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Gulf War I: The Legality of Prosecuting Existing Iraqi Ba'ath Party in Response to Kuwait's Deceased Captives

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Abstract

This paper analyzes and describes the role of international law in prosecuting international crimes committed during and after wartime, in general, and in the territories of Kuwait and Iraq during the invasion by the latter (Gulf War I), in particular. Through these approaches, I will identify the importance of international criminal and humanitarian laws' mandates in trying existing Ba'ath commanders who had ordered, aided, abetted, and/or neglected their duties over their forces in which this conduct resulted in the death of Kuwait's captives. In light of this analysis, I propose the establishment of an ad hoc tribunal to try and punish these perpetrators as a corollary initiative laid out on the United Nations' obligations, and as a consequence to the Security Council resolution to liberate Kuwait.

This paper will consist of four parts. The first part will illustrate the background of the Iraqi invasion of Kuwait and the liberation initiative led by the US and the UN (Operation Desert Storm) to free Kuwait from that invasion. The second and third parts' approaches will analyze and criticize the legality of both: the Iraqi invasion of Kuwait, on the one hand, and the US-UN intervention to liberate Kuwait, on the other hand. Consequently, all of these proponents will lead to the development of a test to create an ad hoc criminal tribunal to try and punish the existing Ba'ath regimes who have violated international law by not keeping Prisoners of War (POWs) safe and unharmed.

In conclusion, this paper is an attempt to achieve informative and analytic frameworks to argue why the UN should create an ad hoc tribunal and how this mechanism can be accomplished.

INTRODUCTION

On August 2, 1990, Iraq invaded its neighbor, Kuwait. Iraq, ruled by the Ba'ath Party,⁽¹⁾ had threatened to invade Kuwait before 1990 for many reasons. Most notably, Iraq was claiming sovereignty over the Kuwaiti territory and its resources. Iraqi leaders referred to Kuwait as the “nineteenth province of Iraq” at the time.⁽²⁾

The Iraqi invasion was one of the most heinous acts of aggression as opposed to crimes of aggression committed throughout history. Iraq was a close neighbor to Kuwait. Kuwait provided significant assistance to both the Iraqi people and the government during their war on Iran that lasted more than eight years. This is why Kuwaitis felt betrayed when Iraqi troops crossed the borders of this small country at the dawn on August 2, 1990. The people of Kuwait were afraid and shocked when the powerful Iraqi army invaded their country. Iraq's forces committed war crimes and crimes against humanity. For instance, Iraqi troops took Kuwaiti men and women into the bathrooms of the public elementary schools in Kuwait, flooded the floors with water, and electrocuted these non-combatants by battery shocks. The Iraqi army burnt most of the oil fields, destroyed Kuwait's monuments, and stole its people's fortune.

Adding to the tragedy of this war is that many of the families of the people who were held captives still do not know the fate of their sons

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- (1) The Ba'ath Party is a political and authoritarian party that alleges Islamic values and attributes its relation to the Arabian region. The party was founded by Michel Aflaq and Salah al-Din al-Bitar in Damascus, Syria, in 1943. Ba'ath Party, Encyclopedia Britannica, <https://www.britannica.com/topic/Bath-Party> (last visited Mar. 20, 2019). The Ba'ath Party ruled Iraq from 1968 to 2003 when it ended with the defeat of the Iraqi Army in the Second Gulf War. See also John F. Devlin, *The Ba'ath Party: A History from Its Origins to 1966* (1976).
 - (2) ABIDI, A. H. H., *Origins, and Dimensions of the Iraqi Claim Over Kuwait*, India International Centre Quarterly, vol. 18, no. 1, pp. at 129 (1991). Available at JSTOR, www.jstor.org/stable/23002125. Last visited (Mar. 22, 2020).

and daughters. The Iraqis took most of the Kuwaitis' personal property, and they took their cars and changed the license plates to Iraqi ones. Historians described: "Kuwait was a shamble, six hundred of its oil wells ablaze, the air over and around it polluted with carbon dioxide and sulfur, and the Persian Gulf awash in oil."⁽³⁾

The Iraqi invasion of Kuwait and the armed intervention by the international community led by the United States⁽⁴⁾ have raised fundamental questions regarding principles of international law. Since 1945, when the United Nations was created, two key principles have been the defining features of the international legal order.

The first principle is provided under Article 2(4) of the U.N. Charter. It stipulates that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the purposes of the United Nations."⁽⁵⁾ As a consequence, it is now generally accepted that a State cannot employ force to acquire legal title to a territory, and if an occupation occurred, it must respect the law of armed conflict.

The second principle is that no country has the power to serve as the world's policeman. Although Article 51 of the U.N. Charter directly provides that states have a right to individual and collective self-defense,⁽⁶⁾ the responsibility of policing the international community is a mandate left to the U.N. Security Council (UNSC) through peace-keeping and security achievement that is stated in the U.N. Charter.⁽⁷⁾

Both principles have frequently been reiterated by the international community. Therefore, numerous General Assembly Resolutions adop-

(3) Richard J. Regan, *The Gulf War* (1991), in *Just War: Principles and Cases* 179 (2d ed. 2013).

(4) Desert Storm is the military operation that was initiated by the U.S.-led coalition to liberate Kuwait. It was opened by an attack against the Iraqi forces carried out by the U.S., Saudi Arabia, and Egypt. See Brynn Holland, *HISTORY Vault: Operation Desert Storm*, History.com (Mar. 17, 2017), <https://www.history.com/news/history-vault-operation-desert-storm>.

(5) U.N. Charter art. 2, ¶ 4.

(6) U.N. Charter art. 51.

(7) U.N. Charter art. 1. A state is prohibited to use force against another.

ted have expressly reaffirmed the validity of the prohibition against the use of aggressive force; the most prominent one was the 3314 resolution that defined the crime of aggression.⁽⁸⁾ A pragmatic example, the International Court of Justice in the case *Nicaragua v. The United States of America* rejected the argument, raised by the United States, that a country or groups of countries have a right to exercise a police function without the authority of the Security Council.⁽⁹⁾ Historically, even where a country decided to take action in contravention of one of the two principles, it generally sought to defend its conduct by relying upon a loose interpretation of the right to self-defense or distorting the truth, as opposed to refuting the legitimacy of the principle itself.

However, as illustrated in this paper, the events surrounding the First Gulf War are different as will be illustrated thoroughly later in the paper. The Iraqi invasion of Kuwait and its subsequent annexation of Kuwait directly challenged the first principle which prohibits the aggressive use of force and bars an aggressor from securing legal title to occupied territory. The response by the United States and the international community to the Kuwaiti invasion through massive military action also necessitates some critical analysis regarding the second principle.

Furthermore, during and after the First Gulf War, the U.S. attempted to create an ad hoc regional tribunal to prosecute Saddam Hussein, members of the Ba'ath Party, and the Iraqi military for the crime of aggression, crimes against humanity, genocide, and war crimes, but these efforts failed.⁽¹⁰⁾ Perhaps one of the reasons why the US failed to establish an ad hoc tribunal is that it could not, arguably, find support to do so at that time. As when the US invaded Iraq in 2003, its legal basis was the referral to the Security Council resolution 678.⁽¹¹⁾ However, this failure was justifiable on two grounds: First, the U.N. Chapter VII powers regarding the establishment of judicial bodies were debatable

(8) See G.A. Res. 3314 (Dec. 14, 1974).

(9) See *Nicaragua case*, see *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. The U.S.)*, Merits, Judgment, 1986 I.C.J. Rep. 14 (June 27), <http://www.worldlii.org/int/cases/ICJ/1986/1.html>.

(10) See *The Kuwait Crisis: Basic Documents* 73 (Elihu Lauterpacht et al. eds., 1991).

(11) Noting that this resolution did not mention prosecutions and was issued primarily to liberate Kuwait. See Permanent Rep. of the U.S. to the U.N., Letter dated March 20, 2003, from the Permanent Rep. of the U.S. to the United Nations addressed to the President of the Security Council, 2, U.N. Doc. S/2003/351 (Mar. 21, 2003).

at that time. The U.N. Chapter VII authority in this regard was used in creating the International Criminal Court of the Former Yugoslavia (ICTY) due to the paucity of using such powers in creating international judicial bodies. Second, the process is frustrating to try Saddam and his Ba'ath party at that time considering that Iraqis were in conflict after the liberation of Kuwait.⁽¹²⁾ Moreover, crimes of aggression were not recognized by law at that time for the purposes of prosecuting individuals until the establishment of the International Criminal Court.⁽¹³⁾ Ultimately, the Iraqi Ba'ath Party were being invisible during the post-conflict phase when the conflict was between Sunni and Shai religious groups, on one the hand, and the Kurds conflict, on the other hand. Ultimately, the main goal of the U.N.-U.S. initiative was to liberate Kuwait imminently due to the aggravated attack by the Iraqi forces against Kuwait.

Some scholars contend that were it not for the failure of international criminal justice in the First Gulf War, the 2003 invasion of Iraq by the United States “would never have happened.”⁽¹⁴⁾ Therefore, the paper proposes the establishment of an ad hoc tribunal, by the U.N., to prosecute war crimes committed during the Kuwait war.

Before addressing the above legal issues related to the First Gulf War, it is important to highlight the history of the relations between Iraq and Kuwait and how they culminated in the war. Part II of the paper will provide a brief history of the events leading up to the invasion, and highlighting the motives why Iraq made the unprecedented decision to invade Kuwait. Part III will discuss the legality of the Iraqi Invasion whether the conduct of Iraq, back then, was an act of aggression under International Humanitarian Law. Part IV will illustrate the legitimization of the intervention by both the United States and the United Nations per se. Finally, Part V of the paper will propose and argue the possibility of establishing an ad hoc tribunal to complement the mission

(12) Bassiouni in his Memo to the Judge notes that establishing an International Tribunal would raise an insult to the Iraqi people.

(13) Crimes of Aggression was first regulated by the Security Council Resolution XXIX in 1974 to hold states responsible for such acts. See The Crime of Aggression, Crime of Aggression | Coalition for the International Criminal Court, <http://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression> (last visited Mar 12, 2020).

(14) Paul W. Kahn, Lessons for International Law from the Gulf War, 45 Stan. L. Rev., at 425 (1993).

of achieving peace and security that was started in the Resolution to liberate Kuwait; what I call the Gulf War's Easter-egg.

II. BACKGROUND

A. Brief History of the Iraq- Kuwait Dispute

Following the end of the Iraq-Iran war in 1988, Iraq was left in economic ruin. Given that Iraq's neighbors, including Saudi Arabia and Kuwait, had offered significant financial support to Iraq during its eight-year war with Iran, the end of the war meant that Iraq had huge debts to repay and an economy to rebuild.⁽¹⁵⁾ Worse still, the price of crude oil on the international market followed a downward trend, making it difficult for Iraq to generate sufficient revenues to rebuild its economy and repay its debts.⁽¹⁶⁾ In response to the excess supply of oil in the market, the Organization of Petroleum Exporting Countries (OPEC) set the oil production quota for each member and fixed the price of oil at \$18 per barrel.⁽¹⁷⁾ Iraq accused Kuwait of violating the quota.

Additionally, Iraq alleged that Kuwait was stealing its oil by slant drilling beneath the Rumaila oil field and demanded \$2.5 billion in compensation.⁽¹⁸⁾ Kuwait denied the allegations, refused any negotiations with Iraq maintained its oil production levels and refused to condone any wartime loans extended to Iraq. Iraq interpreted Kuwait's move as a declaration of economic war.

(15) Whether these finances were legal, from an international law perspective: some scholars note that states who offer foreign aid, including financial ones, are jointly responsible if the war was an invasion (a crime of aggression). a bright example for that: the ICJ ruled against the US in the Nicaragua Case where the US assisted the rebel groups. See Johan van der Vyver, *Acts of Aggression and Prosecuting the Crime of Aggression*, LAMBERT Academic Publishing, at 127 (2015). However, this analysis is in conjunction with The Iraq-Iran war; Kuwait, Saudi Arabia, the US, and the UK offered Iraq assistance under the legal characterizations of the share-of-interest and collective self-defense principles. At that time, the Iranian regime attacked a US-Panamanian ship that was "operating for exploring purposes" in the gulf. Moreover, "[t]he Iranians seized several foreign ships during 1980-81, including a ship operating in disputed waters between Iran and Kuwait." S.H.Amin, *The Iran-Iraq war: Legal implications*, Marine Policy Review, Volume 6, Issue 3, July 1982, at 209. <https://www.sciencedirect.com/science/article/pii/0308597X82900239> (last visited Mar. 10, 2020).

(16) *Id.* at 874.

(17) See Nigel John Ashton, *New Perspectives on the Iran-Iraq War* 21 (2012).

(18) *Id.* at 22.

In light of the Iraqi-Iranian dispute, this brought the legacy of colonialism into the fold. The casual manner in which the Gulf area was divided into countries was the source of the territorial dispute between Iraq and Kuwait. While border disputes were not exclusive to the two countries in the region, the Kuwait-Iraq border dispute was unique due to its long history and limited progress in reaching a long-term solution that could satisfy both parties.⁽¹⁹⁾

Consequently, as part of the negotiations, Iraq had demanded that Kuwait should write off the debts and relinquish part of its territories, including Bubiyan Island and the Ratga oil field.⁽²⁰⁾ Gulf region states led by Saudi Arabia tried to resolve the Iraq-Kuwait dispute, but they could not find a solution acceptable to both parties. The final meeting was held in Jeddah, but no progress was made in resolving the dispute.⁽²¹⁾ Therefore, this dispute persuaded the Iraqi Regime to claim that Kuwait is the 19th province of Iraq and it's a part of Iraq territory.

B. Iraq's Invasion and the U.S.-U.N. Response

On August 2, 1990, Iraq invaded Kuwait and annexed its territory. Saddam Hussein, the then-president of Iraq, calls this a response to Kuwait's overproduction of oil and its illegal pumping of oil from Iraq's Rumaila oil field.⁽²²⁾ On the other hand, the U.S. was concerned about Iraq's imperialist ambitions, and there were fears that Saddam could invade Saudi Arabia and assume control of the region's oil supplies. As a result, the U.S. started mobilizing an ad hoc multinational coalition to recapture Kuwait and defeat Saddam's attempt. Shortly after Iraq invaded and annexed Kuwait, the U.N.S.C. passed Resolution 660 by a vote of 14-0.⁽²³⁾ Under this Resolution, the U.N.S.C. instructed Iraq to immediately withdraw its troops from Kuwait.⁽²⁴⁾ Four days later, the U.N.S.C. passed Resolution 661 imposing economic sanctions

(19) See Abbas Alnasrawi, *Economic Consequences of the Iraq-Iran War*, 8 *Third World Q.* 869 (1986).

(20) *Id.* at 23.

(21) Kuwait accuses Iraq of invasion, UPI, <https://www.upi.com/Archives/1990/08/01/Kuwait-accuses-Iraq-of-invasion/4024649483200/> (last visited Mar 25, 2019).

(22) See Peter Sluglett & Marion Farouk-Sluglett, *The Times Guide to the Middle East: The Arab World and Its Neighbours* 99-107 (1996).

(23) See S.C. Res. 660 (Aug. 2, 1990).

(24) *Id.*

on Iraq⁽²⁵⁾. Following the sanctions, Iraq put forward its first proposal to end the impasse.⁽²⁶⁾ However, Iraq's efforts did not receive diplomatic support. Meanwhile, in Kuwait, Saddam's forces destroyed property, arrested, tortured, and executed Kuwaitis while looting the country's assets. While U.S. military commanders were making war plans, the U.N. passed Resolution 678 authorizing U.N. member countries to take all the necessary steps if Iraq failed to withdraw its forces by January 15, 1991.⁽²⁷⁾ Last-minute diplomatic efforts continued, but neither Iraq nor the U.N. Security Council was willing to cede ground.⁽²⁸⁾ As a response, US-led coalition forces started assembling in Saudi Arabia. On 12 January 1991, the U.S. Congress authorized armed intervention against Iraq. A Soviet-Iraqi peace plan was hastily developed that allowed the gradual withdrawal of Iraqi troops from Kuwait and gave Iraq until 22 February 1991 to withdraw its troops.⁽²⁹⁾ However, since the peace plan did not comply with U.N. resolutions, President George H. W. Bush rejected it. Immediately thereafter, hostilities started. Within four days of fighting, the U.S.-led coalition forces, comprising mainly of air force units and supported by the U.S. Navy, had destroyed Iraqi defenses and defeated Saddam's forces in an operation that came to be known as "Desert Storm." Following the defeat of Iraqi forces by the airstrikes, Saddam Hussein declared that Iraq would comply with the U.N.S.C. Resolution 660, including withdrawing Iraqi troops from Kuwait.⁽³⁰⁾ However, U.S.-led coalition forces started the ground war and by 26 February 1991, coalition troops had captured Kuwait City.⁽³¹⁾ A day earlier, Iraqi troops had started withdrawing, but were killed on the "highway of death".⁽³²⁾ Ultimately, on 27 February 1991, Saddam Hussein yielded and the US-led coalition declared a unilateral ceasefire.⁽³³⁾ Top Iraqi military officers and the coalition forces met to deli-

(25) See S.C. Res. 661 (Aug. 6, 1990).

(26) See William R Polk, *Understanding Iraq: A Whistlestop Tour from Ancient Babylon to Occupied Baghdad* 148 (2005).

(27) See S.C. Res. 678 (Nov. 29, 1990).

(28) See Polk, *supra* note 26, at 149.

(29) See *id.* at 152.

(30) *Id.* at 153.

(31) *Id.*

(32) See Ramsey Clark, *War Crimes: A Report on U.S. War Crimes Against Iraq* 20 (1992).

(33) See Polk, *supra* note 26, at 152.

berate on the terms for a formal ceasefire to end the war. On 2 March 1991, Iraq agreed to comply with all the U.N.S.C. resolutions.⁽³⁴⁾ The human cost of the war on the part of the Iraqi military is estimated to be in excess of US \$120 billion.⁽³⁵⁾ In addition, more than 20,000 Iraqi and Kuwaiti civilians lost their lives, while the coalition forces lost approximately 342 soldiers.⁽³⁶⁾ Other than the loss of lives, the war also caused significant damage to infrastructure in the Gulf region's environment.⁽³⁷⁾ It is worth noting that the war did not end with the ceasefire of the 28 February 1991. A few days after the ceasefire, internal rebellions by the Shia Arabs and Kurds started against Saddam's regime in Iraq.⁽³⁸⁾ The Iraqi military crushed the rebellion resulting in thousands of civilian casualties and millions of refugees fleeing the country.⁽³⁹⁾

III. THE LEGALITY OF THE IRAQI INVASION/ACT OF AGGRESSION

Iraq's invasion and the ensuing annexation of Kuwait was evidently a violation of Article 2(4) of the U.N. Charter. While there are some cases since 1945 where a country annexed a territory through the successful use of force, for example, Israel's annexation of East Jerusalem and the Golan Heights, the annexation of Goa by India, the annexation of East Timor by Indonesia, and annexation of Afghanistan, Crimea and the City of Sevastopol in Ukraine, and South Ossetia and Abkhazia in Georgia by Russian Federation⁽⁴⁰⁾, these actions were largely condemned by the international community and there was no doubt that modern international law does not allow acquisition of territory through force.⁽⁴¹⁾

(34) Id. at 153.

(35) Id. at 154.

(36) Id.

(37) See William M Arkin et al., *On Impact: Modern Warfare and the Environment: a Case Study of the Gulf War 15* (1991).

(38) See Polk, *supra* note 26, at 20.

(39) See Arkin et al., *supra* note 37, at 17.

(40) See van der Vyver, *supra* note 12, at 128.

(41) See S.C. Res. 389 (Apr. 22, 1976). See also Mrachek, Alexis, *Beware of Russia's Creeping Annexation of Georgia*, The Center for the National Interest, 4 Sept. 2018, <https://nationalinterest.org/blog/buzz/beware-russia%E2%80%99s-%E2%80%9Ccreeping-annexation%E2%80%9D-georgia-30227>, (last visited Mar. 7, 2020).

One of the unique features of the Iraqi invasion is that the Iraqi government attempted to advance a legal justification for its invasion. The Iraqi government, through its London embassy, released a memorandum explaining the reasons for its invasion.⁽⁴²⁾ Some of the key points in the memorandum lacked a legal basis, including the continuous border-dispute between the two countries and the over crude oil prices. Even if these arguments were valid, they could not provide any justification for Iraq to invade the entire state of Kuwait. Nonetheless, there are two arguments that warrant closer analysis.

At the start of the invasion, Iraq argued in the memo that it had intervened at the request of some factions within Kuwait who subsequently created the “Provisional Government of Free Kuwait.” In so doing, Saddam Hussein wanted to equate the situation where the invasion of Kuwait occurred to a situation of the U.S. where intervention by the latter happened in Panama in 1989. Therefore, Iraq’s argument was that the invasion was by invitation. However, this argument lacks legitimacy in international law. Under international law, no country has a right to intervene by force in another country regardless of how authoritarian the government in the other country may be or how attractive the democratic qualities of those installed in its place. It is worth noting that in 1989, the US justified its intervention in Panama on the same ground, which was illegal.

Even if the US invasion of Panama had been legal, the cases of Kuwait and Panama were very different. In the case of Panama, the Panamanian Opposition that requested the US to intervene had won in the country’s elections with a clear victory six months prior to U.S. action. Besides, the opposition continued to enjoy widespread support before and after the U.S. intervention. On the other hand, the pro-Iraqi regime that Saddam Hussein installed in Kuwait was made up of individuals who were unknown to the Kuwaitis, and most of them appeared to have been Iraqi army personnel.⁽⁴³⁾ The “Provisional Government of Free Kuwait” was merely a puppet regime that did not enjoy any support from the people of Kuwait.

(42) See The Kuwait Crisis, *supra* note 10, at 73.

(43) *Id.*

However, the invasion by invitation argument was short-lived. Soon, Saddam Hussein abandoned the idea of the “Provisional Government of Free Kuwait” and instead opted for outright annexation of Kuwait. Specifically, the “Provisional Government of Free Kuwait” made a formal request for the “reunification of Iraq and Kuwait.” In the few days that the “Provisional Government of Free Kuwait” existed, it did not manage to create any form of authority independent of the Iraqi army.⁽⁴⁴⁾

The Iraqi government also tried to justify its annexation of Kuwait on grounds that historically, Kuwait was a territory of Iraq and that the existence of Kuwait as a state was stemmed from the British colonization.⁽⁴⁵⁾ The above argument was not new. Successive Iraqi regimes had attempted to advance similar claims over the years, particularly in 1961 when Kuwait gained its independence from the British. The foundation of this claim is that Kuwait was originally part of the Ottoman Empire, an extension of the wilayah of Basra, one of the three Ottoman provinces that later created the state of Iraq. It was subsequently claimed that the British separated Kuwait from Basra in a secret agreement with the Sheikh of Kuwait in 1899. Subsequently, during the First World War, the British recognized Kuwait as a separate state.⁽⁴⁶⁾

The above argument is weak both on historical and international law grounds. From a historical standpoint, Kuwait’s independence from the Ottoman Empire was recognized by the British in 1914. Similarly, in the 1923 Treaty of Lausanne, Turkey renounced any claims over territory it might still have possessed. Besides, Iraq itself did not exist as a single entity before it was carved out of the Ottoman Empire at the end of World War I. By this time, Kuwait was already recognized as a distinct territory and was governed as such. Kuwait’s distinct existence was first acknowledged by the British Mandate Authorities stationed in Iraq and subsequently in 1932 by the Iraqi Premier when Iraq attained its full independence. The 1932 exchange of letters also contained an acknowledgment by Iraq that it recognized the existing border between Iraq and Kuwait.⁽⁴⁷⁾

(44) See Majid Khadduri & Edmund Ghareeb, *War in the Gulf, 1990-91: The Iraq-Kuwait Conflict and Its Implications* 100 (2001).

(45) See *The Kuwait Crisis*, supra note 10, at 75.

(46) Id. at 9.

(47) Id. at 49.

From an international law perspective, Iraq's claim over Kuwait has been rejected regardless of the historical position. When the status of Kuwait as a British protectorate was terminated in 1961, the international community formally recognized Kuwait as an independent state. Kuwait was subsequently admitted to the Arab League and the United Nations. Therefore, its claim to exist as an independent state free from Iraq was therefore confirmed beyond a reasonable doubt. In 1963, Iraq itself acknowledged and accepted Kuwait's independence. In the same year, the two governments of Kuwait and Iraq signed an agreement, which provided that, "the republic of Iraq recognized the independence and complete sovereignty of the state of Kuwait with its boundaries as specified in the letter of Prime Minister of Iraq (in 1932)."⁽⁴⁸⁾

Under Saddam Hussein, Iraq contested the validity of the above agreement, arguing that the manner in which it was signed violated the Iraqi constitution. However, even if the 1963 agreement violated the constitution that was then in force, that fact alone could not make it invalid. According to international law, a country can only invoke a violation of its own domestic law as invalidating its consent to be bound by a particular treaty, if the violation was obvious to any country conducting itself in accordance with normal practice and good faith and if it concerned a rule of the domestic law of significant importance.⁽⁴⁹⁾ Even when the above is true, a country cannot rely on such a violation if, after being aware of the facts, its conduct indicated assent to the validity of the treaty.⁽⁵⁰⁾ Therefore, the argument put forward by Iraq for its invasion and annexation of Kuwait falls short on both counts. It is no surprise, therefore, that Iraq's claims to sovereignty over Kuwait have largely been dismissed as nothing but frivolous.⁽⁵¹⁾

The last argument put forward by Iraq to justify its invasion is that all boundaries in the Arab league should be viewed as essentially temporary and artificial demarcations within one Arab nation.⁽⁵²⁾

(48) Id. at 56.

(49) See U.N. Vienna Convention on the Law of Treaties, May 23, 1969, arts. 45 and 46, 1155 U.N.T.S. 331, 343.

(50) Id.

(51) See R. V. Pillai & Mahendra Kumar, *The Political and Legal Status of Kuwait*, 11 *Int'l & Comp. L. Q.* 108 (1962).

(52) See *The Kuwait Crisis*, *supra* note 10, at 109.

Such an argument may find support among many Arabs. However, to conclude that a single Arab state powerful enough can eliminate one of those artificial boundaries by force is another issue altogether. Such a conclusion can hardly be supported even by those Arab governments that were sympathetic to Iraq and Saddam Hussein. From an international law point of view, such a conclusion has no legal basis and merit. The preamble to the Arab League agreement clearly stipulates that whereas founders of the League (Iraq being one of the founding members) were eager to strengthen the close relations and various ties that bind the Arab states, they were committed to achieving these objectives based on respect for sovereignty and independence of the founding member states.⁽⁵³⁾

Based on the preceding discussion, Iraq's invasion and annexation of Kuwait violated international criminal law (A crime of aggression)⁽⁵⁴⁾, and a challenge to article two of the UN charter that prohibits the aggressive use of force. The violation was so extreme and deliberate. Unlike past cases where a state had invaded the other, in the Iraq case, there was no provocation or menace from Kuwait. Besides, Iraq made no real efforts to justify its invasion in terms of contemporary international law. Iraq's claims that Kuwait should have accepted what it termed as "legitimate demands" by relinquishing part of its territory and subordinating its authority to Iraq could only be accepted when international law was at its nascent stage. As Professor Schachter argued in 1989, "the naked use of force for economic gain, or to avenge past injustices, or civilize 'inferior' people, or vindicate the honor, or achieve 'manifest destiny' is no longer asserted as national policy. Seen in the perspective of history, this is a profound change in the relations of states."⁽⁵⁵⁾ Therefore, the annexation of Kuwait by Iraq ignored this progress. Iraq's actions were not only illegal but posed a significant threat to the international legal order.

(53) See Robert W Macdonald, *The League of Arab States: A Study in Dynamics of Regional Organization* 42 (2015).

(54) G.A. Res. 3314 (XXIX) of 14 Dec. 1974. Available at <http://hrlibrary.umn.edu/instree/GAres3314.html>.

(55) See Oscar Schachter, *Self-Defense and the Rule of Law*, 83 Am. J. Int'l L. 257, 259 (1989).

IV. THE LEGITIMIZATION OF THE COLLECTIVE SELF-DEFENSE BY THE U.S. AND THE U.N. RESPONSE

The U.S. intervention and the U.N. response to the intervention were remarkable.⁽⁵⁶⁾ Within days following the Iraqi invasion, the U.N. Security Council imposed the most comprehensive sanctions in U.N. history. Simultaneously, the U.S.-led coalition comprising of forces from more than 20 countries was deployed to the region and ultimately used to counter-attack the Iraqi forces. The above-mentioned responses raise several legal questions of their own. Therefore, it is important to examine the legality of these interventions.

A. United Nations Interventions

The economic sanctions imposed on Iraq by the United Nations were certainly a collective action. U.N.S.C. Resolution 661 enforcement measures were imposed under Article 41 of the U.N. Charter.⁽⁵⁷⁾ Therefore, the resolution was binding on all U.N.-member countries. As a response, more than 100 countries took various measures to implement the Resolution. Even some non-member states of the U.N., such as Switzerland, imposed sanctions on Iraq based on the terms of Resolution 661.

At the start, the legality of enforcement of the sanctions was put to question. Specifically, shortly after the passage of Resolution 661, the US and Britain communicated that their warships patrolling the region

(56) The law of armed conflict imposes two prerequisite conditions regarding collective self-defense principle (lawful use of force): 1) if an attack by State A on State B is occurring or about to occur in which it is “instant, overwhelming, and leaving no choice of means, and no moment for deliberation,” the re-attack by state B is necessary (Caroline Test), See Anthony Clark Arend, International law and the preemptive use of military force, *The Washington Quarterly*, vol. 26, no. 2, at 90 (2003), <https://www.tandfonline.com/doi/citedby/10.1162/01636600360569711?scroll=top&needAccess=true>. (last visited Mar. 10, 2020); 2) The re-attack by State B should be proportionate meaning “an eye for an eye,” and does not exceed the legal use of force under international humanitarian law. See Gardam Judith Gail, Proportionality and Force in International Law, *The American Journal of International Law*, vol. 87, no. 3, 1993, pp 391,392-394. JSTOR, www.jstor.org/stable/2203645 (last visited Mar. 10, 2020). Thus, the Operation Desert Storm attack on Iraqi forces in the Gulf War I fulfilled these conditions.

(57) See *The Kuwait Crisis*, *supra* note 10, at 88-98.

would intercept any vessel they suspected of violating the U.N. sanctions. Specifically, the US issued a notice indicating that ships found to be carrying goods banned by Resolution 661 would be stopped from proceeding and warned that any ship that failed to comply with directions would attract the use of the minimum level of force required to ensure compliance.⁽⁵⁸⁾ While the legal basis given for the naval operation was collective self-defense, it could have easily been interpreted to mean that the countries concerned had assumed a policing role on behalf of the international community. However, the uncertainty related to the legal status of the naval operation was eliminated when the U.N. Security Council passed Resolution 665 on 25 August 1990. According to this Resolution, U.N.-member countries cooperating with Kuwait in the deployment of maritime forces were required to use measures proportionate to specific circumstances in stopping incoming or outgoing ships for inspection and verification of their cargos and destinations.⁽⁵⁹⁾ The objective was to ensure strict compliance with the provisions of Resolution 661 related to such shipping. Although the phrase “minimum force” was replaced with “such measures commensurate to the specific circumstances,” the latter was interpreted to mean that the use of force had been authorized where a vessel refused to stop despite being ordered to do so. Resolution 665 effectively brought the maritime operation of intercepting ships under the control of the U.N. Security Council. It also made it clear that the warships involved in the operation were part of the collective enforcement action against Iraq.

In subsequent U.N. Resolutions, the U.N. tightened its sanctions against the Iraqi regime. In particular, Resolution 666 clarified that it was the exclusive mandate of the U.N. Security Council and its sanctions committee to determine whether humanitarian circumstances existed that justified the shipping of food to Iraq.⁽⁶⁰⁾ Therefore, no single state could make this decision on its own. The Resolution further emphasized that the sanctions imposed by the U.N. were enforcement measures that were directly under the control of the U.N. Security Council. Furthermore, through Resolution 670, the U.N. expanded the measures that member states were required to undertake by mandating

(58) Id. at 248.

(59) See S.C. Res. 665 (Aug. 25, 1990).

(60) See S.C. Res. 666 (Sep. 13, 1990).

them to prevent any plane bound for Kuwait or Iraq from overflying their airspace.⁽⁶¹⁾ Therefore, by ensuring that all sanctions were under its control, the United Nations ensured that it was implemented in full compliance with international law.

B. U.S.-U.N. Led Intervention

The question that this section seeks to address is whether the U.S. military response to Iraq was justifiable under international law and if yes, on what grounds. On the one hand, the initial deployment of military forces to Saudi Arabia and selected Gulf countries (Operation Desert Shield) raise no legal issues since the original objective of these forces was to stop Iraq from invading Saudi Arabia. The legal basis for the original deployment of the forces rests on the invitation by the governments of the concerned states. Had Saddam Hussein attacked Saudi Arabia or another Gulf state, the right to collective self-defense under Article 51 of the U.N. Charter would have offered a clear legal justification for the use of those forces in responding to the attack.

On the other hand, the legality of the use of armed intervention to force Iraq out of Kuwait (Operation Desert Storm) is less clear. Both the US and British governments insisted that the right of collective defense under Article 51 of the U.N. Charter offered a sufficient legal basis and that there was no legal requirement for them to seek authority from the U.N. Security Council before embarking on Operation Desert Storm to free Kuwait from Iraq's invasion. Under Article 51 of the U.N. Charter, "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."⁽⁶²⁾ The basic requirements stipulated under Article 51 were met. Iraq's decision to invade and annex Kuwait was expressly an armed attack against a U.N. member state. Furthermore, the armed attack continued even after Iraq secured control of Kuwait since Saddam used his army to maintain control over Kuwait's territory. Moreover, it is evident that the Kuwaiti government had expressly requested military assistance, in U.N. General Assembly right after the invasion.

(61) See S.C. Res. 670 (Sep. 25, 1990).

(62) See U.N. Charter art. 51, ¶ 1.

The legal challenges arise from the fact that, under Article 51, the right to self-defense exists only, “until the Security Council has taken measures necessary to maintain international peace and security.”⁽⁶³⁾ Critics of the U.S.-British view argue that the right of collective self-defense ended when the Security Council adopted Resolution 661 that imposed economic sanctions on Iraq and the succeeding resolutions. Therefore, any military action to free Kuwait could no longer be based on the right of collective self-defense, but rather required express and specific authorization from the U.N. Security Council.

Two important reasons can be used to reject the above argument. First, Article 51 does not state that the right of self-defense ends as soon as the U.N. Security Council is seized of a dispute or even when the Council implements measures under Chapter XI of the Charter.⁽⁶⁴⁾ The right to self-defense by any U.N. member country exists until the U.N.S.C. “has taken measures necessary to maintain international peace and security.”⁽⁶⁵⁾ The aforementioned provision was intended to mean that once the U.N. Security Council implemented military measures, a country’s right to employ force in self-defense becomes subsumed in the Council’s broader operations. Whether economic sanctions can generate the same effect so that a country no longer needs to use military force in its self-defense depends on whether the imposed sanctions are adequately effective. To argue otherwise would imply that the activities of Kuwaiti resistance against Iraqi occupation forces could not be justified as self-defense once the initial economic sanctions under Resolution 661 were imposed by the Council.

Second, in drafting Resolution 661, the U.N.S.C. had anticipated this problem by incorporating in the preface to the resolution a paragraph “affirming the inherent right of individual or collective defense, in response to the armed attack by Iraq and Kuwait, in accordance with Article 51 of the Charter.”⁽⁶⁶⁾ This affirmation indicates that measures adopted in Resolution 661 were not meant to replace the exercise of individual self-defense by Kuwait or of collective self-defense if Kuwait made a request for assistance. Therefore, the coalition forces acted law-

(63) Id.

(64) See U.N. Charter arts. 73 and 74.

(65) See U.N. Charter art. 51, ¶ 1.

(66) See S.C. Res. 661 (Aug. 6, 1990).

fully when they countered Saddam's forces and liberated Kuwait without the authorization of the U.N.S.C. Besides, the U.N.S.C. through Resolution 678 endorsed the use of force.⁽⁶⁷⁾ Once more, the resolution demanded that Iraq should comply with all the previous U.N.S.C. resolutions on Kuwait. Subsequently, at paragraph 2, the Resolution authorized "member states cooperating 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."⁽⁶⁸⁾

While the above citation does not mention the use of force, the phrase "all necessary means" was meant to refer to force. Indeed, Resolution 678 has to be read in the context of earlier U.N.S.C. resolutions on Kuwait. Viewed from that background, it is evident that by "all necessary means," the Security Council meant the use of force, given that the U.N.S.C. had already imposed comprehensive economic sanctions on Iraq.

Besides, the text of U.N.S.C. Resolution 678 cannot be properly understood without reference to the debates that preceded this resolution. In particular, the records of the U.N.S.C. debates that preceded the adoption of Resolution 678 suggest that none of the countries that took part in those debates doubted that the resolution endorsed military action.⁽⁶⁹⁾ Military intervention was emphasized repeatedly throughout the debate by countries that sponsored the Resolution, including the US, Canada, Britain, the Soviet Union, Romania, and France, and other U.N.S.C. members, including those who were against its adoption.⁽⁷⁰⁾ Considering the above circumstances, while Resolution 678 did not require the application of military force, it gave express authority for military action against Iraq if the latter failed to comply with the relevant resolutions by 15 January 1991.

(67) See S.C. Res 678 (Nov. 29, 1990).

(68) *Id.* ¶ 2.

(69) See Burns H. Weston, Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy, 83 *Am. J. Int'l L.* 516-535 (1991).

(70) See The Kuwait Crisis, *supra* note 10, at 159.

Having determined that the U.N.S.C. gave authority for the use of military force under Resolutions 678, it is important to examine the authorization on a legal basis. The introduction to Resolution 678 indicates that the U.N.S.C. was acting under Chapter VII of the U.N. Charter. Chapter VII of the U.N. Charter is quite broad. In addition to the provisions on collective measures of the UN (stipulated in Articles 41 and 42), the Chapter also includes provisions related to self-defense (Article 51).⁽⁷¹⁾ Therefore, it is important to examine whether the U.N.S.C. was authorizing countries to take collective measures against Iraq on behalf of the U.N. or whether it was simply giving its blessings to the military action which was based on the right to self-defense as a legal justification.

Under Article 42 of the U.N. Charter, the U.N.S.C. has the powers to take military measures to restore international security and peace, if in its consideration economic sanctions “would be inadequate or have proved to be inadequate.”⁽⁷²⁾ Therefore, under the Charter, the U.N.S.C. is not required to wait and test the effectiveness of economic measures before it can employ military action. Instead, if the U.N.S.C. considers that the economic sanctions will be inadequate, the Council can directly opt for military action. For example, in the case of Kuwait, despite economic measures (embargoes) having been applied by the Council, the Kuwaiti population was still being harmed by the Iraqi forces, and therefore, a military operation was feasible within a reasonable time. To this effect, Article 43 provides that the United Nations should negotiate agreements with member countries to make their armed forces available to the U.N.⁽⁷³⁾ While no such agreements were made prior to the military action against Iraq, Article 42 was still in force. Without Article 43 agreements, the U.N.S.C. cannot require member countries to contribute their forces to military action. Nonetheless, this does not stop the Council from authorizing such action and using forces that have been voluntarily contributed by the member countries.

Neither does Article 42 specifically require that the operations of such forces be directly under the control of the United Nations itself. In

(71) See U.N. Charter ch. VII.

(72) See U.N. Charter art. 42.

(73) See U.N. Charter art. 43.

practice, the United Nations lacks the machinery for controlling a military operation of a significant scale such as Operation Desert Storm.⁽⁷⁴⁾ In such circumstances, there is no reason grounded in law that stops the U.N. from giving its legal authority to a group of countries and allow those countries to set up a command structure amongst themselves. Several factors appear to suggest that Resolution 678 was considered to be the authorization for collective military action as opposed to a green light for self-defense action. The second paragraph of the resolution authorized countries cooperating with Kuwait to ensure that Iraq complied with all U.N.S.C. resolutions and “restore international peace and security in the area.”⁽⁷⁵⁾ The direct reference to peace and security recalls Article 42 and may be interpreted as going beyond the limits of the doctrine of self-defense. Furthermore, the U.N.S.C. debates indicate a general assumption that the Council was implementing a collective action as opposed to endorsing self-defense action.

By characterizing the military measures against Iraq, as enforcement action as opposed to collective self-defense, raises important legal implications. It implies that the limits on the action are determined not by what is necessary to liberate Kuwait from Iraqi occupation, but by what is necessary to restore international security and peace in the area. However, even if the military operation were premised on the right of self-defense, that would require coalition forces to confine their military action (ground or air forces) to Kuwait, the allied forces would still have the right to employ their military power to push Iraq out of Kuwait and protect Kuwaiti security forces from further Iraqi attacks. Therefore, military action in Iraq was legitimate and would certainly have proved to be necessary. However, if Kuwait could be retaken by the coalition forces and secured, but Iraq continued its aggression, threatening the stability of the entire Gulf region, the restoration of international peace and security may have necessitated measures that went beyond the defense of Kuwait. The U.N.S.C. has the power to implement such measures, and the authority to restore international peace and security given under Resolution 678 flows directly from that power.

(74) See John Hillen, *Blue Helmets: The Strategy of UN Military Operations* (2000).

(75) See S.C. Res. 678, ¶ 2 (Nov. 29, 1990).

Additionally, if the action of the allied forces is viewed as enforcement action instead of self-defense, the ensuing conflict is not between Iraq and the countries that contributed to the allied forces, but rather between Iraq and the U.N. Therefore, the Geneva Conventions related to armed conflict, including the law of neutrality, can still be applied.⁽⁷⁶⁾ However, the law of neutrality cannot be applied in the usual way. Although a country may opt not to be involved in the war and is therefore under no obligation to contribute its forces to the coalition forces, it cannot invoke the law of neutrality to justify actions that would undermine the U.N.S.C. resolutions, which are legally binding on all member states. The responsibilities of the U.N. and its officials are also affected since the U.N. cannot serve as an impartial arbiter in the dispute. The conflict that ensued following Iraq's invasion of Kuwait was not a dispute between countries, but one of action by the international community as a whole against Kuwait, which the U.N.S.C. had identified as the lawbreaker. While this does not prevent the U.N. Secretary-General from trying to attain a diplomatic settlement, any such efforts have to be done in the context of the U.N.'s involvement in the conflict.

From the foregoing discussion, it is clear that the U.S. intervention in the Kuwait crisis was legal. The actions of the U.N.S.C. through Resolution 678 gave the United States and the allied forces the legal mandate to restore international peace and security in the Gulf region, which is the opposite situation of the second Gulf War.⁽⁷⁷⁾ Therefore,

(76) Hans-Peter Gasser, International Humanitarian Law and the Protection of War Victims, Int'l Committee of the Red Cross (Nov. 30, 1998), <https://www.icrc.org/en/doc/resources/documents/misc/57jm93.htm>.

(77) The Second Gulf War is the humanitarian intervention in Iraq by the United States to topple the government of Iraq, particularly, Saddam Hussein; in response to, what the U.S. alleged, using nuclear weapon by Saddam. For a thorough explanation see House., Authorization for use of military force against Iraq: markup before the Committee on International Relations, House of Representatives, One Hundred Seventh Congress, second session on H.J. Res. 114, October 2 and October 3, 2002; Authorization for use of military force against Iraq: markup before the Committee on International Relations, House of Representatives, One Hundred Seventh Congress, second session on H.J. Res. 114, October 2 and October 3, 2002 (2002).

the entire military operation against Iraq by the allied forces enjoyed the full blessings of the U.N.S.C., and is, therefore, legal under international law.

V: ESTABLISHING AN AD HOC TRIBUNAL TO PROSECUTE EZZAT ALDOURY AND HIS SUBORDINATES FOR COMMITTED WAR CRIMES AND CRIMES AGAINST HUMANITY

“In a perverse way, Saddam’s regime will escape responsibility for aggression against its two neighboring states and the resulting casualties suffered by his people because, after World War II, the major powers did not declare an aggression international crime.”⁽⁷⁸⁾

Before, during, and after the First Gulf War, Saddam Hussein and the Ba'ath Party had committed many crimes against humanity, war crimes (including taking hostage of U.S. citizens and using them as human shields during the war, genocide, rape, torture, and murder of Kuwaiti civilians), and crimes of aggression.⁽⁷⁹⁾ Given the importance of transitional justice to the people of Kuwait and the international community as a whole, the main goal of establishing an ad hoc tribunal would be to prosecute military officers and civilian leaders in the Ba'ath Regime for violations of international humanitarian law and domestic criminal laws. Retributive justice in the above cases is necessary to reinforce future deterrence and prevention. However, for the tribunal to deliver on its goals, it must command legitimacy and credibility in the eyes of the Iraqi people and the international community in general. In addition, its proceedings have to be conducted fairly and effectively. Therefore, the purpose of this part of the essay is to propose the setting up of an ad hoc tribunal by the United Nations that is legitimate, credible, and whose operations are both fair and effective.

An interesting point to mention, before arguing the possibility of establishing an ad hoc Tribunal, is that the Security Council undertook

(78) Bassiouni, M. Cherif, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, Cornell J. Int'l L., vol. 38, Iss. 2, Article 1., at 333 (2005). See also *The Crimes of Aggression*, supra note 12.

Available at: <http://scholarship.law.cornell.edu/cilj/vol38/iss2/1> (last visited Mar. 12, 2020).

(79) See Harry M. Rhea, *An International Criminal Tribunal for Iraq After the First Gulf War*, 19 Int'l Crim. Just. Rev. 308 (2009).

many endeavors to help restore the situation in Kuwait following the conflict. The Security Council issued resolution 686, 687 in 1991; 833 in 1993; 1284 in 1999, and 2107 in 2013 to urge the post-government of Iraq to look for the Kuwaiti nationals and third-party countries' nationals who went missing during the war. The resolutions were a crucial move by the U.N. as it was addressing the two governments and the International Committee of the Red Cross (ICRC) to cooperate in this mission. However, Resolution 2107 in 2013 established the United Nations Assistance Mission for Iraq (UNAMI) to implement the Resolution to find the missing people. The resolution welcomed:

the ongoing cooperation between Iraq and Kuwait in the search for missing Kuwaiti and third-country nationals within the framework of the Tripartite Commission and its Technical Subcommittee under the auspices of the International Committee of the Red Cross (ICRC), and the positive efforts by the Government of Iraq regarding the return of all Kuwaiti and third-country nationals or their remains, and the return of Kuwaiti property.⁽⁸⁰⁾

This resolution was followed by a recent statement by the President of the Security Council in which the President expressed the Council's regrets about the 369 missing Kuwaitis and third-country nationals, stating:

The Security Council notes with regret that there remains [sic] 369 cases of missing Kuwaiti and third-country nationals still unresolved and that no human remains have been exhumed since 2004. The Council reiterates its deepest sympathy to the families of the missing and expresses its condolences for the lives lost. The Security Council welcomes the sustained commitment of the Government of Iraq to return all remaining Kuwaiti property including the national archives and acknowledges the important steps taken recently by the Governments of Iraq and Kuwait to reinvigorate this file and welcomes, in particular, the handing over of a consignment of Kuwaiti property by His Excellency Dr. Barham Saleh, President of the Republic of Iraq, during his recent visit to Kuwait on 11 November 2018 to meet His Highness Sheikh Sabah Al-Ahmad Al-Jaber Al-Sabah, the Amir of the State of Kuwait. The Security Council encourages the Iraqi government to continue its

(80) See S.C. Res. 2107 (June 27, 2013).

search for the missing property, in particular, to reinvigorate its search for the missing Kuwaiti national archives.⁽⁸¹⁾

His statement is an official response to Kuwait, vicariously, that all those people have lost their lives in Iraq. However, the statement is not sufficient to amount to such an announcement. This statement would change the status of the people from missing to killed, and it has reflection and another dimension under International Humanitarian Law.

Those people were prisoners of war (POWs) under the norms of the law of armed conflict, and it puts the U.N. under an obligation to carry out its mandate to achieve peace and security.⁽⁸²⁾ The mission of keeping peace and security does not end at the point of liberating the country from the aggressor, from an international law perspective, particularly from the field of transitional justice. A follow up to indict and prosecute those perpetrators of war crimes and crimes against humanity, during the gulf war, is an obligation under the U.N. legal framework, which it can be interpreted from peace-keeping and security achievement mandates, and is parallel to situations that have been dealt with before such as the situations in Yugoslavia and Rwanda. Therefore, I will be defending the proposition to create an ad hoc tribunal to prosecute those perpetrators for

the aforementioned crimes in tandem with a Security Council mandate.⁽⁸³⁾ Moreover, the reason I propose an ad hoc Tribunal is based on the U.N.'s justifications; the U.N. has legitimate reasons to create ad hoc tribunals in conformity with the consent of the states for the following reasons. "The Security Council has the power to create 'subsidiary organs' under Article 29 of the U.N. Charter; there should be no obstacles preventing creating the judicial system as of the U.N. already

(81) See U.N. President of the S.C., Statement by the President of the Security Council dated Feb. 19, 2019, U.N. Doc. S/PRST/2019/1 (Feb.19, 2019).

(82) See Gasser, *supra* note 76.

(83) Ad Hoc Tribunals are the courts that have been established by either a Security Council resolution or by a treaty which has the consent of its parties and the United Nation called Treaty Based Courts such as the International Criminal Tribunal of Yugoslavia, and the International Criminal Court of Rwanda. For more details, see Stojanka Mirceva, Why the International Criminal Court is Different, *Global Pol'y F.* (Jan. 26, 2004), <https://www.globalpolicy.org/component/content/article/164/28450.html>.

had established administrative organs; the Security Council has an Obligation to deal with threats to international peace and security under Article 41 of the U.N. Charter.”⁽⁸⁴⁾ Ultimately, An ad hoc Tribunal, “if it’s implemented properly, it will be a powerful mechanism and a secure solution for preventing conflicts between the majority and minority of the state.”⁽⁸⁵⁾

A. Establishment

1. Overview

The necessity of creating an ad hoc tribunal to prosecute international criminals lays out on laws and customs of international order, and in cases where transitional justice initiatives such as criminal prosecutions mechanisms played a significant role in societies of post-war states.

The U.N. Security Council, through a resolution, has the power to establish an ad hoc criminal tribunal for Iraq under Chapter VII, Article 41.⁽⁸⁶⁾ The U.N.S.C. used the legal basis provided under Article 41 to create the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as the Special Court of Sierra Leone (SCSL), and the Special Court of Lebanon (Hybrid Tribunals).⁽⁸⁷⁾ The same provisions can be applied in the Iraq case. Once established, the criminal tribunal for Iraq should be given the authority to prosecute and judge Iraqi Ba’athists for crimes against humanity, war crimes, crimes of aggression, and other crimes under international law and the laws of Iraq. The tribunal’s authority would extend to the above crimes even if they were committed outside Iraqi territory (for example in Kuwait and Iran).

Before proceeding with the process of establishing an ad hoc tribunal, it is beneficial to highlight some legal challenges prior to the establishment of such court. While these challenges may or may not affect this mechanism, they can be insightful.

(84) Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia (Cesare P. R. Romano et al. eds., 2004).

(85) Id.

(86) See U.N. Charter art. 41.

(87) See UN Documentation: International Law, United Nations, <https://research.un.org/en/docs/law/courts> (last visited Mar. 24, 2019).

These issues are depicted on inquests such as: will this gap affect the legality of prosecuting Ba'athists who have committed international crimes during the Gulf War; will the ad hoc tribunal be able to spot Ba'athists after such time; and did the Iraqi Criminal Tribunal of Saddam Hussein and other Ba'athists addressed the crimes that resulted in the death of Kuwait's captives? All of these problematic, yet, configurable challenges will be discussed subsequently.

2. National v. International Prosecutions, and Statute of Limitations

The current literature argues that trying existing Ba'athists who have committed international crimes during the Gulf War I, which resulted in the death of Kuwait's captives after thirty years of the Gulf war, is unlikely to happen.⁽⁸⁸⁾ This claim rests on the ground that Saddam Hussain and other Ba'athists have earlier on been tried before the Iraqi High Criminal Court (IHCC).⁽⁸⁹⁾ This claim is backed up by Article 1/ Second of the IHCC Statute, which reads:

...[t]he Court shall have jurisdiction over every natural person whether Iraqi or non-Iraqi resident of Iraq and accused of one of the crimes listed in Articles 11 to 14 below, committed during the period from July 17, 1968 and until May 1, 2003, in the Republic of Iraq or elsewhere...⁽⁹⁰⁾

These claims are refutable on many legal grounds, indeed. The trials of Saddam Hussain and his other six co-defendants proved nothing but the opposite. These trials practically were targeting War crimes, the coupe against the Iraqi Government to topple Ahmed Hassan Al-Bakr (former Iraqi President succeeded by Hussein) and the internal armed conflicts in the territory of Iraq against Shia groups in the southern part of the country and the Kurds in the northern parts of the country before and after the Gulf War.⁽⁹¹⁾ However, the Court wasn't able to prosecute

(88) See Kuwait Crisis, *supra* note 9.

(89) *Id.*; See also Bassiouni, *supra* note 75, pp 331,332.

(90) The Iraqi High Criminal Court Law [hereinafter IHCC Statute], res. 10 (2005), art. 1/Second. Available at https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/62dfa419b75d039cc12576a1005fd6c1/%24FILE/IST_statute_official_english.pdf.

(91) See M. Cherif Bassiouni and Michael Wahid Hanna, Ceding the High Ground: The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein, 39 Case W. Res. J. Int'l L. 21 (2007) <https://scholarlycommons.law.case.edu/jil/vol39/iss1/3>

Ba'athists over Kuwait's invasion because it did not have jurisdiction over crimes of aggression, and consequently, the crimes committed as a result of that particular invasion.⁽⁹²⁾

An interesting point to mention is that the IHCC was a national court ruled fully by Iraqi personnel under the new Iraqi Constitution.⁽⁹³⁾ This court was established to try Saddam Hussein and other Ba'athists for, as stated in its Statute, crimes committed from 1968 to 2003.⁽⁹⁴⁾ As discussed above, the trials and the punishments were substantially for crimes committed domestically. However, because of its nationally-originated nature and its municipal jurisdiction,⁽⁹⁵⁾ it is impossible to try these Ba'athists for international crimes (noting that the country was in a transitional justice phase), particularly crimes of aggression within the confines of international criminal law.⁽⁹⁶⁾ [emphasis added] Moreover, in the case of justice for Kuwait after the war, if we grant the view that the Ba'ath party has been prosecuted, they were prosecuted for the crimes of Prisoners of War (POWs) but not under the updated offense: Killing POWs. Now under the President of the Security Council's Statement in 2019 which asserted the Death of Kuwait's captives, their status under international law has been shifted from POWs to death victims (Taking hostages, as the IHCC Statute states, and Killing them are two different indictments)⁽⁹⁷⁾. Therefore, a new international trial, based on this new offense, should be pursued.

In respect to the Statute of Limitations principle and its applicability to international crimes, in 2005, the Kurdish authority arrested one

(last visited Mar. 12, 2020); see also Human Rights Watch, *Genocide in Iraq: The Anfal Campaign Against the Kurds* (1993)

<http://www.hrw.org/reports/1993/iraqanfal/> (last visited Mar. 12, 2020).

(92) See the IHCC Statute, *supra* note 88, section two.

(93) Note that the nature of this court was debatable at that time, and this court was established under different circumstances (supported and initiated by a foreign country: the US) and the language of its statute was a mixture of other international criminal tribunals. See M. Cherif Bassiouni, *Prosecuting Saddam Hussein*, *Foreign Policy* (2005), <https://foreignpolicy.com/2005/07/01/prosecuting-saddam-hussein/> (last visited Mar 14, 2020).

(94) *Id.*

(95) Bassiouni and Hanna, *supra* note 88, pp 54-60.

(96) See the Crimes of Aggression, *supra* note 12.

(97) See IHCC Statute, art. 12.

of the Ba'athists who committed crimes of killing Kurdish families during the conflict time between the Ba'ath party and the Kurds.⁽⁹⁸⁾ These crimes were committed from 1980 till 1992 by Ba'athists soldiers and commanders, and it happened to be that some of these perpetrators were Kurds as well. This Kurdish/Ba'athist perpetrator, named Hadi Salih, who committed the abovementioned crimes brought to justice and got indicted although the crimes he committed had a history of twenty-five years from the first day they occurred. The point is that international crimes, unlike some laws with national jurisdictions, are not subject to a statute of limitations.⁽⁹⁹⁾ As long as an individual committed international crimes, these offenses will constantly be inherent to this individual's criminal record until justice is served. Accordingly, in cases where international crimes were committed as a result of the invasion of Kuwait, e.g., killing Kuwait's POWs, Ba'athists will be constantly indictable and should be held responsible. Moreover, the obligations of the international community, represented by the U.N., to prosecute international criminals will arise and required taking into account bringing them to justice is applicable and the rule of law is promoted.

3. Other Pragmatic Challenges to the Iraqi Tribunal, Worthiness of this Proposal, and Spotting Ba'athists

It has been said that Ba'athists had been tried before a court. However, perpetrators who ordered, abetted, aided, and/or jointly committed crimes against victims of the Gulf War were not confined to Saddam and his other six co-defendants who were tried before the IHCC. In April 2019, Ezzat Al Douri⁽¹⁰⁰⁾, the former deputy of Saddam Hussein revealed in a video on the internet whether the proposed ad hoc tribunal

(98) See Prosecuting the Ba'ath, Institute for War and Peace Reporting, <https://iwpr.net/global-voices/prosecuting-baath> (last visited Mar 18, 2020).

(99) See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, art. 2/b. Available at https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.27_convention%20statutory%20limitations%20warcrimes.pdf.

(100) Ezzat Al Douri is one of the Ba'athists who she happened to be the vice president of Iraq at that time. He and other exiting Ba'athists are still alive along with the Ba'ath Party who are also operating in a different parts of the Middle East. See Jodi Thorp, Welcome Ex-Dictators, Torturers and Tyrants: Comparative Approaches to Handling Ex-Dictators and Past Human Rights Abuses, 37 Gonz. L. Rev., at 168 (2001).

could spot Ba'athists and bring them to justice. This video went viral on social media platforms and faced critiques from scholars and the people of Kuwait.⁽¹⁰¹⁾ His appearance in the video was pointed out to Kuwait, apologizing to Kuwait's President and the Kuwaiti citizens for the invasion of Kuwait assuring that Kuwait is not part of Iraq but is an independent state.⁽¹⁰²⁾

The issue here is not whether the international community could identify and spot Ba'athists or not; as the process of spotting international criminals became a sort of an attainable knowledge, especially if they were wanted by powerful states and the U.N. Rather, it is how the ad hoc tribunal will proceed to capture those Ba'athists to try them for the Killing of Kuwait's captives. To flesh this issue out, international judges and prosecutors have the ability to issue an arrest warrant before, during, and after the investigation period.⁽¹⁰³⁾ The International Criminal Court (ICC), for instance, has a mechanism, for the purposes of indicting international criminals and capturing them, called judicial arrest warrants, and their enforcement would be through the states' cooperation with the I.C.C.⁽¹⁰⁴⁾ This mechanism through states' cooperation is unlikely to be taken seriously, as with the Al Bashir Case at the I.C.C., and the dilemma to enforce the arrest warrant by the Sudanese government is still on.⁽¹⁰⁵⁾ However, the situation with the ad hoc tribunals is different. Ad hoc tribunals are U.N. creations, and accordingly, the process of indicting Ba'athists before the Court and therefore arresting them will be supported by the U.N. Through the history of the ad hoc tribunals such as the I.C.T.Y. and the I.C.T.R., these ad hoc tribunals have witnessed the capability to arrest and indict international criminals. Ultimately, with the Chapter VII power of the U.N., the process of spotting (enforcement of arrest warrants) and arresting Ba'athists will

(101) See Saddam's deputy apologises for Kuwait invasion, Middle East Monitor (2019), <https://www.middleeastmonitor.com/20190415-saddams-deputy-apologises-for-kuwait-invasion/> (last visited Mar 16, 2020).

(102) *Id.*

(103) Humoud Y. Alfadhli, Police Force Organ to Support the ICC's Judgments and Arrest Warrants: A Proposition to Amend Article 86 of the Rome Statute, 1 Cts. & Just. L.J., pp 27-29 (2019).

(104) *Id.*, at 30.

(105) See Omar al-Bashir: Sudan agrees ex-president must face ICC, BBC News (2020), <https://www.bbc.com/news/world-africa-51462613>. (last visited Mar 17, 2020).

impose a legal obligation on states, under the breach of security and peace criteria, to spot and capture those Ba'athists who still exist.⁽¹⁰⁶⁾

In light of that, establishing an ad hoc tribunal to try the existing Ba'ath regime, particularly the commanders and the soldiers of this regime who were the causal link to the death of Kuwait's captives, is conceivable. The Issuance of arresting warrants to any Baathist will not cause any hurdle —although it might take some time— for the ad hoc tribunal. The ad hoc tribunal arrest warrants have shown worthiness and credibility in bringing justice to victims by trying perpetrators of international crimes. Nevertheless, the ad hoc tribunal might face challenges as every international criminal court has witnessed, it is still the most effective mechanism to try international criminals only if, theoretically and pragmatically, those challenges are properly and legally dealt with under the support of the U.N.

B. Specific Proposals

1. Initial Set-Up, Including Process, Timeline, and Personnel

Cases involving mass violations of humanitarian law and human rights, such as war crimes, crimes of aggression, and crimes against humanity present unique logistical and legal challenges due to a large number of victims, witnesses, and documentary evidence that have to be processed, examined, and organized for use in the cases.⁽¹⁰⁷⁾ The above challenges become more problematic is when such cases are handled through an ad hoc tribunal that necessitates the building of a new judicial institution from scratch.

Based on the experiences of other U.N. tribunals, particularly the I.C.T.Y., I.C.T.R., and S.C.S.L., the first major step in creating the ad

(106) A clear example when the Security Council issued a resolution to require the U.N. Military to arrest Charles Taylor, the former president of Sierra Leone, and bring him before the Special Court for Sierra Leone. See S.C. Res. 2098, U.N. Doc. S/RES/2098 (Mar. 28, 2013), available <http://unscr.com/en/resolutions/2098>; see also David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals*, Princeton Univ. Press, at 166 (2012).

(107) See Victor Peskin, *Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 4 J. Hum. Rts. 213 (2005).

hoc tribunal for Iraq is developing a strategy that considers the tribunal's purpose and the realistic goals it can achieve. Strategy formulation should involve all organs of the tribunal. From the strategy, a timeline for the tribunal's work should be developed. For example, in the case of S.C.S.L., a ten-phase strategy was created covering a period of three years.⁽¹⁰⁸⁾ Given the nature of both, the crimes committed by Iraqi forces and the evidence of beyond reasonable doubt⁽¹⁰⁹⁾ that Ba'ath commanders' conduct resulted in Kuwait's captives death, six years, considering the nature of this case in comparison with other international/hybrid tribunals,⁽¹¹⁰⁾ can be a reasonable timeframe for the completion of the tribunal's mandates.

Once a strategy is developed, an outreach program should be implemented. In particular, the Iraqi people should be informed of the tribunal's plans, including the proposed timeframe for its operations and the goals it seeks to achieve. Unless the Iraqi people understand the process being pursued by an ad hoc tribunal, there is a risk that the tribunal may not be viewed as a credible contributor to justice and stability in the country and the region. As the tribunal continues with its work, it is critical to explain indictments issued and the reasons why they are issued. For example, the I.C.T.Y. is regarded to have failed in conducting effective outreach. Although the I.C.T.Y. effectively reached out to the international community for funding, it did not reach out to the local population in the region who were concerned with its work.⁽¹¹¹⁾ Conse-

(108) See Luc Reydam's et al., *International Prosecutors* (2012).

(109) See U.N. President of the S.C. Statement, *supra* note 77.

(110) International Criminal Tribunals were to some extent lengthy; these long processes were normal considering the nature of the cases reviewed before them and the regions that were involved. For example, in the case of the I.C.T.Y., international crimes involved multi-ethnic groups in a large region, hence, the prosecution took about twenty four years. Note that the proposed prosecution of the crimes committed by Ba'athists has resulted from the crime of aggression committed in Kuwait, unlike the other tribunals that were established as a result of other international crimes. See UN Documentations: Courts and Tribunals, United Nations, <https://research.un.org/en/docs/law/courts>, (last visited Mar. 7, 2020).; See also, Official Report, Judicial Reports/International Criminal Tribunal for the Former Yugoslavia, <https://guides.lib.unc.edu/internationallaw/tribunals>, (last visited Mar. 7, 2020).

(111) See Jane E. Stromseth et al., *Can Might Make Rights? Building the Rule of Law after Military Interventions* (2010).

quently, the I.C.T.Y.'s work was affected by credibility challenges.⁽¹¹²⁾ On the contrary, from the onset, the S.C.S.L. placed more emphasis on outreach (through town hall meetings across the country, continuous communications through local media, and regular consultations with representatives of civil societies).⁽¹¹³⁾ The above outreach programs significantly contributed to the S.C.S.L.'s credibility in the local population.⁽¹¹⁴⁾ Therefore, an outreach program should from the onset be understood as an important component of the Iraq ad hoc tribunal. Other than providing information about the tribunal to the public, the outreach program should ensure wider public access to its hearings by providing adequate public gallery in the courtroom and covering the proceedings through both television and radio.

The third priority is ensuring that an adequate legal framework exists. There must be a basis in substantive law in Iraq for the ad hoc tribunal to prosecute crimes. The legal framework should specify all elements of the crimes under the tribunal's jurisdiction, including crimes against humanity, war crimes, genocide, and specific crimes under Iraqi law and international law.⁽¹¹⁵⁾ It must also identify elements of the underlying acts, including sexual violence, murder, torture, kidnapping, and holding hostages.⁽¹¹⁶⁾ Besides, the legal framework should also specify the defenses available to the accused persons.⁽¹¹⁷⁾ Analysis of all evidence and documents should follow the above framework, such that information entered into the system is tagged to the specific legal element to which it relates.

Other issues that should be considered in the startup phase include developing an effective staffing structure that is based on the developed strategy to ensure optimum utilization of staff. In Sierra Leone, the S.C.S.L. initially hired a small staff of seven that included the chief of investigations, chief prosecutor, special assistant, and operations offi-

(112) Id. at 266.

(113) See Ariel Ezrachi, *Research Handbook on International Competition Law* (2013).

(114) Id. at 165.

(115) See Ward N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (2006).

(116) See Gabrielle Kirk McDonald & Olivia Swaak-Goldman, *Substantive and Procedural Aspects of International Criminal Law* (2000).

(117) Id. at 393.

cer.⁽¹¹⁸⁾ After 30 days, S.C.S.L.'s timeline and strategy were reviewed and the hiring of additional staff started.⁽¹¹⁹⁾

An additional priority relates to organizing security for the tribunal personnel as well as other Iraqis that the tribunal will need to engage in its work. In particular, a strong witness protection program has to be established as soon as investigators start contacting witnesses.⁽¹²⁰⁾ Besides, written protocols have to be developed specifying how witness statements are taken and how evidence is handled to retain its evidentiary value in court.⁽¹²¹⁾ Finally, if non-Iraqis who cannot speak Arabic are involved in the tribunal's work, then high-quality interpreters and translators have to be recruited and trained to ensure quality translation and interpretation during the tribunal's proceedings.⁽¹²²⁾

2. Management Structure

For effective operation of the tribunal, the tribunal's management structure should be designed in a manner that ensures coherence of the tribunal as a whole and the independence of its various branches, which include the prosecutions department, judiciary, and administrative department.⁽¹²³⁾ Previous U.N. tribunals have instituted a coordination council, where heads of the various branches meet regularly to iron out issues, as an important component of the structure. Despite the independence of the various branches, a clear chain of command should also be established to avoid confusion, deadlocks, and conflicts. For example, for the S.C.S.L., a senior management board was established where the various branches were represented. However, the chief prosecutor retained the dominant role in shaping the court's direction.⁽¹²⁴⁾

(118) See Reydamas et al., *supra* note 108, at 278.

(119) *Id.* at 279.

(120) See Gert Vermeulen, *EU Standards in Witness Protection and Collaboration with Justice* (2005).

(121) See Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (2007).

(122) See Charles Chernor Jalloh & Alhagi B. M. Marong, *Promoting Accountability under International Law for Gross Human Rights Violations in Africa* (2015).

(123) See Richard Goldstone & Adam M. Smith, *International Judicial Institutions* (2015).

(124) See Reydamas et al., *supra* note 108, at 426.

The organizational structure of the tribunal has to consider the importance of providing services to witnesses and victims with whom the tribunal's personnel will interact. For example, a unit can be created under the prosecutions department to assist victims and witnesses. At the S.C.S.L., for example, the witness management unit was under the office of the prosecutor and was responsible for evaluating the risks to witnesses and organizing their protection (including relocating them and their family members to foreign countries, when necessary).⁽¹²⁵⁾ The ad hoc tribunal for Iraq may consider creating field offices, particularly in Kuwait and Iran, identical to the field offices created under the I.C.T.Y. in the capitals of countries of the former Yugoslavia.⁽¹²⁶⁾ From such offices, investigators can work and perform interviews while providing capacity for liaising with local officials.⁽¹²⁷⁾ Since the Iraq tribunal will be created under Chapter VII of the U.N. Charter, it has the authority of creating the field offices without entering into agreements with the respective countries.

3. Investigative Judges and Prosecutors

For the tribunal to be effective in its work, it is important to ensure that the respective offices of individual prosecutors and investigative judges work together as opposed to working as isolated and separate entities. The need for collaboration and information sharing between and among investigative judges and prosecutors is particularly important when dealing with complex state-sponsored war crimes, which are not isolated acts, but all part of a single fabric.⁽¹²⁸⁾

4. Establishing a Defense Counsel System

Legal support for indigent defendants is likely to be a costly component of the tribunal's operations. For example, at the I.C.T.Y., expenses in legal aid accounted for approximately 10% of the tribunal's budget (between \$10 and \$13 million per year).⁽¹²⁹⁾ In Sierra Leone, due to budget constraints, the S.C.S.L. created a public defender office as part of

(125) Id. at 244.

(126) See Richard H. Steinberg, *Assessing the Legacy of the ICTY* (2011).

(127) Id. at 159.

(128) See Patricia Heberer & Jürgen Matthäus, *Atrocities on Trial* (2008).

(129) See Carsten Stahn, *The Law and Practice of the International Criminal Court* (2015).

the Court's structure, which administered the defense counsel system.⁽¹³⁰⁾ Based on the experience of other tribunals, the ad hoc tribunal for Iraq should pay flat fees (depending on the complexity of the case) to defense counsel in installments, as opposed to hourly billing. For example, at the I.C.T.Y., an hourly system (\$200 per hour) was used in the initial eight years that was prone to abuse.⁽¹³¹⁾ The hourly fee system was also blamed for the slow pace of proceedings since the defense counsel had limited incentive to work faster.⁽¹³²⁾

Other issues that the tribunal will need to consider include integrating the role of international personnel in the tribunal's operations in advisory and observer capacities to improve the credibility and legitimacy of the tribunal.⁽¹³³⁾ The tribunal can also seek the assistance of international non-governmental organizations in areas such as legal research support, training, and outreach activities.⁽¹³⁴⁾ Most importantly, the ad hoc tribunal for Iraq should formulate rules of procedure and evidence, as well as rules governing detention.⁽¹³⁵⁾ Finally, the tribunal sentencing guidelines should ensure that trial results in different trial chambers are comparable. For example, due to a lack of sentencing guidelines, the I.C.T.Y. was widely criticized for inconsistent sentencing.⁽¹³⁶⁾ Sentencing guidelines can especially be useful for international crimes whose penalties are not provided under Iraqi law.

VI. CONCLUSION

Iraq's invasion of Kuwait was a blatant violation of international law. In so far as Iraq invaded and annexed Kuwait in total disregard of Article 2(4) of the U.N. Charter and the Arab League Agreement, its

(130) See James L. Bischoff & Natalie L. Reid, *International Criminal Law Practitioner Library* (2011).

(131) See Gideon Boas & William A Schabas, *International Criminal Law Developments in the Case Law of the ICTY* (2003).

(132) *Id.* at 73.

(133) See Jean d'Aspremont, *International Criminal Law Practitioner Library: International Criminal Procedure* (2013).

(134) *Id.* at 148.

(135) See Karin Calvo-Goller, *The Trial Proceedings of the International Criminal Court* (2006).

(136) See Willem De Lint, *Criminal Justice in International Society* (2014).

actions were illegal. On the other hand, both the U.N. response and the armed intervention by the U.S. and its allies were legal under international law. Chapter VII of the U.N. Charter expressly mandates that the U.N. Security Council counter any acts of aggression and threats to international peace. Similarly, the military intervention by the United States and its allies was legal since it was based on Resolution 678 of the U.N.C.S. which gave express authority to U.N. member countries to employ all the necessary means to ensure all U.N.S.C. resolutions related to Iraq are upheld and that international security and peace in the Gulf area is restored. Consequently, both the language of the relevant resolutions and the practice of the U.N.S.C. with respect to those resolutions supported the armed intervention against Iraq, particularly in light of extensive support by most of the U.N.S.C. members in the period preceding Operation Desert Storm.

Despite the success of the above interventions, the paper has proposed the establishment of an ad hoc tribunal for Iraq by the U.N. to try war crimes and crimes of aggression after the war. Drawing on the lessons learned from the creation and operations of U.N. tribunals and special courts, the paper has provided useful insights on operational considerations that should inform the design and management of the ad hoc tribunal for Iraq. The proposed establishment of an ad hoc tribunal can contribute toward reconciliation and justice in Iraq while ensuring that the tribunal runs efficiently, complies with high standards of due process, and attains credibility not only in the eyes of the people of Iraq but also the international community.

دور القانون الدولي بشأن مدى محاكمة مرتكبي الجرائم الدولية أثناء قيام حالة النزاع المسلح وبعد انقضائها

أ. حمود يوسف الفضلي

ملخص الدراسة

يسعى هذا البحث ، عموماً ، إلى وصف وتقليد دور القانون الدولي بشأن مدى محاكمة الشراخ وبعد القصائها، ووصف وتفنيد الجرائم على وجه الخصوص. بواسطة تلك المنهجيات ، يشرح البحث أهمية القانون الدولي الإنساني والجنائي في دورهم المنوط بتنظيم الأفعال التي تشكل جرائم دولية ووجوب معاقبتها أثناء النزاع المسلح (أو الاعتداء الدولي هنا)، بالنسبة للأول؛ والمحاكمة الجنائية ضمن اختصاص الثاني، كما أن هذا البحث يشمل عرض تطبيقي لنظرية المساهمة الجنائية الدولية (modes of liability) التي تستقيم مع مسؤولية أعضاء حزب البعث العراقي الجنائية، والتي أيضاً أدت إلى وفاة أسرى دولة الكويت خلال الفترة اللاحقة للغزو.

ولأغراض التطبيق العملي للجانب النظري، يقدم البحث نموذجاً لإنشاء محكمة دولية جنائية تكون بقرار من منظمة الأمم المتحدة (ad hoc tribunal) لمحاكمة من تبقى من حزب البعث العراقي استناداً لن (أ) وجوب مسائلة مرتكبي جرائم قتل أسرى الحرب المنصوص عليها في قانون النزاع المسلح ؛ (ب) واقعة استمرار تسلم رفات شهداء دولة الكويت من اللجنة الدولية التي شكلت بالتعاون مع حكومة دولة العراق ؛ و (ج) مبدأ عدم سريان المدة القانونية على مجرمي الحرب (Statute of Limitations) في ظل قواعد القانون الدولي الجنائي.

وفي الختام ، يهدف البحث لوضع أطر قانونية وتعريفية سبيلها التأكيد على مسألة محاسبة مرتكبي الجرائم الدولية أمام محاكم دولية جنائية تضمن سلامة إجراءات المحاكمة الجنائية وتوفير الضمانات القانونية من جانب المجرم الدولي ، وحفظ كرامة المجتمع الدولي من خلال مفهوم الردع الجنائي المتطلب -فقها وقانوناً-، في ديباجة جميع أدوات العدالة الدولية الجنائية ومبدأ سيادة الدولة ونزاهتها الحدودية.

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Gulf War I: The Legality of Prosecuting Existing Iraqi Ba'ath Party in Response to Kuwait's Deceased Captives

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