriation, and it is proposed to consider these briefly in turn before dealing with internment.

Local release

Article 21 provides that ‘Prisoners of war may be partially or wholly released on parole or promise, in so far as is allowed by the laws of the Power on which they depend’ (i.e. Iraq in the present case). Article 21 goes on to provide that ‘Upon the outbreak of hostilities, each Party to the conflict shall not notify the adverse Party of the laws and regulations allowing or forbidding its own nationals to accept liberty on parole or promise’. No such notification was received from the Iraqi authorities at any stage, and the question of local release was accordingly not considered further.

Repatriation during hostilities

The Convention contains detailed provisions (Articles 109 and 110) concerning the repatriation and accommodation in neutral countries of seriously injured or sick prisoners of war while hostilities continue. There are no such provisions relating to healthy prisoners, who are entitled to be repatriated only ‘after the cessation of active hostilities’ (Article 118). Whether healthy prisoners should be repatriated during hostilities is thus a question of policy. Since it is hardly in the interests of a state to supply its enemy with, in effect, reinforcements, the practice of repatriating healthy prisoners of war is rare. There seemed to be no reason on this occasion to help augment Iraq’s military forces, and the
question was not considered further. In any event, the difficulties of ensuring the prisoners’ safety in accordance with Article 13 right up to the moment of their arrival back in Iraq might well have proved insuperable. Furthermore, the prisoners might have been unwilling to be repatriated, particularly in the case of those who had ignored their call-up papers from Baghdad.

**INTERNMENT**

The decision to intern Iraqi prisoners of war has been criticized on a number of grounds: that there is no article in the Geneva Convention to say that … a person who is in the military in your country, with his family here, can be taken as a PoW’; that the Convention was ‘being used oppressively’, on the basis that it ‘is intended to be protective of the rights of people captured in combat or in occupied territories, not used as a justification for detaining non-combatants away from the war zone’; that there was no royal proclamation, order in council or emergency legislation; that ‘the only justification for this behaviour is a First World War court case which ruled that a German civilian could be treated as a PoW because all Germans were dastardly and could not be trusted’; and that it was simply a response to threats of reprisals issued by Iraq.

Among the many considerations a state will take into account in deciding whether to intern prisoners of war are the following:

1. The possibility that some of the prisoners might otherwise leave the country, make their way home and rejoin their units;
2. The fact that combatant members of armed forces are entitled under the law of armed conflict to attack military objectives. It is now known that the threats made by Iraq to carry out world-wide sabotage if attempts were made to free Kuwait by force were never implemented, but, not unreasonably, they were taken seriously at the time;
3. The duty imposed on the detaining power by Article 13 of the Convention to provide prisoners of war (not just those interned) with protection, ‘particularly against acts of violence or intimidation and against insults and public curiosity’. Such protection is difficult, if not impossible, to ensure if those entitled to it remain at large. It is a matter of conjecture whether the thirty-five Iraqis would have been at risk of violence from, say, Kuwaitis in exile in the UK, but it is unlikely that the media would have kept its curiosity under control;
4. The requirement under Article 16 to treat all prisoners of war alike. It is not suggested that this provision would necessarily have been contravened if Iraqi prisoners in the UK had been allowed to remain at large while their comrades captured on the battlefield in the Gulf were interned, but it was nevertheless a consideration to be taken into account.

Some of these considerations are clearly of greater significance than others. In the particular circumstances of this conflict, since the Iraqis in question were highly qualified and were engaged in advanced scientific studies, they might have been of considerable value to their country’s military effort. These considerations aside, the decision to intern them was clearly not oppressive, and the government would have been open to serious criticism if it had not acted in the way it did.
As to the implication that the absence of a proclamation, order in council or legislation rendered the internment unlawful, it is necessary to consider briefly the relationship between international law and English domestic law, and then the basis under the latter for interning prisoners of war.

Although the Convention, like the other three Geneva Conventions of 1949, is printed in full as a Schedule to the Geneva Conventions Act 1957, only those provisions of the Convention which are referred to in the body of the Act (e.g. those which make grave breaches of the Convention offences triable in the civil courts) are part of English law. It follows that the internment provisions of the Convention cannot in themselves provide the necessary legal justification under English law for depriving prisoners of war of their liberty.

In the absence of statutory provision, the internment of prisoners of war in the United Kingdom must therefore be justified, if it can be justified at all, by reference to the royal prerogative. According to Hood Phillips:

Wartime legislation and emergency powers during both the two world wars gave the Crown very extensive powers of control over enemy aliens…. The legislation expressly preserved the Crown’s prerogative in relation to enemy aliens. At common law their licence to remain at large may be revoked at any time at the complete discretion of the Crown, and they can be interned or deported. The internment of an enemy alien is an act of state, and he has no right to apply for a writ of habeas corpus against the executive to challenge the Crown’s power to intern or deport (R. v. Bottrill, ex p. Kuechenmeister). The existence and extent of the prerogative to intern prisoners of war was considered during the First World War in R. v. Vine Street Police Station Superintendent, ex p. Liebmann, where it was held, inter alia, that:

1 The Crown was entitled to intern enemy aliens in time of war.
2 An enemy alien so interned could correctly be described as a prisoner of war, even though neither a combatant nor a spy.
3 ‘The action of the Government in [interning alien enemies] is not open to review by the Courts of law by habeas corpus’.

In view of the developments in the law of armed conflict which have taken place since Liebmann was decided, in particular the clear distinction now drawn between civilians protected by the Civilians Convention on the one hand and those combatants and accompanying civilians (e.g. war correspondents, supply contractors, etc.) entitled on capture to prisoner of war status under Geneva Convention III on the other, it is unlikely that a court today would follow point 2 above, but there is no reason to suppose that the propositions in points 1 and 3 are no longer valid.

Liebmann was approved in Kuechenmeister, which was decided shortly after the end of the Second World War. One of the arguments advanced in that case was that the internment of enemy aliens under the prerogative was lawful only in time of war. Since Germany had unconditionally surrendered on 5 June 1945, it was argued that a certificate dated 2 April 1946 from the Secretary of State, to the effect that His Majesty was then
still at war with Germany, should not be regarded as conclusive, on the ground that international law would consider the state of war to have come to an end on 5 June 1945. However, the court rejected the argument and refused to go behind the certificate, holding that it was conclusive.

In a Parliamentary written answer given on 28 January 1991, the Prime Minister stated that the UK was not in a state of war with Iraq but was, together with others, engaged in hostilities against Iraq under the authority of the United Nations Security Council. This does not, it is submitted, invalid the prerogative as authority for interning the thirty-five Iraqis at Rollestone Camp, on the basis that the courts today would doubtless accept that international law has developed since Kuechenmeister, and that the concept of ‘armed conflict’ has to some extent at least superseded that of ‘war’. If so, the courts would be likely to regard a state of armed conflict as equating, for prerogative purposes, to a state of war, thereby confirming the right to intern prisoners of war as an act of state.

There is no legal requirement for the internment of prisoners of war under the prerogative to be preceded by a royal proclamation or order in council, as suggested. It is exercised on the advice of ministers without the need for any legal preliminaries.

**DETERMINATION OF STATUS**

All thirty-five Iraqis were interviewed individually by the Commandant of Rollestone Prisoner of War Camp shortly after arriving there. A number protested to him that they were not members of the Iraqi armed forces, and asked to be released.

Whether a person is entitled to be treated as a prisoner of war can be a question of the utmost importance. In extreme cases it can be a matter of life or death. A soldier who takes a direct part in hostilities, for example by attacking an enemy soldier and killing him, and is then captured, is entitled to prisoner-of-war status, and provided the killing was not contrary to the law of armed conflict (as it would have been if, say, the enemy soldier was clearly *hors de combat* when he was killed), he cannot be put on trial by his captors. A civilian captured by the enemy after carrying out such an act, on the other hand, would not be entitled to the protection of the Convention, and would be liable to be tried as a war criminal for unlawfully taking part in the hostilities. Depending on the circumstances and the local law, he might be liable to the death penalty. Since the denial of combatant, and therefore prisoner-of-war, status can have such serious consequences, Article 5 of the Convention provides that:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Such tribunals may be either military or civil. Their composition is not laid down by the Convention, but it seems that they are expected to consist of more than one person, because when the provision was being negotiated there was concern that ‘decisions which
might have the gravest consequences should not be left to a single person, who might often be of subordinate rank, as had been the case under an interpretation of the corresponding provision of the previous Convention of 1929.

Article 5 tribunals for persons falling into the hands of British forces are governed by The Prisoner of War Determination of Status Regulations, 1958, made under the authority of, and appearing as the First Schedule to, the Royal Warrant Governing the Maintenance of Discipline among Prisoners of War of the same year. However, the regulations are applicable only:

Whenever it appears to an officer (hereinafter called the unit commander) who is the commanding officer of a body of Her Majesty’s forces or who is the commandant of any camp or other place set apart for the internment of prisoners of war, that a doubt exists as to whether any person in his custody who has committed a belligerent act before capture, belongs to any of the categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War, 1949.

In other words, the Regulations apply only when Article 5 of the Convention is applicable, namely to cases where a belligerent act is alleged to have been committed prior to capture. Since none of those protesting against prisoner of war status at Rollestone was alleged to have committed such an act, Article 5 and the Regulations were both inapplicable. However, in order to follow the spirit of the Convention, it was decided that where the Commandant of Rollestone entertained doubts about the status of a particular individual, the correct course would be for him to report those doubts to his superiors, with a recommendation that a board of inquiry should be convened under the Board of Inquiry (Army) Rules 1956, which derive their authority from s. 135 Army Act 1955. The board would investigate and report their findings and recommendations, thereby enabling the Commandant to make a properly informed decision on status. Although this differed from the procedure under the Determination of Status Regulations, under which the board’s report constitutes the effective determination of the status of the person concerned under the Convention, it was considered to be the most appropriate course in the circumstances. It followed that individual prisoners could not demand a board of inquiry as of right, though their representations were naturally taken into account by the Commandant when carrying out his initial assessment.

By 30 January it was established that there were five categories of prisoner. The first acknowledged membership of the Iraqi armed forces; the second accepted that they carried military rank, but claimed that it was purely honorary and had been given to them simply to facilitate military funding of their courses; the third admitted previous military service, but claimed that although still entitled to their rank, they had in fact been discharged; the fourth (consisting of one prisoner only) claimed never to have had any military connections whatsoever; and the fifth (a group of four prisoners) acknowledged that they were deserters.

In the event, the Commandant, after considering each of the thirty-five cases individually, concluded that there was no doubt that thirty-one of them were currently members of the Iraqi armed forces, but that there were reasonable doubts about the position of the remaining four. The prisoners were informed accordingly.

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Commandant reported these doubts to his higher authority, the local garrison commander, who in turn passed them on to the general officer commanding the military district. The latter thereupon signed orders convening four separate boards of inquiry.

The first board assembled on 8 February to consider the case of the prisoner who claimed never to have had any connection with the armed forces. The board consisted of a president (a lieutenant-colonel) and two members (both majors). The president opened the proceedings by explaining the basis of the inquiry and its purpose, pointing out that although witnesses would be called, it was not a trial. Nevertheless the prisoner could be represented, if he desired, by a lawyer. When the prisoner expressed a wish to be legally represented, the proceedings were adjourned immediately to enable him to make the necessary arrangements.

In the knowledge that some prisoners might not be able to afford legal representation, consideration had already been given in the Ministry of Defence to the possibility of legal aid at public expense. It had been decided that although there was strictly speaking no entitlement, nevertheless, in the unusual circumstances confronting the prisoners, it was undesirable that they should be deprived of the possibility of professional advice and assistance merely because of lack of funds. Accordingly it was agreed that legal aid should be made available on the same basis as applies to soldiers facing trial by court-martial. In the event, all four prisoners whose cases were the subject of boards of inquiry applied for, and were granted, representation at public expense by solicitors in private practice.

The proceedings were conducted in the presence of the prisoner and his solicitor, but otherwise in private. Witnesses gave their evidence on oath and were subject to questioning by the board and the prisoner’s solicitor. Hearsay evidence was admissible, having regard to the provisions of r.12 of the 1956 Rules.

The first inquiry concluded and reported its findings on 11 February. On the same day the individual concerned was informed that the Commandant had concluded that he was not a member of his country’s armed forces. He was released immediately and provided with a warrant to enable him to purchase a rail ticket.

The other three boards of inquiry, with the same president and members, began on 12 February and finished on 27 February. Two of the individuals concerned were immediately released on the basis that they were not prisoners of war. In the third case the prisoner was informed that the Commandant no longer doubted that he was a member of Iraq’s armed forces, and he would accordingly continue to be interned.

There is no special system for appealing against the findings and recommendations of boards of inquiry or against decisions made as a result. A person subject to military law who considered himself wronged in such circumstances could use the redress of grievance procedure laid down by sections 180 and 181 Army Act 1955 to bring his complaint to the notice of senior officers, but prisoners of war are not subject to military law. Nevertheless, all the prisoners were informed that whether or not their cases had been the subject of boards of inquiry, any further representations they wished to make would be considered by the Commandant and his superiors.
ROLLESTONE CAMP

Rollestone Camp, a disused former Army camp near Shrewton on Salisbury Plain, was converted into a prisoner of war camp in the space of three days, and at considerable expense. The perimeter fence was fitted with screens to protect the internees from public (particularly media) curiosity. The Commandant was initially the commanding officer (a lieutenant-colonel) of a local infantry battalion (later the commanding officer of a local artillery regiment took over command) and the camp was administered and guarded by troops from those units with specialist help (e.g. from members of the Military Provost Staff Corps).

Accommodation

The prisoners were accommodated in Nissen huts, sleeping eight men to a room. The huts were not in the best state of repair, but were nevertheless warm and comfortable. Four prisoners were accommodated separately at their own request. They considered themselves to be deserters, and were concerned that they might be attacked by the other prisoners if they were not segregated. In accordance with Article 34 of the Convention, rooms were made available for religious observance and (Article 38) recreation (table-tennis). The Prisoners’ Representative (the senior Iraqi officer) was given his own room, to enable him to conduct private interviews with other prisoners.

Facilities

Food was supplied by contract caterers, with advice from the prisoners themselves on religious and dietary requirements. For an hour each day a canteen was open for purchases to be made (Article 28 of the Convention). There was a medical reception station, and a doctor was available to visit the camp when required. Prisoners needing dental treatment were taken to a nearby army dental centre. Recreational facilities included football and volleyball pitches, a gymnasium and a multi-gym. Newspapers were supplied daily, and a library containing both English and Arabic books was installed on 3 February. Cleaning duties would normally have been carried out by other ranks, but since all the prisoners were officers these duties had to be performed by prisoners selected by the Prisoners’ Representative.

Camp regime

The camp was run on military lines in accordance with the requirements of the Convention. On arrival prisoners were briefed, searched, medically examined, photographed and documented. Uniforms with badges of rank were provided for them to wear. In accordance with Article 39 of the Convention, prisoners were required to salute the Commandant. They were given copies of the Convention, Camp and Fire Orders and the Prisoners of War (Discipline) Regulations, 1958, both in English and in Arabic. In addition, the Prisoner’s Representative was provided with an extract from Instructions for
the Handling of Prisoners of War (Ministry of Defence Joint Service Publication 391) dealing with his duties. Regular meetings took place between the Commandant and the Prisoner’s Representative, and separately between the Commandant and the representative of the segregated prisoners. These meetings enabled a number of difficulties to be resolved, such as altering the rules for leaving huts between curfew and reveille in order to accommodate prayer times.

Welfare

The prisoners were concerned less with their own welfare than with that of their families, particularly since many of their wives were aware of the harsh treatment given to prisoners of war during the Iran-Iraq war, and might have been under the impression that this was standard practice in wartime. A number of wives spoke little English, and most were in financial difficulties because funds from Baghdad had stopped, in some cases leading to problems over accommodation. Requests were therefore made by the prisoners for authority to make or accept telephone calls, and to receive family visits.

The Convention makes no provision for telephone calls or family visits. Whether they should be permitted is thus a question of policy, though once again the requirement (Article 16) to treat all prisoners alike meant that consideration had to be given to the possibility of complaints by Iraqi prisoners held in the Gulf if they received less favourable treatment. In the event it was decided that in the special circumstances the right course was to grant both requests, subject to conditions.

In the event, hostilities ended and the prisoners were released before arrangements could be made for the first family visits. However, one prisoner was allowed out under escort to accompany his pregnant wife when she visited her doctor to discuss a serious medical complication.

As to telephone calls, the approved arrangements were for outgoing calls only, and they were required to be monitored to ensure that conversation was confined to family matters. Prisoners’ wives needing to communicate urgently with their husbands were asked to telephone the British Red Cross Society, with whom arrangements had been made to forward messages to the camp.

Both incoming and outgoing mail was subject to censorship as set out under Article 71.

Education

The prisoners were particularly anxious that their studies should not be disrupted more than necessary, and a number expressed concern about examinations they were due to sit shortly. Enquiries were made on their behalf with the universities and institutions concerned with a view to assisting them to continue their studies in the camp, but in the event they were released before arrangements could be made. By that stage it had, however, become apparent that it would not be possible, on security grounds, to allow prisoners to use personal computers even where they were vital to the prisoner’s studies.
Financial matters

The requirement under the Convention for the detaining power to make periodic payments to prisoners was the subject of much ill-informed comment in the popular press. Article 60 provides for monthly advances of pay, and in common with the other provisions of the Convention required to be honoured, regardless of whether or not the enemy was complying with the Convention. Prisoners’ families in the UK were provided where necessary with Income Support from the Department of Health and Social Security.

ICRC visits

Article 126 provides that delegates of the International Committee of the Red Cross (‘ICRC’) ‘shall enjoy the same prerogatives’ as representatives or delegates of protecting powers. ICRC delegates therefore have a right, in common with representatives of protecting powers (none, it will be recalled, had been appointed), ‘to go to all places where prisoners of war may be, particularly to places of internment…. They shall be able to interview the prisoners,… without witnesses, either personally or through an interpreter.’

The ICRC asked to visit the two Iraqi lieutenant-colonels at Wellington barracks in London shortly after the Ministry of Defence took responsibility for them from the Home office, and subsequently requested to see all the prisoners held at Rollestone. Their requests were immediately agreed to. Details of such visits are normally confidential, but following the first visit the senior ICRC delegate held a press conference, during which he confirmed that the ICRC considered the two Iraqi prisoners were being treated in accordance with the Convention. The ICRC visited Rollestone on 20/21 February.

The camp was also visited by a local Member of Parliament, who reported that conditions there were good, that the prisoners were being treated in the best possible way, and that their welfare and that of their families was uppermost in the mind of the camp commandant.

REPATRIATION

Once it became clear, towards the end of February, that hostilities were unlikely to last much longer, consideration was given to the procedure to be adopted for releasing the prisoners from Rollestone. On the face of it, the principle laid down in the Convention, namely that the detaining power must release and repatriate prisoners ‘without delay after the cessation of active hostilities’ (Article 118, para. 1) was perfectly clear. In the absence of any agreement to the contrary between the parties to the conflict, the detaining power must ‘establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph’ (Article 118, para. 2), and in all cases the arrangements proposed ‘shall be brought to the knowledge of the prisoners’ (Article 118, para. 3).
Whereas the provisions of the Convention relating to the repatriation of seriously sick and wounded prisoners expressly state (Article 109) that ‘No sick or injured prisoner of war who is eligible for repatriation under...this Article may be repatriated against his will during hostilities’, the Convention contains no such qualification, relating either to sick or wounded prisoners or to their healthy comrades, once hostilities are at an end. It would seem, therefore, that at the conclusion of active hostilities the detaining power is under an absolute obligation to repatriate all prisoners, regardless of their individual wishes.

However, the true position is not as clear-cut as this, and as so often when seeking the proper construction of international treaty obligations, it is necessary to consider the negotiating history. This is discussed in Chapter 9.

Despite the unqualified nature of Article 118, paragraph 1, the duty to repatriate prisoners of war at the conclusion of active hostilities should accordingly not be regarded as absolute. This was accepted by the Ministry of Defence, and steps were taken to devise a procedure which would ensure a proper balance between the duty to repatriate and each prisoner’s own wishes.

In normal circumstances, arrangements would have been made to permit representatives from the ICRC to interview each prisoner privately prior to repatriation or release. However, it is understood that the very large number of Iraqi prisoners taken on the battlefield in the Gulf meant that the ICRC had to concentrate their resources in that area. It was therefore agreed that in the case of the prisoners at Rollestone interviews with ICRC representatives would take place only in the case of prisoners expressing a wish to be repatriated immediately. All the prisoners were accordingly addressed together by the Commandant and then interviewed individually by him in order to ascertain their wishes. In the event, only one prisoner said he had plans to return to Iraq, but he preferred to do so in his own time and at his own expense. The remainder objected to repatriation. All were released locally at Rollestone on 6 March and conveyed to local railway stations, where they were provided with warrants to enable them to buy tickets to their chosen destinations.

CONCLUSIONS

The possibility that members of a country’s armed forces might choose to stay in enemy territory after the outbreak of hostilities appears not to have been foreseen when the Convention was drafted, nor was it anticipated prior to the commencement of hostilities in January 1991 that a prisoner of war camp would need to be set up in the UK in the circumstances described in this chapter. Such a situation does not appear to have any precedent, and is perhaps unlikely to be repeated. Nevertheless, it would be helpful in due course when possible amendments to the Convention are next discussed in Geneva if consideration could be given to two matters.

The first relates to the lack of guidance provided by the Convention in determining membership of a belligerent’s armed forces, particularly when, as was the case in the Gulf conflict, the Protecting Power system does not function and there is no other way of finding out from the country concerned whether it considers that a particular individual is, or is not, currently a member of its armed forces. This might usefully be considered as
part of a general review of the Protecting Power system, which has generally failed to live up to expectations.\textsuperscript{36}

The second concerns family visits and communications where the prisoner and his family happen to be in the same country. Humanitarian considerations point strongly towards allowing such visits and telephone calls, but it would be helpful to have guidance on a number of matters such as frequency, entitlement (e.g. spouses alone or relatives generally), privacy, cost (in the case of outgoing telephone calls), etc. and to be able thereby to counter accusations of contravening the equality of treatment principle laid down in Article 16 in cases (normally the majority) where prisoners’ families remain in their own country and cannot visit or telephone the prisoner.

The internment of Iraqi prisoners of war in the UK affected individuals in different ways. The prisoners themselves, understandably, strongly resented the loss of their liberty and the interruption to their studies. Certain civil rights organizations regarded the whole exercise as a clear abuse of human rights.\textsuperscript{37} Certain sections of the public, together with the popular press, complained loudly about the comforts and facilities provided for the prisoners, thereby displaying a woeful ignorance of the provisions of the Convention and its underlying principles, despite the importance emphasized in Article 127 of the text of the Convention being ‘known…to the entire population’.\textsuperscript{38} Members of the British armed forces, particularly those concerned with Rollestone, seem to have shared the determination expressed by the Prime Minister on 25 January\textsuperscript{39} to ‘observe our obligations under [the 1949 Conventions] scrupulously’, doubtless not only because states should always comply strictly with their international obligations, but also to emphasize the contrast with Iraq’s widespread failure to honour the very same obligations, and to deny her leaders any opportunity for justifiable complaint against the UK.

One final reflection, which may have occurred to many both within and outside the British armed forces, is that proper compliance with the Convention is enormously expensive in manpower, equipment, supplies, planning and administration, particularly in relative terms when the number of prisoners to be interned is small, as was the case at Rollestone. It is heartening that despite all these factors, both the letter and the spirit of the Convention were maintained at Rollestone to the maximum extent possible.
Chapter 15
Detention and deportation of foreign nationals in the United Kingdom during the Gulf conflict

Bernadette Walsh

INTRODUCTION

Throughout the Gulf conflict, public attention inevitably centred on events in the Gulf itself. Such events clearly overshadowed the making of deportation decisions in respect of a number of Arab, predominantly Iraqi, nationals living in the United Kingdom, and the subsequent detention of some of them. The action of the United Kingdom government was, however, correctly identified by the media as raising the perennial conflict between the interests of national security and the interests of individuals in the protection of their civil liberties.1

The specific aims of this chapter are to outline the legal bases for the selective detention and deportation of Arab nationals and to consider whether the action taken conformed to the standards demanded by domestic and international law. The more general issue to be pursued is whether, in taking such action, the United Kingdom government struck the appropriate balance between the competing interests at stake.

POWERS OF DETENTION AND DEPORTATION: THEIR LEGAL BASES

There are two main legal bases for the powers which may be used to restrict the movement (either by deportation or detention or both) of nationals of other states: powers exercisable under the royal prerogative, and powers conferred by statutory authority. For the purposes of this discussion the term ‘alien’ will be used to refer, as in the British Nationality Act 1981, to a person who is neither a commonwealth citizen nor a British protected person nor a citizen of the Republic of Ireland.2 The term ‘enemy alien’ is used to describe a person falling within this description who is the subject of a foreign state with which this country is at war.3

Among the many specific prerogative powers exercisable in times of war are powers to intern and deport enemy aliens.4 As the United Kingdom did not make a declaration of war during the Gulf conflict, it is unlikely that Iraqi nationals living in this country acquired the status of enemy aliens.5 The extent of the prerogative power to deport aliens who are not enemy aliens is a matter of some dispute. There are a number of dicta which can be relied upon to support the existence of a prerogative power to deport aliens, in particular where there is a situation of national emergency.6 Vincenzi has, however,
doubted the correctness of the *dicta* supporting a wide prerogative power to deport aliens. During this century, the detention and deportation of aliens (other than prisoners of war) has in fact generally been accomplished through the use of statutory powers. Hence, following the outbreak of the First World War, the Defence of the Realm Act 1914 was enacted, authorizing the making of regulations to secure public safety and the defence of the realm. In *R v. Halliday ex parte Zadig* the House of Lords held that an internment scheme established by the government by statutory instrument fell within the general empowering provisions of the 1914 Act. Parliament left the matter in no doubt when, on the outbreak of the Second World War, the Emergency Powers (Defence) Act 1939 provided expressly for the making of regulations for the detention of persons on security grounds. Regulation 18B of the Defence (General) Regulations 1939 empowered the Home Secretary to detain anyone whom he had reasonable cause to believe ‘to be of hostile origin or associations, or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm, or in the preparation or instigation of such acts’. Persons detained were entitled to make objections to an advisory committee appointed by the Home Secretary, who was himself obliged to report monthly on the number of persons detained and the number of cases in which he had not followed the advice of his advisory committee. As is well known, this limited form of Parliamentary scrutiny was relied upon by a majority of the House of Lords in *Liversidge v. Anderson* to justify their effective refusal to exercise review of the Home Secretary’s decision to order detention.

Neither the Defence of the Realm Act nor the Emergency Powers Act (nor regulations made thereunder) regulated deportation (as opposed to detention). However, in addition to passing the Defence of the Realm Act in 1914, Parliament introduced wide powers to deport aliens by the enactment of the Aliens Restriction Act 1914. There has, of course, been a long history of laws governing the deportation of aliens. The modern law can be traced to the Aliens Act 1905, passed in response to the anti-Jewish campaign which accompanied immigration to Britain from eastern Europe between 1880 and 1905. The grounds for deportation were specified in the Act and displayed a concern to reduce the social costs of alien immigration. With the outbreak of the First World War, however, the Aliens Restriction Act, which passed through Parliament in one day, conferred a broad discretion on the executive to deport aliens. Under the Act orders authorizing the removal of aliens on the basis that their presence was not conducive to the public good were made; the legality of such orders was upheld in *R v. Leman Street Police Station Inspector ex parte Venicoff*. Although originally designed as a temporary measure, it is this Act which set the precedent for the current law. The basis of this transition from emergency to permanent status was twofold. First, the Aliens Restriction (Amendment) Act 1919 removed the limitation in the 1914 Act which confined its use to situations of national danger. It gave the Secretary of State power, for one year from the passing of the Act of 1919, to make deportation orders at any time. The 1914 and 1919 Acts were thereafter renewed each year by the Expiring Laws Continuance Acts. Under these statutes various Aliens Orders were made, the last being the Aliens Order 1953, which authorized, *inter alia*, deportation on the ‘conducive to the public good’ ground. The Aliens Orders governed the deportation of aliens until the repeal of the relevant legislation in 1971 by the Immigration Act, the provisions of which will be considered further shortly.
documented their use during the Second World War, when many internees were deported to Australia and Canada.\textsuperscript{19}

Consistent with earlier practice in the twentieth century, the royal prerogative was used during the Gulf War to provide a legal basis only for the detention of those Iraqis living in the United Kingdom who were classified as prisoners of war. Their treatment is discussed further in Chapter 14. While statutory authority therefore provided the main legal basis for the detentions and deportations, no special emergency legislation, equivalent to the Defence of the Realm Act or the Emergency Powers Act, was passed. Rather the controls exercised over Arab nationals (other than those classified as prisoners of war) were imposed under the Immigration Act 1971. The reasons why the government did not consider it necessary to introduce special emergency legislation were twofold. First, as will be made clearer later, the Immigration Act 1971 already conferred very broad powers upon the Secretary of State. Secondly, it was not considered necessary to impose controls on British citizens living in the United Kingdom; by contrast the use of powers of detention against British citizens during the two World Wars is well-documented.\textsuperscript{20}

Following the Iraqi invasion of Kuwait in August 1990 the immigration rules were amended in September 1990 to prevent Iraqi nationals entering the UK to study.\textsuperscript{21} In January 1991 all Iraqi nationals with leave to enter or remain in the United Kingdom for a limited period were required to register with the police.\textsuperscript{22} The immigration rules were further amended in the same month to prevent any Iraqi nationals from entering the country or extending their leave to stay.\textsuperscript{23} From the perspective of those affected, the most serious measures were those relating to detention and deportation.

Deportation has been described ‘as the process whereby a non-British citizen can be compulsorily removed from the United Kingdom and prevented from returning there unless the deportation order is revoked’.\textsuperscript{24} The Immigration Act 1971 preserves the power of the Secretary of State to order deportation on the ground that he deems deportation to be conducive to the public good.\textsuperscript{25} In theory such orders can be made by any Secretary of State, but in practice they are invariably made by the Secretary of State for the Home Department.\textsuperscript{26} It is significant that there is no express legislative requirement that the Secretary of State must reasonably suspect that deportation is conducive to the public good, or even that he must be satisfied that deportation is conducive to the public good.

Deportation under the immigration legislation is a two-stage procedure. The first step in the deportation procedure is the decision by the Secretary of State to deport and the notification of that decision to the person concerned.\textsuperscript{27} Regulation 3 of the Immigration Appeals (Notices) Regulations 1984 (made under section 18 of the Immigration Act 1971) requires notice of the deportation decision to be given, and regulation 4 requires that this mandatory notice shall include a statement of the reasons for the decision.\textsuperscript{28} There is generally a right of appeal against deportation decisions made on the ‘conducive to public good’ ground, but this right does not apply where the decision is taken ‘as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature’.\textsuperscript{29} In such cases individuals in respect of whom deportation decisions are made are entitled instead to apply to a panel of three advisers who make recommendations to the Home Secretary. This panel was established by the executive in 1971. Its existence is recognized in Rule 157 of the
Immigration Rules, which provides that the person proposed to be deported will be informed, so far as possible, of the nature of the allegations against him and will be given the opportunity to appear before the advisers and to make representations to them before they tender advice to the Secretary of State. The final stage in the deportation procedure arises when the Secretary of State decides, in the light of any advice tendered by the committee, whether to issue a deportation order.

The Secretary of State may order deportation to a country of which the individual concerned is a national or citizen, or to a country or territory to which there is reason to believe he will be admitted. The ‘deportee’ must be informed of the destination. While it is normal for the destination to be specified when the deportee is notified of the Home Secretary’s decision to deport, this sometimes occurs at a later stage. Rights of appeal against the destination of deportation are considered further below.

The Secretary of State is empowered to authorize detention pending the making of the deportation order, provided that notice of the decision to deport has been given to the person concerned. In practice some people leave the country voluntarily at this stage, waiving any hearing by the panel, possibly because they do not wish to be detained in custody pending the hearing.

The controls exercised over Arab, predominantly Iraqi, nationals during the Gulf War, were thereby achieved without the need for emergency legislation; the powers contained in the Immigration Act apply generally in peacetime and in wartime. Use of the Immigration Act during the Gulf conflict can therefore be described as an example of the deployment of ‘normal’ laws to deal with an abnormal situation of crisis. Ironically, however, the origins of the power to deport on the ‘conducive to public good’ ground can, as demonstrated above, be traced to the introduction of special controls on the outbreak of the First World War.

DEPORTATION AND DETENTION DURING THE GULF CONFLICT

In the period from 2 August 1990 to 6 February 1991 the Secretary of State, Kenneth Baker, decided to make deportation orders against 162 Iraqi nationals and fourteen other Arab nationals. The list of those selected for such treatment was drawn up by the police Special Branch and MI5. It has been reported that many of those detained had British wives and children. The deportees received notice as required by the immigration regulations, although the amount of information provided varied. For example, Mr and Mrs B and Mr Cheblak, whose cases will be discussed in further detail below, simply received notice in the following terms:

The Secretary of State has decided that your departure from the United Kingdom would be conducive to the public good for reasons of national security. Accordingly he has decided to make a deportation order against you.

In some cases Iraqi nationals were informed that the decision was taken because of their links and activities in connection with the Iraqi regime, which had threatened to take
terrorist action in the event of Gulf hostilities. Other Arab nationals were sometimes informed that the action was being taken because of the individual’s links with an organization which would take such action in support of the Iraqi regime. At the same time those threatened with deportation were informed, in compliance with rule 157, that:

By virtue of section 15 (3) of the Act, you are not entitled to appeal against the decision to make the deportation order but, if you wish, you may make representations to an independent advisory panel. You will be allowed to appear before the panel if you wish but you may not be represented. To such an extent as the advisers may sanction, you may be assisted by a friend and arrange for third parties to testify on your behalf. You should inform the officer who hands this letter to you whether or not you wish to make representations to the panel of advisers.

One hundred and ten of those issued with deportation notices since the beginning of November 1990 were detained for various periods of time. Thirty-five of this number were subsequently classified as prisoners of war; their treatment is discussed further in Chapter 14. The remainder were detained under the immigration legislation itself. Initially the detainees were placed in Pentonville Prison in London but the majority were subsequently moved to Full Sutton in Yorkshire, while some remained in London in Wormwood Scrubs. The detentions did not, however, necessarily follow on immediately from the service of notices of intention to deport; hence, for example, Home Office press releases reveal that three Iraqi nationals who were served with notices of intention to deport on 5 November were detained only from 16 January. It is also evident from the statistics that not all of those issued with deportation notices were detained; some left voluntarily before detention, whilst a small number were never detained but were instead subject to restriction orders which required them to live at a specified address and report to a specified police station.

Many of those issued with deportation notices exercised their right to appear before the advisory panel, the members of which were the chairman, Sir Anthony Lloyd (a member of the Court of Appeal and vice-chairman of the Security Commission which reports to the Prime Minister on the work of the security services), Mr David Neve (a former chairman of the Immigration Appeal Tribunal) and Robert Andrews (a former deputy under-secretary at the Home Office and former permanent under-secretary at the Northern Ireland Office). During the period when Lloyd LJ was preparing for and hearing the appeal of the ‘Birmingham Six’ against their convictions for murder, Bingham LJ acted as an additional chairman to hear cases when Lloyd LJ was not available. In addition reserve members were also appointed. The Panel hearings took place in Pentonville Prison in London.

By 8 March fifty-six of those issued with notices of intention to deport between November 1990 and January 1991 had appeared before the panel. There is little published material on the conduct of panel hearings. When they were established the Home Secretary told the House of commons:

The advisers will…take account of any representations made by the person concerned. They will allow him to appear before them if he
wishes. He will not be entitled to legal representation, but he may be assisted by a friend to such extent as the advisers sanction. As well as speaking for himself, he may arrange for a third party to speak on his behalf. Neither the sources of evidence nor evidence that might lead to disclosure of sources can be revealed to the person concerned and the procedure will give him the best possible opportunity to make the points he wishes to bring to their notice. Since the evidence against a person necessarily has to be received in his absence, the advisers in assessing the case will bear in mind that it has not been tested by cross-examination and that the person has not had an opportunity to rebut it. If the person does not wish his case to go to the three advisers, he will be given full opportunities to make representations to the Secretary of State.48

It may be added that the recommendations of the panel are secret and not binding on the Secretary of State, although it has been speculated that their recommendations are invariably followed.49

Such information as is available about the conduct of panel hearings during the Gulf War indicates that the procedures outlined by the Home Secretary in his speech to the House of Commons were followed. Applicants were permitted to bring a friend and a witness (or witnesses), but legal representation was prohibited. The friend could, however, be a legally qualified person and could assist the applicant.50 Prior to the hearings the panel received written reports from the security service on each case and asked questions of the officers in the absence of the deportees. The panel then put questions to the deportees based on the security reports; in some cases this process inevitably led to the disclosure of certain additional information to the deportees. Leigh therefore argues that the panel’s role was that of an intermediary ‘testing the case of the Service by putting it obliquely to the deportee and relaying his or her version to the Secretary of State’.51

Until developments in the Gulf, the most notorious use of deportation on the ‘conducive to public good’ ground occurred when, in 1976, the government made deportation decisions against a former Central Intelligence Agency agent, Mr Agee, and a journalist, Mr Hosenball, both of whom were American citizens. The basis for the decisions to deport them was stated to be that they had been involved in activities harmful to the security of the United Kingdom. The amount of detail provided to the applicants is indicated by the letter sent to Hosenball, which was set out in the judgment of Lord Denning MR in subsequent judicial review proceedings:

The Secretary of State has considered information that Mr Hosenball has, while resident in the United Kingdom, in consort with others, sought to obtain and has obtained for publication, information prejudicial to the safety of the servants of the Crown. In light of the foregoing, the Secretary of State has decided that Mr Hosenball’s departure from the United Kingdom would be conducive to the public good.52
Both Agee and Hosenball sought a hearing before the panel. The procedure at the panel hearing is also recorded in Lord Denning’s judgment. The relevant passages merit full quotation because of the light they shed on procedures before the panel.

On receiving the letter and its enclosure, Mr Hosenball at once consulted his lawyers. They asked for further particulars of what was alleged against him. But they did not get any. The Secretary of State himself personally considered the request for further information, but he was of the view that it was not in the interests of national security to add anything to what he had already said. In order to see that he was fairly treated, Mr Hosenball was given a hearing before a special panel of three advisers. No doubt that panel had before them a good deal of information, and I expect evidence from the security service about the activities of Mr Hosenball. That information and evidence was not made available to Mr Hosenball or his lawyer, but at the hearing he was allowed to make representations. His solicitor did so on various matters which seemed to require explanation. The chairman told the solicitor ‘I should think if you concentrate on those areas it would help us a lot and if we think there is anything else we can tell you.’ They told him of nothing else. He called several witnesses of high standing in journalism, who spoke of Mr Hosenball’s good character. After the hearing the panel made a report to the Home Secretary, but it was not made available to Mr Hosenball.53

Macdonald describes Agee’s predicament somewhat more poignantly:

The Home Secretary refused absolutely to give any particulars, and the two Americans had no idea of what case they had to meet. One had the ludicrous situation of the Three Advisors sitting with their little security files in front of them, while the appellant, Mr Agee, had to put before them every conceivable instance that might or might not be relevant throughout his whole life.54

Although the nature of the advice which the panel tendered to the Secretary of State is not known, it is clear that he subsequently confirmed the making of the deportation orders against Agee and Hosenball.

Despite Macdonald’s acerbic comments about Agee’s predicament, there is some indication that the procedures followed in Agee’s and Hosenball’s cases were more advantageous to applicants than those employed during the Gulf conflict. The information provided to the potential deportees was even more limited than the details given in the earlier cases. Further, whereas Agee and Hosenball had several days in which to make representations and answer questions, the average length of the individual hearings in the Gulf War cases was forty-five minutes to an hour. Finally, as the extract from Lord Denning’s judgment indicates, Hosenball was apparently permitted legal representation, notwithstanding the terms of the Home Secretary’s speech to the House of Commons, while this was denied during the Gulf conflict, although written representations by legal advisers were permitted and legally qualified friends could...
The contrasts between the hearings may be explained by the fact that during the Gulf War the panel was required to hear a large number of cases in a relatively short time. Perhaps as a consequence of the difficulties of processing a large number of cases in a short period of time, procedural difficulties arose. Hence, for example, some detainees were given no more than four or five days notice of the hearing. This was particularly serious because applicants often had to make their preparations whilst in custody and possibly far removed from friends and advisers. There were additional problems associated with Lloyd LJ’s commitments in connection with the hearing of the Birmingham Six appeal, although these problems were to some extent ameliorated by the appointment of Bingham LJ as a substitute chairman.

Although the findings of the panel are secret, the Secretary of State’s decisions, following consideration of the panel’s recommendations, are not. The outcomes of the fifty-six cases which the panel considered before 8 March and which concerned deportation notices issued between November and January 1991 are given below:\(^56\)

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Release with notice of intention to deport withdrawn:</td>
<td>15</td>
</tr>
<tr>
<td>Release on restriction pending further investigation:</td>
<td>7</td>
</tr>
<tr>
<td>Release pending making of deportation order:</td>
<td>3</td>
</tr>
<tr>
<td>Held in detention pending further investigation:</td>
<td>25</td>
</tr>
<tr>
<td>Held in detention pending making of a deportation order:</td>
<td>6</td>
</tr>
</tbody>
</table>

On 8 March 1991, following the end of hostilities, the Home Secretary reviewed the situation generally. He then ordered that the remaining thirty-three detainees (thirty-one of whom were Iraqi) be released. Restriction orders against a further eight individuals (six of whom were Iraqi) were cancelled and remaining deportation orders which had not yet been implemented were revoked.\(^57\)

The number of Arab nationals actually deported during the Gulf conflict is not entirely clear. On 7 February 1991, it was reported in Parliament that three Iraqi nationals had been deported. Statistics produced by the Home Office, however, suggest that overall there were five deportations; the discrepancy may be explained if the two further deportations occurred after 7 February 1991 or if they concerned persons other than Iraqi nationals, but the statistics provided by the Home Office are not sufficiently detailed to establish which explanation, if any, is correct. In addition, a number of those issued with notices of intention to deport left the United Kingdom voluntarily. The Home Office statistics specify that, between 1 October 1990 and the end of hostilities, sixty-two persons left voluntarily. A further thirteen of those issued with notices of intention to deport were subsequently found to have already left the United Kingdom voluntarily.\(^58\)
THE LEGALITY OF THE PROCEDURES UNDER ENGLISH LAW

During the Gulf War the courts considered two applications for habeas corpus to obtain release from detention, one in the name of Mr and Mrs B and one in the name of Mr Cheblak, and two applications for judicial review to quash deportation decisions of the Secretary of State, made by the same applicants. The challenges were made prior to the hearings before the advisory panel and hence the grounds relied upon by the applicants did not concern the procedure before the panel itself. Mr and Mrs B were born in the West Bank and had come to live in the United Kingdom in 1975 and 1977 respectively. They both worked as engineers and Mrs B was expecting their first child at the time of the deportation decisions. They had been granted indefinite leave to remain in the United Kingdom in 1986 and 1988 respectively. Prior to this grant they had applied for asylum in this country on the basis that they were refugees, but their applications had been refused and they had taken no further steps to seek asylum in the light of the grant of indefinite leave. Mr Cheblak was a Palestinian journalist who had lived in the United Kingdom since 1975 and had been granted indefinite leave to remain here in 1987. Mr B and Mr Cheblak were both in detention at the time of the hearings but Mrs B had been released subject to restrictions.

On 22 January 1991 Simon Brown J. granted leave for the applications of Mr and Mrs B for judicial review to be heard before the Divisional Court and at the same time adjourned the applications for habeas corpus to be heard before the same court. However, on 23 January, he refused Mr Cheblak leave to seek judicial review and dismissed his application for habeas corpus, expressing the view that he had been wrong to allow the Bs’ case to proceed on the earlier occasion. The Divisional Court (consisting of Mann LJ and Tudor Evans J.) rejected the applications by Mr and Mrs B on 29 January. In the meantime Mr Cheblak appealed to the Court of Appeal against the refusal of a writ of habeas corpus and renewed his application for leave to apply for judicial review. His appeal was rejected on 1 February 1991. The applicants were all subsequently released from detention following hearings by the advisory panel.

In both cases the applications for habeas corpus rested on the submission that the reasons given in the notice were insufficient to satisfy the requirements of regulation 4 of the Immigration Regulations. Notice had been served upon Cheblak in the terms that ‘[T]he Secretary of State has decided that your departure from the United Kingdom would be conducive to the public good for reasons of national security.’ A similar notice had been provided to Mr and Mrs B. Counsel argued that the interests of national security constituted the ground for the decision, but not the reason for that ground. It was accepted by all the courts concerned in the litigation that failure to provide reasons, pursuant to regulation 4, would render the detention unlawful. The courts also accepted the argument that there was a distinction between ‘reason’ and ‘ground’ in the immigration regulations. They held, however, relying on R v. Secretary of State for the Home Department ex parte Swati that reasons had been provided. The reasoning leading to this conclusion is encapsulated in the following quotation from Mann LJ’s judgment in ex parte B:
The first sentence of the notice in this case I have already rehearsed but I read it again.

‘The Secretary of State has decided that your departure from the United Kingdom would be conducive to the public good for reasons of national security.’

There, in my judgment, is discernible a ground and a reason. The ground is that departure would be conducive to the public good. That is the ground to be identified in section 3 (5) (b). The reason for the ground is ‘for reasons of national security’.65

The applications for judicial review also rested in part on the alleged insufficiency of the reasons provided. Both Simon Brown J. in *ex parte Cheblak* and the Divisional Court in *ex parte B* appeared to consider that, provided the requirements of regulation 4 were satisfied, this argument must necessarily fail. In the court of Appeal, however, the sufficiency of the reasons, for the purposes of the application for judicial review, was considered more generally in the context of whether the requirements of natural justice had been fulfilled: the Court concluded that the requirements of natural justice were satisfied. In reaching this conclusion the Master of the Rolls took into account not simply the initial reasons given pursuant to regulation 4, but also an amplification, first provided on behalf of the Secretary of State during the proceedings before Simon Brown J. and subsequently communicated in writing, in which it was stated that:

The Iraqi government has openly threatened to take terrorist action against unspecified western targets if hostilities break out in the Gulf. In the light of this, your known links with an organization which we believe would take such action in support of the Iraqi regime would make your presence in the United Kingdom an unacceptable security risk.

Although the Master of the Rolls took this amplification into account there is no indication in his judgment that he would have reached a different conclusion had it not been provided.

The second main argument, relied upon in respect of the applications for judicial review, was that the decision to deport the applicant was so unreasonable that no reasonable Secretary of State could have come to it or, as the argument is more commonly expressed, that the decision was *Wednesbury* unreasonable.66 In *ex parte B* Mann LJ, after referring to *R v. Secretary of State ex parte Hosenball*67 and *Council of Civil Service Unions v. Minister for the Civil Service*, concluded that it was ‘a matter of extreme difficulty for an applicant to impugn a decision taken by the Secretary of State on the ground of unreasonableness where a question of national security is concerned.’ Mann LJ gave two justifications for this statement. First he relied on the accountability of the Minister to Parliament noting that ‘[T]he Secretary of State, who we are informed in this case has himself taken the decisions, is answerable for those decisions in Parliament.’69 Secondly, he stressed the non-justiciability of issues relating to national security. Following *dicta* in *CCSU v. Minister for the Civil Service*, Mann LJ therefore confined the role of the court in dealing with matters of national security to that of ensuring that there is evidence which takes the case beyond the mere assertion that
interests of national security are involved.\textsuperscript{70} The validity of such justifications is explored further below.

In \textit{ex parte Cheblak}, Simon Brown J. rejected the argument based on unreasonableness, somewhat peremptorily stating that the court could not investigate the reasonableness of a decision taken on national security grounds. He further stated that, in respect of this ground of challenge, it was in any event more appropriate for the applicant to use the non-statutory advisory procedure. In the Court of Appeal their Lordships devoted little space to the argument based on irrationality; indeed the Master of the Rolls was content simply to state that ‘there is no evidence whatsoever that the decision was irrational and, in this particular field, it would probably be a unique case if there was.’\textsuperscript{71} Both the accountability of the executive to Parliament and the merits of the procedure before the advisory panel were again relied upon to justify the restricted role of the courts in matters relating to national security.

It is undoubtedly the context of national security which provides the key to understanding the courts’ limited role in reviewing the exercise of the Secretary of State’s discretion. Only Beldam LJ, giving judgment in the Court of Appeal in \textit{ex parte Cheblak}, emphasized the significance of the wording of the legislation itself; he considered that, as the Secretary of State’s power was exercisable where he ‘deems’ a person’s deportation to be conducive to the public good, his discretion was limited only by the requirement that he must act in good faith. The general absence of reliance on the statutory wording, however, suggests that even if the legislation had provided that the power was exercisable where the Secretary of State ‘has reasonable cause to believe …’, the outcome of the cases would not have altered.\textsuperscript{72} It is the deference to executive decision-making in the field of national security which explains the outcome.

In the Court of Appeal, Lord Donaldson MR began his judgment by insisting that:

\begin{quote}
This appeal and application…arise out of the circumstances that British forces are now engaged in hostilities in the Gulf in support of United Nations Resolutions. It is important that the public should know, and be in no doubt, that the existence of such hostilities has no effect whatsoever upon the administration of justice in this country. Unless and until Parliament alters the law, which it has not done, the courts will continue to approach such appeals and applications in precisely the same way as they would have done before those hostilities began. To assert, as has been asserted outside court in the context of this particular case, that ‘British justice must now figure among the casualties of the Gulf War’ is simply untrue. Whatever criticisms may be levelled at British justice, they could just as forcefully have been made before the outbreak of hostilities as after, because there has been no change whatsoever.\textsuperscript{73}
\end{quote}

Lord Donaldson’s statement may be criticized because, by focusing simply on the elaboration of general principles of review and their application by the courts, it neglects the extent to which the practical operation of the law is inevitably dependent upon the particular context. It has already been suggested that some of the differences between the procedures adopted in Agee’s and Hosenball’s cases, on the one hand, and those adopted during the Gulf conflict, on the other hand, can be explained by the surrounding
circumstances. If, however, one accepts the focus upon the role of the courts exercising their review jurisdiction, there is considerable substance in Lord Donaldson’s claim: many of the criticisms of the procedures made during the Gulf conflict were strikingly familiar. Indeed, so also was the response of the courts to such criticisms. When the Secretary of State made a deportation order against the journalist, Mark Hosenball, after considering the recommendations of the panel, he sought judicial review on the grounds that the proceedings breached the rules of natural justice. He was, however, unsuccessful and the Court’s views are aptly illustrated in the following quotation from the judgment of Lord Denning MR:

[T]his is no ordinary case. It is a case in which national security is involved, and our history shows that, when the state itself is endangered, our cherished freedoms may have to take second place. Even natural justice itself may suffer a setback. Time after time parliament has so enacted and the courts have loyally followed.74

It is therefore clear from litigation both prior to and during the Gulf conflict that challenges to the adequacy of the reasons provided and challenges based on the alleged unreasonableness of the decisions to deport are unlikely to succeed. There are other possible bases of challenge, however, which will be briefly explored. Whilst they were not raised during the Gulf conflict, an outline of them serves to indicate the scope and limits of domestic remedies.

A distinction must first be drawn between habeas corpus proceedings and judicial review proceedings. **Dicta in ex parte Cheblak** and a subsequent case in the Court of Appeal, **R v. Home Secretary ex parte Muboyayi**,75 establish that habeas corpus proceedings are not appropriate where the challenge is directed to the validity of the underlying decision to deport rather than to the lawfulness of the detention itself.76 It is clear from the case law discussed in this section that the lawfulness of the detention can be challenged on the basis that there has been a failure to comply with any statutory preconditions for the exercise of the power to detain. Hence a failure to serve the requisite notice of the decision to deport would justify the grant of habeas corpus. If the Secretary of State adopted a blanket policy of detaining all those issued with deportation decisions, this could be challenged on the basis that it amounted to an unlawful fettering of a discretion conferred by statute.77 Other possible grounds of challenge are bad faith and improper purpose. Bad faith is, however, notoriously difficult to establish, and one of the problems facing an applicant who wishes to argue that the detention was for an improper purpose is that of ascertaining from the statute the range of purposes which would be regarded as legitimate. The Secretary of State’s discretion to order detention is subject only to certain procedural requirements concerning in particular the giving of notice. It is, however, implicit in the scheme of the legislation that the detention must in some way be related to the deportation proceedings, that is to say in the present context, that it must be for the purpose of reducing any risk to national security pending deportation or for the purpose of enabling the necessary arrangements for deportation to be made.

Challenges to the underlying decision to deport must, as noted earlier, be made in judicial review proceedings. It seems clear that a challenge would succeed if the decision...
(or subsequent deportation order) was motivated by bad faith or taken for an improper purpose, for example, if the deportation decision was simply a guise for extradition or a convenient method of securing preventative detention without the need for specific emergency legislation authorizing internment. Equally, it is implicit in the judgments in ex parte B and ex parte Cheblak that judicial review might also be granted if, contrary to the immigration regulations, notice was not served or there was no evidence to take the executive’s reliance upon reasons of national security beyond a mere assertion. The latter ground is, of course, fraught with difficulty. It is clear from CCSU v. Minister for the Civil Service that evidence that the decision was in fact taken for reasons of national security is required, but equally it seems clear that, unless bad faith is established (which is unlikely), the courts will not require a detailed statement of such reasons. The amount of information required can be judged by the limited nature of the information provided in Cheblak’s case and accepted by the court as sufficient evidence.

In the Court of Appeal in ex parte Cheblak Lord Donaldson indicated that the advisory panel itself is susceptible to judicial review ‘if, for example, it could be shown to have acted unfairly within its terms of reference.’ There is, for example, an indication in Hosenball that judicial review may be granted if an individual, who has made himself available and has not simply disappeared, is refused an opportunity to appear before the advisers and make representations. Ex parte Hosenball indicates, however, that the failure of the advisory panel to allow cross-examination is unlikely to provide a successful basis for an application. The issue of legal representation was not raised in ex parte Hosenball because, in fact and contrary to the Home Secretary’s statement on the introduction of the panel, Hosenball was permitted legal representation. In the admittedly different context of adjudications by prison boards of visitors, recent decisions indicate that, in the absence of statutory authority for an express exclusionary rule, authorities making decisions which have important consequences for individuals are required to exercise a discretion whether to permit legal representation. The discretion is to be exercised taking into account a wide range of factors, including the seriousness of the matter for the individual concerned, his capacity to represent himself, whether or not any difficult points of law are likely to arise and fairness generally for each of the parties involved in the hearing. In ex parte Cheblak Lord Donaldson MR indicated, obiter, that the absence of legal representation was a matter for Parliament, which approved the terms of reference of the panel, and not for the courts. In fact, there was no formal approval of the terms of reference, which were simply announced in the House of Commons in the course of debates on the Immigration Bill (which subsequently became the Immigration Act 1971); they could only be said to have been approved in the rather tenuous sense that Parliament subsequently enacted legislation which expressly excluded national security cases from the normal appeals procedure. It may be further objected that Lord Donaldson’s approach is to treat the terms of the Home Secretary’s speech to the Commons in 1971 as equivalent to a statute authorizing a prohibition on legal representation. However, the justification given for the absence of legal representation is often for reasons of national security and, given the general approach of the courts in this field, it seems unlikely that the exclusion of such representation would be considered unlawful. The cogency of this justification will be considered further below.

The prospects of a successful challenge to the procedures governing deportation cases therefore remain somewhat remote. While EC law places restrictions on deportation,
has limited relevance in the present context because none of those affected were EC nationals. The provisions of international law, however, remain to be considered.

THE LEGALITY OF THE PROCEDURES UNDER INTERNATIONAL LAW

There are a number of provisions of international law which are relevant to the present discussion. The provisions of Geneva Convention IV of 1949 become applicable whenever there is an ‘armed conflict’ between two or more of the High Contracting Parties (Article 2); they therefore clearly became applicable between Iraq and the United Kingdom on January 17 1991. A number of the detainees fell within the definition of protected persons in Geneva Convention IV. Article 4 of this Convention defines protected persons as being ‘those who, at a given moment and in any manner whatsoever find themselves in the case of a conflict or occupation in the hands of a Party to the Conflict or occupying power of which they are nationals’. Nationals of a neutral state or a co-belligerent state are not, however, ‘protected persons’ while that state has ‘normal diplomatic relations’ with the detaining power. It is therefore clear that the Iraqi detainees fell within the definition of protected persons, and the better view appears to be that this is correct irrespective of whether the detentions began before or after January 17. It is not clear, however, whether the Palestinian, Lebanese or Yemeni detainees came within the definition of protected persons, since the relevant countries did not participate in the conflict and might therefore have been regarded as neutral, despite the authorization of the United Nations for the use of force. In addition, the relevant provisions of the European Convention on Human Rights and the International Covenant on Civil and Political Rights arise for discussion. The provisions of international law pertain to a number of issues: conditions of detention, rights to challenge deportation, rights to challenge the destination of deportation and rights to challenge detention pending deportation.

The United Kingdom did not seek to derogate from any of its obligations under international law during the Gulf conflict. In the cases considered in the preceding section, the courts were not, however, concerned with the provisions of international law. In general, the provisions of international law do not become binding in domestic law unless they are incorporated into domestic law by Act of Parliament. Where there is an ambiguity in a statute the courts apply a presumption that Parliament intended to conform to the United Kingdom’s international obligations. The courts do not, however, require that discretionary powers conferred by statute be exercised so as to conform to international obligations.

Conditions of detention

Both the European Convention on Human Rights and the United Nations Covenant on Civil and Political Rights contain provisions which are relevant to the conditions for detention. For example, they prohibit torture, inhuman and degrading treatment, and prevent individuals from being held in slavery or servitude. As protected persons, the detainees were also entitled to the protection afforded by Articles 27–34 of Geneva
Convention IV. Article 27 provides that protected persons are entitled to respect for their persons, their honour, their family rights, their religious convictions and practices and their manners and customs. In addition, protected persons are to be afforded facilities to apply to the International Committee of the Red Cross, and detailed rules exist, similar to those applicable to prisoners of war, for their protection. No coercion is to be used to obtain information from protected persons and they are not to be subjected to physical suffering or extermination.96

The conditions of detention of protected persons during the Gulf War have received relatively little attention. Although there were initial complaints about the conditions of the detainees in Pentonville Prison in London, the majority were subsequently moved to a better-equipped prison in York, while a small number remained in London in Wormwood Scrubs. While the government has denied that the move occurred after the intervention of the International Red Cross, it is clear that a report into the conditions of detention was compiled by that organization.97 The contents of the report are, however, confidential because the Red Cross considers that in general such confidentiality helps to secure success in its attempts to persuade governments to accept its recommendations. In the House of Commons, in response to the question of whether in future any changes in conditions of detention would be made in the light of a Red Cross Report into the conditions of detention during the Gulf War, the government simply replied that ‘any exceptional detention arrangements which might be necessary in a future emergency would be considered in the light of the circumstances prevailing at the time’.98 It may be suggested that it would have been more appropriate for the government to affirm its commitment to the international standards which the Red Cross seeks to uphold.

Rights to challenge deportation

Article 13 of the International Covenant on Civil and Political Rights states that:

an alien lawfully in the territory of a State Party to the Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and have his case reviewed by, and be represented for those purposes before, a competent authority.99

There is no identical provision in the European Convention on Human Rights. Article 1 of Protocol No. 7 stipulates certain minimal procedural guarantees in respect of the expulsion of an alien lawfully resident in the territory of a state, but the United Kingdom has not ratified the Protocol.100 The jurisprudence of the Human Rights Committee suggests that it is unlikely that procedures in the United Kingdom governing deportation would be considered to be in breach of Article 13. In Hammel v. Madagascar, Hammel was expelled before being given any opportunity to use the administrative appeals procedure which provided for the individual concerned to be brought before and heard by a special commission, which gives an opinion to the Minister of Interior who makes a final ruling. Like the advisory panel in the United Kingdom, the special commission therefore had only an advisory role. The Human Rights Committee found that there was a
breach of Article 13; there is, however, no suggestion in this case that, if the procedure had been followed, any question of a violation of Article 13 would have arisen simply because the commission acted only in an advisory capacity.101

Reliance may be placed on the refusal of the government to permit legal representation before the panel. Article 13 does not, however, expressly provide a right to legal representation at the hearing itself. Moreover, the government has sought to justify its exclusion of legal representation by relying on national security considerations and, in its analysis of Article 13, the Human Rights Committee has emphasized its inability to test a sovereign state’s evaluation of an alien’s security rating.102

Section III of Geneva Convention IV of 1949 regulates deportation, but its provisions do not apply to the civilians detained in the United Kingdom; there are, however, other provisions in the Geneva Convention which concern the transfer of protected persons, and these are considered further below. Rights to challenge deportation are conferred on refugees whose position is governed by the Geneva Convention of 1951 Relating to the Status of Refugees (as amended by the Protocol to the Convention 1967). Article 32 gives refugees lawfully within the territory of a contracting state a right not to be expelled save on the grounds of national security or public order. Article 32 (2) further provides that, except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for this purpose before a competent authority or a person or persons specially designated by the competent authority. Article 32(3) provides that the contracting states shall allow such a refugee a reasonable period within which to seek legal admission into another country.

Article 32 therefore does not absolutely prohibit the expulsion of refugees; they may be expelled on the grounds of national security. However, such refugees are to be afforded the procedural protections outlined above. There are certain differences between the protections afforded by the 1951 Geneva Convention and those afforded by Article 13 of the International Covenant. In particular the Geneva Convention refers to the right of appeal: the use of this term, rather than ‘review’, provides more scope for the argument that reconsideration by the original decision-maker following a recommendation by an advisory executive body is insufficient.103 However, the article does not expressly require a right of appeal to an independent body, and this clearly diminishes the force of the argument.

Some of those issued with deportation notices sought refugee status, but the author is not aware that any were officially accepted as refugees before the end of the Conflict.104 The 1951 Geneva Convention does not prescribe the procedures for determining refugee status. It will further be recalled that in ex parte B the Court held that the Home Secretary was under no obligation to consider whether Mr and Mrs B were refugees, in the absence of any express application by them to be so considered. It would, of course, be open to those detained to make applications to be considered as refugees, and in such cases it is suggested that deportation orders should not normally be executed pending consideration of the application. Article 9 of the 1951 Convention provides that:

nothing in the Convention shall prevent a contracting state, in time of war or other grave and exceptional circumstances, from taking provisional measures which it considers to be essential to the national security in the
case of a particular person, pending a determination by the Contracting State that person is in fact a refugee, and the continuance of such measures is necessary in his case in the interests of national security.

Since applicants for refugee status can be detained pending the execution of the deportation order, it is difficult to maintain the argument that their deportation is essential to national security pending determination of their application for refugee status. However, as noted above, it seems unlikely that the acquisition of such status would afford them any greater procedural rights to challenge the decision to deport than are already afforded in domestic law.

**Rights to challenge the destination of deportation**

By virtue of their status as protected persons under Geneva Convention IV of 1949, the United Kingdom was under a duty to keep those threatened with deportation safe and not to return them to the war zone. Article 45 further imposes restrictions on the transfer of protected persons. They can only be transferred to a state which is a party to the Geneva Convention and is willing and able to apply it. Furthermore there is an absolute prohibition on the transfer of a protected person to a country where he or she may have reason to fear persecution of his or her political opinions or religious beliefs. In addition, the government has certain obligations under the Geneva Convention on Refugees.105

Under English law, where the Secretary of State makes a deportation order for reasons of national security, the individual concerned is entitled to appeal specifically on the grounds that he ought to be removed to a different country specified by him.106 Paragraph 173 of the Immigration Rules107 provides that a deportation order will not be made against a person if the only country to which he can be removed is one to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.108

The indications from media and parliamentary coverage of events during the Gulf War suggest that efforts were made to conform to international obligations with respect to the destination of deportation. It was stated in Parliament that the question of destination was one which was discussed with the detainees.109 Home Office press releases also indicate that at least one detainee was released pending consideration of his claim for asylum.110 In *ex parte B*, counsel for Mr and Mrs B sought to challenge the destination of deportation which they had been told, in response to a question, would be Jordan, on the basis that it would be unsafe for them to return there. However, the court considered that this argument was untimely, in view of the fact that no formal decision about the destination of deportation had yet been taken. The deportation decisions made against the couple were in any event revoked after the panel hearing.

**Rights to challenge detention pending deportation**

A number of those threatened with deportation were detained pending the making of final decisions. The legality of detention pending deportation under international law must therefore be considered separately from the legality of the deportation itself.
The first set of potentially relevant provisions arise under Geneva Convention IV of 1949, by virtue of the detainees’ status as protected persons. Article 42 provides that the internment or placing in assigned residence of protected persons may be ordered only if the security of the detaining power makes it absolutely necessary. Article 43 further provides that the detaining state is under a duty to afford to interned protected persons an opportunity to have the internment (or placing in assigned residence) reconsidered as soon as possible by an appropriate court or administrative board designated by the detaining power for that purpose. Further, if the internment (or assigned residence) is maintained, the court must at least twice yearly give consideration to the case with a view to the favourable amendment of the initial decision if circumstances allow.

The reconsideration required by the Convention is presumably a reconsideration of the necessity of the detention. This is not a matter with which the panel was directly concerned, its focus being upon the merits of the deportation decision. The limited review provided by judicial review or habeas corpus renders it unlikely that such remedies satisfy the requirement of the Convention that there should be a reconsideration. It is unclear, however, whether Articles 42 and 43 apply to the protected persons detained under the Immigration Act. Article 38 of the Convention appears to draw a distinction between special measures and the provisions concerning aliens in terms of peace. Among the special measures specifically referred to in the Convention is internment. It may be argued that the provisions of Articles 42 and 43 only apply to internment where it is a special power not applicable in peacetime, and that they therefore have no application where detention is effected under the terms of domestic legislation. It is this which has given rise to Staunton’s claim [111] that the civilians detained under the immigration legislation would have been better off had they been interned under special powers.

The relevance of the general human rights treaties remains to be considered. Article 6 of the European Convention on Human Rights appears at first sight to be relevant, as it provides that:

in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

However, it has been held that the term ‘in the determination of his civil rights and obligations’ does not generally apply to decisions relating to deportation. [112]

The provisions of Article 5 of the European Convention are, however, clearly relevant. Article 5 (1) provides that:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
Article 5 (2) requires that everyone ‘who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.’ Further, Article 5 (4) provides that everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

The requirements of Article 5 are broadly similar to those in Article 9 of the International Covenant on Civil and Political Rights; for the purpose of the discussion, reference will be made to cases under the European Convention, since case law specifically pertaining to the United Kingdom has arisen thereunder, whereas the United Kingdom is not a party to the Optional Protocol which gives individuals a right of petition to the Human Rights Committee alleging a violation of the International Covenant. The requirements of Article 5, in the context of deportation, were raised in Caprino v. UK which arose when, in December 1974, the Home Secretary made a deportation order against Mr Caprino, an Italian national, on the ground that his deportation was conducive to the public good as being in the interests of national security. Simultaneously he authorized Mr Caprino’s detention pending deportation. The deportation order was revoked in January 1975 and Mr Caprino was released.

Mr Caprino complained to the Commission that there had been a violation of Article 5 because of the detention imposed on him in connection with the deportation order and because of the alleged lack of effective remedies to challenge the detention. The Commission held that the applicant’s claim that there was a breach of Article 5 (1) (f) was manifestly ill-founded, but it accepted that his complaint based on Article 5 (4) was admissible. At the full hearing of the complaint before the Commission, however, it was held that the application failed because the applicant had not exhausted his domestic remedies. This was because Caprino had failed to particularize any grounds of unlawfulness of his detention which the English courts would not have investigated in habeas corpus proceedings; an inquiry into whether or not the remedies afforded by domestic law satisfied the requirements of the Convention was therefore regarded as hypothetical. The Committee of Ministers subsequently made a ruling identical to that of the Commission.

It is unfortunate that there was no further guidance from the Commission as to the requirements of Article 5 in the context of deportation. The Commission, however, did make a number of comments in its rulings, which are pertinent to the present discussion.

First, the Commission held that the word ‘lawful’ in Article 5 (1) (f) meant lawful in accordance with the provisions of domestic law and any applicable EC law; the Commission further held that the applicant’s detention was lawful in this sense. Caprino, however, also argued that his detention must not only be lawful but also necessary to secure the deportation. The Commission accepted this argument stating that:

[I]t is implied in the character of this provision as an exception clause that it must be strictly interpreted and that no other criteria than those mentioned in the exception clause itself may be the basis of any restriction of the right to liberty and security of the person…. It follows that the
detention of a proposed deportee can only be justified under Art. 5 (1) (f) if it is related to the deportation proceedings and is for no other purpose. It may e.g. not be used as a substitute for detention on remand or for any other form of detention which would have been open to the authorities but which they have chosen not to use.\textsuperscript{117}

Subsequently, at the hearing of the application, the Commission stated that the detention must satisfy the principles of necessity and proportionality. The potential significance of such statements is, however, undermined by the comments of the Commission in its conclusion at the admissibility hearing that this part of Caprino’s argument was manifestly ill-founded. Its finding, that there was ‘an adequate relationship between the detention and deportation proceedings’ and that there was no evidence that factors extraneous to the deportation proceedings influenced the decision to detain, appears to have satisfied the Commission.\textsuperscript{118}

Secondly, the Commission made a number of observations on Article 5 (4) which obliges contracting states to make available to the person detained a right of recourse to a court. In declaring the application admissible, the Commission doubted whether the remedies of judicial review and habeas corpus were adequate remedies for the purposes of Article 5 (4) in the light of the limited nature of the review undertaken by the courts in such proceedings.\textsuperscript{119} However, at its consideration of the merits, the Commission held that the application failed because Caprino had not particularized any grounds of unlawfulness of his detention which the English courts could not have investigated. It cannot be concluded from this, however, that the availability of the remedies of judicial review and habeas corpus means that the requirements of Article 5 (4) are satisfied. The comments of the Commission in the admissibility hearing raise serious doubts on this issue. The answer must inevitably depend on precisely what the court must be able to consider in order to satisfy the requirements of Article 5 (4).\textsuperscript{120} It is accepted that applicants for the remedies of habeas corpus and judicial review cannot require the court to consider whether it was necessary to detain them pending deportation. The Immigration Act confers power on the Secretary of State to detain those in respect of whom deportation decisions are taken, and it is clear that the courts would not seek to substitute their judgment of the necessity of this action for that of the Minister. However, bearing in mind the extracts referred to above at p. 321, one possible interpretation is that the requirements of Article 5 (4) are satisfied if the court is able to investigate whether there is an adequate relationship between the detention and the deportation, and whether the detention was motivated by factors extraneous to the deportation. In habeas corpus and judicial review proceedings, challenges to the detention may be made on the basis that it was motivated by bad faith or that it was for purposes unrelated to the deportation, for example, if it was simply being used as an expedient way of securing detention, there being no ultimate intention to deport the applicant.\textsuperscript{121} The possibility that this limited form of review would nonetheless satisfy the requirement, for an investigation into the ‘adequacy’ of the relationship between detention and deportation, cannot be entirely excluded.\textsuperscript{122}

Whilst there therefore remain considerable doubts about whether judicial review or habeas corpus proceedings satisfy the requirements of Article 5 (4), it is clear that proceedings before the advisory panel do not. The principal reason for this is that it has
been held that a tribunal which has merely advisory functions cannot be described as a court within the meaning of Article 5 (4).  

INDIVIDUAL LIBERTY AND NATIONAL SECURITY: DEFINING THE BALANCE

The foregoing discussion illustrates that the compatibility of the detentions and deportations with provisions of international law is, in certain respects, open to serious question. The issues raised in the discussion were not addressed by the English courts because the relevant provisions of international law are not part of domestic law. Outside the courts of justice, however, the use of the Immigration Act during the Gulf conflict has very clearly raised the question as to whether the powers and procedures employed strike the correct balance between the interests of national security and the interests of the individual in the protection of his civil liberties.

There are suggestions in *ex parte B* and *ex parte Cheblak* that the limited role of the courts in national security cases is adequately compensated by the availability of other mechanisms of control: first, and most importantly, the advisory panel and, secondly, Parliament. However, there are serious reasons to doubt the effectiveness of Parliament as a forum for controlling the exercise of the Secretary of State’s powers. During the Gulf conflict there were a number of written answers giving factual information about the detentions and deportations, but only one short session of oral questions, which consisted primarily of requests for information and for assurances that the Secretary of State would seek to exercise his powers in a way which was as little detrimental to individual civil liberties as was compatible with the interests of national security, assurances which the Secretary of State was clearly happy to provide. Since no special emergency powers were introduced, the normal debates which accompany the enactment of such legislation were absent. The role of the advisory panel, however, merits greater consideration. For Lord Donaldson in *ex parte Cheblak* it provided a mechanism for bridging the gap between the interests of national security and those of the individual:

> The approach adopted by the Home Secretary’s advisory panel is, perhaps, best described as an ‘independent judicial scrutiny’. The members all have the necessary security clearance to enable them to take an active role in questioning and evaluating the weight of the evidence and information which formed the basis of the Home Secretary’s decision. Similarly they seek to discover any countervailing evidence, information or representations which the detainee may wish to put forward and evaluate its weight. Whilst that part of their task which involves the protection of the rights of the individual would be easier of performance if they could reveal to the detainee all that has become known to them, it is by no means impossible to perform it effectively where they cannot do so. Sufficient may already have been revealed by the Home Secretary himself to steer the detainee in the right direction, and it is always possible for members of the panel to ask questions in a form which is itself not informative, but which leads the detainee on to giving as full an account
as he wishes of his contacts and activities in the areas which are relevant to the Home Secretary’s decision.\textsuperscript{126}

The claims made for the advisory panel are not without substance. That the members of the panel are given access to the files is clearly important, as is their inquisitorial method of examining the government representatives. However, traditional adversarial methods of cross-examination by legal representatives also have their function in eliciting the truth and in ensuring that justice is not only done but is seen to be done. The question which must be asked is whether the present procedures are necessary in the interests of national security or whether, alternatively, additional safeguards could be afforded to the individual without any real prejudice to those interests.

A preliminary question which therefore arises for consideration is the necessity for the wide power vested in the Secretary of State to order deportation on the basis that he deems it to be conducive to the public good. The existence of such a wide power has been subjected to rigorous criticism by Evans, who argues that ‘Unnecessary and potentially oppressive Executive power to silence those whose views it finds unpalatable or whose conduct embarrassing, remains a threat to civil liberty even though rarely used.’\textsuperscript{127} Evans concludes by suggesting that even if it is necessary to retain such a power, the grounds for deportation should be particularized with more precision. He concedes, however, that ‘perhaps national security and diplomatic relations must also remain grounds, despite their ambivalence and their capacity for abuse’. That national security should remain a ground for deportation is a view which may readily be accepted. So also is it accepted that there was nothing inherently abhorrent about their use during the Gulf conflict. Whilst deportation on the ‘conducive to public good’ ground is mainly used against those with a criminal record, the possibility that its use may be justified to prevent a risk to national security cannot be excluded \textit{in limine}.

It is therefore suggested that the most serious issues arise, not from the existence of a power to deport on the basis of national security, nor from the use of such a power during the Gulf conflict, but rather from the procedures which accompany the use of such powers. There are a number of aspects of such procedures which raise concern,

The first relates to the quality of information used in determining those in respect of whom deportation decisions should be made. The information used by the police Special Branch and MI5 is obviously not generally available. Grant has suggested that there was an over-reliance on outdated information, and at least one clear case of mistaken identity (in respect of a person detained as a prisoner of war).\textsuperscript{128} She also states that the Foreign Office itself leaked information about its lack of confidence in the fact-finding procedures.\textsuperscript{129} While it is difficult to reach clear conclusions in the absence of more concrete evidence, there must be genuine concern about the reliability of the procedures used. The Advisory Panel system does provide a mechanism for identifying errors arising from the use of outdated information, but this does not obviate the need to establish reliable fact-finding procedures in the first instance.\textsuperscript{130} In December 1991 newspapers reported on the contents of a confidential inquiry into the detentions during the Gulf War, conducted by Sir Peter Woodfield.\textsuperscript{131} The inquiry refused to criticize the quality of the information relied upon by the security service, allegedly accepting security service arguments that it was right to err on the side of caution. The precise meaning of this is unclear; while it may be correct to err on the side of caution where reliable information
identifies an appreciable risk to national security, to err on the side of caution in the sense of acting on unreliable information is a very serious erosion of civil liberties. The validity of the conclusions reached by the inquiry is therefore difficult to establish in the light of the confidential nature of the report.

The most frequent object of criticism, however, has been the procedure before the panel. The exclusion of political and security cases from the normal appeals procedure is, indeed, one which prima facie requires justification. The establishment of such a special system to consider national security cases is in fact contrary to the recommendations of the Wilson Committee, whose report in 1967 led to the establishment of the present immigration appellate system.\textsuperscript{132} It is suggested, however, that the best method of establishing whether there is such a justification is by an examination, not of its origins, but of the individual aspects of the system which distinguish it from the ordinary immigration appeals system. The most significant of these relate to the restrictions on the information provided to the applicant and the refusal to permit cross-examination and legal representation.

The limited information given to applicants regarding the basis for the deportation decision has been a persistent source of complaint, and indeed lay behind the three cases considered in the section on the legality of the proceedings in domestic law. Evans has aptly depicted the dilemma to which such complaints give rise:

\begin{quote}
[T]o require the executive to disclose with any precision the reason for the decision is likely to damage the very interests that the decision is intended to protect—yet an appeal in which the Executive is able to withhold information is likely to generate a sense of injustice.\textsuperscript{133}
\end{quote}

It has been suggested that one possible solution is to provide for hearings to be held in camera, as can occur in criminal trials where sensitive information is being considered;\textsuperscript{134} this solution was indeed canvassed by the Wilson Committee on Immigration Appeals.\textsuperscript{135} However, the argument against disclosure of information within such ‘in camera’ hearings is essentially that the applicant himself may be able to ascertain the source of the information (or other information prejudicial to the interests of national security) and use such information in a manner which would be prejudicial to state interests in national security. This is, of course, an argument which could be applied equally in the course of a criminal trial hearing in camera. That the argument is not raised may be explained by the fact that where information is too sensitive to be disclosed, even in camera, the case may simply not be prosecuted, for without such disclosure there may be no prospect of a conviction.\textsuperscript{136} In the cases under consideration here, however, the position is somewhat different, for the government can withhold information, relying on arguments relating to national security, but without prejudice to its ability to accomplish its desired objective of deportation. The burden of proof is on the applicant, unless the challenge is based on the ground that specific statutory preconditions for the exercise of power were not fulfilled.\textsuperscript{137} Since the government is not prejudiced by its failure to explain its case to the applicant, it is easy to understand the temptation to reveal as little as possible. Some support for the view that the executive succumbed to such minimalist tendencies during the Gulf War arises from the fact that the letters issued appeared to be standard letters; this suggests that little consideration was given to the amount of information which could
be provided in individual cases. The sudden discovery of the government during the course of Cheblak’s hearing that it could, without prejudice to national security, disclose further information, albeit also of a limited nature, again does not inspire confidence in the processes by which decisions about the necessity for restrictions on disclosure (and their precise content) are reached.

One possible safeguard against the temptation to succumb to ‘minimalism’ lies in the power of the panel to disclose further information in the course of its questioning of the applicant; however, this safeguard can only be meaningful if the panel is alert to the likelihood of minimalist tendencies and furthermore if, in appropriate cases, the applicant can be given further time to consider issues which are first put before him at the panel hearing. One possible solution might be for the panel to meet beforehand precisely to consider what further information, if any, can be placed before the applicant. A precedent for this exists in Canada where review of immigration decisions involving national security takes place before the Security Intelligence Review Committee. The Committee is responsible for advising the Governor-in-Council on whether a deportation order should be confirmed but, unlike the panel, is also responsible for sending to the individual a statement summarizing the available information so far as possible to enable him or her to prepare for an investigatory hearing.

The standard justification given for the refusal to permit cross-examination is that it could be used to seek to elicit information which should not be disclosed in the interests of national security. A further justification is that, since the reasons given are very limited, cross-examination would in any event not prove to be a particularly valuable tool. With regard to the first objection, it may be argued that the government can be expected to send representatives who will be sufficiently skilled and experienced to resist questions which attempt to elicit sensitive information; it is conceded that those representing the government must have the right to disclose such information only to the panel members itself. As regards the second objection it is suggested that it must be for the applicant and his advisers to decide whether cross-examination would serve a useful purpose in the light of the limited information.

While the need for certain information to be withheld from the applicant is therefore accepted, the Canadian experience again suggests that there may be ways of modifying the detrimental consequences to the applicant. In Canada the Security Services Committee uses its own counsel (who have all been subject to security vetting) to cross-examine the government witnesses and, moreover, it provides to the applicant a summary of such evidence, subject to the deletion of any material disclosure of which would be contrary to the interests of national security.

The arguments against legal representation should now be familiar. The standard justification is that to allow legal representation would be to subvert the goal of withholding information in the interests of national security. Clever lawyers would attempt to elicit answers. This, however, presupposes that answers can be elicited by skilful lawyers; yet one must ask from whom, precisely? If government officials are not available for cross-examination (and this appears to be the case under present procedures) it can scarcely be contemplated that the redoubtable individuals who constitute the panels would be easily intimidated into disclosing vital information. Even if government officials were available for cross-examination, it seems unlikely that they could not be specially trained to avoid the traps set by even the most skilled of lawyers; members of
the panel would also clearly be astute enough to ensure that improper lines of questioning were not pursued. It may be that what the executive fears is essentially embarrassment arising from criticisms of its refusal to answer particular questions, or indeed speculation as to the reasons for its silence on certain issues. Even if it is legitimate to take this factor into account, the appropriate remedy would seem to lie in the holding of proceedings in camera and restrictions on the disclosure of information relating to them. The justifications are in any event considerably weakened by the fact that legal representation has been afforded in the past (in the case of Agee and Hosenball) and is permitted in other areas where comparable arguments based on the interests of national security might be applied, for example in criminal proceedings under the Official Secrets Acts. During the Second World War the advisory committees established to consider detentions made under Regulation 18B did not employ an absolute rule against legal representation, albeit that such representation was rarely granted. In the present-day context it is particularly significant that under the Prevention of Terrorism (Temporary Provisions) Act 1989 those served with an exclusion order are entitled to legal representation.

**CONCLUSIONS**

Executive claims that the traditional requirements of natural justice must be modified in the interests of national security are frequently heard. The reluctance of the judiciary to substitute their judgment of the requirements of national security for that of the executive can be easily understood. The judiciary are not trained in assessing the precise requirements of national security, and an erroneous judgment on their part would have potentially far-reaching and devastating consequences. The deference of the courts to the executive extends not only to the substance of executive decision-making, a reluctance which can be explained by the nature of judicial review itself, but also to the decision-making procedures. The message sent from the courts of justice to Whitehall in *ex parte Hosenball* was effectively that, subject to very limited exceptions, the courts will leave it to the executive to determine the procedural requirements governing deportation. The executive has responded, as might have been predicted, by employing procedures which clearly serve its own perceived interests in limiting the disclosure of information and, hence, challenges to its decision-making. It is suggested, however, that this reaction, while understandable in organizational terms, is nonetheless disproportionate to the legitimate requirements of national security when individual civil liberties are at stake. In particular the refusal to allow legal representation and cross-examination appears manifestly indefensible, since the solution to the fears which have prompted such exclusionary rules surely lies in ensuring that properly trained and qualified staff attend the hearings.

The case for reform is a very strong one. Unfortunately the executive has little incentive to consider innovative ways of accommodating the interests of national security within procedures which are not so detrimental to the interests of individuals. While there may be a place for a more incisive judicial review of the necessity for the curtailment of normal procedural rights, within our existing constitutional arrangements the role of the judiciary is inevitably limited both by the supervisory nature of the judicial review process and by the genuine difficulties facing the judiciary in assessing the requirements
of national security. International pressure for reforms in this particular area seems unlikely. The interests of aliens raised no more than flickers of concern in Parliament during the Gulf conflict. One is therefore forced to conclude that prospects for reform are bleak, but no less pressing for that.
Chapter 16
Effect on commercial law of non-declaration of war
Anthony H.Hudson

A feature of the many armed conflicts since the Second World War is that most have been ‘non-war’ hostilities,¹ that is they have not been described, except in colloquial terms, by the participants as ‘war’² and have not been preceded by formal declarations of war. There are a number of reasons for this, including reluctance on the part of states to be charged with open defiance of the United Nations Charter, endeavours to prevent states not involved declaring their neutrality and so hampering the activities of the combatants, and perhaps attempts to play down and restrict the area and scale of the conflict.³

This practice has applied to United Nations enforcement action no less than to other types of hostilities. Neither the United Nations nor individual member states described the operations against North Korea from 1950 to 1953 as war, though in length, scale and ferocity they clearly surpassed many wars of the past. A similar course has been followed in regard to action taken against Iraq following the invasion of Kuwait.⁴

This has significant consequences in municipal English law. Had this country been formally at war a number of important results would have followed, both at common law and under statute. Iraq would have become an enemy state, those voluntarily living and trading in that country alien enemies, and at common law most obligations and transactions involving them would have been nullified and in some cases have become criminal. In statute law the Trading with the Enemy Act 1939 would have brought into operation a still more stringent regime of prohibition and control, and other less well-known statutory provisions would have come into force. Serious restraints would have applied to proceedings brought by or against these alien enemies.⁵

Had the absence of a formal state of war with Iraq been the whole story the situation would have been simple, if somewhat paradoxical, so far as commercial relations were concerned. Trade could have continued without interruption, and litigation resulting from it would have been unaffected. It would, however, be too much to expect, when relations between states deteriorate to the point of armed confrontation, that fetters would not be placed on the continuation of normal trading relations. Thus in the Falklands conflict with Argentina diplomatic relations were broken off, Argentinian assets in this country were frozen, British banks were not allowed to give credit to Argentinian borrowers, export credit guarantees for Argentinian transactions ceased, and imports from Argentina were prohibited. Argentina replied with countervailing economic measures, including the freezing of British assets. Thus the commercial and economic aspects of the confrontation were regulated by a series of specific measures of finite if extensive character, rather than by the invocation of the blanket inhibitions which would have
followed upon a formal declaration of war. Similarly during the Korean war export of goods to North Korea was forbidden by statutory instrument.  

PEACE AND WAR

The explanation for this piecemeal approach in part lies in the fact that for the purposes of bringing into operation both statute and common law dependent on enemy status English and Scots law knows no intermediate stage between war and peace, though in related fields such as the interpretation of commercial documents a more realistic and flexible approach may be adopted.

The leading authority is the decision of the House of Lords in Janson v. Driefontein Consolidated Mines. This involved a claim on an insurance policy covering a consignment of gold from Transvaal mines which had been seized by the South African Republic some days before the outbreak of the Boer War, at a time when relations were so strained that war must have seemed imminent. The claimant was a company incorporated in the South African Republic, though almost all its shareholders were not subjects of the Republic and lived outside it. Permission was given to the defendant, an English underwriter, to waive the plea of alien enemy so that the case could be tried on its merits during the war. It was held that since the seizure fell within the perils insured against the policyholder could recover, the House of Lords refusing to extend on the basis of public policy the cases which deny recovery of insurance on enemy property. The House pointed out that there might be serious disadvantages in thus extending public policy since it might prejudice this country’s relations with another state at a time when relations were delicately poised.

This decision was not a new departure. Lord Ellenborough had reached a similar conclusion in Muller v. Thompson, a claim on an insurance on a neutral Danish ship on a voyage to Konigsberg at a time when diplomatic relations with Prussia had not been severed nor British ships barred from Prussian ports. As Lord Ellenborough put it, ‘though the relations of amity are not very strong between us, yet we are not at war with Prussia, and a voyage from an English to a Prussian port is not illegal’.

These cases thus decline to extend the legal category of war to a period when hostilities appear imminent but when neither legally nor colloquially could there be said to be ‘war’, and when to anticipate its occurrence might accelerate its happening.

INTERPRETATION OF COMMERCIAL DOCUMENTS

In other contexts where these dangers are not present a very different approach is to be seen, and more regard is paid to the usages of ordinary speech than to the rules of international law. Thus, once again in the context of insurance policies, it was held by the Court of Appeal in dealing with a claim arising from the 1916 Rising in Dublin that ‘war’ also covered ‘civil war’ and this was later approved by the House of Lords in Pesquerias y Secaderos de Bacaio de Espana v. Beer, Lord Morton explicitly saying that he could see no good reason for giving the word ‘war’ a meaning which excluded.
one type of war, and that in a policy of insurance the word ‘war’ included civil war unless
the context made it clear that some other meaning should be given to the word.15

The clearest and best-known instance of this relaxed interpretation of the term is the
 carriage of goods by sea case of Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham
Steamship Co.16 Here a charterparty between British owners and Japanese charterers
 contained a clause allowing either the charterers or owners to cancel the charterparty ‘if
war breaks out involving Japan’. In September 1937 the owners cancelled the
charterparty, since widespread and heavy fighting between the regular forces of China
and Japan was taking place, even though war had not been declared and diplomatic
relations had not been broken off. It was argued for the charterers that the existence of
war was a matter of which the court should take judicial notice and, if there was any
uncertainty, a certificate should be obtained from the Foreign Office. One of the parties
had obtained such a certificate which was to the effect that the Foreign Office was not
prepared to say whether a state of war existed but at the same time suggesting that the meaning to be attached to the term ‘war’ in a charterparty might simply be a question of
interpretation and that the view of the government ‘might not necessarily be conclusive
on the question whether a state of war exists within the meaning of the term “war” as
used in particular documents or statutes’. In the light of this, Goddard J. felt that he was
free to construe the word ‘war’ in the clause ‘in the sense in which an ordinary
commercial man would use it or…as the captain of a tramp steamer would interpret it’.17
He then had no difficulty in concluding that the ordinary captain arriving at Shanghai and
finding heavy fighting in progress would recognize that war existed. Businessmen could
not, he thought, be expected to concern themselves with the distinctions drawn by jurists
between reprisals, armed intervention, peaceful penetration and war. Just as Pickford J.
had construed the word ‘pirates’ in a broader or coarser sense, disregarding the niceties or
refinements of writers on international law,18 so Goddard J. was prepared to apply a
‘coarser’ meaning to the word ‘war’.19

His decision was upheld in the Court of Appeal,20 where Greene MR (with whom the
other members of the court agreed) in view of the terms of the Foreign Office certificate
treated with some scorn arguments that the Executive might be embarrassed by any
divergence between its view of the position in public international law and the
interpretation of expressions in commercial documents.21

It would thus seem that if it is a question of applying English rules of public or
criminal law which are dependent on the existence of a state of war between the United
Kingdom and some other country, then the view of the Executive will prevail as to the
commencement, continuance and conclusion of the war22 and similarly if it is a question
of whether this country recognizes that a state of war exists between two or more
countries, again the view of the Executive will prevail.23 If, however, it is merely a
question of whether language in a commercial document has been used in a technical or
colloquial sense, this is a question of construction for the courts on which the views of
the Executive will almost certainly be irrelevant.

Applying this to events following the invasion of Kuwait, it is suggested that if a court
were called upon to construe the expression ‘war’, or similar terms such as ‘hostilities’ or
‘armed conflict’,24 in a commercial document in relation to facts occurring during the
‘Desert Shield’ period, when the avowed aim was the protection of Saudi Arabia, the
situation would be held to be still one of peace, whereas after the start of the air war and
the commencing of ‘Desert Storm’ expressions connoting, in a colloquial sense, belligerency, would be held to be operative.

STANDARD FORMS

Many standard forms used in commerce evade the problems circumvented in *Kawasaki* either by avoiding the use of the word ‘war’ or by adding additional expressions which make it absolutely clear that hostilities other than ‘war’ in the full technical sense are also intended. Some, however, do not, and the *Kawasaki* approach in its full simplicity may be required to construe them.

Thus the Hague Rules and the Hague-Visby Rules in Article IV r.2(e) (carrier’s exemptions) speak merely of ‘Act of War’, and commentators suggest that *Kawasaki* would be applicable here. It may be, however, that the next following exemption, ‘Act of public enemies’, might be construed to cover the activities of a state resisting United Nations enforcement action and not be confined to pirates, as *Scrutton* seems to suggest. In any event, the final exemption, ‘Any other cause arising without the actual fault or privity of the carrier, etc.’ even if it were to be construed *ejusdem generis* with the preceding list, might well cover enforcement action, undeclared war, and those other situations related to hostilities or warlike acts which *Scrutton* suggests would not be covered by ‘Act of War’ itself.

Other well-known formulations present fewer problems. In marine insurance the Institute Time Clauses (Hulls) and the Institute Cargo Clauses exclude loss caused by ‘war civil war revolution insurrection or civil strife arising therefrom, or any hostile act by or against a belligerent power’ and ‘derelict mines torpedoes bombs or other derelict weapons of war’ and the Institute War and Strikes Clauses correspondingly provide cover against harm arising from any of these causes of loss but still exclude loss, damage, liability or expense arising from ‘the outbreak of war (whether there be a declaration of war or not) between any of…. United Kingdom, United States of America, France, the Union of Soviet Socialist Republics, the People’s Republic of China’. The reference to ‘hostile acts by or against a belligerent power’ should be sufficient to cover the events of an undeclared war. Again the ‘War Risks’ clause of the Gencon charterparty provides that:

In these clauses ‘War Risks’ shall include any blockade or any action which is announced as a blockade by any Government or by any belligerent or by any organized body, sabotage, piracy and any actual or threatened war, hostilities, warlike operations, civil war, civil commotion or revolution.

Once again, these words, in mentioning ‘hostilities’ and ‘warlike operations’, would seem to cover undeclared war.
**Force majeure clauses**

More generally, very many contracts now contain *force majeure* clauses designed to render the consequences of interruption of performance more predictable and less stringent than is the case under the common law of frustration. There is no standard form for these clauses, nor is there any settled judicial approach to their interpretation. They very rarely use the term ‘*force majeure*’ standing alone, but rather specify a range of events which will excuse non-performance. If the term did stand alone, however, it has been held that the fact that it is a French version of the Latin *vis major*, which in Roman law was almost equivalent to Act of God, will not have a correspondingly restrictive effect in English law. A strike and breakdown of machinery were held to be within the term, but not bad weather or workers’ absenteeism, so *a fortiori* it would seem that armed hostilities would be within the term. It would also seem that a mere steep rise in price or financial difficulties would not be within the term either, and that a promisor cannot rely on his own act, negligence or default as amounting to *force majeure*. The *force majeure* must be a physical or legal restraint. There is reason to suppose that they are not strictly speaking exceptions clauses, nor will they be interpreted as strictly as exception clauses were in the past. The clause in point of form will often contain a long catalogue of *force majeure* events and conclude with a very broadly worded provision for unforeseen and uncontrollable events, and will often impose on the party who may wish to invoke a *force majeure* event a duty to report it to the other party. The effect of the event depends entirely on the terms of the contract. A common form is in the first instance to give extra time for full performance and, if that fails, only then to bring the contract to an end. Given the frequency with which they are now used, it is not unlikely that many such clauses will have been brought into operation by the Gulf conflict.

**SANCTIONS LEGISLATION**

A special feature of the Gulf conflict was that almost from the outset a considerable mass of statutory instruments and other subordinate legislation was brought into force to give effect not only to United Kingdom but also United Nations and European Community sanctions designed to deprive Iraq of any financial or commercial benefits from the invasion and to induce it to reconsider the course on which it had embarked. This sanctions legislation is, strictly speaking, only tangentially or coincidentally associated with undeclared war, since it was the hope of many that sanctions might have avoided the necessity for actual hostilities, and sanctions have continued in force long after those hostilities ceased, but in practice sanctions went far towards imposing on Iraq many of the commercial consequences of enemy character in a declared war, for there can be little doubt that existing transactions falling within this legislation would have been discharged by supervening illegality and new transactions infringing its terms would have been void for illegality.
FRUSTRATION OF CONTRACTS

Quite apart from these matters peculiar to the Gulf conflict, war, declared or undeclared, has been a potent factor in bringing into play the doctrine of frustration and this may be highly relevant when considering transactions and operations the performance of which has been prevented, hindered, delayed or rendered more expensive or dangerous by the conflict, whether or not they related directly to Iraq and Kuwait.

The basic principles of frustration, such as that there must be a radical change in circumstance and that mere increase in time or expense is not enough, apply in relation to frustration caused by warfare no less than to other types of frustration, but a group of cases coming, strangely enough, from very close to Kuwait, have recently explored the application of the doctrine to the consequences of hostilities.

When hostilities broke out between Iraq and Iran some sixty ships were trapped in Basra. At first there was a reasonable expectation that these hostilities would come to a speedy end in a victory for Iraq and that the ships would be released. Events, however, turned out otherwise and the question of frustration of charterparties fell to be litigated. The cases were appeals on points of law from arbitrators and this, as Mustill J. pointed out, may have contributed to some at first sight puzzling aspects of the decisions, in particular the fact that contracts the performance of which was affected by the same set of facts, the closing of the Shatt-el-Arab, were found to have very different dates of frustration. There are a number of different explanations for this. The terms, durations and unexpired periods of the charters varied and in any event the courts were not deciding the correct date or even the correct range or ‘bracket’ of dates, but rather whether the date chosen by the arbitrator fell outside the permissible range of dates. Some element of ‘disconformity’ of this kind was, as Mustill J. pointed out, the price to be paid for the policy of relaxation of judicial control over arbitrations introduced by the Arbitration Act 1979.

Despite these incidental difficulties, the cases focused on a number of points crucial to the effect of hostilities, whether in declared or undeclared war, on commercial contracts.

In the first place, both Mustill J. in Finelvet v. Vinava, The Chrysalis and Bingham J. in International Sea Tankers Inc. v. Hemisphere Shipping Co. Ltd, The Wenjiang (No. 2) cited an important dictum of Lord Sumner in Akties Nord-Osterso Rederiet. v. E.A.Casper, Edgar & Co. Ltd. In correcting an unguarded remark of Bailhache J. in the court below, to the effect that on the outbreak of war any reasonable person would assume that frustrating delay would occur, Lord Sumner there said that, apart from supervening illegality, whether a contract was affected by the outbreak of war would depend upon the circumstances. Amongst these would be the likelihood of the war affecting the contract at all, and another the likelihood of its duration. Or, to put it in the words of the arbitrator in The Wenjiang, which were explicitly approved by Bingham J.: ‘it was the surrounding circumstances, and how they would affect the contract, which were all-important, and the war itself had no special significance’. The arbitrator, in a conclusion which was further approved by Bingham J., went on to say that he would look upon the conflict just as he would any event which might lead to the frustration of the contract.
This analysis clearly shows that, apart from the mechanisms bringing supervening illegality into play, the approach to frustration arising from the event of a declared or undeclared war, or from peacetime hindrances to performance, will be the same, thus simplifying the formal statement of the law and extending the range of applicable authority.

A specific application of this similarity of approach appeared in *Finelvet*. It seems that counsel for the charterers in *The Wenjiang* may have argued before the arbitrator that ‘any serious war, of more than a few days’ duration, had the automatic and absolute effect of frustrating any contract affected by it’, but this was not advanced before Bingham J. 55 In *Finelvet*, however, counsel for the charterers did contend that ‘a declaration of war frustrates a contract ipso jure, in that it impinges directly on the performance of the contract’ or, to use the words of the headnote, discharges ‘a contract on which the war had a direct bearing’ 56 and went on to sustain this argument by citing a number of dicta of long standing and high authority which gave some apparent support to it. Thus in *Geipel v. Smith*, 57 a case of a charterparty to carry coal to Hamburg, then blockaded during the Franco-Prussian War, Lush J. had said: ‘a state of war must be presumed to be likely to continue so long and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this.’ Again in *Horlock v. Beat*, 58 where a British ship had been caught in Hamburg on the outbreak of the First World War and its crew imprisoned, Lord Shaw of Dunfermline, in holding that the contract of employment was frustrated, had said:

that stoppage and loss, having arisen from a declaration of war, must be considered to have been caused for a period of indefinite duration and so as to have affected a solution of the contract arrangements for and dependent upon the completion or further continuance of the adventure.

Yet again in *Denny, Mott and Dickson v. James B. Fraser*, 59 a case involving a long-running timber supply contract rendered illegal by wartime legislation, Lord Wright, citing with approval the dictum of Lush J. in *Geipel v. Smith*, had said:

It is true that Lush J. was there referring to a single definite adventure, not to a continuous trading. But the real principle which applies in these cases is that businessmen must not be left in indefinite suspense. If there is a reasonable probability from the nature of the interruption that it will be of indefinite duration they ought to be free to turn their assets, their plant and equipment and their business operations into activities which are open to them and to be free from commitments which are struck with sterility for an uncertain future period.

Lord Wright thought this approach was supported by Lord Shaw and Lord Sumner in *Bank Line v. Capel*.

Faced with these dicta, counsel for the shipowners in *Finelvet* 60 said that if the cases did support a rule of automatic discharge by frustration on the outbreak of war, they should now be disregarded, since the nature of wars had changed. Improvements in weapons and communications had brought the possibility of very short wars, much
shorter than would be necessary to discharge an ordinary commercial contract, and hence it was no longer proper to presume the indefinite duration of a state of war.

To this Mustill J. replied by saying that, whilst he had sympathy with the argument, it was one which a court of first instance had to approach with caution in view of the weight of the authorities cited. He was, however, able to achieve the same end by finding on a careful inspection of the cases and by relating them to their legal and factual contexts that they had not laid down any hard and fast rule of automatic discharge on the outbreak of war, except in regard to supervening illegality. It was acts done in the course of the war which might or might not frustrate contracts, depending on the circumstances of individual cases. If there was any presumption at all, it was as to the duration of the war, which, as has been seen, might be relatively unimportant, not as to the effects which the war might have on the performance of the contract, the war and its effects on the contract not being necessarily coterminous. Any presumption as to the duration of the war was rebuttable. This, said Mustill J., seemed to be consistent with the cases cited, with the views of authoritative commentators and with the speech of Lord Roskill in The Evia, the only one of the Basra cases to reach the House of Lords.

Unsolved problems of delay in frustration

The Basra cases have thus rejected explicitly or implicitly any suggested rule that contracts affected by hostilities are automatically discharged (except in cases of supervening illegality). However satisfactory it may be to have disposed of a proposed rule which might have been at odds with the realities of modern warfare, it has nevertheless been forcefully argued that the law regarding frustration by unforeseen delay was in an unsatisfactory state prior to these cases, and they have done nothing to resolve the major difficulties.

Four major problems have been identified. The first is the point of time at which it can be decided that delay has frustrated a contract, the second whether that is the same as the date from which the contract is taken to be frustrated, the third whether the question of frustrating delay is to be decided by the facts as known at the start of the delay, or at the date of frustration if that is different, or at the trial and the fourth whether the frustrating event is the delay itself or the cause of the delay. All four of these questions were raised by the facts of the Basra cases, but most were not mentioned in the judgments and only in The Agathon—where the question was whether there was an arguable case to go to the arbitrator—was the relevance of the views of the parties as to the likely length of delay discussed.

Moreover, a dictum of Lord Sumner in Bank Line v. Capel, one of the well-known First World War charterparty frustration cases, is said to lie at the root of much uncertainty in this field. He said: ‘The question must be considered at the trial as it had to be considered by the parties when they came to know of the cause and the probabilities of the delay and had to decide what to do.’ This, it is pointed out, has led the courts to assess the frustrating effect of foreseen delay either on the basis of the expectations of the parties, or the reasonable expectations of reasonably well-informed observers, rather than on the basis of the actual course of events in the light of all the evidence available to the court. The first two tests suffer from all the disadvantages of speculative assessments, which in rapidly changing situations may themselves change with equally daunting speed.
and in any event may be speedily falsified by the actual course of events. A notorious example is *Court Line v. Dant and Russell*, where a ship was trapped in the Yangtse river by a boom laid by the Chinese and, since delay seemed likely to be indefinite, the contract was frustrated. In fact, however, the boom was soon broken by the Japanese and the ship escaped in time to fulfil the contract. Nonetheless it was still held to be frustrated. Lord Roskill is also accused of having compounded confusion in a well-known passage in his speech in *The Nema* when he said that in some cases:

> where the effect of the event is to cause delay in the performance of contractual obligations, it is often necessary to wait upon events in order to see whether the delay already suffered and the prospects of further delay from that cause, will make any ultimate performance of the relevant contractual obligation ‘radically different’

for no indication is given as to the type of case in which such waiting will be necessary, nor for how long it should continue. Further, neither Lord Sumner nor Lord Roskill give any indication as to whether it is the views of the parties or of informed observers which are to be taken into account, though Lord Denning in *The Agathon* rejected the views of the parties, favouring an objective view restricted to considering the facts as they appeared to the parties when they had to make their decision. The other Basra cases, it is said, seem to assume that it is the delay rather than the cause of the delay which is the source of frustration, and that the occurrence of frustration ‘is to be judged in the light of expectations retrospectively assessed’, rather than objectively in the light of information available at the trial, thus leaving open the problem of selecting dates in situations of rapidly changing facts and knowledge of and opinions on those facts. The evidential problems may be very considerable and the risk of a recurrence of a *Court Line* situation not inconsiderable.

In view of this it has in consequence been urged that a strictly objective approach on the basis of all the information available at the trial should be adopted, though modern authorities make it impossible to do this. If, however, this were done, businessmen faced with an uncertain position could apply for a speedy arbitration, when the arbitrator would reach his decision in the light of all the evidence then available.

Whatever the merits of this proposed solution, and they seem considerable, the case presented for it clearly demonstrates that the Basra cases still leave many questions open for further examination and the test of reasonable expectations, though simple to state, may be difficult and uncertain in application.

**Other aspects of frustration**

One other familiar aspect of frustration was in question in one of the Basra cases, *The Evia*. It is well-settled that if an express clause in a contract deals with an alleged frustrating event, the contract will prevail, but if the event which has happened, though of the same general class as that mentioned in the contract, is of a wholly different order, then there may be frustration. A clause in the charterparty in *The Evia* made detailed provision for the situation if the ship were to be ordered to a war zone, but in the courts
below it was held that this had no application to the situation when the ship was trapped in Basra.78

Problems of frustration resulting from hostilities have not, of course, been confined to the entrapment of employees, ships and goods in hostile territory. During the First World War powers were taken to requisition ships under charter and this gave rise to some of the classic frustration cases,79 the outcome being, in simple terms, that frustration depended on the ‘ratio which the interruption bears, or is likely to bear, to the contract period: the higher the ratio is, the more likely it is that the contract will be frustrated.’80 There is no reason why powers should not be taken during or in contemplation of non-war hostilities to requisition ships and other property held under contracts of hire and, given that one looks to the effects rather than the specific character of the hostilities, there seems no reason why exactly the same approach should not be adopted to alleged frustration in such cases.

Hostilities or their effects may result in the frustration of a contract of employment in circumstances other than the absolute prevention performance caused by incarceration as a prisoner of war, as in Horlock v. Beal.81 In a number of cases involving seamen’s contracts of employment it was held that when the contract was initially entered into as a peacetime engagement but events converted it into an obligation, if continued, to serve under the perils and risks of hostilities, then the contract would be terminated.82 It has been pointed out that this principle has no necessary connection with the outbreak of hostilities but could equally apply to contracts entered into whilst hostilities were proceeding but where the character of the work the employee was required to do differed fundamentally from that originally envisaged.83 Once again there seems no difficulty in applying these cases to a situation of undeclared war, but it may well be that an important element in their application would be the degree and gravity of the danger to be faced by the employee. Thus it has been surmised that the risk of Scud missile attacks upon towns in Saudi Arabia during Desert Storm would not be treated as creating a sufficient degree of danger to have a frustrating effect.84 On the other hand the actual occupation of Kuwait, coupled with the uncertain fate which at one time faced all there, might well be found to be within the principle of these cases.

Under a related rule of employment law the danger created by hostilities may have the effect of modifying the operation of the obligation of obedience in a contract of employment without frustrating the contract, since it is well settled that employees may legitimately refuse to work in situations where they fear their life and health may be in imminent danger. The cases involve infectious diseases85 and racial conflict, rather than inter-state hostilities, but there would seem to be no obstacle of principle to extending them to that field. Thus the fact that in recent conflicts this country remained technically at peace with both Argentina and Iraq would not of itself justify an employer demanding that an employee take up an assignment in either country, such as to work as a journalist, which did not infringe relevant legislation or rules of public policy. In the case of Argentina, where it seems British subjects suffered no special prejudice, an employee’s refusal might well not have been justified,86 whereas in the case of Iraq, at the time when the employee might reasonably have feared inclusion in the human shield of hostages at sites of strategic importance, refusal would certainly seem to have been justified.
RESTRAINTS OF PRINCES, RULERS AND PEOPLES

A traditional formula in shipping documents conferred immunities in respect of ‘arrests or restraints of princes, rulers and peoples’ and these words, with the addition of ‘seizure under legal process’, appear in the catalogue of carrier’s immunities in the Hague-Visby Rules. The words would certainly seem to cover many matters incidental to declared or undeclared war, such as arrest of ships, embargoes, blockades and the effect of the common law rules as to trading with the enemy. They would not, it seems, apply to steps taken by a belligerent for the safety of shipping, nor to threats of a belligerent which indicate danger to neutral shipping. Many standard forms now contain clauses in more modern wording covering the same ground. Thus the Institute Hull and Cargo Clauses exclude, and the War and Strikes Clauses include, ‘capture, seizure, arrest restraint or detainment and the consequences thereof or any attempt thereat’, and the Gencon charterparty says that the vessel:

shall have the liberty to comply with any directions or recommendations as to loading, departure, arrival, routes, ports of call, stoppages, destination, zones, waters, discharge, delivery or any other wise whatsoever (including any direction or recommendation not to go to the port of destination or to delay proceeding thereto or to proceed to some other port) given by any Government or by any belligerent or by any organized body engaged in civil war hostilities or warlike operations or by any person or body acting or purporting to act as or with the authority of

these entities mentioned. There would seem to be no difficulty in bringing the events of undeclared war within the scope of these clauses.

Public policy

Whilst it seems clear that only a formal declaration of war will bring into operation the full machinery of both common law and statute law on trading with the enemy, it has been persuasively argued that the courts might well find a principle of public policy which would strike down commercial transactions with the opponents of this country in an undeclared war. The difficulty is the reluctance that the courts have displayed to create new heads of public policy and, indeed, Janson v. Driefontein Mines has been used by commentators as a classic illustration of this general attitude. That case, however, involved facts which occurred when both in strict law and in the ordinary use of language peace still prevailed, and one of the policy considerations weighing with the House of Lords was that a contrary decision might have led to situations which would exacerbate already high diplomatic tension and accelerate the outbreak of hostilities. This consideration would no longer apply once actual hostilities had broken out.

Beyond this, for undeclared war both in the case of United Nations enforcement action and for other situations, as in the self-defence situation of the Falklands conflict, it is possible to find both statements of principle and analogies which would make the formulation of such a rule of public policy no very startling innovation. So far as both
types of undeclared war are concerned there is the classic statement of principle by Lord Alvanley in *Furtado v. Rogers* when he said:

> We are all of the opinion that on the principles of English law it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by act of parliament.

Though this found its specific application in disallowing English insurance of enemy ships it is obviously of much wider potential scope. Again during the Korean conflict the then Minister of Defence expressed in a Parliamentary answer an opinion that assistance to the Chinese might have been treasonable. It would seem to follow *a fortiori* that any commercial contracts and transactions having the same effect would be struck down for illegality. Moreover it has long been accepted that the underlying principle of one group of public policy cases is that transactions which tend to prejudice the good relations of this country with friendly foreign states will be struck down, the clearest general statement of this coming in the judgment of Lawrence LJ in *Foster v. Driscoll*. When this country is involved in supporting Security Council resolutions, little could more certainly tend to prejudicing our relations with other UN members than that British subjects were profiting commercially from assisting those defying the action. It would seem, therefore, both on the ground that *Janson* can be readily distinguished and on the ground that it would be no very far-reaching extension of prior authority that such a head of public policy would be found to exist.

If this head of public policy were found to exist, it would seem likely that the courts would turn for guidance to the analogy of the treatment of contracts with enemies in time of declared war, which originally developed as a head of common law public policy before being overlaid with legislative developments.

The position there is complex, but in outline all executory contracts existing at the outbreak of war are abrogated and no new contracts can be formed. It is not possible to make a legally binding agreement that such contracts shall merely be suspended until the conclusion of hostilities. In the case of contracts made before the outbreak of war, accrued rights of action in respect of pre-war breaches, debts and other liquidated sums and the recovery of chattels survive, but these rights are suspended for the duration of the war. Moreover, existing contracts which are ‘the concomitants of rights of property’ such as leases, irrevocable powers of attorney, shares, intellectual property and life assurance all survive, though action upon them will be suspended. On the other hand, ordinary contracts of agency and insurance are abrogated.

Subject to any specific legislation, it would seem that all those contracts and concomitants of property which survive but are suspended in a declared war would also survive in an undeclared war, but without suspension of rights of action since the plea of enemy alien would not be available. Insurance in particular may raise difficult problems. It is well-known that Lord Mansfield, far from seeing anything reprehensible in English underwriters insuring French ships during wars with France, thought the practice highly commendable, though, as one French writer pointed out, this amounted to one part of the British nation restoring to the French what the other part took from the
French by right of war. Judicial views, however, changed radically with the judgment of Lord Alvanley in *Furtado v. Rogers*, and it would now seem that even in the absence of specific legislation, British underwriters would not be required to pay for marine or aviation losses caused to an opponent in an undeclared war by British or co-belligerent military action. Apart from that, in view of the importance of insurance cover in sustaining the operation of a modern economy, even payment on non-war risk might be regarded as contrary to public policy. In any event, given problems of evidence whilst hostilities are in progress, there would seem to be a case for suspension until hostilities end.

**CONCLUSIONS**

The legal position in undeclared war, apart from specific legislation, is thus both highly fragmented and largely speculative, but may perhaps be summed up as follows:

1. The overall common law and statutory prohibitions on commercial intercourse with an enemy will not come into operation.\(^{113}\)
2. Litigation by and against subjects and residents of an opponent state can in principle continue or be instituted.\(^{114}\)
3. Specific legislation may strike transactions with illegality.\(^{115}\)
4. Cancellation, *force majeure* and restraints of princes, rulers and peoples clauses will be brought into operation.
5. This following from the fact that expressions relating to war and hostilities in commercial documents will be given their colloquial rather than strict legal meaning.\(^{116}\)
6. The effects of hostilities in the form of supervening interruption of communications, delay and danger may result in frustration of contracts.\(^{117}\)
7. There may be a principle of public policy of as yet uncertain scope which may affect with illegality transactions likely to be of assistance to an opponent state in an undeclared war.\(^{118}\)
8. If this principle is developed, it would seem likely that the courts would look to analogies from the common law relating to illegality in a declared war.
9. Those transactions, chiefly associated with rights of property and accrued rights, which survive in suspense during a declared war should, apart from legislation, survive an undeclared war, though since there would be no suspension of litigation, they might well survive in full effect.\(^{119}\)
Appendix 1


This arrangement establishes procedures for the transfer from the custody of the British Forces to the custody of the Armed Forces of the United States of Enemy Prisoners of War and Civilian Internees taken during the combined effort to liberate Kuwait. The parties undertake as follows:

1. The American Forces and the British Forces will treat all prisoners of war and civilian internees in accordance with the relevant provisions of the Geneva Conventions of 1949.

2. The American Forces shall accept prisoners of war and civilian internees taken by the British Forces, and shall be responsible for maintaining and safeguarding all such individuals whose custody has been transferred to them by the British Forces.

3. The British Forces shall initially process and classify enemy prisoners of war under Articles 4 and 5 of the Geneva Convention Relative to the Treatment of Prisoners of War.

4. The American Forces will be responsible for the accurate accountability of all persons turned over to the American Forces by the British Forces. Such records will be made available for inspection by the British Forces upon request.

5. Any prisoner of war or civilian internee transferred by the British Forces shall be returned upon the request of the British Forces to their control.

6. The British Forces will retain a right of access to prisoners of war and civilian internees transferred from British custody while such persons are in the custody of the American Forces.

7. The release or repatriation of enemy prisoners of war transferred under this arrangement shall be made upon mutual agreement by the military authorities of both parties or when otherwise required under the terms of the 1949 Geneva Conventions.

8. The British Forces will reimburse the United States for the costs involved in maintaining enemy prisoners of war and civilian internees transferred by the British Forces to the custody of the American Forces pursuant to this arrangement.

9. The British Forces shall assign a liaison officer to the American Forces to facilitate the implementation of this arrangement.
10 The British Forces expressly acknowledge and agree that the American Forces may transfer enemy prisoners of war and civilian internees transferred to them by the British Forces to the power of the Kingdom of Saudi Arabia upon such terms and conditions as are required by the 1949 Geneva Conventions.

Done at Riyadh, Saudi Arabia on this 31 day of January, 1991.

FOR THE COMMANDER IN CHIEF UNITED STATES CENTRAL COMMAND

[Signed] ROBERT P. WALTERS, SR. Colonel, United States Army Provost Marshal

FOR THE COMMANDER BRITISH FORCES MIDDLE EAST

[Signed] W.E. STRONG Colonel Headquarters, British Forces Middle East
Appendix 2

EXTRACTS FROM UNITED NATIONS SECURITY COUNCIL SELECTED RESOLUTIONS RELATING TO THE GULF WAR 1990–91*

Article 25 UN Charter 1945

Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.


Adopted by the Security Council at its 2,932nd meeting on 2 August 1990

THE SECURITY COUNCIL,

Alarmed by the invasion of Kuwait on 2 August 1990 by the military forces of Iraq,

Determining that there exists a breach of international peace and security as regards the Iraq invasion of Kuwait,

Acting under Articles 39 and 40 of the Charter of the United Nations,

1. Condemns the Iraqi invasion of Kuwait;

2. Demands that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990;

3. Calls upon Iraq and Kuwait to begin immediately intensive negotiations for the resolution of their differences and supports all efforts in this regard, and especially those of the League of Arab States;

4. Decides to meet again as necessary to consider further steps to ensure compliance with the present resolution.

2 August 1990

Editor’s Note

By Resolution 661, 6 August 1990 (paragraphs 3(a)(b) and 4), the Security Council decided that states should ‘prevent the import into their territories of all commodities and products originating in Iraq or Kuwait exported therefrom after the date of the present resolution’ or any activities promoting the export or trans-shipment of any commodities or products from Iraq or Kuwait. It further decided that states ‘should not make available to the Government of Iraq or to any commercial, industrial or public utility in Iraq or
Resolution 662 (1990)

Adopted by the Security Council at its 2,934th meeting on 9 August 1990

THE SECURITY COUNCIL,
Recalling its resolutions 660 (1990) and 661 (1990),
Gravely alarmed by the declaration by Iraq of a ‘comprehensive and eternal merger’ with Kuwait.
Demanding, once again, that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990,
Determined to bring the occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence and territorial integrity of Kuwait,
Determined also to restore the authority of the legitimate Government of Kuwait,
1. Decides that annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void;
2. Calls upon all States, international organisations and specialised agencies not to recognise that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation;
3. Further demands that Iraq rescind its actions purporting to annex Kuwait;
4. Decides to keep this item on its agenda and to continue its efforts to put an early end to the occupation.

9 August 1990

Resolution 665 (1990)

Adopted by the Security Council at its 2,938th meeting on 25 August 1990

THE SECURITY COUNCIL,
Recalling its resolutions 660 (1990), 661 (1990), 662 (1990) and 664 (1990) and demanding their full and immediate implementation,
Having decided in resolution 661 (1990) to impose economic sanctions under Chapter VII of the Charter of the United Nations,
Determined to bring an end to the occupation of Kuwait by Iraq which imperils the existence of a Member State and to restore the legitimate authority, and the sovereignty, independence and territorial integrity of Kuwait which requires the speedy implementation of the above resolutions.
Deploring the loss of innocent life stemming from the Iraqi invasion of Kuwait and determined to prevent further such losses,
Gravely Alarmed that Iraq continues to refuse to comply with resolutions 660 (1990), 661 (1990), 662 (1990) and 664 (1990) and in particular at the conduct of the Government of Iraq in using Iraqi flag vessels to export oil,
1. Calls upon those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990);

2. Invites Member States accordingly to co-operate as may be necessary to ensure compliance with the provisions of resolution 661 (1990) with maximum use of political and diplomatic measures in accordance with paragraph 1 above;

3. Requests all States to provide in accordance with the Charter such assistance as may be required by the States referred to in paragraph 1 of this resolution;

4. Further requests the States concerned to co-ordinate their actions in pursuit of the above paragraphs of this resolution using as appropriate mechanisms of the Military Staff Committee and after consultation with the Secretary-General to submit reports to the Security Council and its Committee established under resolution 661 (1990) to facilitate the monitoring of the implementation of this resolution;

5. Decides to remain actively seized of the matter.

25 August 1990

Resolution 666 (1990)

Adopted by the Security Council at its 2,939th meeting on 13 September 1990

THE SECURITY COUNCIL,

Recalling its resolution 661 (1990), Paragraphs 3 (c) and 4 of which apply, except in humanitarian circumstances, to foodstuffs,

Recognizing that circumstances may arise in which it will be necessary for foodstuffs to be supplied to the civilian population in Iraq or Kuwait in order to relieve human suffering,

Noting that in this respect the Committee established under paragraph 6 of that resolution has received communications from several Member States,

Emphasizing that it is for the Security Council, alone or acting through the Committee, to determine whether humanitarian circumstances have arisen,

Deeply concerned that Iraq has failed to comply with its obligations under Security Council resolution 664 (1990) in respect of the safety and well-being of third State nationals, and reaffirming that Iraq retains full responsibility in this regard under international humanitarian law including, where applicable, the Fourth Geneva Convention,

Acting under Chapter VII of the Charter of the United Nations,

1. Decides that in order to make the necessary determination whether or not for the purposes of paragraph 3 (c) and paragraph 4 of resolution 661 (1990) humanitarian circumstances have arisen, the Committee shall keep the situation regarding foodstuffs in Iraq and Kuwait under constant review;

2. Expects Iraq to comply with its obligations under Security Council resolution 664 (1990) in respect of third State nationals and reaffirms that Iraq remains fully responsible
for their safety and well-being in accordance with international humanitarian law including, where applicable, the Fourth Geneva Convention;

3. Requests, for the purposes of paragraphs 1 and 2 of this resolution, that the Secretary-General seek urgently, and on a continuing basis, information from relevant United Nations and other appropriate humanitarian agencies and all other sources on the availability of food in Iraq and Kuwait, such information to be communicated by the Secretary-General to the Committee regularly;

4. Requests further that in seeking and supplying such information particular attention will be paid to such categories of persons who might suffer specially, such as children under 15 years of age, expectant mothers, maternity cases, the sick and the elderly;

5. Decides that if the Committee, after receiving the reports from the Secretary-General, determines that circumstances have arisen in which there is an urgent humanitarian need to supply foodstuffs to Iraq or Kuwait in order to relieve human suffering, it will report promptly to the Council its decision as to how such need should be met;

6. Directs the Committee that in formulating its decisions it should bear in mind that foodstuffs should be provided through the United Nations in co-operation with the International Committee of the Red Cross or other appropriate humanitarian agencies and distributed by them or under their supervision in order to ensure that they reach the intended beneficiaries;

7. Requests the Secretary-General to use his good offices to facilitate the delivery and distribution of foodstuffs to Kuwait and Iraq in accordance with the provisions of this and other relevant resolutions;

8. Recalls that resolution 661 (1990) does not apply to supplies intended strictly for medical purposes, but in this connection recommends that medical supplies should be exported under the strict supervision of the Government of the exporting State or by appropriate humanitarian agencies.

13 September 1990

Resolution 674 (1990)

Adopted by the Security Council at its 2,951st meeting on 29 October 1990

THE SECURITY COUNCIL,

Recalling its resolutions 660 (1990), 661 (1990), 662 (1990), 664 (1990), 665 (1990), 666 (1990), 667 (1990) and 670 (1990),

Stressing the urgent need for the immediate and unconditional withdrawal of all Iraqi forces from Kuwait, for the restoration of Kuwait’s sovereignty, independence and territorial integrity and of the authority of its legitimate government;

Condemning the actions by the Iraqi authorities and occupying forces to take third-State nationals hostage and to mistreat and oppress Kuwaiti and third-State nationals, and the other actions reported to the Security Council, such as the destruction of Kuwaiti demographic records, the forced departure of Kuwaitis, the relocation of population in Kuwait and the unlawful destruction and seizure of public and private property in Kuwait, including hospital supplies and equipment, in violation of the decisions of the
Council, the Charter of the United Nations, the Fourth Geneva Convention, the Vienna
Conventions on Diplomatic and Consular Relations and international law,

Expressing grave alarm over the situation of nationals of third States in Kuwait and
Iraq, including the personnel of the diplomatic and consular missions of such States,

Reaffirming that the Fourth Geneva Convention applies to Kuwait and that as a High
Contracting Party to the Convention Iraq is bound to comply fully with all its terms and
in particular is liable under the Convention in respect of the grave breaches committed by
it, as are individuals who commit or order the commission of grave breaches,

Recalling the efforts of the Secretary-General concerning the safety and well-being of
third-State nationals in Iraq and Kuwait,

Deeply concerned at the economic cost and at the loss and suffering caused to
individuals in Kuwait and Iraq as a result of the invasion and occupation of Kuwait by
Iraq,

Acting under Chapter VII of the Charter of the United Nations,

***

Reaffirming the goal of the international community of maintaining international
peace and security by seeking to resolve international disputes and conflicts through
peaceful means,

Recalling the important role that the United Nations and its Secretary-General have
played in the peaceful solution of disputes and conflicts in conformity with the provisions
of the Charter,

Alarmed by the dangers of the present crisis caused by the Iraqi invasion and
occupation of Kuwait, which directly threaten international peace and security, and
seeking to avoid any further worsening of the situation,

Calling upon Iraq to comply with the relevant resolutions of the Security Council, in
particular its resolutions 660 (1990), 662 (1990) and 664 (1990),

Reaffirming its determination to ensure compliance by Iraq with the Security Council
resolutions by maximum use of political and diplomatic means,

A

1. Demands that the Iraqi authorities and occupying forces immediately cease and desist
from taking third-State nationals hostage, mistreating and oppressing Kuwaiti and third-
State nationals and any other actions, such as those reported to the Security Council and
described above, that violate the decisions of this Council, the Charter of the United
Nations, the Fourth Geneva Convention, the Vienna Conventions on Diplomatic and
Consular Relations and international law;

2. Invites States to collate substantiated information in their possession or submitted to
them on the grave breaches by Iraq as per paragraph 1 above and to make this
information available to the Security Council;

3. Reaffirms its demand that Iraq immediately fulfil its obligations to third-State
nationals in Kuwait and Iraq, including the personnel of diplomatic and consular
missions, under the Charter, the Fourth Geneva Convention, the Vienna Conventions on
Diplomatic and Consular Relations, general principles of international law and the
relevant resolutions of the Council;
4. Also reaffirms its demand that Iraq permit and facilitate the immediate departure from Kuwait and Iraq or those third-State nationals, including diplomatic and consular personnel, who wish to leave;

5. Demands that Iraq ensure the immediate access to food, water and basic services necessary to the protection and well-being of Kuwaiti nationals and of nationals of third States in Kuwait and Iraq, including the personnel of diplomatic and consular missions in Kuwait;

6. Reaffirms its demand that Iraq immediately protect the safety and well-being of diplomatic and consular personnel and premises in Kuwait and in Iraq, take no action to hinder these diplomatic and consular missions in the performance of their functions, including access to their nationals and the protection of their person and interests and rescind its orders for the closure of diplomatic and consular missions in Kuwait and the withdrawal of the immunity of their personnel;

7. Requests the Secretary-General, in the context of the continued exercise of his good offices concerning the safety and well-being of third-State nationals in Iraq and Kuwait, to seek to achieve the objectives of paragraphs 4, 5 and 6 above and in particular the provision of food, water and basic services to Kuwaiti nationals and to the diplomatic and consular missions in Kuwait and the evacuation of third-State nationals;

8. Reminds 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;

9. Invites States to collect relevant information regarding their claims, and those of their nationals and corporations, for restitution or financial compensation by Iraq with a view to such arrangements as may be established in accordance with international law;

10. Requires that Iraq comply with the provisions of the present resolution and its previous resolutions, failing which the Security Council will need to take further measures under the Charter;

11. Decides to remain actively and permanently seized of the matter until Kuwait has regained its independence and peace has been restored in conformity with the relevant resolutions of the Security Council.

12. Reposes its trust in the Secretary-General to make available his good offices and, as he considers appropriate, to pursue them and to undertake diplomatic efforts in order to reach a peaceful solution to the crisis caused by the Iraqi invasion and occupation of Kuwait on the basis of Security Council resolutions 600 (1990), 662 (1990) and 664 (1990), and calls upon all States, both those in the region and others, to pursue on this basis their efforts to this end, in conformity with the Charter, in order to improve the situation and restore peace, security and stability;

13. Requests the Secretary-General to report to the Security Council on the results of his good offices and diplomatic efforts.

29 October 1990
Resolution 677 (1990)

Adopted by the Security Council at its 2,962nd meeting on 28 November 1990

THE SECURITY COUNCIL,

Acting under Chapter VII of the Charter of the United Nations,

1. Condemns the attempts by Iraq to alter the demographic composition of the population of Kuwait and to destroy the civil records maintained by the legitimate Government of Kuwait;

2. Mandates the Secretary-General to take custody of a copy of the population register of Kuwait, the authenticity of which has been certified by the legitimate Government of Kuwait and which covers the registration of the population up to 1 August 1990;

3. Requests the Secretary-General to establish, in co-operation with the legitimate Government of Kuwait, an Order of Rules and Regulations governing access to and use of the said copy of the population register.

28 November 1990

Resolution 678 (1990)

Adopted by the Security Council at its 2,963rd meeting on 29 November 1990

THE SECURITY COUNCIL,


Noting that, despite all efforts by the United Nations, Iraq refuses to comply with its obligation to implement resolution 660 (1990) and the above-mentioned subsequent relevant resolutions, in flagrant contempt of the Security Council,

Mindful of its duties and responsibilities under the Charter of the United Nations for the maintenance and preservation of international peace and security,

Determined to secure full compliance with its decisions,

Acting under Chapter VII of the Charter,

1. Demands that Iraq comply fully with resolution 660 (1990) and all subsequent relevant resolutions, and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of goodwill, to do so;

2. Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area;
3. Requests all States to provide appropriate support for the actions undertaken in pursuance of paragraph 2 of the present resolution;

4. Requests the States concerned to keep the Security Council regularly informed on the progress of actions undertaken pursuant to paragraphs 2 and 3 of the present resolution;

5. Decides to remain seized of the matter.

29 November 1990

Resolution 686 (1991)

Adopted by the Security Council at its 2,978th meeting on 2 March 1991

THE SECURITY COUNCIL,

Recalling and reaffirming its resolutions 660 (1990), 661 (1990), 662 (1990), 664 (1990), 665 (1990), 666 (1990), 667 (1990), 669 (1990), 670 (1990), 674 (1990), 677 (1990), and 678 (1990),

Recalling the obligations of Member States under Article 25 of the Charter,

Recalling paragraph 9 of resolution 661 (1990) regarding assistance to the Government of Kuwait and paragraph 3 (c) of that resolution regarding supplies strictly for medical purposes and, in humanitarian circumstances, foodstuffs,

Taking note of the letters of the Foreign Minister of Iraq confirming Iraq’s agreement to comply fully with all of the resolutions noted above (S/22275), and stating its intention to release prisoners of war immediately (S/22273),

Taking note of the suspension of offensive combat operations by the forces of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990),

Bearing in mind the need to be assured of Iraq’s peaceful intentions, and the objective in resolution 678 (1990) of restoring international peace and security in the region,

Underlining the importance of Iraq taking the necessary measures which would permit a definitive end to the hostilities,

Affirming the commitment of all Member States to the independence, sovereignty and territorial integrity of Iraq and Kuwait, and noting the intention expressed by the Member States cooperating under paragraph 2 of Security Council resolution 678 (1990) to bring their military presence in Iraq to an end as soon as possible consistent with achieving the objectives of the resolution,

Acting under Chapter VII of the Charter,

1. Affirms that all twelve resolutions noted above continue to have full force and effect;

2. Demands that Iraq implement its acceptance of all twelve resolutions noted above and in particular that Iraq:

   (a) Rescind immediately its actions purporting to annex Kuwait;
   (b) Accept in principle its liability under international law 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;
   (c) Immediately release under the auspices of the International Committee of the Red Cross, Red Cross Societies, or Red Crescent Societies, all Kuwaiti and third country
nationals detained by Iraq and return the remains of any deceased Kuwaiti and third country nationals so detained; and

(d) Immediately begin to return all Kuwaiti property seized by Iraq, to be completed in the shortest possible period;

3. Further demands that Iraq:

(a) Cease hostile or provocative actions by its forces against all Member States, including missile attacks and flights of combat aircraft;

(b) Designate military commanders to meet with counterparts from the forces of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990) to arrange for the military aspects of a cessation of hostilities at the earliest possible time;

(c) Arrange for immediate access to and release of all prisoners of war under the auspices of the International Committee of the Red Cross and return the remains of any deceased personnel of the forces of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990); and

(d) Provide all information and assistance in identifying Iraqi mines, booby traps and other explosives as well as any chemical and biological weapons and material in Kuwait, in areas of Iraq where forces of Member States cooperating with Kuwait pursuant to resolution 678 (1990) are present temporarily, and in the adjacent waters;

4. Recognizes that during the period required for Iraq to comply with paragraphs 2 and 3 above, the provisions of paragraph 2 of resolution 678 (1990) remain valid;

5. Welcomes the decision of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990) to provide access and to commence immediately the release of Iraqi prisoners of war as required by the terms of the Third Geneva Convention of 1949, under the auspices of the International Committee of the Red Cross;

6. Requests all Member States, as well as the United Nations, the specialized agencies and other international organizations in the United Nations system, to take all appropriate action to cooperate with the Government and people of Kuwait in the reconstruction of their country;

7. Decides that Iraq shall notify the Secretary-General and the Security Council when it has taken the actions set out above;

8. Decides that in order to secure the rapid establishment of a definitive end to the hostilities, the Security Council remains actively seized of the matter.

2 March 1991

Resolution 687 (1991)

Adopted by the Security Council at its 2,981st meeting on 3 April 1991

THE SECURITY COUNCIL,

Welcoming the restoration to Kuwait of its sovereignty, independence and territorial integrity and the return of its legitimate Government,

Affirming the commitment of all Member States to the sovereignty, territorial integrity and political independence of Kuwait and Iraq, and noting the intention expressed by the Member States cooperating with Kuwait under paragraph 2 of resolution 678 (1990) to bring their military presence in Iraq to an end as soon as possible consistent with paragraph 8 of resolution 686 (1991),

Reaffirming the need to be assured of Iraq’s peaceful intentions in the light of its unlawful invasion and occupation of Kuwait,

Taking note of the letter sent by the Minister for Foreign Affairs of Iraq on 27 February 1991 and those sent pursuant to resolution 686 (1991)…

E

16. Reaffirms that Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait;

17. Decides that all Iraqi statements made since 2 August 1990 repudiating its foreign debt are null and void, and demands that Iraq adhere scrupulously to all of its obligations concerning servicing and repayment of its foreign debt;

18. Decides also to create a fund to pay compensation for claims that fall within paragraph 16 above and to establish a Commission that will administer the fund;

19. Directs the Secretary-General to develop and present to the Security Council for decision, no later than thirty days following the adoption of the present resolution, recommendations for the fund to meet the requirement for the payment of claims established in accordance with paragraph 18 above and for a programme to implement the decisions in paragraphs 16, 17 and 18 above, including: administration of the fund; mechanisms for determining the appropriate level of Iraq’s contribution to the fund based on a percentage of the value of the exports of petroleum and petroleum products from Iraq not to exceed a figure to be suggested to the Council by the Secretary-General, taking into account the requirements of the people of Iraq, Iraq’s payment capacity as assessed in conjunction with the international financial institutions taking into consideration external debt service, and the needs of the Iraqi economy; arrangements for ensuring that payments are made to the fund; the process by which funds will be allocated and claims paid; appropriate procedures for evaluating losses, listing claims and verifying their validity and resolving disputed claims in respect of Iraq’s liability as specified in paragraph 16 above; and the composition of the Commission designated above.

Editor’s Note

By Resolution 692 of 20 May 1991 the Security Council decided to establish the Fund referred to in paragraph 18 above and that the requirement for Iraqi contributions would apply in the manner to be decided by the Governing Council with respect to all Iraqi petroleum and petroleum products exported (or delivered) from Iraq after 3 April 1991.
By Resolution 705, 15 August 1991 the Security Council decided that compensation to be paid by Iraq (arising from section E of Resolution 687) should not exceed 30 per cent of the annual value of petroleum and petroleum products from Iraq. By Resolution 706, 15 August 1991, the Security Council permitted states to import limited amounts of Iraqi petroleum and petroleum products (notwithstanding paragraphs 3(a), (b) and 4 or Resolution 661 (1990)), subject to the approval of the Security Council Committee established by Resolution 661. Payment by the purchaser was to be paid into an escrow account to be established by the UN.

*Extracts from Security Council Resolutions 660, 662, 665, 666, 674, 677, 678, 686 and 687 are reproduced by kind permission of the United Nations.*
Notes

2

THE UNITED NATIONS AND THE JUS AD BELLUM


3 S/PV.2932, 2 August 1990.

4 Compare the Iraqi memorandum, reprinted in KBD at 73.


6 Iraq failed for days to produce the so-called Revolutionary government, and when it did, it appeared to consist of Iraqi army officers and affiliated personnel.

7 Under Article 40, such pronouncements would in fact be impermissible.

8 S/PV.2934. See also the pronouncements of the Arab League, the EC, the GCC, the Non-Aligned Movement, the Nordic Countries and the OAS on this matter, reprinted in KBD, Chapter 8.

9 Resolution 661 (1990) had already referred to the aim of restoring the legitimate government of Kuwait. On the government in exile, see S/21666, reprinted in KBD, 185.

10 Article 43 and 45 of the Vienna Convention, 500 UNTS 95. See also the 1963 Vienna Convention on Consular Relations, 596 UNTS 261.

11 S/PV.2940.

12 In fact, this episode served to reunite the Council, which had been in danger of division over the issue of exceptions to the economic sanctions under Resolution 661, see below.

13 The Sanctions Committee had its first meeting on 9 August 1990, when it elected the delegate of Finland as its Chairman. See KBD, 197.

14 A/AC.25/SR.2, 4.

15 E.g., S/21715, reprinted in KBD, p. 200.


17 Some unspecified allegations were made by the United States and certain other powers immediately before and after the Council adopted Resolution 665 concerning the naval
blockade, A/AC.25/SR.3 at 5. However, these apparently related mostly to Iraqi attempts to breach the embargo, rather than violations by other states.

18 Medical supplies were totally exempt from the application of Resolution 661. See also Chapter 10.

19 Resolution 666.

20 Statement by the Chairman of the Committee established by Resolution 661 concerning the Situation between Iraq and Kuwait, 14 September 1990, reprinted in KBD, p. 234. See also Chapter 11 for the role of the International Committee of the Red Cross and of the constituent parts of the Red Cross and Red Crescent Movement.


22 S/21498. For discussion of naval operations in the Gulf, see Chapter 7.

23 Transcript of a Press Conference given by the British Foreign and Commonwealth Minister of State, Mr William Waldegrave, 13 August 1990, reprinted in KBD, p. 245.

24 S/21537.

25 This explicit wording of Article 41 does not leave room for the idea that authority to enforce economic sanctions militarily is somehow implied in the concept of economic sanctions. Of course, if Resolution 661 had requested states to co-operate in implementing it militarily, if necessary, then it would have been a measure adopted under Article 42. But no such request had been made.

26 15 UNTS 295.

27 Protocol Relating to the Amendment to the Convention on International Civil Aviation, 18 May 1984, 23 International Legal Materials 705.

28 See S/PV.2959, S/PV.2960, S/PV.2962, and Chapter 6 in KBD.

29 A/45/236/Cor.1, KBD, p. 193.


31 It was precisely for this reason, of course, that Cuba and Yemen voted against the Resolution, and China abstained. See S/PV2963 passim.

32 S/PV.2963, pp. 19, 31, 52 respectively.

33 1971 ICJ 22.

34 If there were any doubts left concerning the formal validity of Resolution 678, Article 106 concerning transitional Security Arrangements might perhaps be invoked.


36 American Society of International Law, Proceedings of the 85th Annual Meeting, (1991), at p. 431. For further discussion, see Chapter 4.


38 Article 5, North Atlantic Treaty, 34 UNTS 243.


40 1986 ICJ 122.

41 S/PV. 2963, 31. The United States and Britain did not refer to a wide interpretation of the relevant provision prior to the adoption of the Resolution.

42 Resolution 376 (V).

43 Resolution 83. Korea had, of course, been subject to the attention of the United Nations before the invasion occurred, and there had been previous findings of the organization that a unified government should be established. Nevertheless, a specific authorization to use force to effect such a change was required.
44 Greenwood retorts that in the case of Korea the General Assembly was only requested to legitimize an operation which had already been decided upon. Even if that is the case, it still seems relevant to note that a resolution from the General Assembly was deemed desirable to cover the proposed operation north of the thirty-eighth parallel.

45 S/PV.2963, p. 74.
46 Article 23.
47 S/PV.2981, p. 32.
48 S/22456.
49 S/22558, Annexe II.
50 S/PV.2981, p. 78.
51 S/22558, Annexe III.
52 Since this chapter was concluded the Boundary Commission has adopted a line of demarcation which does not in all places match the previously assumed boundary line. That decision has been endorsed by the Security Council.

3

THE ROLE OF LEGAL ADVISERS IN THE ARMED FORCES

1 The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict commenced its first session in February 1974 and concluded with the Final Act of Conference on 10 June 1977 which established the final text of Article 82 of Protocol I, addressed to the Geneva Convention of 1949. Consideration of the proposals to create a post of legal adviser to military commanders had started in 1971 and appeared as Article 71 of the draft Protocol presented by the ICRC to the Diplomatic Conference.

2 See G. Draper, ‘Role of Legal Advisers in Armed Forces’, International Review of the Red Cross, 202, (1978), p. 6. In his article, Colonel Professor Draper identified Article 1 of Hague Convention IV 1907, and common Articles 47/48/127 and 144 of the Geneva Conventions 1949 as containing the first two of such devices, which took the form of requirements to issue instructions to the armed forces in conformity with the Hague Conventions and to disseminate the contents of the Geneva Conventions. See also, F. Hampson, ‘Fighting by the Rules. Instructing the Armed Forces in Humanitarian Law’, International Review of the Red Cross, 269, (1989), p. 111, where the literature is reviewed.


4 See Brigadier (Retd.) R.C. Halse, ‘A Short History of Legal Services in the Army’, Military Law Journal, (first edition, 1991), p. 35. Legal advice to the UK Armed Forces may come from a variety of sources, depending upon the nature of the problem. No less than five separate legal departments exist within the Ministry of Defence: MOD Legal Adviser, which is an outstation of Treasury Solicitor and is concerned with all matters having civil legal implications; Personnel and Logistics (Legal Services), which is a secretariat staffed by non-legally qualified civil servants with responsibility for handling the MOD interest in civil legal matters; and the three service legal departments (Chief Naval Judge Advocate, Army Legal Corps and the Directorate of Legal Services (RAF)) which are staffed by uniformed lawyers and give advice on single service issues. In matters of overlapping responsibility all groups of lawyers may be involved in conjunction with legal advisers from other Ministries.

5 Brigadier Halse (see note 4 above) has indicated, for instance, that Army Legal Services officers in the rank of major were sent to Japan to give advice during the Korean War.
6 The annual tri-service exercises involving UK armed forces include a number of uniformed legal officers at each force headquarters in posts known as SO1, SO2 and SO3 (Legal).

7 This does not mean to say that Article 82 was ignored. In conversations with the Director of Operations at the Joint Headquarters, the Director of Legal Services (RAF), Air Vice-Marshal R.T.Dawson CBE, referred to the requirements of Article 82. In the opinion of the writer the Article was of relevance in view of the obligation to refrain from acts which would defeat the object and purpose of a treaty which has been signed but not ratified, contained in Article 18 of the Vienna Convention on the Law of Treaties 1969.


9 These figures have been calculated from Table 1 of the Statement on the Defence Estimates, vol. 1, (1991), HMSO, p. 9. Nations which only provided financial assistance to the coalition have not been included as part of the overall number. See further Chapter 4.

10 In a letter dated 28 January 1991 to the RAF legal officer at the Joint Headquarters, the Head of the Legal and Committee Services Department of the British Red Cross provided this information. The two Iraqi government officials known to have expertise in the law of armed conflict were identified as the Head of the Legal Department at the Iraqi Ministry of Foreign Affairs, Dr Al-Witry and the Head of the International Organizations Department at the Ministry of Foreign Affairs, Dr Ryad Al Qaissy.

11 The Ministry of Defence (MOD) Lawyers Group consisted of the Head of the Treasury Solicitor Outstation at MOD, law of armed conflict specialists from each of the three service legal branches and a principal from Personnel and Logistics (Legal Services) whose department also acted as a secretariat for the group. The writer was a member of the group. Prior to formation of the group some of its members had already established an excellent working relationship with the FCO legal advisers which enabled the group to gain a clear picture of political developments and their legal implications.

12 See second supplement to The London Gazette, (28 June 1991), no. 52589. This supplement is the Despatch by the Joint Commander and contains a detailed section on communications.

13 The first uniformed legal officer to deploy to the Gulf was Major R.P.M.Austin ALC. An amusing account of his exploits in the Gulf prior to the commencement of hostilities can be found on p. 9, Military Law Journal, (1991), under the title ‘Baldrick Rides Again’.

14 See Chapter 9.

15 Another legal officer from Army Legal Corps was also to be posted to the Gulf at the end of hostilities to act as a battle casualty replacement. She was Captain J.A.Eyton-Jones, who was the only female legal officer to be deployed.

16 See second supplement to The London Gazette, (28 June 1991), op. cit., note 12 above, for details of the size of the forces of nations involved.

17 The figure for the US Army and Air Force were mentioned by Colonel Burger in his presentation referred to in note 8 above. The US Marine Corps also deployed with a number of lawyers including reservists. It is also known that five legal officers of the Canadian Defence Force deployed to the Gulf and served with their forces in Qatar and Bahrain.

18 The legal officers at Headquarters British Forces Middle East had regular contact with lawyers at the US Central Command where overall operational planning was conducted.

19 On 1 May 1991 the writer attended US Law Day celebrations at the USAF base at RAF Upper Heyford, when US lawyers present expressed some wonderment at the ability of UK uniformed lawyers to cope in such small numbers.

20 See second supplement to The London Gazette, (28 June 1991), op. cit. The maps at the end of the Joint Commander’s despatch show the extent of deployment throughout Gulf states.

article is one of the few documents to explain the law relating to this small area of international law.

22 Service disciplinary systems function in any part of the world, and a person subject to service law is subject to the criminal law of England wherever he may be. For details of the jurisdiction of courts-martial and the service disciplinary system in general, see Manual of Air Force Law, vol. 1, (sixth edition), chapter VII, HMSO. In the absence of an agreement with a host state, the primary right of jurisdiction would lie with that host state in all criminal matters.

23 In cases where such negotiations prove extremely protracted, decisions may be taken to deploy British servicemen abroad before such agreements have been concluded. Where this happens the drafts of the proposed agreement with a host state may be used to negotiate suitable jurisdictional arrangements where a difficulty has arisen. Agreements related to the Gulf crisis were concluded in a matter of weeks.

24 Arrangements for criminal jurisdiction have already been mentioned above. The jurisdiction of civil and administrative courts also forms the subject matter of agreements and will usually allow for immunity from civil claims where the act or omission giving rise to the claim arose whilst the visiting serviceman was performing his duties. Claims arising out of off-duty activities will not normally be the subject of immunity. Arrangements for claims and financial matters will be negotiated according to the requirements of the parties in the particular circumstances of the agreement.

25 The Joint Commander received his directive from the Chief of the Defence Staff. The directives, whilst indicating a chain of command in operational matters, do not deal with the mechanics of the disciplinary chain of command. Servicemen and women deployed to the Gulf were to come from a number of locations. Some were detached from their original units whilst others were posted to newly formed units. Thus some personnel were to retain a disciplinary chain of command which could be traced back to their original unit, whilst others were to come under a new command.

26 See s. 122 Naval Discipline Act 1957, s. 178 Army Act 1955, and s. 178 Air Force Act 1955. All of these sections provide that where powers of command depend on rank, a member of one service who is acting with or is a member of a body of another service shall have the like powers of a member of that service of corresponding rank and shall be so treated.

27 See ss. 113 and 120 and sch. 2 of the Naval Discipline Act 1957, ss. 179 and 208 and sch. 6 of the Army Act 1955, and ss. 179 and 208 and sch. 6 of the Air Force Act 1955. These sections and schedules provide for the attachment of members of one service to another and the making of regulations prescribing when such attachment is deemed to occur.

28 The legal cell at the Joint Headquarters was co-located with the cell with responsibility for rules of engagement. Whilst each set of rules was essentially a matter for those on the operations staff, lawyers were to be concerned with the wording and any implications under international and criminal law.

29 The lawyers at Riyadh were able to communicate direct with special forces in the field. An outline of special forces operations is contained in the second supplement to The London Gazette, (28 June 1991), op. cit., note 12 above.

30 The main concerns with medical establishments were their location and the nature of the protective emblem to be used.

31 The lawyers at Riyadh eventually became the focal point for notification of the itinerary of Red Cross relief convoys travelling from Iran to Iraq.

32 The lawyers at Riyadh were called upon to advise when Iraq deployed a number of its aircraft to Iran and the possible effect on Iranian neutrality.

33 Several delegates from the International Committee of the Red Cross were to present themselves at the Headquarters British Forces Middle East, including the Director of Operations, Jean Rigopoulo, and the Senior Delegate in Saudi Arabia, Arnold Leuthold.
A joint Queen’s Regulation contains the details of this scheme. The regulations cover legal aid both in criminal proceedings and for legal assistance in civil legal problems. The joint Queen’s Regulation dealing with the scheme for criminal proceedings can be seen at paragraph J980 of Queen’s Regulations for the Royal Air Force. The legal assistance scheme varies for each service. An outline of the RAF assistance scheme can be found at paragraph 983 of Queen’s Regulations for the Royal Air Force.

The deployed lawyers were, in effect, to operate a ‘duty solicitor’ scheme.


See House of Commons Defence Committee, Tenth Report, entitled Preliminary Lessons of Operation Granby, HMSO 287/1, p. xi and Qq. 127, 274. For further discussion, see Chapter 4.

The three service legal branches have an established role in the review of new weaponry which has involved them in a study of the technology involved with the assistance of service experts.

4

CUSTOMARY INTERNATIONAL LAW AND THE FIRST GENEVA PROTOCOL OF 1977 IN THE GULF CONFLICT


2 See the Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention IV, 1907, UKTS 9 (1910), Cd 5030; Roberts and Guelff, p. 43.


5 Remarks of Michael Matheson, Deputy Legal Adviser, Department of State, in 1987 Workshop at p. 420.

6 See the President’s Message, note 4 above.

7 The list of states is taken from the table on page 17 of the Statement on the Defence Estimates 1991, vol. I (London, HMSO, July 1991) and shows those states which are described there as having taken part in offensive air, land or naval operations against Iraq. A number of other states deployed forces to the region, for example to assist in the naval embargo, but were not involved in the main operations.
8 Canada deposited its instrument of ratification on 20 November 1990; Australia ratified Protocol I after the Gulf conflict had ended.
9 Both the customary law and the 1949 Geneva Conventions (which are discussed elsewhere in this volume) applied equally to both Iraq and the coalition, notwithstanding that Iraq was the aggressor and the coalition forces had a mandate from the United Nations; see the various ICRC appeals and, in particular, the ‘Legal Outline’ published at 31 International Review of the Red Cross, (1991), p. 28. The absence of a declaration of war also had no effect on the application of these rules; see C. Greenwood, ‘The Concept of War in Modern International Law’, 36 International and Comparative Law Quarterly, (1987), p. 283.
13 For a discussion of some of the practice in earlier conflicts, see Greenwood, in Delissen and Tanja, op. cit., note 3 above, at pp. 100–3.
14 The nature of the hostilities was such that the controversial provisions of Article 1 (4) (on wars of national liberation) and Articles 43–7 (on combatant status) received very little attention.
19 See, e.g., the decision of the Arbitral Tribunal for the Agreement on German External Debts in Kingdom of Belgium and Others v. Federal Republic of Germany, 59 ILR 494.
21 Paragraph 71 of the judgment.
23 For criticism of the Court’s approach, see Meron, op. cit., note 3 above, at pp. 25–37, and J. Charney, ‘Customary International Law in the Nicaragua Judgment on the Merits’, 1 Hague Year Book of International Law, (1988), p. 16.
24 Trial of the Major German War Criminals, Cmd 6964, (1946), p. 65.
27 The judgment in the North Sea cases admits this possibility, ICJ Reports, 1969, at p. 42.
28 For a more far-reaching view of the role of treaties in shaping customary law, see Cassese, op. cit., note 3 above, at pp. 65–8.
29 Meron, op. cit., note 3 above, at p. 43.
31 See also Articles 51 (1) and 52 (1).
32 Articles 51 (5) (b) and 57 (2) (a) (iii).
33 See also Article 35 (3). These two provisions are discussed together in pp. 86–7 of this chapter. See also Chapter 6.
34 Closely related to the provisions discussed above are Articles 59 and 60, which lay down rules regarding non-defended localities and demilitarized zones, Articles 61–7, dealing with civil defence, and Articles 68–71, dealing with relief operations.


42 See the documents cited in note 39 above.

43 For an analysis of these attacks, see Middle East Watch Report, Needless Deaths, (1991), pp. 317–99 (‘Middle East Watch Report’).

44 See, e.g., UN Docs S/22134 (22 January 1991) and S/22154 (28 January 1991).


46 United States Department of the Navy, Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations, NWP 9 (rev. A) (Washington, 1989), para. 8.1.1 states that:

Military objectives are those objects which, by their nature, location, purpose or use, effectively contribute to the enemy’s war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.


48 Pentagon Interim Report, op. cit., note 15 above, p. 4–2. This list may be compared with a list of categories of military objectives drawn up by the ICRC in 1956 and reprinted in C.Pilloud et al., Commentary on the Additional Protocols, Geneva, (1987), pp. 632–3 (‘ICRC Commentary’).

49 It was, of course, necessary to ask whether each port or airfield was in fact making an effective contribution to military operations, but in the circumstances of the conflict it is likely that almost all would have been found to have been doing so. To this writer’s knowledge, it has not been suggested that any of the port or airfield facilities attacked did not constitute military objectives.

50 See, however, Chapter 6.

51 The Ba’ath Party Headquarters in Baghdad was destroyed.

52 Amongst the ministries attacked was the Ministry of Justice, and government buildings in several provincial centres also appear to have been targeted.

53 The Pentagon Final Report, op. cit., note 15 above, at p. 0–11, comments that Iraqi command and control structures were highly centralized. ‘With Saddam Hussein’s fear of internal threats to his rule, he has discouraged individual initiative while emphasizing positive control.’

54 The telecommunications towers in several Iraqi cities were attacked during the air campaign; see Pentagon Final Report, op. cit., note 15 above, at p. 0–11.

55 For criticism of the attacks on these targets, see the Middle East Watch Report, op. cit., note 43 above, at p. 186 et seq.

57 General Schwarzkopf, the United States commander in the Gulf, told a press conference on 31 January 1991:

One fourth of Iraq’s electrical generating facilities are completely inoperative and another 50 per cent suffered degraded operations. I think I should point out right here that we never had any intention of destroying all of Iraqi electrical power. Because of our interest in making sure that civilians did not suffer unduly, we felt we had to leave some of the electrical power in effect and we’ve done that.


58 *Pentagon Interim Report*, op. cit., note 15 above, pp. 2–6 to 2–7; *Pentagon Final Report*, pp. 0–10 to 0–11.


61 The *Pentagon Final Report* comments that:

Some Iraqi military installations had separate electrical generators; others did not. Industries essential to the manufacturing of [chemical weapons], [biological weapons] and conventional weapons depended on the national electric power grid.

(Op. cit., note 15 above, at p. 0–11)


64 The coalition declared that it had achieved air supremacy ten days after the air campaign opened; op. cit., note 15 above, p. 4–5.


67 *ICRC Commentary*, op. cit., note 48 above, para. 2030.


70 The Report refers especially to attacks on Bedouin tents and traffic on the Baghdad-Amman highway.


Notes 329

77 Declaration by the United Kingdom on signature, Roberts and Guelff, op. cit., note 1 above, p. 467. Similar declarations were made by Canada, Italy and the Netherlands.
78 See, e.g., UN Docs S/22090 and 22122 (USA) and S/22115 and S/22156 (UK).
79 UN Doc S/22122.
81 Loc. cit. note 16 above at p. 25. See also the Legal Outline prepared for the ICRC, ibid., at p. 29.
82 Middle East Watch Report, op. cit., note 43 above, Chapter 3.
83 See, e.g., the evidence of Lieutenant-General Sir Peter de la Billière to the House of Commons Defence Committee, op. cit., note 18 above, at p. 87, Q. 122.
84 Page 12–2. See also Pentagon Final Report, p. 0–10.
86 Para. 8.1.2.1 and note 17.
88 In his Foreword to the ICRC Commentary, the President of the ICRC states that ‘the ICRC…allowed the authors their academic freedom, considering the Commentary above all as a scholarly work, and not as a work intended to disseminate the views of the ICRC.’
90 For discussion of the scale of these effects, see Michel, op. cit., note 16 above, at p. 29 and the Report by M.Ahtisaari for the Secretary-General of the United Nations, which comments that:

The recent conflict has wrought near-apocalyptic results upon the economic infrastructure of what had been, until January 1991, a rather highly urbanized and mechanized society. Now most means of modern life support have been destroyed or rendered tenuous. Iraq has, for some time to come, been relegated to a pre-industrial age, but with all the disabilities of post-industrial dependency on an intensive use of energy and technology.

UN Doc S/22366, p. 5.
95 Op. cit., note 72 above, p. 34. Gasser did not regard the reprisals provision of Article 54 (discussed below) as declaratory.
99 See Resolution 666, Lauterpacht, op. cit., note 98 above, p. 91.
101 See, e.g., Gasser, op. cit., note 72 above, p. 34.
109 Op. cit., note 18 above, p. 38, Q. 74. For another part of this answer, see text accompanying note 87.
111 Ibid., p. 12–3.
112 Carnahan, op. cit., note 68 above, p. 37.
115 Interview with W.H. Parks, Keeva, op. cit., note 107 above, p. 58.
116 United Kingdom declaration, Roberts and Guelff, p. 467. Similar statements were made by Canada, Italy and the Netherlands.
117 Pentagon Interim Report op. cit., note 15 above, p. 12–3. This approach is in accordance with the interpretation placed on Article 57 by a number of states in declarations made on signature or ratification. Thus, the UK, on signing Protocol I declared its understanding that ‘the word “feasible” means that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations’ (Roberts and Guelff, p. 467). Similar statements were made by Italy and the Netherlands.
119 See also Article 28, Fourth Geneva Convention.
120 Pentagon Interim Report, op. cit., note 15 above, p. 12–3. For more detailed criticism of Iraq’s failure to observe these requirements, see Pentagon Final Report, pp. 0–13 to 0–14. See also UN Doc S/22341 (8 March 1991).
121 UN Doc S/16649 (28 June 1984).
122 It must, however, be stressed that in most conflicts little more than lip service appears to have been paid to this rule.
123 See also Chapter 6.
126 See the letters from Kuwait to the President of the Security Council, UN Doc S/22165 (28 January 1991), giving details of the oil spill, and to the Secretary-General, UN Doc S/22444 (4 April 1991), on the damage to oil wells.
127 Pentagon Interim Report, op. cit., note 15 above, p. 12–6. The Report also refers to Article 23(g) of the Hague Regulations, 1907, and Article 147 of the Fourth Geneva Convention.
128 Pentagon Final Report, op. cit., note 15 above, pp. 0–26 to 0–27. The Final Report draws on the proceedings of a Conference of Experts held at Ottawa in the summer of 1991, on


130 Ibid., p. 27.

131 In the earlier Iran-Iraq conflict, violations of the law reached such a level that few worthwhile conclusions about the status of Protocol I provisions could be drawn. Other conflicts, such as the Falklands conflict, raised very few questions regarding those provisions.

5

MEANS AND METHODS OF WARFARE IN THE CONFLICT IN THE GULF


2 *The Independent*, (18 January 1991), pp. 1 and 9 (UK), p. 3 (USA).*


4 The author has been told that a lawyer attached to General Schwarzkopf’s personal staff played a material role in the planning of operations—US Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress*, Washington DC, (April 1992), (‘Pentagon Final Report’), Appendix O, pp. 1, 3–4, 36. See also Chapter 3.


6 See, e.g. Greenpeace, op. cit., note 5 above, pp. 26–34.


8 See respectively Chapters 4 and 6; see also Greenpeace, op. cit., note 5 above.

The references within this section of notes to newspapers have been made possible thanks to an index compiled by Hanne Juncher.

10 See Greenpeace, op. cit., note 5 above.


13 See discussion of the attack on the Amiriya command and control centre/air-raid shelter in the section below.

14 This is dealt with later in the chapter.


16 Kalshoven, op. cit., note 3 above, pp. 25–6 Schwarzenberger, op. cit., note 3 above, pp. 10–14, 128–36; H. McCoubrey, International Humanitarian Law, Aldershot: Dartmouth, (1990), pp. 198–203. The definition of a ‘grave breach’ of Geneva Convention IV, for example, includes ‘extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly’ (emphasis added); Article 147.

17 Oppenheim/Lauterpacht, op. cit., note 3 above, pp. 523–30; see generally references in note 3.


19 Additional Protocol I of 1977, Article 51, para. 2.


21 Additional Protocol I of 1977, Article 51, para. 2.

22 Ibid., Articles 54, para. 2, 55 and 56 prohibit attacks on objects indispensable to the survival of the civilian population, such as food and water, and on works or installations containing dangerous forces, and prohibit the use of methods or means of warfare likely to cause widespread, long-term and severe damage to the natural environment.

23 See, e.g. The Independent, (19 January 1991), p. 6. However, Robert Fisk, at p. 9 in the same paper, states that US technicians said that the Scud’s alleged margin of error of 20–30 miles was a legend. If fired by professionals, they claimed Scud missiles to be accurate to within 200 metres of the aiming point.

24 The range was increased from 175 miles to 425 and 550 miles. The modification also required the use of a smaller warhead; The Independent, (19 January 1991), p. 6.


27 Parks (1982), op. cit., note 3 above, p. 98 at pp. 102–4:

> It is important to note that, with the possible exception of the coalition’s need to direct considerable effort toward the hunt for Iraqi Scud missiles, no Iraqi action leading to or resulting in a violation of the law of war gained Iraq any military advantages. This ‘negative gain from negative actions’ in essence reinforces the validity of the law of war.


28 Additional Protocol I of 1977, Article 51, para. 4; *Pentagon Interim Report*, op. cit., note 18 above, 12–2 to 12–3; *Pentagon Final Report*, note 4 above, Appendix O, pp. 10–12; *Hansard* (House of Commons), vol. 185, (4 February 1991), cols 14–15; see also Fenrick, art, cit., note 12 above.

29 Additional Protocol I of 1977, Article 51, para. 5 (b).

30 Doswald-Beck, art, cit., note 3 above, p. 156.

31 Additional Protocol I of 1977, Article 49, para 1; *Pentagon Final Report*, op. cit., note 4 above, Appendix O, p. 13 on the definition of ‘attack’.

32 See e.g., the UK’s statement of understandings, (e), Roberts and Guelff, op. cit., note 11 above, pp. 467–8.

33 Additional Protocol I of 1977, Part IV, Civilian Population, Section 1, General protection against effects of hostilities.

34 Parks (1990), art. cit., note 3 above, pp. 184–202, particularly pp. 190–8 on the significance of enemy defences.

35 Additional Protocol I of 1977, Article 52, para. 2.


38 Additional Protocol I of 1977, Article 52, para. 3.

39 See, e.g., the UK’s statement of understandings, (d), Roberts and Guelff, op. cit., note 11, p. 467.


41 See, e.g., Walzer, op. cit., note 3 above, pp. 152–4.

42 It refers to ‘information from all sources which is available to them at the relevant time’. Whilst it does not specify information which ought to be available but is not, nevertheless the use of ‘all’ might suggest that, where, for example, satellite information is known to be available, the commander can insist on receiving that type of information.

43 Parks (1990), art. cit., note 3 above, p. 218, cites an example of an analogous problem with regard to weapon use; ‘the Delegate from Togo proposed a rule that in a war between a
nation with an air force and a nation without an air force, the nation with an air force would be prohibited from using it.'

44 Such a justification has been used with regard to the attacks on Hiroshima and Nagasaki; see Blix, who criticizes the view, art. cit., note 20 above, pp. 54–5; see also Fenrick, art. cit., note 12 above, pp. 121–2 and Parks (1990), art. cit., note 3 above, pp. 176–7, in relation to the attack on Dresden in February 1945.


46 ‘One of the promises I made to the American people was that I would try to achieve the absolute minimum number of casualties on our side’, (emphasis added), General Schwarzkopf, cited in Greenpeace, op. cit., note 5 above, p. 26. The members of the forces themselves are likely to feel that not enough attention is ever paid to limiting military casualties: “It was a war we were always going to win, we took chances we didn’t need to” and that “my little pink body wasn’t really cared about as much at high level as it was by me.” C. Allen, Thunder and Lightning, London: HMSO, (1991), p. 152.

47 See the section on ‘Lessons of the Gulf conflict’ below.

48 Additional Protocol I of 1977, Article 57, para. 2.

49 Fenrick, art. cit., note 12 above, pp. 107–8; Parks (1990), art.1 cit. note 3 above, pp. 175–7.


51 See note 40 and accompanying text. To claim that food warehouses were unlawfully attacked (see The Times, (18 November 1991), p. 12 and Middle East Watch, op. cit., note 26 above, pp. 163–6), it is not enough to show that they were hit. It is necessary to show either that they were targeted or else that a legitimate military objective was attacked in such a way as to give rise to a disproportionate risk of damage to such a warehouse. On the special rules with regard to food supplies, see notes 78 and 79.


53 All the casualties would appear to have been brought out of the bunker/shelter; note 50.

54 When the allegation was made, the RAF said that they would investigate the incident; The Observer, (17 February 1991), p. 26. The initial investigation suggested that the bomb had missed the ‘basket’ through which it was guided to the target. The RAF disputed some of the facts in the allegation but they admitted an error and apologized for any civilian casualties; The Independent, (18 February 1991), p. 1; The Times, (18 February 1991), p. 1. Following the full investigation, the RAF said that the bomb had malfunctioned and again expressed their regret; The Times, (19 February 1991), p. 7.

55 Note 50. It was also suggested that the building was attacked because it was believed to contain key Iraqi military personnel and not because it was a command and control centre; The Independent, (15 February 1991) p. 1. See generally, Pentagon Final Report, op. cit., note 4 above, Appendix O, pp. 14 and 16.

56 Additional Protocol I of 1977, Article 52, para. 2. Middle East Watch, op. cit., note 6 above, pp. 128–47 at 137–8, states that a warning should have been given prior to the attack, but this is to ignore the US claim that they did not know that civilians were using the building as an air-raid shelter. The Americans claimed that it was an exclusively military target. As such, there was no need to give a warning before attacking it; see 1907 Hague Convention IV, Regulations, Article 26 and Additional Protocol I of 1977, Articles 57 para. 2 (c) and 65 para. 1.

57 Ibid. Article 58 (b).


59 The press reports lay considerable emphasis on the way in which the issue was handled in press briefings and the world-wide reaction to the statements. Middle East Watch, op. cit., note 26 above, pp. 137 and 145–7. The result, not of the attack but of the ‘intentional commingling of military objects with the civilian population’ is acknowledged as ‘tragic’ in Pentagon Final Report, op. cit., note 4 above, Appendix O. p. 14.
60 Letter of 20 March 1991 from the UN Secretary-General to the President of the Security Council, 20 March 1991 (S/22366) enclosing Report by Under-Secretary-General, Martti Ahtisaari, on humanitarian needs in Kuwait and Iraq in the immediate post-crisis environment.


63 Greenpeace, op. cit., note 5 above, pp. 47–8.

64 Ibid., pp. 55–61.

65 Whilst humanitarian relief is not subject to the sanctions regime, it is not clear whether the equipment and materials needed to effect repairs comes within the exception.


67 See Chapter 4.

68 At a round-table conference to investigate the need for a fifth Geneva Convention on the protection of the environment in time of armed conflict, 3 June 1991, London, it appeared to be assumed that, because the environmental results of the conflict in the Gulf were unacceptable, the existing legal rules must be inadequate. If states have not ratified existing agreed legal texts, new legal norms may not be any more effective. See generally, G. Plant (ed.) Environmental protection and the law of war: A Fifth Geneva Convention on the Protection of the environment in time of armed conflict, London: Belhaven Press, (1991).

69 Additional Protocol I of 1977, Article 52, para. 2; see also Pentagon Interim Report, op. cit., note 18 above, 2–4, 4–3 and references in note 66.

70 Contrast objects ‘normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school’; ibid., Article 52, para. 3. Dual-function targets do not have dual status. A military objective remains a military objective even if it is also used by civilians. The fact that it is also used by civilians may affect the calculations as to whether the destruction offers a definite military advantage in the circumstances ruling at the time and/or may affect the manner in which it is attacked. See Pentagon Final Report, op. cit., note 4 above, Appendix O, p. 11.

71 Ibid., Article 52, para. 1.

72 Carroll and La Rocque, op. cit., note 1 above, p. 51; see generally Middle East Watch, op. cit., note 26 above, pp. 193–227.


76 Ibid., para. 2 prohibits attacks against such objects ‘for the specific purpose of denying them for their sustenance value…whatever the motive’ (emphasis added).

77 It is used in other contexts: e.g. ‘a method or means of combat the effects of which cannot be limited as required by this Protocol’ (emphasis added), ibid., Article 51, para. 4(c).
78 Ibid., Article 54, para. 3(b).
79 Ibid., Article 54, para. 1. See generally, Middle East Watch, op. cit., note 26 above, pp. 160–93.
80 United Nations, Security Council Resolution 661, of 6 August 1990, operative para. 3(c); Resolution 666, of 13 September 1990, operative para. 1.
81 Additional Protocol I of 1977, Article 56.
82 The installation shall not be made the object of attack ‘if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population’ (emphasis added), ibid., para. 1. See generally, Parks (1990), art. cit., note 3 above, p. 202 et seq.
83 Additional Protocol I of 1977, Article 57, para. 2.
84 Ibid., Article 52, para. 1.
86 A state cannot plead military necessity to justify an otherwise unlawful attack; see note 16 above. What is being suggested here is that a state would have to prove the necessity of an otherwise lawful attack, where the cumulative effect of attacks on that type of target or the foreseeable and consequential effects of the attack on the civilian population would be severe.
87 See the section on ‘Lessons of the Gulf Conflict’ below.
90 Hague Convention IV of 1907, Regulations, Article 23(a); 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; for texts, see Roberts and Guelff, op. cit., note 11 above; Reaffirmation and development of International Humanitarian Law: Prohibitions or Restrictions on the use of certain weapons and methods in armed conflicts: Developments in relation to certain conventional weapons and new weapons technologies, Document drawn up by the ICRC for the 26th International Conference, Budapest, (1991), p. 10.
91 Hague Convention IV of 190, Regulations, Article 23(e); Additional Protocol I of 1977, Article 35 para. 2; preamble to the 1981 Conventional Weapons Convention.
92 See, e.g., International Covenant on Civil and Political Rights, Articles 6 and 7, and European Convention on Human Rights, Articles 2 and 3. Those rights are applicable in all situations, including emergencies and armed conflicts; Article 4 ICCPR and Article 15 ECHR. See also Proclamation of Teheran, (13 May 1968), para. 10. However, ‘there has been a trend by many towards accepting any suffering of soldiers as inevitable, as if they were mere objects’; Reaffirmation, op. cit., note 90 above, p. 5.
93 That, for example, is the reason for the prohibition of ‘any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays’, Protocol I, 1981 Conventional Weapons Convention. Such weapons do not exist; see

94 E. Dinter, Hero or Coward: Pressures Facing the Soldier in Battle, London: Frank Cass, (1985), pp. 12 and 25. The Author was in command of the artillery of the mountain division in Bavaria. In other words, he wrote as a soldier.

95 Note 91. Fenrick, art. cit., note 93, p. 231.

96 1899 Hague Declaration 3 Concerning Expanding Bullets; 1925 Geneva Protocol for the Prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare.

97 Many reservations have been made to the 1925 Geneva Protocol providing that it shall cease to be binding on the ratifying party in regard to any enemy state whose armed forces or whose allies fail to respect the prohibitions laid down in the Protocol; see Roberts and Guelff, op. cit., note 11 above, pp. 144–5.


100 Ibid., Article 1.

101 The People’s Republic of China regarded the absence of a restriction on the use of incendiary weapons against combat personnel as an inadequacy of the Protocol; Roberts and Guelff, op. cit., note 11 above, pp. 487–8.

102 Kalshoven (1987), op. cit., note 3 above, p. 31. The Foreign Office has been informed that Iraq signed the treaty on 11 May 1972 and ratified it on 19 June 1991.


104 Notes 23 and 24 above.

105 The Independent, (1 February 1991), p. 3.

106 Greenpeace, op. cit., note 5 above, Appendix A.


108 Ibid., p. 19; see generally pp. 16–20.

109 Greenpeace, op. cit., note 5 above, Appendix A.

110 Note 43 above.

111 Greenpeace, op. cit., note 5 above, p. 79; see also Mr Al-Anbari, quoting a statement of the Commander of the USAF, Provisional Verbatim Record, 2981 Meeting of the Security Council, (3 April 1991), S/PV 2981, pp. 24–6.

112 Greenpeace, op. cit., note 5 above, Appendix A, p. 3.

113 Simpson, op. cit., note 61 above, p. xiii. Certain states appear to think that incendiary weapons should not be used against combatants; see note 101 above and Reaffirmation, op. cit., note 90 above, p. 29.

114 Concern at the alleged risk of a subjective moral code replacing objective legal rules was one of the reasons why the USA entered a reservation to 1977 Protocol II, Article 10, which protects medical personnel ordered to perform acts contrary to medical ethics; see State Department Report, S Treaty Doc No 2, 100th Cong, 1st Sess (1987).


116 Ibid.

117 Geneva Convention I of 1949, Article 17 requires that the parties to the conflict shall ensure that burial is preceded by a careful examination with a view to confirming death, establishing identity and enabling a report to be made.
Preamble to the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare.

Note 117.


Note 121 Simpson, op. cit., note 61 above, p. 350.

Note 122 Greenpeace, op. cit., note 5 above, pp. 42–4; Simpson, op. cit., note 61 above, pp. xv and 350.

Note 123 Simpson, ibid., p. xiii.

Note 124 This is not the same criterion as proportionality in the jus ad bellum, see Greenwood, art. cit., note 74 above, or even proportionality in the jus in bello, see Fenrick, art. cit., note 12 above. The test proposed is ‘unnecessary to the achievement of the war aim’; see note 86 above. There would clearly be a substantial overlap with proportionality in the jus in bello, but that concept does not appear to be applicable to attacks directed against military objectives where there is no risk to civilians or civilian property. There appears to be a generally applicable norm requiring proportionality in the use of force; W.M.Reisman and A.R.Willard (eds) International Incidents: the law that counts in world politics, Princeton: Princeton University Press, (1988).

Note 125 The attack on the retreating Iraqi forces is discussed in the Pentagon Final Report, note 4 above, Appendix O, pp. 34–5.

Note 126 For instance, Canada, Kuwait and Saudi Arabia.


Note 128 Talk on ‘Multinational military operations and problems of legal inter-operability’, given by the author to the thirteenth defence seminar, University of Essex, (7 May 1991).

Note 129 American commentators opposed to Protocol I fall broadly into two groups. One misrepresents the provisions of the Protocol and then criticizes it for such provisions. An example of this approach is to be found in Roberts, note 73 above. This was ably countered by the head of the US delegation to the Conference that adopted the Protocol in Aldrich, note 73. The second group, best exemplified by Parks, (1990), art. cit., note 3 above, interprets every restriction on the attacker as broadly as possible and then criticizes the provisions as unworkable or ambiguous. Military lawyers with other forces adopt a more commonsensical approach to interpret the restrictions and seem to have concluded that the provisions are workable. They do not appear to regard them as ambiguous, but rather interpret them differently from American military lawyers; see note 127 above and accompanying text. In other cases, military lawyers in different jurisdictions interpret the provision in the same way, but disagree as to its workability; see note 130 below.

Note 130 For instance, the example given in Parks, (1990), art. cit., note 3 above, p. 134. Other military lawyers have told the author that they see no difficulty in being able to attack an ammunition truck driven by a civilian but it being unlawful to attack the civilian when the driver has got out of the truck.

Note 131 It would appear that NATO only began to address the implications of Additional Protocol I for multinational integrated military operations in the mid-1970s, half-way through the negotiating process.
6

FAILURES IN PROTECTING THE ENVIRONMENT IN THE GULF WAR


3 UN Security Council Resolution 678 of 29 November 1990, by not enjoining all member states to take part in military action, left continued space for neutrality. Iran declared its policy in relation to this conflict as one of neutrality: see e.g. the statement of the Supreme National Security Council of Iran on 26 January 1991 regarding the defection of Iraqi planes to Iran; Sunday Times, (27 January 1991), p. 1.


5 See especially the characteristic plea for restraint in Book III, Chapter XII, ‘Moderation in Laying Waste and Similar Things’, in Hugo Grotius (1625) De Jure Belli ac Pacis, trans. Kelsey, Oxford: Oxford University Press, (1925), pp. 745–56. Earlier (in Book III, Chapter IV) he had said that by the law of nations it was forbidden to poison waters, though it might be legitimate to divert a river or cut a spring: ibid., pp. 652–3.


13 Falk, op. cit., note 12 above, p. 16.


15 The Martens Clause was adopted at the 1899 and 1907 Hague conferences principally because the powers had not been able to agree on detailed rules on certain problems relating to occupied territories and the treatment of resistance: but the clause was written in broad terms, and has been widely seen as having a broader application. Its wording is reflected in articles and preambles in a number of subsequent treaties, including the four Geneva Conventions of 1949, Additional Protocols I and H of 1977, and the UN Weapons Convention of 1981.


17 UN General Assembly Resolution 2603A (XXIV) of 16 December 1969.


24 Sandoz *et al.* op. cit., note 21 above, pp. 415, 417–18 and 664. The background to Articles 35 and 55 is also very usefully discussed by Alexandre Kiss in ‘Les Protocoles additionnels

25 Sandoz et al. op. cit., note 21 above, p. 662.


27 Parks, (1990), op. cit., note 26 above, p. 212.

28 On this point, see especially George H.Aldrich, (1991), op. cit., note 8 above, pp. 12–13. Aldrich had been the head of the US delegation to the conference that adopted the Additional Protocols 1977.

The relevance of Article 56 to the Allied bombing in the 1991 Gulf War is explored further below, text at note 90.

29 On the meaning of Article 56, Arkin et al. have asserted unconvincingly: ‘The examples given in Protocol I, such as nuclear electrical generating stations, are not meant to be exhaustive, and a liberal construction could say that the release of the force of the oil fires and spills are covered’; William M.Arkin, Damian Durrant, and Marianne Cherni, ‘On Impact: Modern Warfare and the Environment—A Case Study of the Gulf War’ (a study prepared for the 3 June 1991 London Conference on the Protection of the Environment in Time of Armed Conflict), Washington DC, (May 1991), p. 140.

30 Sandoz et al. op. cit., note 21 above, pp. 668–9.

31 Additional Protocol I 1977, Article 61, para. (a), items ix, xii and xiv.


37 On 22 January 1987 at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law, American University Journal of International Law and Policy, vol. 2, pp. 420 and 422. For Judge Sofaer’s similar remarks on consultations with allies, see p. 471.

For subsequent similar statements by Matheson, see American Society of International Law, Proceedings of the 81st Annual

For a subsequent authoritative account of the state of US-led discussions to fill the gap left by US non-ratification of Additional Protocol I, see the major critique of the Protocol by Parks, (1990), op. cit., note 26 above, pp. 222–3.

41 Aldrich, (1991), op. cit., note 8 above, p. 14. This article, a response to the critiques of the Protocol, is in some respects incomplete. Referring to Matheson’s remarks in January 1987, Aldrich says simply: ‘With respect to the articles concerning the environment, no explanation was offered.’ (p. 12). This does slightly less than justice to Matheson’s remarks as cited above. Curiously, Aldrich does not refer at all to one major US critique of Protocol I—that by Parks, (1990), op. cit., note 26 above.
42 Christopher Greenwood, (1991), op. cit., note 32 above, p. 95. See also his chapter in this volume, where he discusses agreement between coalition states on the rules of engagement and targets.
45 For full text of the ICRC’s note verbale and memorandum dated 14 December 1990, see International Review of the Red Cross, Geneva, no. 280, (January–February 1991), pp. 22–6. On 11 January 1991 the US Department of Defense sent a three-page message to all commands giving the text of the ICRC memorandum (which had been given to the US Government on 10–11 December), along with some detailed comments clarifying US interpretations of the memorandum. Other states do not appear to have reacted so fully.
47 These efforts are described in detail by Angelo Gnaedinger, the ICRC’s Delegate General for the Middle East and North Africa, Department of Operations, in ICRC, The Gulf 1990–1991, op. cit., note 44 above, pp. 10–11. See also the article by Christophe Girod on p. 12.
52 Text of this and other statements by Mr Wakeham are in House of Commons, Foreign Affairs Committee, Third Report, The Middle East After the Gulf War, vol. II, 9 July 1991, pp. 247–8. See also the Note (adopting a roughly similar line, but more detailed) by the
The existence of the Note by the Meteorological Office was known at the time. In a written answer in the House of Commons on 17 January, Mr Archie Hamilton, a junior defence minister, said: ‘The Meteorological Office has produced a note for the government on the possible environmental impacts of burning oil wells of Kuwait. I am placing a copy of this note in the Library of the House’; *Hansard*, vol. 183, col. 546, (17 January 1991).

In *The Washington Version*, Part 3, a programme about the Gulf War shown on BBC television on 18 January 1992, James Baker recounted that Tariq Aziz, having spent 12–15 minutes reading the letter, said that he could not accept it: ‘It is not written in the language heads of state use to communicate with each other.’ At the end of the six or seven hours meeting, throughout which the letter had lain on the table, Aziz again refused an invitation to take it.

Later in the same programme Lawrence Eagleburger, deputy Secretary of State, said of Saddam Hussein: ‘One message I think he did get is that if he were to resort to chemical weapons he would regret it, and regret it intensely.’ Eagleburger was speaking in a general way, not referring specifically to the 9 January Geneva meeting.

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54 Information from an official at UN Headquarters in New York, (June 1991).


57 Quoted in Steven Keeva, ‘Lawyers in the War Room’, *American Bar Association Journal*, vol. 77, (December 1991), p. 52. The author goes on to suggest (p. 59): ‘In the wake of the Persian Gulf War, there is little doubt that the role of lawyers in military operations has changed irrevocably.’ See also the passage on ‘Role of Legal Advisers’ in *US Department of State Dispatch*, (21 January 1991), pp. 37–8.

58 Text published in Scientific American, 264 (5), (May 1991), p. 9. A DOE spokesperson is quoted as saying that the policy was not intended to ‘muzzle the debate’, but because discussions of the possible effects of fires and oil spills could ‘give the Iraqis ideas’.


60 Hansard, vol. 183, cols 981–2 and 984.


63 On 25 January 1991 Marlin Fitzwater, the White House spokesman, said the oil spill at that time taking place in the Gulf was ‘something that far exceeds any kind of tanker spill that we’ve ever witnessed’. He indicated that it was several times bigger than the Exxon Valdez disaster in Prince William Sound, Alaska, in March 1989. This had dumped some 11 million gallons of crude (over 250,000 barrels). The biggest oil spill disaster ever up to that point had been an oil rig accident in the Gulf of Mexico in 1979, which had spilled 535,000 tonnes (over 3,750,000 barrels); report in The Independent, (26 January 1991), p. 1. (Figures in parentheses added.)

On 26 January, reporting from Riyadh on the successful US bombing raid to reduce the flow of oil, Christopher Bellamy said: ‘But even if the flow has been stopped, between five and ten million barrels of thick crude oil have already poured into the Gulf from Kuwait creating an environmental disaster.’ He also reported what were apparently official Saudi estimates that the slick was ‘fifteen times the size of that produced by the Exxon Valdez supertanker disaster in Alaska in March 1989’; The Independent, (28 January 1991), p. 1.

On 28 January Saudi Arabia’s Oil Minister, Hisham Nazer, said that Iraq had pumped more than 11 million barrels of crude oil into the Gulf; The Independent, (29 January 1991), p. 1.

64 On the weekend of 9–10 February 1991 Derek Brown, environmental coordinator for the Bahrain Petroleum Company, flew over the Saudi coast. He subsequently said:

There are plenty of booms in place to protect harbours and installations, and there is a big clean-up operation going on. But the whereabouts of the enormous oil slicks reported a fortnight ago are a complete mystery… There is certainly a severe pollution problem but it does not look like an environmental catastrophe at the moment.


65 In April 1992, the Pentagon said: ‘Between seven and nine million barrels of oil were set free into the Gulf by Iraqi action’; Pentagon Final Report, op. cit., note 57 above, p. 0–26. In the same month, a Greenpeace paper by William M. Arkin, ‘Gulf War Damage to the Natural Environment’, pp. 2–3, gave the same figure, but mentioned additionally that smaller quantities of oil continued to leak into the Gulf from a number of sources until May or early June 1991. See also the various figures in the publication of the Kuwait Environment Protection Council, State of the Environment Report: A Case Study of Iraqi Regime Crimes Against the Environment, Kuwait, (November 1991), pp. 28–30. For a very low figure (1.5 million barrels), see letter by Samir S. Radwan in Nature, 350 (6318), 11 April 1991, p. 456.
A short survey of ecological damage is provided in The Environmental Legacy of the Gulf War, (1992), Amsterdam: Greenpeace. It is weak on legal issues, but, has useful reports of investigations and a wide range of references.

The destruction of oil installations had certainly commenced by 22 January. On that day ‘US military authorities accused Iraq of setting fire to installations at three oilfields in Kuwait. The US command in Riyadh released aerial photographs which, it said, showed Iraq had blown up parts of Al-Wafra oilfield on Kuwait’s border with Saudi Arabia’; The Independent, (23 January 1991), p. 1.

See also Gail Counsell, ‘Blowing up oilfields is “easy task”’, The Independent, (23 January 1991), p. 2.

Kuwait Environment Protection Council, State of the Environment Report, op. cit., note 65 above, pp. 1, 2–3, and Table in Fig. 2. This states that after 26 February, 613 wells were on fire, 76 gushing, and 99 damaged. It quotes the Ministry of Oil in Kuwait as stating that six million barrels of oil per day, and 100 million cubic metres of gas a day, were being lost. Greenpeace’s The Environmental Legacy of the Gulf War, pp. 17 and 38, gives figures of between 2.3 and 6 million barrels per day.

Letter from permanent Mission of Kuwait at UN to the UN Secretary-General, (12 July 1991); text in Plant (ed.), Environmental Protection and the Law of War, (1992), p. 265.


Pentagon Interim Report, op. cit., note 70 above, p. 13–2; see also Pentagon Final Report, op. cit., note 57 above, p. 0–27: ‘As with the release of oil into the Persian Gulf, this aspect of Iraq’s wanton destruction of Kuwaiti property had little effect on Coalition offensive combat operations. In fact the oil well fires had a greater adverse effect on Iraqi military forces.’

Pentagon Interim Report, op. cit., note 70 above, pp. 12–6, 12–7 and 13–1, expresses some puzzlement; as does Pentagon Final Report, op. cit., note 57 above, p. 0–27.

Points emphasized in Pentagon Final Report, op. cit., note 57 above, p. 0–27.


See, e.g., Greenpeace, The Environmental Legacy of the Gulf War, op. cit., note 66 above, pp. 17–22 and 34.


Preliminary UN estimates in November 1991 were that two billion barrels of the country’s oil reserves had been lost; International Herald Tribune, Paris, (21 November 1991).
For the view taken by coalition forces that the entire electricity generation and distribution system was a lawful target, see Chapter 4. For fuller consideration of methods and means of warfare, see Chapter 5.

90 On the US attitude to Article 56, and to Protocol I in general, see above, text at notes 36 to 42.
93 *Pentagon Interim Report*, op. cit., note 70 above, p. 12–3; and *Pentagon Final Report*, op. cit., note 57 above, p. 0–10.
94 See, e.g., UN General Assembly Resolution 37/215 of 20 December 1982.

In March 1992 a British company, Royal Ordnance, said it had removed one million mines and 6,000 tons of ammunition from different parts of Kuwait; *The Independent*, (13 March 1992).


104 Hague Convention IV 1907, Article 3, was one legal basis for the demand for compensation from Iraq, including for damage to the environment.

105 By contrast, the Security Council was silent after the war on the subject of Iraq’s non-adherence to Additional Protocol I, 1977. This was for obvious reasons, including the fact that several coalition powers were not themselves parties to the Protocol, the US government being especially critical of it: they would hardly have been in a position to impose it on Iraq, even if they had wished to do so.

106 See *US Department of State Dispatch*, issues published in January–March 1991, for several statements by President Bush and others favouring the overthrow of the Iraqi regime.

107 Some discussion of a possible new treaty dealing with environmental damage in war took place at the international conference held at King’s College, London, on 3 June 1991.

108 L.C.Green, in his paper for the July 1991 Ottawa Conference (above, note 4), p. 14, suggested ‘the General Assembly or even the Security Council charging the International Law Commission, as a matter of urgency, to take up this issue’.


110 The postponement, announced on 26 November 1991, was due to disagreements on the question of Palestinian representation. The International Conference had been intended to address, as one of its two themes, respect for international humanitarian law. Among the ICRC preparatory documents containing references to the effects of war on the environment was one entitled ‘Implementation of International Humanitarian Law, Protection of the Civilian Population and Persons Hors de Combat’, Geneva, (1991), 40 pp.

111 Draft resolution which was to have been item 4.2 on the provisional agenda of the Commission I, document dated 1 November 1991.

112 UN General Assembly decision 46/417 of 9 December 1991, requesting the Secretary-General to report on activities undertaken in the framework of the ICRC regarding protection of the environment in time of armed conflict.

113 This paper was published as ‘Protection of the Environment in Times of Armed Conflict: Report of the Secretary-General’, UN Doc. A/47/328 of 31 July 1992.


115 Kuwaiti woman interviewed on television programme, *Dispatches*, made by Jenny Barraclough and shown in the UK on Channel 4 on 8 January 1992.


117 The coalition was reportedly prepared to resort to chemical and/or nuclear weapons, and a plan was reportedly made known to the Iraqis to deter a possible Iraqi resort to chemical weapons; Christopher Bellamy, ‘Allies “put Iraqis off chemical war”’, *The Independent*, (29 November 1991).


119 The words of Michael J. Matheson, Deputy Legal Adviser, US Department of State, in January 1987, as cited above, text at note 37. On the harmonization of rules, see also the conclusion of Chapter 5 in this volume.

120 ‘The US concern regarding more restrictive environmental provisions is that they could be implemented only at the expense of otherwise lawful military operations—such as attacking targets which require fuel-air explosives (FAE) for their destruction’; Colonel James P. Terry, US Marine Corps, ‘The Environment and the Laws of War: The Impact of Desert Storm’, Naval War College Review, xlv (1), (winter 1992), p. 65.


7

NAVAL OPERATIONS IN THE GULF

1 The opinions expressed in this chapter are those of the author and do not represent the views of the Royal Navy or the Ministry of Defence.

2 Perhaps the most apposite and poignant aspect of the Royal Navy’s long association with the Gulf was the pre-emptive reinforcement of Kuwait that took place in 1961. After some bellicose statements from the Iraqi government, the Kuwaiti government formally requested British assistance under the then very recent Anglo-Kuwait treaty. This led to an initial landing of some 600 Royal Marines from HMS Bulwark, which was followed by rapid reinforcement by sea and air including a naval concentration of some forty-five Royal Navy warships. See James Cable, Gunboat Diplomacy 1919–79, London: Macmillan in association with the International Institute for Strategic Studies, (1981), pp. 65–7.

3 ‘The Armilla patrol is continuing to provide reassurance to British Merchant Shipping in the Gulf by independently patrolling International Waters and remaining immediately available to go to their protection’, Hansard, HC 147, (20 February 1989), col. 446.

4 Joint memorandum submitted by the Foreign and Commonwealth Office and other departments to the House of Commons Defence Committee, 3rd Rep, Defence Committee 1986–7, HC 409, p. 70.

5 Despatch by the Joint Commander of Operation Granby published in the Second Supplement to The London Gazette of Friday 28 June 1991.

6 A full list of the eight mandatory resolutions of the UN Security Council is contained at Annexe 2 of the Minutes of Evidence of the Foreign Affairs committee; HC 655ii, 89/90, (24 October 1990).

7 Resolution 661 applied in equal terms also to imports from and exports to occupied Kuwait. There was thus also a corresponding additional exception in favour of assistance to the legitimate government of Kuwait and its agencies. For further discussions see p. 158.


11 By Article 6 of SI 1990/1651 where any ‘authorized officer’ has reason to suspect that any British ship registered in the UK has been or is being or is about to be used in contravention of the foregoing, then he may (either alone or accompanied and assisted by persons under his authority) board the ship and search her and may for that purpose use or authorize the use of reasonable force. There is a further power for the authorized officer to prevent the continuation of the voyage of the ship, and to take her to any port. The definition of ‘authorized officer’ is that provided for by s.692(1) of the Merchant Shipping Act 1894, as meaning any commissioned officer on full pay in HM naval or military service or a customs officer. Similarly, SI 1990/1652 makes provision in respect of certain dependent territories.

12 The UN Charter prohibits the use or threat of force. See Article 2 (4). Self defence is a recognized exception to this blanket prohibition, however, and is set out in Article 51 of the UN Charter.

13 See Lauterpacht, Greenwood, Weller and Bethlehem, *The Kuwait Crisis: Basic Documents*, Cambridge, (1991), Chapter 5, p. 245. See also *The Times*, (13 August 1990): ‘Mr Baker said in Washington yesterday that the US would intercept Iraqi oil shipments from the Gulf, after what he called a request by exiled Kuwait leaders to enforce UN sanctions against Iraq.

14 *The Times*, (13 August 1990).


16 *The Times*, 14 August 1990.


18 *The Times*, 15 August 1990.

19 For the full text of this warning see op. cit., note 13 above, p. 248.


21 Article 41 of the United Nations Charter reads:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions…. These may include complete or partial interruption of economic relations.

This should be contrasted with Article 42 of the UN Charter:

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include *demonstrations, blockade and other operations* by air, sea or land forces of Members of the United Nations. [Emphasis supplied]

22 See Mr Baker’s comments already quoted both in the text above and also at note 13 above. See also the UN Press Release of 16 August 1990 on the clarification of the reported statement by the UN Secretary-General concerning the imposition of a naval blockade. Op. cit. note 13 above, p. 247.


24 For full text of Article 42 see note 21 above. For further discussion of the applicability of Article 42, see pp. 33–9 *passim*.

25 For full text of Article 51 see note 12 above.

26 Op. cit., note 13 above, p. 245. For further discussion see Chapter 2.
27 Resolution 665 (1990) adopted by the Security Council at its 2,938th Meeting on 25 August 1990 contained the following words (emphasis supplied):

1. Calls upon those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping.

28 See note 10 above.

29 UN Charter Articles 2 (5) and 25 respectively provide that:

All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventative or enforcement action.

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

30 The United States apparently adheres to this view and so the US Navy, were this operation to have amounted to an international armed conflict, could expect to exercise the normal rights of visit and search of shipping and would expect that all states, whether ‘co-belligerents’ or ‘neutral’ would acquiesce in such activity. See the preface to US Navy Naval Warfare Publication, The Commander’s Handbook on the Law of Naval Operations, NWP 9, p. 2:

It is the policy of the United States to apply the law of armed conflict to all circumstances in which the armed forces of the United States are engaged in combat operations, regardless of whether such hostilities are declared or otherwise designated as ‘war’. Relevant portions of Part II [i.e. The Law of Naval Warfare] are, therefore, applicable to all hostilities involving US naval forces irrespective of the character, intensity, or duration of the conflict.


33 The classic statement of self defence is contained in the formulation by the US government sent to the British government in 1841 in the Caroline case, 29 BFSP 1137–8; R.Jennings, ‘The Caroline and Macleod Cases’, 32 American Journal of International Law 82 (1938):

it will be for... [Her Majesty’s] Government to shew a necessity of self defence... [that in the exercise of self defence those exercising it] did nothing unreasonable or excessive; since the act justified by the necessity of self defence, must be limited by that necessity.

34 See op. cit., note 13 above, p. 249. Extract of a press conference given by the British Foreign Secretary, Mr Douglas Hurd on 24 August 1990:

So the discussions in New York are not of an empty, ritualistic kind. We have no doubt, the Americans have no doubt, about the legal basis on which our ships operate, but we are anxious that that basis should be
accepted by everybody, that it should clearly be with the authority of
the UN and with the terms agreed by the UN that these operations take
place.
35 See UN Charter Article 2 (4) at note 12 above.
36 Non-belligerency would seem unlikely as a permissible condition; see Natalino Ronzitti
(ed.), The Law of Naval Warfare, Dordrecht: Martius Nijhoff. At pp. 211 to 213 a
Commentary by Dietrich Schindler on ‘Neutral Powers in Naval War’:

If war broke out between two states [before the First World
War]…third states had the choice between entering the war on the side
of one of the belligerents and remaining neutral. International
Law…did not recognize any intermediate position. All ‘non
belligerents’ were bound to apply the law of neutrality… [The
preceding paragraphs] lead to the conclusion that according to present-
day international law, in the case of an international armed conflict in
which the Security Council does not take any decision, third states may
either become belligerents on the side of the victim of aggression or
remain neutral or adopt an intermediate position favouring the victim
of aggression.
37 Apparently not; see note 35 above and also C.J.Greenwood, op. cit., note 23 above.
38 See, for example, the following extract from a letter from the Permanent Representative of
the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, 23

Furthermore, in line with its principles and requirements of its national
security, the Islamic Republic of Iran considers it imperative to refrain
from engagement in the present armed conflict.

Also, the following extract from a letter from the Permanent
Representative of the Islamic Republic of Iran to the United Nations
addressed to the Secretary General, (28 January 1991) (S/22163, 28
January 1991):

The National Security Council of the Islamic Republic of Iran,
reiterating the position of the Islamic Republic of Iran concerning non-
engagement in present hostilities, warned the belligerent parties to
refrain from the use of Iranian airspace. It further decided that in the
event of emergency landing of any aircraft of either side in the territory
of the Islamic Republic of Iran, the aircraft would be seized and held
until the termination of hostilities…. Furthermore, reiterating the
position of non-engagement of the Islamic Republic of Iran in the
hostilities in the Persian Gulf and its commitment to resolutions of the
Security Council, the Foreign Ministry of the Islamic Republic of Iran
has informed the government of Iraq that, in line with the relevant rules
of international law, the Islamic Republic of Iran will not allow the use
of military vessels and personnel who have entered the territory of the
Islamic Republic of Iran to any of the belligerent parties until the termination of hostilities.

39 See note 19 above.
41 The Iranian Advisory Zone (AIZ), declared during the course of the Iran-Iraq conflict was still extant. This area, running the full length of the Gulf from the land border between Iran and Iraq down to the Straits of Hormuz and enclosing approximately 40 miles of sea measured from the Iranian coast, was designated by Iran as an area in which guidelines for safe navigation were offered. Iran stated that it would not take ‘responsibility for damage caused to those who did not comply’.
43 See note 20 above and associated text.
48 The same reasoning would have applied to a member of a US Navy boarding party. After the killing of Leon Klinghoffer by the Achille Lauro terrorists, a change in US law was made whereby jurisdiction was vested in the US courts for the purposes of any terrorist murder or manslaughter or any serious physical assault on any US national, wheresoever perpetrated. This amendment (now Chap 113 of Title 18 of the US code) was, when introduced, not intended to cover ‘barroom brawls or normal street crime’ and before prosecution may take place a certificate by the Attorney General is required, stating that in his judgement the offence was intended to coerce, intimidate or retaliate against a government or civilian population. It does not seem likely that the envisaged circumstances in the Gulf would fall within this definition.
50 See note 21 above and the text of UN Charter Article 42 quoted therein.
51 See Hansard, HL Debates, (6 February 1991), cols 1192 to 1196.
52 See operative paragraph 3 of Resolution 678 which ‘Requests all States to provide appropriate support for the actions undertaken in pursuance of paragraph 2 of the present resolution’, where paragraph 2 authorizes ‘all necessary means’. See also note 29 and note 36 above.
53 See letters at note 38 above.
57 The Second Geneva Convention 1949, Article 34: ‘In particular, hospital ships may not possess or use a secret code for their wireless or other means of communication’, while Article 30 provides that ‘The High Contracting Parties undertake not to use these vessels [i.e. hospital ships] for any military purpose’ and that ‘Such vessels shall in no wise hamper the movements of the combatants. The US government notified Iraq, through the Swiss government, of the presence of two US hospital ships in waters off the Arabian Peninsula, UK Treaty Series No. 43, (1991), Cm 1619, p. 15.
62 1907 Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines, Article I.
62 Op. cit., note 57 above, p. 5. See also 1907 Hague Convention VIII Article 5: ‘At the close of the war, the contracting Powers undertake to do their utmost to remove the mines which they have laid’.

8

THE WOUNDED AND SICK
2 For discussion of the role of the International Committee of the Red Cross, see Chapter 11.
3 See Chapter 4.
4 The same provision for the wounded, sick and shipwrecked at sea is made by Article 12 of Geneva Convention II 1949 which, making allowance for the context of application, is ‘common’ to the two conventions.
6 The same provision is made at sea by Geneva Convention II 1949, Article 18.
8 The same criteria for action, or inaction, would of course apply.
9 Hague Regulations 1907, Article 27, and Geneva Convention IV 1949, Articles 16 and 18.
10 For discussion of the occupation of Kuwait see Chapter 10.
11 Geneva Convention III 1949, Articles 29–33. See also Chapter 4.
17 As to the general occupation regime, see Chapter 10.
19 In relation to civilian hospitals, see Geneva Convention IV 1949, Article 18.
20 As to methods and means of warfare in the conflict, see Chapter 5.
21 As to the role of the International Red Cross, see Chapter 11.
25 Geneva Convention II of 1949, Article 21. For an account of the armed conflict at sea in the Gulf see Chapter 7.
26 Geneva Convention I, 1949, Article 27.
27 As to United Nations Forces as such, see the 1971 Zagreb Resolution of the Institute of International Law on Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces may be Engaged. The coalition forces in the 1990–1 Gulf conflict were not of course ‘UN Forces’ in this sense.
33 See note 27.
34 Ibid.
38 Ibid.
39 See Chapter 9.
41 Ibid.
44 See in particular Chapter 11.

9 PRISONERS OF WAR IN THE GULF AREA

4 See, for example, *The Dostler Case* I WCR 22; *The Almelo Trial* I WCR 35; *The Jalvit Atoll Case* I WCR 71; *The Essen Lynching Case* II WCR 88 (civilians killed British aircrew); *Trial of Bach* II WCR 60; *Trial of Bury and Hafner* III WCR 62 (Bury stated that ‘he had orders that “terror fliers” were no longer to be granted the protection of prisoners of war and were to be killed by lynching or beating.’ He was convicted); *Trial of Killinger* III WCR 67. See also, J. Bacque, *Other Losses*, London: Futura, (1989), who argues that by styling surrendered enemy personnel as disarmed enemy rather than as prisoners of war, the Geneva Convention of 1929 (operative during the Second World War) was thwarted.
5 *Trial of Sawada* V WCR I (where reference is made to the ‘Enemy Airmen’s Act’ of August 1942 whereby participation in the bombing or strafing of non-military targets would result in a death sentence if captured).
7 _The Times_, (22 January 1991). RAF aircrew were provided with written guidance as to their right to be treated as a prisoner of war and of the obligations of Iraq as the detaining power.

8 Attempts to recover aircrew who had ejected from their aircraft over Iraq are described in _Tenth Report of the Defence Committee, Preliminary Lessons of Operation Granby_, London: HMSO HC 287/1, (1991), para. 174, ‘There was a very sophisticated combat survival and rescue operation…led by the United States, which embarked upon some very daring recovery missions given the slightest indication that the crews had survived’, Air Vice-Marshal W.Wratten (now Air Marshal Sir William Wratten, KBE, CB, AFC).

9 _The London Gazette_, (28 June 1991), reprinted in the _Tenth Report of the Defence Committee_ (see note 8) at p. G. 44. Sir Peter de la Billière spoke of the psychological effect on the Iraqi troops of having enemy special forces in their midst and was quoted as saying, ‘However comprehensive the aerial surveillance [of the enemy forces], there is still nothing to replace a pair of eyes on the ground’, _The Times_, (29 October 1991). See also B.Brown and D.Shukman, _All Necessary Means_, London: BBC Books, (1991), ch. 4 for an excellent discussion of the role of the SAS and of their activities in locating and destroying Scud launchers. A report of the inquest on four SAS men is reported in _The Times_ of 29 February 1992. The coroner recorded verdicts that all four had died while on active service and engaged in combat. The bodies of three of the men had been returned by the Iraqis at the end of the war.

10 Article 4 of the Geneva Convention III, 1949, requires a person to ‘have fallen into the power of the enemy’ and replaces the wording of the 1929 Geneva Convention which, in Article I, used the phrase, ‘who are captured by the enemy’. This chapter is concerned only with Article 4 of the 1949 Convention.


12 This is styled ‘perfidy’ by Article 37 (1) of the 1977 Additional Protocol.

13 [1968] 3 All ER 488.

14 The Privy Council considered it important that the accused was wearing civilian clothes both at the time of the sabotage and when captured. See also the arguments of the defence in the _Dostler Case_ I WCR 22 at pp. 26–7.


16 _Mohammed Ali_ v. _Public Prosecutor_ [1968] 3 All ER 488. The accused was convicted of the murder of three civilians and was sentenced to death; compare _Public Prosecutor v. Koi_ [1968] 1 All ER 419: ‘It would be an illegitimate extension of established practice to read [Malaysian domestic law] as referring to members of regular (sic) forces fighting in enemy country. Members of such forces are not subject to domestic criminal law’, per Lord Hodson. Compare with this the dissentent speeches of Lord Guest and Sir Garfield Barwick at p. 432.

17 Article 29 Hague Regulations 1907. Soldiers ‘not wearing a disguise who have penetrated into the zone of operation of the hostile army, for the purpose of obtaining information, are not considered spies’, ibid.
18 The Privy Council in *Mohammed Ali v. Public Prosecutor* [1968] 3 All ER 488, at p. 497 considered, without deciding, whether the accused also forfeited his rights under Geneva Convention III, 1949 ‘by breach of the laws and customs of war by [his] attack on a non-military building in which there were civilians.’ It is submitted that such an action by combatants not disguised as civilians would not deprive them of their protection under Geneva Convention III. See, in particular, Article 85 thereof. To accept such a position could lead to the denial of prisoner-of-war status to captured aircrew (see note 4).

19 See the *Tenth Report of the Defence Committee*, op. cit., note 8 above, at p. G. 44.

20 See Chapter 5 for a full discussion.

21 See generally, J.Witherow and A.Sullivan, (1991), op cit., note 11 above, pp. 80–3; special forces used hand-held lasers to illuminate targets for bombers, ibid. at p. 162. For a discussion of the bombing of the Amiriya bunker see Chapter 4.

22 Article 23(f). Much hangs on the interpretation of the word ‘improper’.

23 *The Trial of Skorzeny* IX WCR 90, who was acquitted in the absence of evidence that an attack was launched while wearing American uniforms. This suggests that the use of enemy uniforms other than during an attack is not prohibited by the laws of war. See also Oppenheim, op. cit., note 11 above, p. 429; *Manual of Military Law Part III*, London: HMSO, (1958), p. 103; Jobst, ‘Is Wearing the Enemy’s Uniform a Violation of the Laws of War?’, (1941), 35 *American Journal of International Law*, (1941), vol. 35, p. 435. Compare Article 39 of the 1977 Additional Protocol I, which was not applicable in the Gulf War, as to which see Chapter 4.


25 See L.Schapiro, ‘Repatriation of Deserters’, *British Yearbook of International Law*, (1952), p. 310 at p. 323. The distinction between a prisoner and a deserter does not usually arise at the moment when captivity begins, since the status of the two is in almost invariable practice assimilated.’ *Manual of Military Law Part III* op. cit., note 23 above, at p. 47: ‘Deserters in the military law sense become prisoners of war if they are captured.’ Compare defectors, who are considered not to be entitled to prisoner-of-war status, ibid., para. 126, although the distinction between a deserter and a defector may be a difficult one to draw. See also R.J.Wilhelm, ‘Peut-on-Modifier le Statut Des Prisonniers de Guerre?’, (1953), *Revue Internationale de la Croix-Rouge*, p. 681, who takes a different view at p. 682 as does Oppenheim, op. cit., note 11 above at p. 268.

26 *The Times*, (9 and 14 February 1991); the latter reports that the Iraqi authorities arrested whole families of men who had deserted and that the allies were ‘reluctant to name [some deserters] to the International Committee of the Red Cross in case of revenge measures against their families.’


28 For their involvement in the Gulf War, see *Tenth Report of the Defence Committee*, (1991), op. cit., note 8 above, pp. 11 and 87.

29 The Army Terms of Service Regulations 1986, SI 1986 No. 2072, Regulation 12 which refers to s. 21(2) of the Army Act 1955. They are not specially recruited abroad in order to fight in an armed conflict, and the pay they receive is less than that of soldiers of a comparable rank recruited within the UK.

30 If individuals were members of the Kuwaiti armed forces they would automatically be entitled to prisoner-of-war status, despite these four conditions, assuming they had not lost their right to be so treated by, for example, wearing civilian clothes during an attack, see ante, or while spying; T.Meron, ‘Prisoners of War, Civilians and Diplomats in the Gulf Crisis’, 85 *American Journal of International Law*, (1991), p. 104. For a general discussion of the legal issues raised by partisans, see Clarke, Glynn and Rogers, in M.Meyer (ed.)


32 Article 43 Hague Regulations 1907; Article 64 of Geneva Convention IV of 1949; see Chapter 10.

33 See Chapter 10.


35 Article 4 (A) (4) of Geneva Convention III of 1949. For a specimen identity card see Annexe IV to the Convention.


38 See Chapter 14. Note the circumstances required by Article 5, that the person had ‘committed a belligerent act.’

39 Article 5.

40 Compare the problem with the Kuwaiti resistance, discussed above. For an organized resistance movement, compliance with the laws and customs of war is a precondition to the grant of prisoner-of-war status. Similarly, a person who is not entitled, for other reasons (such as carrying out an attack wearing civilian clothes) to prisoner-of-war status may be dealt with for breaches of domestic law or a war crime.

41 Compare a grave breach of the Convention, as outlined in Article 130.

42 XI WCR 53. For a similar practice during the Vietnam war, see H. Levie, (1968), op cit., note 6 above, pp. 380–2 describing the parading of captured US aircrew through the crowd-lined streets of Hanoi and the protest made by the ICRC to the government of North Vietnam.


44 Quaere whether the British press and television compounded the wrongful act by repeating it for British audiences.

45 The Times, (15 March 1991), where Lieutenant Zaun of the US Navy said the puffiness of his face was caused mainly by his ejection at 500 mph, but also by slaps from his captors. Flight Lieutenant Peters’ wife did not think he had been beaten when she saw him on the television; Daily Telegraph, (6 March 1991).

46 For details of the treatment of RAF aircrew as prisoners of war, see C. Allen, Thunder and Lightning, The RAF in the Gulf, London: HMSO, (1991), ch. 9. It might also be noted that Article 17 of the same Convention provides that no form of ‘coercion may be inflicted on prisoners of war to secure from them information of any kind whatever.’

47 The Times, (25 January 1991), although The Times, (28 January 1991), states that Article 13 ‘had led American forces to ban photographs identifying Iraqi prisoners of war already taken in border skirmishes.’

48 See note 24, at p. 141.


50 The Times, (13 February 1991), which reported that ‘concern at the rate of desertions has been demonstrated by a new policy of arresting whole families of men whose names appear on deserters lists’ or on television.

51 The next-of-kin would normally be advised by the service of which he was a member following notification from the detaining power via the International Committee of the Red Cross. Iraq, however, refused permission for the International Committee to visit prisoners of war, contrary to Article 126 of Geneva Convention III. Information to relatives was not therefore available. See, for example, the account of the crew of an RAF Tornado, whose
bombs exploded prematurely on 23 January but whose fate only became clear when they were repatriated on 5 March, RAF *Yearbook Special, Air War in the Gulf*, op. cit., note 43 above, p. 63. See also *Statement on the Defence Estimates*, London: HMSO, (1991), Cm 1559–I, para. 217: ‘only when Iraq released the prisoners it was holding and the bodies of allied personnel under the cease-fire terms was it discovered that 7 of the 12 RAF officers missing were alive.’

52 *The Times*, (28 February 1991) (letter), and see Article 14 of Geneva Convention III. See also *Trial of Tanak Chuichi* XI WCR 62, where a guard was convicted of ill-treating Sikh prisoners of war by cutting off their hair and beards and forcing them to smoke. These acts were forbidden by the Sikh religion.


Inasmuch as hundreds of photographs have been taken and published in every war of the moment of surrender…full-faced…with no complaints by the belligerents, and inasmuch as it is impossible to recognise any particular individual in the Falklands picture, there is at least a reasonable doubt that the photograph violated article 13 (2) of the Convention.

Suppose the individuals had been identifiable. This would not, it is suggested, have caused the photograph to be a violation of Article 13 (2). Compare, however, a draft resolution to the Twenty-Sixth International Conference of the Red Cross and Red Crescent, (1991), proposed by The British Red Cross which called upon states to interpret the prohibition against insults and public curiosity in Article 13 …as prohibiting the public transmission of images of prisoners of war as individuals, but not forbidding the public transmission of images of prisoners of war who cannot be individually recognised.

The Conference to be held in Budapest in November 1991 was postponed indefinitely.

54 It is normal practice to photograph each prisoner of war during the registration process, but this is intended for identification purposes only.

55 A definition of torture is given in s. 134 of the Criminal Justice Act 1988.

56 *The Almelo Trial* I WCR 35; *The Jalvit Atoll* I WCR 71; *The Amberger Trial* I WCR 81; *Essen Lynching Case* I WCR 88; *Wagner Trial* II WCR 23; *Schoner Trial* II WCR 65; *Killinger Trial* II WCR 67, *Trial of Meyer* III WCR 97, *Trial of Karl Student* III WCR 118; *The High Command Trial* XII WCR 1; See also vol. XV, *Digest of Laws and Cases* at pp. 80–4.


On arrival in Baghdad, most Air Force, Navy and Marine POWs were taken immediately to what the POWs referred to as ‘The Bunker’…for
initial interrogation. They were then taken to what appeared to be the main long-term incarceration site, located in the Iraqi Intelligence Service Regional Headquarters (dubbed ‘The Biltmore’ by the POWs). Since this building was a legitimate military target, the detention of POWs in it was a violation of Article 23...; POWs were thus unnecessarily placed at risk when the facility was bombed on 23 February.... In contravention of Article 26...all US POWs incarcerated in ‘The Biltmore’ experienced food deprivation...and had inadequate protection from the cold, in violation of Article 25... All US POWs suffered physical abuse at the hands of their Iraqi captors, in violation of Articles 13, 14 and 17.... Most were tortured, a grave breach, in violation of Article 130... Some...were forced to make public propaganda statements, in violation of Article 13 [and] none was permitted the right of correspondence authorized by Article 70.


58 In C.Allen, (1991), op. cit., note 46 above, p. 99. Waddington’s navigator was Flight Lieutenant Stewart whose account is given at pp. 99 and 101. They were shot down on 19 January; for further details, see RAF Yearbook Special, Air War in the Gulf, op. cit., note 43, p. 62.
60 For example, see Manual of Military Law, Part III, op. cit., note 23, para. 133, note 5 describing the conviction of General Muller for placing prisoners of war alongside an oil refinery and prohibiting them access to an air raid shelter when allied forces bombed the refinery. The example is given as one of unlawful reprisal, but no further details of the case are reported. See also Trial of Karl Student IV WCR 118; High Command Trial XII WCR 44; Trial of Koshiro XI WCR 1.
63 Article 22.
64 Article 25.
65 C.Allen, (1991), op. cit., note 46 above, p. 132. His account of his cell and food rations is at pp. 100–1.
66 See Articles 14, 25, 29, 88, 97 and 108.
67 The Times, (5 February 1991). The Minister for the Armed Forces stated that, ‘more than 800 Service women are serving with their units in the Gulf...they have weapons for their own self-defence and expect to use them’, H.C. vol. 184, col. 150, (1991). Women served in HMS Invincible and HMS Brilliant in the Gulf.
69 G.Aldrich, (1992), op. cit., note 1. Other figures given were approximately 85,000:
US forces captured 62,456 EPWs [Enemy Prisoners of War] during the conflict. Additionally 1,492 displaced civilians were evacuated to Saudi Arabia through EPW channels...French and British Forces captured an additional 5,874 EPWs and transferred them to US control. The Arab Command captured 16,921 EPWs.


70 Tenth Report of the Defence Select Committee, op. cit., note 8, p. 4:

The Royal Highland Fusiliers and the Kings [Own Borderers], part of the Prisoner of War Guard Force, following up behind the leading brigades, were awash with prisoners and busy supervising their move back to the divisional prisoner of war compound manned by the Coldstream Guards.

Second Supplement to *The London Gazette*, (28 June 1991), published as appendix to *Tenth Report of the Defence Select Committee* at p. G. 45. The change of the rules of engagement to encourage surrender rather than to destroy the enemy is discussed by Sir Peter de la Billière (Commander of British Forces Middle East) in the *Tenth Report of the Defence Select Committee* at p. 19.

72 *The Times*, (26 February 1991). See also the *Tenth Report of the Defence Select Committee*, op. cit., note 8, p. XXIII.
74 Article 13. For an account of the action of shackling British prisoners of war as a reprisal see *Manual of Military Law Part III*, op. cit., note 23, p. 53, note 2(a) and the *Dostler Case I WCR 22* at p. 28.
75 Iraq did not appear to acknowledge the existence of the Convention. This stands oddly with its insistence, following the cease-fire, that repatriation was to be organized only by the International Committee of the Red Cross, ‘which it had learned to trust as a result of its experiences after the Iran-Iraq Conflict’, *The Gulf 1990–91, From Crisis to Conflict, The ICRC at Work*, Geneva: ICRC, (1991), p. 25.
76 See generally, Chapter 12.
77 *The Times*, (26 February 1991). If prisoners of war have their own protective equipment, this must not be removed; Article 18.
78 They could not be used to deter Iraq from launching a chemical attack: Article 19 and 23. See also Pictet, *Commentary on Geneva Convention III*, op. cit., note 24 above, pp. 172–3.
82 *Tenth Report of the Defence Select Committee*, op. cit., note 8 above, p. 78.
83 Articles 34–7.
84 Article 26.
86 Article 60; the figures are stated in Swiss francs with no inflation index.
88 The Times, (28 January 1991). Article 60 provides that the advance should be paid in the currency of the detaining power in order that prisoners of war may make use of it during their captivity. For the history of payments made to prisoners of war, see Manual of Military Law, Part III, op. cit., note 23 above, p. 61, note 1. The pay of British servicemen taken prisoner of war by Iraq remained payable for the period of capture. Forfeiture of such pay would only occur if the servicemen failed to take ‘reasonable steps to rejoin the service’, see s. 25(1)(e) and s. 145(2) of the Army Act 1955.

89 Except in Article 89 (1).

90 Article 49.

91 Article 52. A similar provision was contained in Article 32(1) of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War, see the High Command Trial XII WCR 1, at pp. 92, 98. For discussion of the many cases involving the use of prisoners of war to undertake work having a direct connection with the operations of war, see XV WCR pp. 103–6.


93 See above for the Iraqi questioning of captured RAF aircrew.


97 The prisoners of war taken by the armed forces of other states were handed directly to Saudi Arabia, The Gulf 1990–91, From Crisis to Conflict, op. cit., note 75 above, p. 24.

98 Tenth Report of the Defence Select Committee, op. cit., note 8 above, p. 4. Note the point made by the Secretary of State that after transfer the prisoners of war would ‘remain our responsibility’. The agreement between the UK and the US in Appendix 1 appears to impose joint responsibility; see para. 6.


100 See J. Pictet, Commentary on Geneva Convention III, op. cit., note 24 above, p. 137, who discusses the earlier draft of Article 12 which would have imposed joint responsibility on both the transferring and the receiving states. The Information Bureau must be informed of such transfers (see below). Prisoners of war may only be transferred to a state party to the Convention. They could not therefore be transferred to the UN.

101 Article 70. An example of the capture card is contained in Appendix IVB to Pictet, (1960), op. cit., note 24 above.

102 Article 122. This provides a link with Article 118. Unless the total number of prisoners of war is notified, in practice, to the International Committee of the Red Cross, it is impossible to determine whether all prisoners of war have been released at the end of hostilities. See Respect for International Humanitarian Law: ICRC review of five years of activity (1987–1991), Geneva: ICRC, (1991), p. 6.

103 Op. cit. The use of facsimile facilities to despatch this information is in accordance with the requirement of Article 122 that such information be forwarded by the ‘most rapid means’ The Gulf 1990–91, From Crisis to Conflict op. cit., note 75 above, p. 25.

104 Article 70 merely requires that the detaining power ‘enable a prisoner of war to write’ a capture card, whereas Article 17 provides that he is ‘bound to give only his surname…’ (emphasis supplied).

105 Made under a Royal Warrant, dated 7 August 1958. The Regulations are contained in the Second Schedule.
106 Regulation 27 provides for the composition of such a court-martial. It can sit with a president (not below the rank of captain) and, if necessary, one other officer. Quaere whether this procedure complies with Article 102 of Geneva Convention III. The problem would be solved by making a prisoner of war subject to the Army Act 1955 for any offence that might be committed by a British soldier, such as a disciplinary offence (sufficiently amended to reflect his different status) or a crime against English law, see Regulations 5 and 6.

107 See ibid., Regulation 10.

108 See Articles 85 and 129 of Geneva Convention III. Section 1 of the Geneva Conventions Act 1957 and Regulation 7 of the 1958 Regulations incorporate these provisions into English law. For war crimes generally, see Chapter 12.

109 See Articles 99 and 105 of Geneva Convention III. The difficulty of trying prisoners of war for war crimes is discussed by W.H.Parkes, op. cit., note 62 above, p. 100. For the position of retaining prisoners of war at the end of hostilities, see Article 119 of the same Convention.

110 H.C. vol. 186, col. 148, (1991). Note the role of the International Committee of the Red Cross in the repatriation process directed by Security Council Resolution 686. ‘In accordance with its mandate as a neutral intermediary, the ICRC organized a meeting in Riyadh bringing together military representatives of the coalition forces and of Iraq. An agreement was signed on the procedures and timetable of operations’ ICRC, op. cit., note 102 above.

111 Implementing the Lessons of the Falklands Campaign, op. cit., note 95 above, p. 320. For the retention of Pakistan’s prisoners of war by India on the ground that further hostilities were contemplated (as were war crimes trials), see Case Concerning Trial of Pakistani Prisoners of War (Pakistan v. India) [1973] ICJ 328 and the comments of the ICRC that

On completion of the repatriation operations which started on 15 August 1990, or two years after the effective entry into force of the ceasefire established [between Iraq and Iran] under Security Council Resolution 598, more than 79,000 prisoners of war had returned to their country, but each party nevertheless accuses the other of still holding prisoners in captivity.


112 Tenth Report of the Defence Committee, op. cit., note 8 above, p. 2. These figures should be set against the 36 British servicemen killed, although in actual operations the number who lost their lives was 17.

113 The Prime Minister stated in the House of Commons that ‘the release of all prisoners of war remains a top priority before a formal cease-fire is declared’, H.C. vol. 187, col. 247, (1991). For an account of the release of Flight Lieutenants Waddington and Stewart see C.Allen, (1991), op. cit., note 46 above, pp. 132–3. For an account of the releases of coalition prisoners of war on 4 March see The Times, (5 March 1991), (ten released) and for those released on 5 March see The Daily Telegraph, (6 March 1991), ‘Baghdad hands over last 35 allied troops to Red Cross’. British prisoners of war were released to the ICRC who took them to the British Embassy in Amman, Jordan. Iraq also repatriated ‘more than 6,600 Kuwaiti prisoners of war and civilian internees,’ ICRC, op. cit., note 102 above.


118 See *Manual of Military Law, Part III*, op. cit., note 23 above, pp. 86–8, where both views are explored; Schapiro, ‘Repatriation of Deserters’, 29 *British Yearbook of International Law*, (1952), p. 310, esp. pp. 322–4; Gutteridge, ‘The Repatriation of Prisoners of War’, 2 *International and Comparative Law Quarterly*, (1953), pp. 207, 216, who takes the view that, ‘no repatriation by force … ought … to be inserted in the Convention when it is next revised’; Baxter, 30 *British Yearbook of International Law*, (1953), Asylum to Prisoners of War’, pp. 489–98. See also M. Hastings, (1987), op. cit., note 59 above, p. 398 et seq. At p. 406 Hastings discusses the fact that 21 US and one British servicemen refused to be repatriated, the latter returning to the UK in 1970. A British soldier who fails to ‘take any reasonable steps to rejoin HM services which are available to him’ commits an offence under s. 25 (1) (e) of the Army Act 1955. He is also liable to forfeiture of pay from that moment (s. 145 (2)). The forcible repatriation of the Cossacks, other Russians and anti-communist Yugoslavs in 1945 by the British Army is investigated in the Cowgill Report, which concludes that this policy was in accord with the Yalta Repatriation Agreement in respect of Soviet citizens and that operational reasons justified such action, *Report on an Inquiry into the Repatriation of Surrendered Enemy Personnel to the Soviet Union and Yugoslavia from Austria in May 1945 and the Alleged ‘Klagenfurt Conspiracy’*.  
119 J. Pictet, (1960), op. cit., note 24 above, p. 547, who also relies upon a UN General Assembly Resolution of 3 December 1952, which affirms that ‘force shall not be used against prisoners of war to prevent or effect their return to their homelands.’  
120 *The Times*, (5 March 1991).  
34,000 forgotten Iraqi refugees and former prisoners of war [are] still languishing in two tented camps in the Saudi desert…. Many have refused to allow the Red Cross to tell their families that they are still alive because they believe vengeance would be inflicted on their relatives if it became known that they had been taken prisoner.  

10 CIVILIANS IN OCCUPIED TERRITORY  
1 That is, the Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention IV 1907.  
6 Ibid. at p. 249.
7 Ibid. at pp. 261–2.
10 [1925] Belgo-German Mixed Arbitral Tribunal, 5 MAT, 712.
11 This was a date upon the French Revolutionary calendar, an IV commencing in September 1795.
12 [1931] 2 RIAA, 1113.
15 See ibid. at p. 719.
19 Ibid.
20 Ibid. at p. 261.
23 Ibid.
27 Hague Regulations, (1907), Article 43.
29 Geneva Convention IV, (1949), Article 64.
30 Ibid., Art. 66.
31 For an account of the parallel process at the Nuremberg trials see A.Neave, Nuremberg, London: Hodder & Stoughton, (1978), passim. The International Committee of the Red Cross was refused access by the Iraqi authorities to Kuwait. Since no protecting powers were appointed, the mandate given to the International Committee of the Red Cross by Article 143 of Geneva Convention IV of 1949 was of particular significance.
32 Geneva Convention IV 1949, Article 67.
33 Ibid., Article 68.
34 P.Rowe, op. cit., p. 183.
36 Ibid.
37 As to the norms of the jus in bello, see references above.
38 The Independent, (20 February 1991).
40 Article 56.
42 Art looting occurred amongst the troops on both sides between 1939 and 1945, but for an account of the development of Hitler’s plans for a museum at Linz and the associated ‘collecting’, see Charles de Jaeger, The Linz File, London: Webb & Bower, (1981). As to
recent discoveries, it may be noted that ‘missing’ art treasures from the Kunsthalle Museum in Bremen which disappeared from Schloss Karnzow at the end of the Second World War have been found in Russia; see *The Observer*, (16 December 1991).

43 Article 4 (3).
47 For discussion of these issues see Chapter 12.

11 THE ROLE OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT: PROBLEMS ENCOUNTERED

1 The views expressed in this chapter are solely those of the author and do not represent the opinions of the British Red Cross or other Red Cross or Red Crescent organizations.

2 The International Red Cross and Red Crescent Movement, sometimes called the International Red Cross, has three components: the International Committee of the Red Cross (ICRC); the National Red Cross and National Red Crescent Societies, and the International Federation of Red Cross and Red Crescent Societies (the Federation).


4 *The Times* and *Daily Telegraph*, (22 August 1990).
5 *The Independent*, (22 August 1990).
6 Cartoon reproduced with the kind permission of Mr Colin Wheeler.
7 *Daily Mail*, (22 August 1990).
8 *Financial Times*, (22 August 1990).
9 *The Independent*, (22 August 1990).
10 Ibid.
14 Geneva Convention IV 1949, Article 143.
15 Statutes of the ICRC 1973 as revised, Article 4 (2); reproduced in the Statutes of the International Red Cross and Red Crescent Movement 1986, Article 5 (3). Both texts can be found in the *International Review of the Red Cross*, nos 263 and 256, (March–April 1988 and January–February 1987), at p. 157 and p. 33 respectively.
16 Geneva Convention IV, Article 10; also see Articles 30, 142 and 143.
17 This was because despite the tense relations between the countries of these nationals and Iraq, at this time the British and other governments continued to maintain normal diplomatic relations with Iraq; therefore their nationals in Iraq had the status of citizens of neutral states: see Geneva Convention IV, Article 4 (2). However, they still benefited from the general protection accorded to the whole population of a country in conflict set out in Part II of Geneva Convention IV, Articles 13–26.
18 Apparently, some governments did not understand that the ICRC does not have the means of a state to give diplomatic protection; that it is only able to visit places of detention, guarantee relations with the exterior, or bring material and medical assistance if necessary: J.-C. Risse, ‘La protection des personnes civiles dans la guerre du Golfe’, presented at the 16th Round Table on International Humanitarian Law, San Remo, (5 September 1991), pp. 7–8.


20 The ICRC sought such an agreement with the Iraqi government based on ‘a global humanitarian approach’, in early September 1990. Unfortunately, despite days of negotiation, a general agreement on humanitarian action could not be reached then, or later: IRRC, no. 278, (September–October 1990), pp. 437–8; Telex to National Societies from Jean de Courten, ICRC Director of Operations, (7 September 1990); The Gulf 1990–1991: From Crisis to Conflict, op. cit., note 3 above, p. 10.

21 The ICRC has been calling for such an exchange since the ceasefire between the two countries went into effect in August 1988: Red Cross Red Crescent 6 (3), (September–December 1990), p. 8. Also see Geneva Convention III, Article 118, and the duty to repatriate ‘without delay after the cessation of active hostilities’.

22 For states not yet party to Additional Protocol I 1977, including the US, UK and Iraq, some of the statements of law in the ICRC’s appeals were also debatable. No government seems to have objected to the right of the ICRC to make such appeals on the basis of its moral authority and its role as guardian of the rules of international humanitarian law. (For a useful explanation of these responsibilities of the ICRC, see Y. Sandoz, ‘The ICRC’s responsibilities in connection with the Middle East conflict’, IRRC, no. 281, (March–April), pp. 211–14.) However, such appeals may affect the perception of the ICRC’s neutrality, and make it more difficult for the ICRC to perform its combined functions as a mediator and as a relief agency.

23 Hansard, col. 1110.

24 An example is the idea for the UN Secretary-General to convene a meeting of the states parties to Geneva Convention IV to consider possible measures to be taken by them under the Convention to ensure respect for it in the Israeli-occupied territories: see UN Security Council Resolution 681 of 20 December 1990, para. 6.

25 In situations like the Gulf conflict, with one state isolated and nearly all others ranged round the UN Security Council, it is difficult, if not impossible, for neutral states to undertake the role of Protecting Power.

26 Respect for international humanitarian law: ICRC review of five years of activity (1987–1991), ICRC: Geneva, (1991), p. 20. This is the report the institution had intended to present to the 26th International Conference of the Red Cross and Red Crescent, which was scheduled to be held in Budapest in November–December 1991. The conference ‘was postponed indefinitely as a result of political differences’ (ibid., p. 1).

27 UNSC Resolution 661 (August 6, 1990), para. 3 (c): 29 International Legal Materials 1323, (1990), at p. 1326. For discussion of the implementation of this Resolution by the Royal Navy, see Chapter 7.

28 Ibid., para. 4


31 For the prohibition of starvation of civilians as a method of warfare, also see Additional Protocol I 1977, Articles 54 (1) and 70, and Additional Protocol H 1977, Art. 14.

32 UNSC Resolution 666 (September 13, 1990); 29 International Legal Materials 1323, (1990), at pp. 1330–1.

33 Ibid., fourth preambular paragraph.
34 Ibid., para. 6.
36 J.-C. Risse, ibid.
37 Respect for international humanitarian law (etc.), op. cit., note 26 above, p. 20. It is interesting that the UN General Assembly adopted Resolution 45/6 granting the ICRC observer status on 16 October 1990, during the Gulf crisis. For a useful analysis of the ICRC’s relationship with the UN in its capacity as an observer, see C. Koenig, ‘Observer status for the International Committee of the Red Cross at the United Nations’, IRRC, no. 280, (January–February 1991), pp. 37–48. Another difficult UN-related issue is the so-called right of interference, which arose in the context of the safe haven operation in Kurdistan after the end of the Gulf war.
38 See Articles 3, 5 and 6 respectively in IRRC, no. 256, (January–February 1987). The roles of the components of the Movement are also set out in other documents, such as their respective statutes/constitutions; in agreements between themselves, and in Additional Protocol I 1977, Article 81. Many readers may be unaware of the importance to the Movement and its work of the 1986 International Statutes and of agreements between the components. Some of these instruments can be found in Compendium of Reference Texts of the International Red Cross and Red Crescent Movement, ICRC and League (Federation), Geneva, (1990).
39 E. g. see Geneva Convention IV, Article 10 and UNSC Resolution 666, op. cit., note 32 above, para. 6.
40 At the time of the events in 1990–1, the Federation was still known as the League of Red Cross and Red Crescent Societies (‘the League’). The change in name occurred at the General Assembly of the League Federation in November 1991, Decision 36.
41 Protection activities are those which normally, the ICRC must carry out independently because of its status as a neutral humanitarian intermediary, such as visiting prisoners of war and civilian detainees. Other components of the Movement may also have a role, for example in helping to trace missing persons. In practice, it is difficult to separate protection and assistance since, e. g., providing material and medical relief in conflict areas can also help to protect the recipients. See J.-P. Hocké, ‘Humanitarian Action: Protection and Assistance’, IRRC, no. 238, (January–February 1984), pp. 11–17.
45 ICRC Telex, reference 63132. Also see the Decision of the Executive Council of the League (Federation) at its 26th session in October 1990, and the press release issued by the Standing Commission of the Red Cross and Red Crescent on 22 October 1990 at IRRC, no. 280, (January–February 1991), pp. 54–5, and pp. 53–4 respectively.
47 Red Cross Red Crescent 6 (3), (September–December 1990), pp. 4–5 and 7–8; IRRC, no. 278, (September–October 1990), pp. 444–5.
48 Red Cross Red Crescent 1 (1) op. cit., note 46 above, pp. 4–6.
49 B. Clutterbuck, ‘Desert storm, desert shield, desert tragedy’, International Welfare ‘91, British Red Cross, p. 2. Whatever difficulties the British Red Cross faced, they did not of course compare to the problems encountered by the Kuwaiti Red Crescent which, despite Article 63 of Geneva Convention IV, reportedly experienced pressure from the occupying power, including the detention of four board members: Appeal from the President of the
Kuwait Red Crescent Society to the President of the ICRC, (18 September 1990), telex ref. TB5681. For a discussion of the treatment of Iraqi prisoners of war detained in the UK, see Chapter 14 and for the detention and expulsion of civilians, see Chapter 15.


51 Article 7.


53 Ibid., p. 298.

54 Article 19.

55 Statutes of the International Red Cross and Red Crescent Movement, Article 1 (1), op. cit.; also see the Preamble.


57 Ibid., p. 72.

58 E.g., see Articles 39–44, Geneva Convention I, and Articles 18 and 20, Geneva Convention IV.

59 The second authorized exception, the red lion and sun emblem, was abandoned by Iran in favour of the red crescent emblem in 1980.

60 J.S. Pictet (ed.), (1952), op. cit., note 52 above, p. 302.

61 Iran: see note 59 above.

62 C. Smith, ‘Phantom padres of the desert’, The Observer, (16 December 1990); S. Tisdall, ‘Hospitals appear on desert sands’, The Guardian, (8 August 1990), which reported that US hospitals were asked to use the red crescent.

63 See note 58 and the related text above.

64 I am grateful for this, and several other observations in this section, to colleagues at the ICRC.

65 Conversations with officers of the British Army Legal Corps.

66 Ibid., with appreciation to British Army Legal Services for their assistance.


69 Article 3 common to all four Geneva conventions 1949 sets out minimum humanitarian standards for non-international armed conflicts.

70 See note 26 above. Also see Council of Delegates, Budapest 1991, Resolution 2, ‘Appeal to the governments’. It is hoped that it will be possible to convene the International Conference within the next few years. The Movement, in particular the ICRC, is also concerned about possible lacunae in international humanitarian law arising from the Gulf War or its aftermath. Such issues include the protection of the environment; the need for a modern and practical interpretation of the prohibition against subjecting prisoners of war to insults and public curiosity (Geneva Convention III, Article 13 refers); and the disproportionate effects of proportionate damage (e.g., at a practical level, what should be the Movement’s response when the population of an industrialized society is left permanently disadvantaged after an armed conflict because they cannot repair the damage and other states refuse to do so?).

LIABILITY FOR WAR CRIMES


4 E.g., Sun Tzu, The Art Of War, (English trans. S.B.Griffith), Oxford, (1963); Sun Tzu wrote in 500 BC.


6 22 USCMA 534, 48 CMR 19; the charges of which he was convicted included the premeditated murder of twenty-two infants, children, women and old men and of assault with intent to murder a child. He was charged with offences under the Uniform Code of Military Justice and tried under US military (i.e. domestic) law. The actions themselves constitute war crimes.


8 Charter of the International Military Tribunal of Nuremberg, Cmd 6668 (1945); International Military Tribunal of Nuremberg, HMSO, Cmd 6964 (1946).


13 Protocol I of 1977, Article 90, 2 (c) (i); the twentieth acceptance of the competence of the International Fact-Finding Commission was received by the Swiss government on 20
November 1990. The members of the Commission were chosen on 25 June 1991; see IRRC no. 283, Thirty-first year, (July–August 1991), p. 411.

14 Geneva Convention I, Article 49; II, Article 50; III, Article 129; IV, Article 146; see generally, Pictet, op. cit., note 11 above.

15 Rogers, (1990), op. cit., note 9 above, p. 800.


23 L.C.Green, Superior Orders in National and International Law. Leiden: Sijthoff, (1976); Y.Dinstein, The Defence of ‘Obedience to Superior Orders’ In International Law, Leiden: Sijthoff, (1965). The International Military Tribunal at Nuremberg, however, held, in dealing with Keitel, the Chief of The High Command of the German Armed Forces, that ‘Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly and without military excuse or justification’, Cmd 6964 (1946), p. 92.


25 The relationship between the quality of leadership and respect for the law of war in actual conflict situations is reflected in the decision of the US Army that a practical working knowledge of the rules by each member of a command is a matter of command responsibility, US Army Regulation 350–216 para. 6 (a); W.L.Williams ‘The Law of War and Personnel Infrastructure’, XV Rev De Droit Penal Militaire et De Droit De La Guerre, (1976), Pt 1–2, p. 19 at p. 27; see generally, W.H.Parks, (1976) ‘Crimes In Hostilities’, Marine Corps Gazette, 60 (8), (1976), pp. 16–22; no. 9, pp. 33–9.

26 See note 24 above.


28 Geneva Convention IV, Article 2.

29 The provisions were held by the Nuremberg International Military Tribunal to constitute customary international law. Whilst the Convention speaks of ‘war’, which has a technical meaning, it probably applies to de facto armed conflicts.
30 Geneva Convention IV, Article 4.
33 Geneva Convention III, Article 4. For further discussion of prisoner-of-war status, see Chapter 9.
34 The Independent, (15 December 1990).
35 Pictet, op. cit., note 11 above.
37 Pictet, op. cit., note 11 above, vol. 4, p. 236; see W.L.Williams, ‘The Freedom of Civilians of Enemy Nationality to Depart From Territory Controlled by a Hostile Belligerent’, XXIII Military Law & Law of War Review, (1984), p. 407 at pp. 422–4. If the national interests argument were to be invoked by Iraq, it could not be applied to children. An argument based on economic considerations could only be relevant if the civilians remained in the occupied territory and continued to perform the work, the necessity of which justified denying them leave to depart. The basis on which certain foreign nationals were denied permission to leave Kuwait appears to have been their nationality. This is in breach of Geneva Convention IV, Article 27.
40 Ibid., p. 209.
44 Geneva Convention IV, Article 147; Pentagon Final Report, op. cit., note 41 above, Appendix O, pp. 4–5.
45 The Times, (24 October 1990).
46 The Times, (15 December 1990).
49 Hague Regulations of 1907, Article 45; Geneva Convention IV, Articles 40, 147.
50 Geneva Convention IV, Articles 40, 147.
52 The Times, (11 December 1990 and 1 March 1991). The Times of 8 February 1991 referred to the deaths of over 7,000 Kuwaitis since the Iraqi invasion. See generally, Simpson, op. cit., note 47 above, pp. 162–71; J.Porter, Under Siege In Kuwait, London: Gollancz, (1991), pp. 184–7; Physicians for Human Rights (UK), op. cit., note 42 above, pp. 10–16. It has been suggested that a case can be made out under the Genocide Convention. There may have been the intent to wipe out Kuwaiti identity, but it is not clear whether there is evidence of an intent to destroy Kuwaitis as a national, ethnic, racial or religious group. See Pentagon Final Report, op. cit, note 41 above, Appendix O, pp. 6–7.
53 The Times, (19 December 1990), quoting a report by Amnesty International. The Times of 8 February 1991 refers to 17,000 Kuwaitis detained in camps and subjected to torture. The
Times of 29 June 1991 gives details of torture implements and relics of torture abandoned in Kuwait by the retreating Iraqi forces.

54 The Times of 21 February 1991 refers to 300 or 400 bodies, many of them badly beaten, at the ice rink in Kuwait City, which was used as a temporary mortuary.


57 Ibid., (15 February 1991).


59 See Chapter 10; Simpson, op. cit. note 47 above, pp. 163–70, especially the list confirmed by the two witnesses at pp. 166–7; Porter, op. cit., note 52 above, especially p. 191 et seq., and Pentagon Final Report, op. cit., note 41 above, Appendix O, p. 7.

60 Geneva Convention IV, Article 33; Hague Regulations, Article 47; confiscation of private property is prohibited under Article 46.

61 Ibid., Articles 55 and 57; see Physicians for Human Rights (UK), op. cit., note 42 above, pp. 22–4; Simpson, op. cit., note 47 above, pp. 166–7.

62 Hague Regulations 1907, Article 52. D.Hiro, in Desert Shield To Desert Storm, London: Paladin, (1992), p. 195 suggests that formal requisitions were made and promissory notes issued in Iraqi dinars as payment. It is not clear whether Hiro is assuming that the property was requisitioned simply because the removal of property was orderly. Much of the property Hiro says was taken cannot lawfully be requisitioned. This author has seen no other claim that property was duly requisitioned.

63 See Chapter 10.

64 Physicians for Human Rights (UK), op. cit., note 42 above pp. 21–2.

65 Simpson, op. cit., note 47 above, p. 168; see also p. 163.

66 The case law suggests that, as between essentially law-abiding belligerents, there is a presumption that the irregular taking of property is a requisition that has not complied with the formalities. This can be contrasted with the situation where one belligerent is practising systematic pillage as a form of economic warfare. The presumption then appears to be reversed; e.g. the Inter-Allied Declaration of London of January 5, 1943, against Acts of Dispossession committed in Territories under Enemy Occupation or Control, Cmd 6418 (1943); Schwarzenberger (1968) op. cit., note 3 above, pp. 276–7; von Glahn (1957) The Occupation of Enemy Territory: A Commentary on The Law And Practice of Belligerent Occupation, University of Minnesota Press, pp. 189–90.


68 Ibid.

69 Ibid., pp. 168–9; Porter, op. cit., note 52 above p. 191.

70 Contra Pentagon Final Report, op. cit., note 41 above, Appendix O, p. 27. See generally, Chapter 6.


72 Geneva Convention IV, Article 147.

To constitute a grave breach, such destruction and appropriation must be extensive: an isolated incident would not be enough. It might be concluded from a strict interpretation of this provision that the bombing of a single civilian hospital would not constitute a grave
breach, but this would be an inadmissible inference to draw if the act were intentional.

Pictet, op. cit., note 11 above, vol. 4, p. 601, including footnote.

73 The cease-fire resolution, UN Security Council Resolution 686, adopted on 2 March 1991 required Iraq, *inter alia*, to accept ‘in principle its liability under international law 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 scheme was created by UN Security Council Resolution 687, adopted on 3 April 1991, operative para. 18. The Secretary-General submitted a report on 2 May 1991, with recommendations on the administration of the fund, S/22559, 2 May 1991. For details, see Chapter 13.

74 Under Security Council Resolution 686, adopted on 2 March 1991, Iraq was required ‘immediately [to] begin to return all Kuwaiti property seized by Iraq’; operative para. 2(d) (emphasis supplied). In Security Council Resolution 687, adopted on 3 April, 1991, the Security Council reaffirmed that Iraq ‘is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait’; operative para. 16. See Chapter 13.

75 See Chapter 6.


80 *The Times*, (22 and 25 January 1991). For the role of the International Committee of the Red Cross, see Chapter 11.


82 Such threats might include the threat, broadcast on Iraqi radio, of treating captured pilots as war criminals; *The Times*, (2 February 1991).

83 International Covenant on Civil and Political Rights, Articles 4 and 7.


85 Geneva Convention III, Article 130; Jean de Courten, director of operations at the ICRC, is quoted as saying that the protection from insults and curiosity includes ‘the curiosity of the camera lens’; R.Wright, ‘War Breaks Out’, *Red Cross, Red Crescent*, (January–April 1991).


87 Geneva Convention III, Articles 1 and 5; Hague Regulations 1907, Article 4.

88 Geneva Convention III, Article 130.


91 Pictet, op. cit., note 11 above, vol. 4, p. 597 says that ‘wilful killing’ also includes cases where death occurs through a fault of omission.

92 Protocol I of 1977, Article 37 (1).
Notes


95 Guelff, (1991), op. cit., note 51 above.


100 *Pentagon Interim Report*, op. cit., note 93 above, pp. 12–6 to 12–7; *Pentagon Final Report*, op. cit., note 41 above, Appendix O, pp. 25, 26–7; see Chapter 6; notes 70 and 71 above and accompanying text.

101 See note 36 above.

102 *Pentagon Interim Report*, op. cit., note 93 above, p. 27–1; *Pentagon Final Report*, op. cit., note 41 above, Appendix O, pp. 32–5; Simpson, (1991), op. cit., note 47 above, xiii. It appears that the original estimate of Iraqi military casualties was far too high; they are now thought to have been of the order of 15,000; *The Independent*, (5 February 1992).


104 Geneva Convention III, Article 12. This is discussed further in Chapter 9 and, in particular, the rights and duties of the transferor and transferee states.

105 Draft Resolution proposed by the British Red Cross which was to have been considered by the Twenty-sixth International Conference of the Red Cross, Belgrade, November 1991 proposed that:

States and other competent authorities...[should] interpret the prohibition against insults and public curiosity in Article 13 of the Third Geneva Convention 1949 as prohibiting the public transmission of images of prisoners of war as individuals, but not forbidding the public transmission of images of prisoners of war who cannot be individually recognized.


106 See Chapters 4, 5 and 6.

107 See Chapter 4.


109 In some circumstances, such actions would amount to ‘grave breaches’ under Protocol I of 1977, had that been applicable: Article 85, paras 3 and 4.
118 The report of Sir Philip Woodfield appears to recognize that the detention of Iraqis in the UK was based on ‘out-of-date files and flimsy suspicions’ but says that no one should be criticized or disciplined; The Independent, (16 December 1991).
119 Respectively Articles 49, 50, 129 and 146 of the four Geneva Conventions of 1949.
120 Weller, art. cit., note 113 above; Roberts, The Independent, (6 September 1990) and art. cit., note 116 above; P.Kellner, The Independent, (1 February 1991); A. and J.Tusa, The Times, (25 February 1991) and The Times, (2 March 1991). The difficulties are illustrated by an action before the Scottish courts in which an individual alleged to have taken part in mass killings during the Second World War sued (unsuccessfully) the television company which made the allegations. The case involves the first sitting of the Court of Session in a foreign country, in order to take evidence from elderly and frail witnesses; The Times and The Independent, (10 February 1992).
121 See notes 109 and 111 and accompanying text.
122 Amnesty International, (1989), newsletter, May, p. 1. The violation of human rights by the Iraqi authorities features both in relation to Kuwait under Iraqi occupation and in relation to Iraq under item 12 of the Commission’s Draft Provisional Agenda for the 48th session in March 1992; E/CN 4/1991/L1, pp. 5–6. It is striking that the Commission decided not to put the situation in Kuwait after its liberation, particularly with regard to the treatment of Palestinians, on the agenda
123 Tusa and Tusa, art. cit., note 120 above.
124 Known as the Martens clause; see the preamble to Hague Convention IV of 1907, and Protocol I of 1977, Article 1 para. 2.
125 This makes it all the more disturbing that the Kuwaiti authorities have either not seen fit or else have not been able to protect resident Palestinians from serious ill-treatment.
13
REPARATIONS AND STATE RESPONSIBILITY: CLAIMS AGAINST IRAQ ARISING OUT OF THE INVASION AND OCCUPATION OF KUWAIT

1 Report to Secretary-General by UN Mission led by Mr Abdulrahmir A.Farah assessing damage inflicted on Kuwait’s infrastructure during the Iraqi occupation of the country from 2 August 1990 to 27 February 1991 annexed to letter dated 29 April of Secretary-General to President of the Security Council, UN Doc. S/22535.

2 Interim Report to the Secretary-General of the UN Mission led by Mr Abdulrahmir A.Farah, assessing losses incurred during the Iraqi occupation of Kuwait as well as Iraqi practices against the civilian population in Kuwait annexed to letter dated 29 April 1991 of Secretary-General to the President of the Security Council, UN Doc. S/22536.

3 UN Doc. S/22021 (1990), and S/22193 (1991).

4 UK HC Select Committee on Foreign Affairs, Third Report the Middle East after the Gulf War, vol. 1 para. 4.12, (9 July 1991), H.C. 1990/1, 143–1.

5 Standard claim forms under expedited procedure: Form A for forced departure, B for serious personal injury or death, C for damages up to US $100,000, D for damages over US $100,000, E for corporations and F for governments and international organizations.

6 Interim Report of Mr A.A.Farah, op. cit., note 2 above, paras 40–2.

7 Costs incurred by US and UK forces were in great part met by contributions in money and in kind made by Kuwait, Saudi Arabia, Japan, Germany and other countries. A Gulf Financial Crisis Co-ordination Group was set up to co-ordinate the financing of the military campaign.

8 Report by UN Secretary-General pursuant to paragraph 5 of Security Council Resolution 706 of 24 September 1991, paras. 15–16 UN Doc. S/23006.


10 Guidelines for the conduct of the work of the Governing Council of the UN Compensation Commission approved at the fourth meeting held on 25 July 1991, in Annex I to the letter of the President of the Governing Council to the President of the Security Council 2 August 1991, UN Doc. S/22885. These guidelines indicate criteria on many aspects of direct loss discussed in this chapter but provide few arguments in support. Paragraph 18 of these guidelines states that claims for death, personal injury or other direct loss will include any loss suffered as a result of: (a) military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991; (b) departure from or inability to leave Iraq or Kuwait (or a decision not to return) during that period; (c) actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation; (d) the breakdown of civil order in Kuwait or Iraq during that period; (e) hostage-taking or other illegal detention. Paragraph 16 states that compensation will not be provided for losses suffered as a result of the trade embargo and related measures.


15 Security Council Resolution 502 (1982) requesting the immediate withdrawal of all Argentine forces from the Falklands, Malvinas Islands rejected the Argentine plea that a long-standing territorial claim to the islands justified the use of force to recover them. Security Council Resolution 687 guaranteeing the inviolability of the international boundary between Iraq and Kuwait supports the rule that a claim to territory is no justification for the use of force.


21 Ibid., 178.

22 Ibid., 180.


27 Ibid., para. 21.

28 ibid., para. 21.

29 In the first and second sessions the Governing Council of the UN Compensation Commission prepared guidelines to expedite urgent cases; see note 10 above.

30 Ibid., para. 28.


34 Letter dated 7 June 1991 from the Permanent Representative of Iraq to the UN Secretary-General, UN Doc. S/22681.

35 Letter dated 31 May 1991 from UN Secretary-General to the President of the Security Council, UN Doc. S/22661.

36 Full payment by the purchasers of the oil is to be made into an escrow account controlled by the United Nations. Thirty per cent of the sums in the escrow account will be paid over to the UN Compensation Fund. In addition the UN has authorized payment out of the escrow account to purchase essential foodstuffs and supplies for use in Iraq under UN supervision, and to meet the full costs of the tasks involved such as the inspection teams of the International Atomic Energy Authority etc., in monitoring Iraq’s compliance with its disarmament requirements, the full costs incurred by UN in facilitating the return of all Kuwaiti property seized by Iraq, and half the costs of the Commission which is demarcating the international boundary between Iraq and Kuwait. This Resolution also provides that Iraq is to provide a monthly statement of its gold and foreign currency reserves, and Resolution 707, adopted unanimously also on 15 August 1991, which deals with Iraq’s compliance with
disarmament requirements, determines that ‘Iraq retains no ownership interest in items to be
destroyed and removed or rendered harmless in accordance with Resolution 687 (1991).’
37 Iraq has indicated unwillingness to resume oil exports in the manner envisaged by the
Security Council, Note by the President of the Security Council, (11 March 1992), UN Doc.
S/23699 para. 24.
discussing full compensation for unlawful expropriation; Lillich, International Claims: their
Settlement by Lump Sum Agreements, Charlottesville: University of Virginia, (1975).
39 See 1962 UNYB, 484–8; 1980 UNYB, 80–5; 1990 Report of the ILC on its work of its 42nd
40 Third Report on State Responsibility of G.Arangio Ruiz to International Law Commission 10
41 See Second and Third Reports on State Responsibility of G.Arangio Ruiz to ILC 22 June
44 De Vischer ‘La Responsibilité des Etats’ II Bibliotheca Visseriana, 118; Graefrath
‘Responsibility and Damages Caused’ 185 Hague Rec. 77. The differing views are usefully
summarized by Arangio Ruiz, Preliminary Report on State Responsibility, 27 May 1988 A
CN4/416/Add. 1.
45 Delagoa Bay case, La Fontaine 398, Moore 1865. Yuille Shortridge and Company (1861)
Great Britain/Portugal, 1 La Pradelle and Politis 348.
46 Chorzow Factory case PCIJ Ser. A. No. 17, p. 47, Aminoil v. Kuwait, 21 International Legal
and the International Law of Expropriation’, (1991), 85 American Journal of International
Law, 474 at p. 489.
4/416 Add. 1, pp. 27–8, paras 114–18.
49 Sixth Report of Willem Riphagen on State Responsibility, (1985), II International Law
Commission Yearbook, pt 1.3 at 9, para. 8; Second Report on State Responsibility by
50 Eagleton, Responsibility of States in International Law, New York: The New York
Washington, vol. III, chap. VII, 1768; Bollecker-Stern, La prejudice dans la theorie de la
responsabilite internationale, Paris: Publ. Rev. gen. de droit int. publi. nouvelle ser. 22,
(1973), pp. 204–11.
52 War Risk Insurance Premium Claims, (1 November 1923), 7 UNRIAA 44 at p. 62.
para. 35.
54 UN Secretary-General’s Report to President of Security Council 2 May 1991, UN Doc.
S/22559, para. 25.
55 See note 10 above. Para. 16 of the guidelines of 2 August 1991 states: ‘Compensation will
not be provided for losses suffered as a result of the trade embargo and related losses.’
57 1930 Portugal/Germany 2 UNRIAA 1013. For the attack on the frontier post at Mazuia, the
tribunal held ‘Allemagne repond des consequences immediates de l’attaque de postes de
Mazuia—pertes de vies, lesions corporelles et degats materiels—mais ne peut etre rendue
responsible de la dimunition des recettes de la Compagnie Nyassa et du coûts des expedition
Massano di Amorim et Mouramendes’ (1019).
loss of medical practice during the hostilities, the cost of transport to other islands, the cost of living elsewhere than in the claimant’s home, the loss of trade during disturbances, the loss of rent…, loss of wages while out of work…, loss of being prevented from breaking up new ground or extending the boundaries of existing farms.


Whilst diplomatic practice in the past has recognized that an occupying power may cancel the exequatur of consuls of neutral third states (War Office (1958) The Law of War on Land being Part III of the Manual of Military Law, ed. Lauterpacht 196, sec. 689), the annexation by Iraq of Kuwait was declared by Security Resolution 662 to be null and void. Iraq’s obligation to comply with the Vienna Conventions and not to hinder diplomatic and consular missions in the performance of their function would seem accordingly to have continued to operate in respect of such missions in Kuwait as well as in Iraq; Meron, (1991), 85 American Journal of International Law 103 at p. 108.

Civilians in Kuwait, whether nationals of Kuwait or of third states, enjoy the protection of Geneva Convention IV relating to Civilians provided the third state is a party to the Convention (Iraq, Kuwait, Saudi Arabia and other allied states are all parties to Geneva Convention IV). If claims relate to acts committed against a third state’s national in the territory of the belligerent, i.e. Iraq, he may not enjoy the protection of the Convention if his third state qualifies as a ‘neutral’ state and is regarded as having ‘normal diplomatic representation’ with that belligerent party (Geneva Convention IV Article 2). Meron considers US nationals in Iraq not to have been protected persons under Geneva Convention IV, (1991), 85 AJIL 104 at p. 106. However, the term ‘neutral state’ is not readily applied to a member state of the UN imposing economic sanctions on Iraq in compliance with the Security Council’s resolutions or taking measures of collective self defence. Paust, also, argues that the state of affairs, where a third state’s embassy in Kuwait was under siege and its nationals relocated to strategic sites in Iraq as hostages, is incompatible with the continuance of normal diplomatic representation. ‘Suing Saddam: Private Remedies for War Crimes and Hostage Taking’, (1991), 31 Virginia Journal of International Law, p. 351 at pp. 355–6.


Acknowledgments are due to Lieutenant-Colonel Stephen Vowles and Major Roger Lewis, both of the Army Legal Corps, for information supplied. However, the opinions expressed in this chapter do not necessarily represent their views, or those of the Army Legal Corps or the Ministry of Defence. For a discussion of some of the issues considered in this chapter, see F. Hampson, ‘The Geneva Conventions and the Detention of Civilians and Alleged Prisoners of War’ [1991] Public Law, p. 507, which was published after this chapter was completed.


See generally, Chapter 4.

See Article 2 common to all four Conventions, in particular the first paragraph.

Article 4, Geneva Convention IV.


At an early stage of the Falklands conflict Argentina repatriated a number of Royal Marines captured during the Argentine invasion. The explanation for this apparently generous behaviour may lie in the fact that Argentina believed Article 117 would prevent the returned Royal Marines being re-employed on active military service. However, the British view was that Article 117 applied only to seriously sick and wounded prisoners of war, i.e. those with
whom Section I, Part IV of the Convention is concerned, and that there was thus no legal
objection to their taking part in the operation to reclaim the Falklands Islands. Had Argentina
insisted on no further employment on active military service as a condition of repatriation,
the position would have been different. For a discussion of this question, see Rowe, *Defence:
11 *Cheney v. Conn* [1968] 1 All ER 779.
12 [1947] KB 41 (CA).
14 [1916] 1 KB 268.
15 *Hansard*, vol. 184, col. 377.
*International and Comparative Law Quarterly* 283.
17 *Burmah Oil Co. v. Lord Advocate* [1965] AC 75 supports the proposition that the prerogative
in this area would extend to armed conflict undertaken under the authority of a United
Nations Security Council Resolution. For a discussion of the effect of war clauses in
contract, see Chapter 16; and for the treatment of Iraqi (and other) civilians, see Chapter 15,
which discusses the role of the Immigration Act 1971 to justify the holding in custody and
deporation of civilians.
18 *Pictet*, op. cit., note 6 above, p. 77.
p. 50.
21 Subject to the proviso that

any officer or authority superior to the officer who convened the board
of inquiry may, if of the opinion that the report of the board of inquiry
is not supported by any evidence recorded before the board of inquiry,
convene a fresh board of inquiry…and thereupon the report of the first
board of inquiry shall be void and of no effect.
22 See r. 6.
23 In accordance with *Queen’s Regulations for the Army* (1975), (Army Code 13206), Chapter
6, Annexe D.
24 Though they are subject to a similar regime of military discipline—see the Prisoners of War
(Discipline) Regulations, 1958, discussed in Chapter 9. This has been criticized as not being
in accordance with Articles 82 and 102 of the Convention—see. e.g., Draper, *The Red Cross
25 This was of particular importance in view of Article 13 and Iraq’s actions in parading
captured British and American pilots in front of television cameras, as to which see Chapter
9.
26 The soldiers providing the camp guard force were required to sleep sixteen to a room. See
Article 25 of the Convention.
28 The provision of these facilities provoked considerable uninformed comment in the tabloid
press. Comments such as ‘holiday camp’ and ‘luxury conditions’ abounded.
30 See, for example, the *News of the World* headlines of 27 January 1991.
31 ‘Advance’ does not mean that on capture a prisoner is entitled to demand immediate
payment of the sum laid down for prisoners of his rank, with a further such sum to follow at
the beginning of his second month’s captivity, and so on, The word ‘advance’ is simply an
acknowledgment that payment is made by the detaining power on behalf of the power on whom the prisoner depends. It follows that payment is made monthly in arrears.

35 Under which, in accordance with Articles 8 and 10, parties to a conflict can invite a neutral state to scrutinize the application of the Convention, thereby safeguarding their interests.
38 The British Red Cross Society has done much valuable work in disseminating the law of armed conflict across the country, and now provides in addition courses of instruction aimed specifically at journalists, but despite their efforts there is still a general ignorance of even the basic principles. Contrast the position in certain other, equally peace-loving, countries (e.g. Sweden and Switzerland), where the subject is widely taught.

15

DETENTION AND DEPORTATION OF FOREIGN NATIONALS IN THE UNITED KINGDOM DURING THE GULF CONFLICT

1 See, e.g., The Times, (25 January 1991), editorial. It must, of course, be acknowledged that the interest of national security and the interests of the individual in the protection of his civil liberties are not necessarily in conflict, since the protection of such liberties may indeed require that action be taken in the interests of national security (e.g. to maintain peace and stability): see R.Blackburn (ed.) Human Rights for the 1990s, London: Mansell, (1991), and R v. Secretary of State for the Home Department ex part Cheblak [1991] 2 All ER 319 at p. 334 (per Lord Donaldson MR).
2 British Nationality Act 1981, s. 51 (4).
3 For a detailed anlaysis of the consequences of enemy alien status, see McNair and A.D.Watts, The Legal Effects of War, Cambridge: Cambridge University Press, (1966), ch. 3. See also Chapter 14 of the present work.
5 The status of enemy alien has traditionally been dependent on the existence of a state of war. In the absence of a declaration, the existence of a state of war cannot be lightly inferred: see McNair and A.D.Watts, op. cit., note 3 above, chs. 1–2 and W.McBryde and I.Scobbie, ‘The Iraq and Kuwait Conflict: the Impact on Contracts’, (1991), Scots Law Times, pp. 39–44. For the effect of a state of war on contracts see Chapter 16 of this work.
6 See, e.g., Musgrove v. Chun Teong Toy [1891] AC 272 PC; Attorney-General for Canada v. Cain and Gilhula [1906] AC 542 PC. For the argument that the courts would recognize a prerogative power to deport aliens who are nationals of countries with whom the United Kingdom is engaged in an armed conflict, see Chapter 14.
8 See V.Bevan, The Development of British Immigration Law, London: Croom Helm, (1986). It should be noted, however, that legislation conferring powers of detention and deportation has explicitly recognized the continued existence of the royal prerogative: see in particular section 33 (5) of the Immigration Act 1971.

10 Emergency Powers (Defence) Act 1939, s. 1 (2) (a).

11 SR & O 978, dated 1 September 1939.


16 [1920] 3 KB 72.


18 The Aliens Orders had to be laid before Parliament and could be disapproved.

19 The deportations ended after the outcry when the Arandora Star was torpedoed en route to Canada (see Pelling, *Britain and the Second World War*, London: Fontana, (1970), pp. 315–16).

20 See C.Cotter, op. cit., notes 9 and 13 above.


23 See 184 (HC) (Official Reports) (6th series), (21 January 1991), at col. 8 (written answers). A Statement of Change in Immigration Rules was laid before Parliament on 18 January. The provisions did not extend to Iraqi nationals who possessed British citizenship or who were also nationals of other European Community countries.

24 See I.Macdonald and N.Blake, *Immigration Law and Practice*, third edition, London: Butterworths, (1991), p. 367. As noted in the text the powers had their origins in the prerogative powers of the Crown relating to aliens, but, since 1962, the statutory powers have been gradually extended to allow for the deportation of anyone other than British citizens; ibid., pp. 366–7.

25 Immigration Act 1971, ss.3 (5) (b) and s.5.

26 By the Interpretation Act 1978, unless the contrary intention appears, ‘Secretary of State’ means ‘one of Her Majesty’s Principal Secretaries of State’: see E.C.S. Wade and A.W.Bradley, *Constitutional and Administrative Law*, tenth edition, London: Longman, (1985), p. 267. During the Gulf conflict decisions to deport were said to have been made personally by the Home Secretary: on the question of whether such decisions must be taken personally by the Secretary of State rather than by an official of the Department see *R v. Secretary of State for Home Department ex parte Oladehinde* [1990] 2 WLR 1195 and Turpin, ‘Deportation and the Carltona Principle’ *Cambridge Law Journal*, 49, (1990), pp. 380–3.
27 The notification may be sent by post in a registered letter or by recorded delivery service, but it is sometimes served by hand: Immigration Appeals (Notices) Regulations (SI 1984/2040) reg. 6; for discussion see Macdonald and Blake, (1991), op. cit., note 24 above, p. 369.


29 Immigration Act 1971, s. 15 (3).


31 Immigration Act 1971, s. 5 and schedule 3 (1).

32 Immigration Act 1971, s. 18 (1) (b) and Immigration Appeals (Notices) Regulations 1984, reg. 4.


34 Immigration Act 1971, schedule 3, para. 2 (2). Such a person is deemed to be in legal custody by virtue of para. 2 (4) and para. 18 (4) of schedule 3.

35 Macdonald and Blake, (1991), op. cit., note 24 above, pp. 369–70. Freedom to leave any country, including one’s own, is protected, subject to certain limitations, by Article 12 of the International Convention on Civil and Political Rights and by Article 2 of the Fourth Protocol to the European Convention on Human Rights, although the United Kingdom is not a party to the latter.


38 MI5 was originally known as MO5 and was established in 1909 as a new military intelligence gathering service. Its functions have gradually expanded since to include surveillance and penetration of domestic political movements. It received its first statutory recognition in the Security Service Act 1989: see I. Leigh and L. Lustgarten, ‘The Security Service Act 1989’, 52 Modern Law Review, (1989), p. 801. The police Special Branch was originally established in 1883 to combat Irish bombings in London, but is now engaged in a wide range of security work.


40 See ex parte Cheblak, note 1 above at p. 324 and ex parte B (The Independent, (29 January 1991); Lexis transcript).

41 Iraqi threats to attack targets in Britain were reported in the press: see The Times, (4 January 1991).

42 In ex parte Cheblak, note 1 above at p. 330 there was some discussion of the fact that, when Simon Brown J. was dealing with the application for leave to seek judicial review, counsel for the Secretary of State stated that she was authorized to say that the action had been taken because of Cheblak’s ‘known links with an organization which we believe would take such action in support of the Iraqi regime’ (emphasis supplied). A copy of a letter subsequently sent to Cheblak’s solicitor used the word ‘could’ rather than ‘would’. Lord Donaldson MR declined to attach any significance to this alteration in wording, given that the statement read out in court had to be taken down in longhand by the judge or in shorthand by a shorthand writer: note 1 above at pp. 324–5.

43 See note 1 above at p. 324.

44 See 526 (HL) Official Reports (6th series) (6 March 1991) at W 70–1 (written answers).


46 The powers to impose such restrictions are conferred by Immigration Act 1971, s. 5 and sch. 3, paras. 2 (5)–(6).
47 Sir Mark Russell, Miss P. Hutchinson and Mr A. Graham were also appointed as additional reserve members (see Hansard (HC) 186 (28 February 1991) at col. 567 and ex parte Cheblak, note 1 above at p. 330).


49 See Lord Donaldson MR’s comment in ex parte Cheblak, note 1 above at p. 335:

The fact that its [the panel’s] decision [sic] operate not as such, but as recommendations, may well be intended to reflect the ultimate personal responsibility of the Home Secretary in so sensitive and important a field, but whilst I strongly suspect that this represents a difference of form rather than substance, it is not for me as a judge to inquire and the answer would only be clear if one knew the number of occasions, if any, upon which its recommendations have not been accepted.

50 See note 37 above.

51 I. Leigh, ‘The Gulf War Deportations and the Courts’, Public Law, (1991), pp. 331–9 at p. 337. Leigh further comments that in a few instances the panel reinterviewed officers from the security service in the light of the deportee’s answers at the hearing.


53 Ibid. at p. 456.


55 One possible explanation for this is that Lord Denning was referring to a friend or friends of Mr Hosenball’s who happened to be legally qualified, but there is no indication of this in the judgment.

56 188 (HC) Official Reports (6th series), cols 269–70 (written answers).


59 R v. Secretary of State for the Home Affairs, ex parte B (The Independent, (29 January 1991)).


61 Ex parte Cheblak, note 1 above.

62 On the basis for habeas corpus, see Wade (1988) op. cit., note 13 above, pp. 617–24. All the judges involved in the litigation proceeded on the basis that, if notice had not been given, para. 18 (4) of schedule 2 of the Immigration Act 1971, which provides that a person detained under the legislation ‘shall be deemed to be in legal custody’ would not prevent the issue of a writ of habeas corpus.

63 For an earlier case accepting the existence of such a distinction, see R v. Immigration Appeal Tribunal ex parte Mehra [1983] Imm AR 156.

64 [1986] 1 All ER 717. This case concerned a notice of refusal of leave to enter which simply stated that the immigration officer was not satisfied that the applicant was genuinely seeking entry only for the limited period sought by him. The Court of Appeal held that this was sufficient notice for the purposes of the regulation.

65 Lexis transcript.

66 The concept of Wednesbury unreasonableness derives from the case of Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1948] 1 KB 223; what is often referred to as the Wednesbury test is the proposition that a court may interfere with the exercise of discretion for unreasonableness only when the authority has come to a conclusion ‘so unreasonable that no reasonable authority could ever have come to it’. This is sometimes

67 See note 52 above.


69 Lexis transcript.


71 See note 1 above, p. 333.

72 Even Beidhan LJ stressed that the court must accept the evidence of the Crown and its officers on matters of national security: ibid. at p. 339. Their Lordships did not, however, presumably intend to exclude the court’s role in establishing whether a decision was in fact taken on national security grounds.

73 Ibid. at p. 322.

74 See note 52 above at p. 457.

75 [1991] 3 WLR 442. While in this respect the Court of Appeal was concerned to restrict the use of habeas corpus, it also emphasized that the remedy of habeus corpus was flexible and could be used for example to prevent the executive deporting an individual pending the hearing of his judicial review application: see also M v. Home Office and another (The Independent, 3 December 1991).

76 Where the validity of the underlying decision to deport rests on the satisfaction of statutory condition precedents, then habeas corpus may be an appropriate remedy: see ex parte Muboyayi, ibid. However, this is not relevant in the present context, since the requirement that the Secretary of State must deem deportation to be conducive to the public good is not regarded as a condition precedent; this is clear from ex parte Cheblak, note 1 above.


78 See note 52 above at p. 464 per Geoffrey Lane LJ. In R v. Brixton Prison ex parte Soblen [1962] 3 All ER 641 (CA) it was argued, unsuccessfully, that the Home Secretary was seeking to use his powers of deportation to extradite Soblen; however, the Court accepted that in principle the exercise of the power of deportation could be challenged on the basis that its purpose was simply extradition. For discussion of the different tests that the courts have in fact adopted, to determine when a decision should be quashed on the basis of improper purpose where it is alleged that the decision-maker had a mixture of lawful and unlawful purposes, see Wade, (1988), op. cit., note 13 above, pp. 439–42; recent cases suggest that the test is whether the same decision would have been reached even in the absence of consideration of the improper purpose: see e.g. R v. Lewisham London Borough Council ex parte Shell UK Ltd [1988] 1 All ER 938.

79 The argument that the deportation decisions were taken simply in order to secure detention was not canvassed in the course of the cases under consideration, presumably because counsel thought there would be little prospect of successfully establishing this.

80 See note 1 above, p. 335.

81 See note 52 above at p. 459 (per Lord Denning MR).


83 See note 1 above at p. 335.

84 The failure of the advisory committee to follow a proper procedure would not inevitably result in the quashing of the deportation decision. If the Secretary of State had not yet issued a deportation order then, since the advisory panel has no formal decision-making powers, the appropriate remedy would normally be an order for mandamus, requiring the committee to
re-hear the case, and an order of prohibition restraining the Secretary of State from issuing or implementing a deportation order until this is accomplished.


88 See Hampson ibid. at p. 510, esp. note 16.


91 Nor, indeed, did Iraq seek to derogate, despite the evident human rights violations: on derogation see Chowdhury, (1989), op. cit., note 17 above. It should also be noted that a state cannot derogate from any of its obligations under the Geneva Convention of 1949.

92 It has been argued that the Geneva Conventions are applicable in domestic law because the effect of the Geneva Conventions Act 1957 was to incorporate the entirety of the Conventions: see Hampson, (1991), op. cit., note 87 above, pp. 517–19.

93 See the discussion in Wade and Bradley (1985) op. cit., note 26 above, p. 322.


95 Articles 3 and 4(1) of the European Convention on Human Rights and Articles 7 and 8 (1) of the International Covenant on Civil and Political Rights.


98 Ibid. (Mrs Rumbold, Minister of State at the Home Office).

99 See also the General Comment of the Human Rights Committee on the position of aliens under the Covenant: Report of the Human Rights Committee: General Assembly: Official Records: Forty-First Session: Supplement No. 40 (A/41/40), at p. 117. Article 14 of the International Covenant on Civil and Political Rights confers procedural protection in respect of the determination of any criminal charge or of an individual’s rights and obligations in a suit of law. In Pinkey v. Canada (Doc. A/37/40, p. 101) the state party argued that deportation did not involve the determination of a criminal charge, but there is no indication as to whether it would involve the determination of rights or obligations in a suit of law: see D.McGoldrick, The Human Rights Committee, Oxford: Clarendon Press, (1991), p. 416. The allegations concerning deportations were held inadmissible on the ground of non-exhaustion of domestic remedies.

100 For a discussion of the requirements of the Protocol and a comparison with Article 13 of the Covenant, see P.van Dijk and G.J.H.van Hoof, Theory and Practice of the European Convention on Human Rights, Deventer: Kluwer, (1990), pp. 503–8. Article 4 of the Fourth Protocol forbids the collective expulsion of aliens and is discussed in van Dijk and van Hoof at pp. 498–501. While the European Convention on Establishment (1955) contained provisions relating to the expulsion of aliens, it has no relevance in the present context because its scope is limited to nationals of the states parties to the Convention.

101 See the report in International Covenant on Civil and Political Rights, Selected Decisions of the Human Rights Committee under the Optional Protocol (seventeenth to thirty-second sessions) at p. 179. See also Maroufidou v. Sweden in International Covenant on Civil and Political Rights: Human Rights Committee: Selected Decisions under the Optional Protocol (second to sixteenth sessions) at pp. 80–3. The Human Rights Committee has generally stated that its role is not to test a sovereign state’s evaluation of an alien’s security rating (see MRB v. Canada: Report of the Human Rights Committee: General Assembly: Official Records: Forty-third session Supplement No. 40 (A/43/40) at p. 258). The reluctance of the

102 MRB v. Canada, ibid.

103 The availability of judicial review proceedings or habeas corpus proceedings is, however, unlikely to satisfy the requirement that there should be an appeal, because of the limited nature of the review undertaken by the courts in such proceedings.

104 Mr and Mrs B sought refugee status, and a Home Office Press Release also refers to a refugee being released pending consideration of his claim for asylum: see Home Office Press Release (6 February 1991).

105 Article 45 of Geneva Convention IV 1949 is similar to Article 33 of the Geneva Convention on Refugees, although this refers to a wider range of reasons for fearing persecution (race, religion, nationality, membership of a particular social group, or political opinion). However, where there are reasonable grounds for regarding the refugee as a danger to the security of the country (Article 33 (2)), the Geneva Conventions on Refugees allows the deportation of an individual to a country in which his life or freedom might be threatened.

106 Immigration Act 1971, s. 17 (1).

107 See note 30 above.


109 See note 37 above.


112 *Agee v. UK* (1977) 7 D&R 164: on the interpretation of civil rights and obligations in Article 6, see van Dijk and van Hoof, (1990), op. cit., note 100 above, pp. 294–307.

113 In *Mario Torres v. Finland* (No. 291/1988) the Human Rights Committee held that executive review of detention pending expulsion did not satisfy the requirements of Article 9 (4) which required a review by a court ‘so as to ensure a higher degree of objectivity and independence in such control’ (see Report of the Human Rights Committee vol. II: General Assembly: Official records: Forty-fifth Session Supplement No. 40 (Doc A/45/40), p. 96 at p. 98). However it has also emphasized in this context its inability to test a sovereign state’s evaluation of an alien’s security rating: see *JRC v. Costa Rica*, note 101 above. The United Nations has also adopted a Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment: United Nations General Assembly Resolution 43/173. This sets forward a number of principles to govern detention, including Principle 32 which is similar but not identical to Article 9: Amnesty International, *United Kingdom: Human Rights Concerns*, (June 1991), at pp. 30–4, but they are not binding in international law unless it could be successfully argued that they are part of customary international law.


115 4 EHRR (1982), 97; Mr M Melchior gave a dissenting opinion in the case on the basis that the Commission’s finding that the applicant had exhausted his domestic remedies
contradicted the Commission’s earlier decision declaring the application admissible. Mr Melchior further considered that both habeas corpus and judicial review were too limited to provide the control required by the Convention.

116 Resolution of the Committee of Ministers DH (81) 7.

117 See note 114 above, pp. 294–6.

118 Ibid.

119 See note 114 above, pp. 298–300.

120 The requirements of Article 5 (4) have been extensively discussed in other contexts: see e.g. Van Der Leer v. Netherlands 12 EHRR (1990), p. 567; Merker v. Belgium 11 EHRR (1989), 68; Weeks v. United Kingdom 10 EHRR (1988), 293; Brogan v. UK 11 EHRR (1989), 117; for a recent discussion of the requirements of Article 5, see van Dijk and van Hoof, (1990), op. cit., note 100 above, pp. 251–94.


122 Judicial review has been held to be an effective remedy, for the purposes of Article 13 of the Convention which requires states to provide a remedy to enforce the substance of Convention rights, in the context of claims alleging a violation of Article 3 of the Convention (prohibition on torture, inhuman and degrading treatment): see Soering v. United Kingdom [1989] 11 EHRR 439. The acceptance of judicial review as an adequate remedy was repeated in the recent case, Vilvarajah v. United Kingdom (The Independent, (5 November 1991)) in which five Tamils who were refused asylum and then deported argued, unsuccessfully, that judicial review proceedings did not constitute an effective remedy for the purposes of Article 13. It may, however, be argued that in this case the European Court failed to appreciate the limitations of judicial review, particularly in the light of the decision in ex parte Brind; see note 94 above.

123 See Neumeister v. Austria 1 (1979–80), EHRR 155; X v. UK (6998/75) Judgment 5 November 1981; see also Weeks v. UK 10 EHRR 293.

124 See note 37 above.

125 Compare the discussion of the introduction of special emergency powers on the outbreak of the Second World War, note 9 above.

126 See note 1 above at p. 332.


128 See Grant, (1991), op. cit., note 21 above.

129 The Foreign Office was specifically reported to have been furious about the detention of Cheblak: see The Independent, (2 and 6 February 1991). Senior Whitehall sources were also reported as saying that the holding of Arabs was ‘a panic reaction based on speculative accusations of terrorist links from MI5’: The Independent, (27 February 1991).

130 It seems unlikely that either judicial review proceedings or habeas corpus proceedings would be useful for the purpose of identifying errors arising from the use of outdated information. As demonstrated in the text, the court in judicial review proceedings is not concerned with the merits of the executive’s assessment of the requirements of the interests of national security, and it is unlikely that the court would wish to be drawn into an evaluation of the evidence relied upon. On the other hand, both habeas corpus proceedings and judicial review could presumably be invoked where the applicant’s claim is based upon mistaken identity since the correct identification of the individual to be detained or deported would ordinarily be regarded as a condition precedent to the validity of such action. If there was a dispute as to such identity, the court would be required to adjudicate upon it. In the Gulf conflict the mistaken identity case was said to involve a prisoner of war: on the availability of the remedy of habeas corpus to prisoners of war, see Sharpe, (1989), op. cit., note 9 above, pp. 115–17.

132 The Committee also recommended, however, that there should be neither an appeal nor a hearing of an advisory committee for cases where the deportation decision was based on political factors. Rather than follow the recommendations of the Committee, the government established a special tribunal to deal, in an advisory capacity, with both national security and political cases. The special tribunal heard only one case: see B.A. Hepple, ‘Aliens and Administrative Justice: the Dutschke Case’ 34 Modern Law Review, (1971), p. 501. Under the special procedures legal representation was allowed and the proceedings took place mainly in public, although evidence from the Security Service was heard in camera. The Immigration Appeal Act 1969 and the Aliens (Appeals) Order 1970 provided a statutory basis for the special tribunal, but these provisions were never brought into force. Criticisms in the aftermath of the Dutschke case led to the removal of the special tribunal and its replacement with the present advisory panel.

133 Ibid., note 127, p. 338.


136 For a recognition that this may be the case see Reform of Section 2 of the Official Secrets Act 1911 (Cm 408) (1988), para. 39.


138 Hampson, (1991), op. cit., note 87 above, p. 511 argues that the issue of standard letters suggests that the detentions and deportations were collective penalties and therefore prohibited by Geneva Convention IV of 1949, Article 33. It is suggested that this argument would be difficult to sustain in the light of the problems of refuting the government’s claim that each case was considered individually.


140 See Leigh, (1991), op. cit., note 51 above.

141 The procedures of the Security Intelligence Review Committee were in fact successfully challenged in Chiarelli v. Minister of Employment [1990] FC 299 in which it was held that the protection of evidence given by the Service from being directly heard by or disclosed to the applicant was wider than the permitted interference allowed under the Canadian Charter of Rights and Freedoms (Canada Act 1982, Schedule B (Constitution Act 1982)). On the Canadian experience see further Leigh, ibid., and the references contained therein. Leigh notes that the procedure is limited to a form of in camera judicial review of a ministerial certificate before the Federal Court. For more general discussion of the role of the Charter see G.A. Beaudoin and E. Ratushny (eds), The Canadian Charter of Rights and Freedoms, second edition, (1989).


The author is grateful to Dr Dominic McGoldrick for commenting on an earlier draft of this chapter. Any errors that remain are the author’s own.
EFFECT ON COMMERCIAL LAW OF NON-DECLARATION OF WAR

3 See Starke, (1989), op. cit., note 1 above, p. 529. Starke pp. 586–7 draws attention to the fact that quasi-neutrals in a ‘non-war’ conflict are not subject to the same strict duties as neutrals in war proper, but practice so far provides little guidance. In UN enforcement action duties may be determined by decisions or recommendations of the Security Council.
4 H.Lauterpacht (ed.), Oppenheim’s International Law, vol. 2, seventh edition, (1952), pp. 224–5: ‘It is consonant with the dignity and purpose of the collective enforcement of the basic instrument of organized international society that it should rank in a category different from war as traditionally understood.’ The laws of war do, however, apply (and see Article 2 of the Geneva Convention 1949). Lauterpacht adds (p. 225 and note 3) that there is nothing to prevent states taking part in enforcement action from enacting legislation bringing into operation measures such as the Trading with the Enemy Act, which are normally dependent on a formal state of war. See also McNair and Watts, (1966), op. cit., note 2 above, pp. 24–9 and 50–2; Fidler, ‘No Gulf war, under English Law’, Financial Times, (18 January 1991), p. 4; written answer by the Prime Minister, H.C. Deb. vol. 184, col. 376, (28 January 1991).
5 See generally McNair and Watts, (1966), op. cit., note 2 above, pp. 78–116, 363–5 on enemies and enemy character. See esp. pp. 363–4 on the doubtful possibility of extending the Trading with the Enemy Act 1939 to non-war conflict. There is power under s. 2 (2) to extend the Act to any persons as if they were enemies, but the better view seems to be that this is only exercisable in war strictly so called. See also Lord Merriman P. in The Glenearn [1941] P. 51 at p. 61 (cited in McNair and Watts, p. 364 n. 1): ‘the legislation relating to trading with the enemy…forbids any form of commerce with the enemy but, as the word implies, that assumes that the commerce is transacted after the war has broken out’ (property in goods passed to British claimants before the outbreak of war). For a comparative survey of the effect of war on contracts see I.D. De Lupis Law of War, (1987), pp. 316–19, showing sharp divergences even amongst countries of the common law tradition. Fidler, (1991), op. cit., note 4 above says that it was thought that the freezing of Iraqi and Kuwaiti assets on the invasion of Kuwait in August 1990 and the prevention of terrorism legislation were sufficient to cover issues which might otherwise have depended on 6 a formal state of war.
6 Export of goods to North Korea was prohibited by the Export of Goods (North Korea) Order S.R. & O. 1950 no. 1117. See on Argentina M.Evans, ‘The Restoration of Diplomatic Relations between Argentina and the United Kingdom’ (1991) 40 International and Comparative Law Quarterly pp. 473–5 where it is also pointed out that some countries banned arms sales to Argentina and the European Community suspended Argentinian imports. For a somewhat different picture stressing the continuance of normal relations see B.J.Davenport QC, ‘War Clauses in Time Charterparties’ in Ewan McKendrick (ed.) Force Majeure and Frustration of Contract, (1991), pp. 133–8 esp. p. 136. It is possible that public policy may render illegal transactions which may assist the opponent of this country in an
undeclared war. See McNair and Watts, (1966), op. cit., note 2 above, pp. 363–4 and notes 103–10 below. On litigation, in *Eastern Carrying Insurance Co. v. National Benefit Life and Property Assurance Co.* (1919) 35 TLR 292 it was held that a Russian company could sue in the English courts, even though British troops were fighting the unrecognized Bolshevik government.

7 On Scots law see the speech of Lord Thankerton in *Sofracht v. Van Udens* [1943] AC 203 at p. 214. See in particular *Blomart v. Roxburgh* [1664] Mor. Dict. 16091 where it was held that, despite the existence of an embargo on Dutch shipping, since there was no declaration or ‘denunciation’ of war against the United Provinces, a pursuer could have process against a defender living there.


9 [1902] AC 484.

10 McNair and Watts, (1966), op. cit., note 2 above, p. 82, n. 2 says this is not likely to be repeated. It was allowed by Mathew J. but criticized by Lord Davey in [1902] AC 484 at p. 499.

11 See [1902] AC at p. 498 (per Lord Macnaghten), p. 500 (per Lord Davey): ‘It might conceivably precipitate a state of war which it was the object of statesmen to avoid’, and Lord Brampton at p. 503 referring to ‘hostile countries negotiating with a view to avoid any rupture of a then existing state of peace’. See also per Lord Merriman P. in *The Glenearn*, note 5 above., holding that there was no prohibition of intercourse with a potential enemy nor were the courts ‘to invent doctrines of public policy in such matters.’ The case involved the exchange, immediately prior to the outbreak of the Second World War, of a German cargo in a British ship in London for a British cargo in German ships in Genoa. The London cargo could not be claimed as prize.

12 [1811] 2 Camp. 610.

13 *Curtis v. Mathews* [1919] 1 KB 425. McNair and Watts, (1966), op. cit., note 2 above, p. 53 n. 4 regard this as an example of a general relaxation for commercial documents. When this case was heard at first instance, [1918] 2 KB 825, the old case of *Langdale v. Mason, Park Marine Insurance*, 8th edn, vol. 2, p. 965, was cited in which Lord Mansfield had treated the Gordon Riots as levying of ‘war’ for insurance purposes.


15 82 L.l.L. Rep. at p. 514. (Seizure of trawlers during Spanish Civil War). Lord Morton also stressed the difficulty of deciding when a civil war has begun. For a controversial decision on the essentials of civil war see *Spinneys (1948) Ltd v. Royal Insurance Co.* [1980] 1 Lloyd’s Rep. 406 specifying two clear sides: objectives and scale of conflict. See Davenport, (1991), op. cit., note 6 above, p. 133 n. 2 who queries this in the light of Liberia in 1989–90 and also queries Mustill J. ‘s approach through the authorities as inconsistent with *Kawasaki*. R. Merkin and A. McGee (1991) *Insurance Contract Law* B11–203 point out that there is no English authority on guerrilla warfare for insurance. In *Pan-American World Airways v. Aetna Casualty* [1975] 1 Lloyd’s Rep. 77 a United States Court of Appeals held it would only be ‘war’ if the guerrillas were acting on behalf of a sovereign or quasi-sovereign government, and it was not enough that they were well-organized. Davenport ibid. p. 134 cautions against too ready an acceptance of American authority in this field. See now also *National Oil Co. of Zimbabwe v. Sturge* [1991] 2 Lloyd’s Rep. 281 at p. 282 (Saville J.) holding that ‘civil war’, ‘rebellion’ and ‘insurrection’ were to be given their ordinary business meaning in an insurance policy and that they covered the activities of Renamo guerrillas in Mozambique.

16 [1939] 2 KB 544; [1939] 1 All ER 819; at first instance [1938] 3 All ER 89. For a similar approach to a different subject matter (a government) see *Luigi Monta v. Cechofracht* [1956] 2 QB 555 and *National Oil Co. of Zimbabwe v. Sturge*, note 15 above.

17 [1938] 3 All ER at p. 83.
19 [1938] 3 All ER at p. 84. On the indeterminacy of the modern concept of war, see Davenport, (1991), op. cit., note 6 above, p. 136 and also note 2 above.
20 [1939] 2 KB 544. In the United States it has also been held that ‘peace’ may mean cessation of combat and not a formally agreed peace, Lee v. Madigan 358 US 228 (1959), Starke (1989) op. cit., note 1 above, 530. See also note 24 below.
21 Ibid. at p. 553.
23 Greene MR in Kawasaki etc. v. Bantham SS Co. at p. 554.
24 It has been held in the United States that in the case of undeclared war the actual commencement and termination of combat marks the beginning and the end of the war. See Schneiderman v. Metropolitan Casualty Co. 220 NYS (2d) 947 (1961) cited by Starke, (1989), op. cit., note 1 above at p. 530. n. 11.
27 Ibid. at p. 447, n. 70.
28 Ibid. at p. 459, where it is suggested that there is no genus which covers all the immunities.’
29 Ibid. at p. 449. It seems that the older expression ‘Act of the Queen’s Enemies’ would only apply to states recognized as at war with the sovereign, and not to piratical or traitorous subjects or to states at peace with the sovereign. Ibid. p. 222 citing Spence v. Chadwick (1847) 10 QBD 517, a case concerning a confiscation of goods by the Spanish courts in time of peace, so that it may not be applicable to undeclared war. There is a considerable mass of case law on the words ‘in consequence of a warlike operation’ under the old f.c. and s. clause in marine insurance, but Davenport, (1991), op. cit., note 6 above, pp. 136–7 n. 11 says these cases ‘are probably beyond consistent and sensible analysis’ and in any event are irrelevant to the interpretation of other clauses in other contracts. But see Merkin and McGee, (1991), op. cit., note 15 above and note 30 below B11 204–5 on ‘hostile act’ in a Lloyd’s MAR policy.
30 Many time charterparties contain war clauses allowing cancellation if any of these named states or the flag state are involved in war: Davenport ibid., p. 133. The vessel need not be affected by the outbreak of the war, so that the possibilities of cancellation opened by the Gulf War may be very large. Such problems are multiplied by the fact pointed out at pp. 137–8, ‘postscript’, that the membership of the coalition against Iraq was never specified and the degree of involvement of states varied widely, down to mere financial contributions. Davenport asks pertinently ‘Is it now good law to say, “They also serve who only stand and pay”?’ Merkin and McGee, (1991), op. cit., note 15 above points out that the states mentioned possess nuclear weapons, B11–103. On ‘hostile act’ it is there suggested, that if the new wording of the MAR policy has not changed the law, the loss of a merchant ship will only be regarded as so caused if it is directly attacked by or used in attacking the enemy, B11 204–5. Vessels lost by perils of the sea whilst employed for war functions will be covered by a policy excluding war risks. The reference to derelict mines and torpedoes is to eliminate Costain Blankenvoort UK Ltd v. Davenport, The Nassau Bay [1979] 1 Lloyd’s Rep. 395, holding that the loss of a dredger which raised dumped naval shells was not a war risk.
Majeure Clauses’ ibid., pp. 21–6; and McKendrick ‘Force Majeure and Frustration—Their Relationship’, ibid., pp. 27–49.
34 The Concordoro [1916] 2 AC 199.
36 Note 34 above.
37 Swadling op. cit., note 31 above, pp. 11–20.
38 Furmston op. cit., note 31 above, pp. 23–6.
39 See The Times, (12 February 1991), p. 31, ‘Contracts and the War’ by Karen Wood suggesting that the Kawasaki approach to the interpretation of ‘war’ will be adopted. The specimen force majeure clause given by Swadling op. cit., note 31 above, p. 9 (Clause 17 of the Refined Sugar Agreement) mentions ‘war’ without further mention of hostilities in its catalogue, but then speaks of ‘any cause of force majeure (whether or not of like kind to those before mentioned)’, so that there would seem to be no difficulty in covering undeclared war. The clause in The Super Servant Two [1990] 1 Lloyd’s Rep. 1 mentioned ‘war, warlike operations, acts of public enemies, restraints of princes, rulers or people’ so it, too, in its more traditional terminology should also cover undeclared war. On the interpretation of terms commonly found in force majeure clauses such as ‘prevented’, ‘hindered’, ‘delayed’, see A.G.Guest (gen. ed.), Chitty on Contracts, twenty-sixth edition, (1989), vol. 1, paras 1035–45. In Zinc Corporation v. Hirsch [1916] 1 KB 541, Bray J. at p. 549 was inclined to the view that force majeure did not cover war, but that ‘restraints of princes’ and the general words would do so, but in the Court of Appeal Swinfen Eady LJ at p. 554 citing continental authority thought war was covered. The war in question was the First World War.
40 See the very helpful article by W.McBryde and I.Scobbie, ‘The Iraq and Kuwait Conflict: the Impact on Contracts’, (1991), Scottish Law Times 39. They point out at p. 42 that since some of this legislation allows for the granting of licences it may be necessary for a party relying on discharge to show that an effort was made to obtain a licence or that such an effort, if made, would have been futile. Bakubhai and Ambalal Ltd v. South Australia Farmers Coop Union Ltd [1941] 69 L.L. Rep. 138; Vidler & Co. (London) Ltd v. R.Silcock & Sons Ltd [1960] 1 Lloyd’s Rep. 509. They also point out at p. 44 that in the absence of a war strictly so called, Iraqi and Kuwaiti residents could sue or be sued in Scottish courts and the same would apply to English courts. See also Davis and Nolan, ‘Web of Legislation Used to Prohibit Business with Iraq’, Financial Times (4 February 1991), p. 9, for a concise survey which also contains an outline of United States sanctions. The statutes authorizing the United Kingdom statutory instruments are the Emergency Laws (Re-enactments and Repeals) Act 1964, the United Nations Act 1946 and the Import Export and Customs Powers (Defence) Act 1939. For details of the statutory instruments and other subordinate legislation giving effect to sanctions, see McBryde and Scobbie in the article cited at pp. 41–2.
41 Denny, Mott and Dickson Ltd v. James B.Fraser Ltd [1944] AC 265.
45 See *Finelvet v. Vinava* note 43 above at p. 660.
49 *Finelvet v. Vinava*, note 43 above, at pp. 664 and 671. For the differing dates, 4 October, 24 November, 9 December, see p. 662.
50 Ibid., p. 664. See to the same effect Bingham J. in *The Wenjiang*, note 46 above, at p. 408.
51 See note 43 above, at p. 670.
52 See note 46 above, at p. 408.
54 See note 46 above, at p. 408.
55 Ibid. at p. 407.
56 See note 43 above, at pp. 664 and 658.
57 [1872] L.R. 7 QB 404 at pp. 412–13. Passages from the judgments of Cockburn CJ at pp. 410–11 and Blackburn J. at pp. 413–14 were also considered by Mustill J.
60 See note 43 above, at p. 668.
61 Ibid.
63 See note 48 above, at pp. 767–8.
65 Ibid., p. 122.
68 See note 64 above, at pp. 125 and 130.
69 [1939] 3 All ER 314.
70 See note 64 above, p. 128. For earlier authority, see McNair and Watts, (1966), op. cit., note 2 above, p. 187–91.
72 See note 66 above at p. 213: ‘I know they did not treat it as frustrated: but that is not decisive.’
73 See note 64 above, pp. 128–30.
74 Ibid., p. 130. It is there pointed out that in neither *The Nema* nor *The Agathon* was *Hirji Mulji v. Cheong Yue* [1926] AC 497 cited. Ironically enough, given that Lord Sumner’s speech in *Bank Line v. Capel* is leading authority for an ‘expectations’ approach to delay, in *Hirji Mulji* he took a strictly objective line. *Hirji Mulji* was cited in *The Wenjiang* (No. 2) at p. 407, but does not seem to have influenced Bingham J.
75 See note 64 above, p. 130.
76 See note 48 above.


81 See note 58 above.


83 Palace Shipping Co. v. Caine [1907] AC 386; Robson v. Sykes [1938] 2 All ER 612. See McNair and Watts, (1966), op. cit., note 2 above, p. 251 who also point at p. 250 note 5 that the report in Liston does not state the nationality of the seamen, going on to express doubt as to whether it would be followed today in the case of British seamen. Sed quaere, given that a German cruiser was close to the port from which the ship was to sail. See also Lord Chorley and O.C.Giles Shipping Law, eighth edition (J.J.N.Gaskell, C.Debattista and R.Swatton, eds) p. 142 for the National Maritime Board’s Summary of Agreements relating to the warning and release of crew facing war hazards and benefits for death, injury or detention. These only apply to ships of companies which are members of the General Council of British Shipping.

84 McBryde and Scobbie, (1991), op.cit., note 40 above, p. 41 who also consider that if a Scud missile destroyed a person’s only place of work this ought to frustrate their contract of employment. The crucial word here is ‘only’.

85 Turner v. Mason (1845) 14 M. & W. 112; Ottoman Bank v. Chakarian [1930] AC 277 (Armenian in Turkey, fear held reasonable); Bouzourov v. Ottoman Bank [1930] AC 271 (similar facts but fear not shown to be reasonable). At the present day these might be extended from life and health to liberty.

86 See Davenport, (1991), op.cit., note 6 above.

87 Article IV r. 2 (g). See Scrutton on Charterparties op. cit., note 26 above, pp. 223–6 for full discussion.

88 Geipel v. Smith, see note 57 above.

89 British and Foreign Co. v. Sanday [1916] 1 AC 650.

90 Becker, Gray v. London Assurance Co. [1918] AC 101. (German ship in 1914 puts into Italian port to evade capture by British. It was not illegal for the ship to have proceeded.)


92 Bolekow, Vaughan v. Compania Minera (1916) 32 TLR 404. (Threat of German submarine warfare led to steep rise in freight rates. Contention by defendant Spanish sellers that this was ‘commercial prevention’ was not accepted.)

93 Janson v. Driefontein Mines, see note 9 above; The Glenearn, see note 5 above.


95 See note 9 above and see also The Glenearn, note 5 above.


97 (1802) 3 B & P 191 at p. 198. See McNair and Watts (1966) op. cit., note 2 above, p. 124. In Eastern Carrying Insurance Co. v. National Benefit Life and Property Assurance Co (1919) 35 TLR 292 Bailhache J., having held that a Russian company was not an enemy alien at a time when British troops were fighting against the unrecognized Bolshevik government, said the decision might have gone otherwise if the company had been supporters of that government. This remark would indicate the existence of such a rule of public policy. See McNair and Watts op. cit., p. 49 and n. 1 and pp. 364–5.
The opinion in answer to a Parliamentary question was given after consultation with the Attorney-General. See McNair and Watts (1966) op. cit., note 2 above, p. 52 n. 2. citing Parl. Debates (5th Series) (Commons) vol. 478 (1950) col. 203; see also cols. 278–9 and 299.


100 [1929] 1 KB 470 at p. 510:

The ground upon which I rest my judgment that such a partnership is illegal is that its recognition by our courts would furnish a just cause for complaint by the United States Government against our Government…and would be contrary to our obligation of international comity, as now understood and recognized, and therefore would offend against our notions of public morality.

See also Viscount Simonds in Regazzoni v. Sethia at p. 319: ‘public policy demands that deference to international comity’, and Lord Keith of Avonholm at p. 327: ‘to recognize the contract between the appellant and respondent as an enforceable contract would give a just cause for complaint by the Government of India and should be regarded as contrary to conceptions of international comity’.

103 McNair and Watts, (1966), op. cit., note 2 above, pp. 135–44.
104 Per Lord Dunedin [1918] AC at p. 269.
105 Halsey v. Lowenfeld [1915] 2 KB 707.
106 Tingley v. Muller [1917] 2 ch. 144.
108 Ibid., pp. 293–6.
109 Seligman v. Eagle Insurance Co. [1917] 1 Ch. 519.
111 On aspects of this in relation to the Gulf conflict see McBryde and Scobbie, (1991), op. cit., note 41 above, pp. 43–4; Eastern Carrying Insurance Co. v. National Benefit Life and Property Insurance Co., note 6 above; on banking contracts see Arab Bank Ltd v. Barclays Bank (Dominion, Colonial and Overseas) [1954] AC 495. The right to be paid a credit balance is an accrued right. See also E.P. Ellinger, Modern Banking Law, (1987), p. 481.
115 Denny, Mott and Dickson v. Fraser; [1944] AC 265.
119 Halsey v. Lowenfeld [1916] 2 KB 707; Tingley v. Muller [1917] 2 Ch. 144.
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