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The Case Against Saddam Hussein--The Case for World Order

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The following Article is an excerpt from a paper written in the Fall of 1990. The author submitted the paper in December 1990 as partial fulfillment of the requirements of the Master of Laws program at the University of Virginia. The opinions and conclusions expressed are those of the individual author and do not necessarily represent the United States Army or other governmental agency.

The United Nations' Charter gives the Security Council enforcement authority for breaches of world peace. To be meaningful, rights must have remedies, and the Security Council should now pursue remedies to enforce the rights provided in the Charter. The bipolar politics that have precluded effective sanctions for the last forty years have now subsided, and the world stands at a precipice anticipating new action. This Article advocates the United Nations Security Council use the current "Crisis in the Gulf" to establish a "Grievous Offender Tribunal" to try individuals
for violations of international law. Iraqi President Saddam Hussein's invasion of Kuwait presents the Security Council with a paradigm case on which to initiate such a Tribunal.

I. INTRODUCTION

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.¹

The world of today is vastly different than the world of just a year ago. The dismantling of the Berlin Wall served both as a literal and figurative symbol of a new world order. Literally, the Wall's destruction united East and West Germany where previously the world's two greatest armies stood facing each other. Figuratively, it symbolized the dismantling of a united Warsaw Pact and the control Moscow enjoyed over many countries. Democratic movements, open markets, and people seeking self-determination came forward. For perhaps the first time, many of the world's people have realistic opportunities to enjoy basic freedoms, to be protected by fundamental human rights, and to live by the "rule of law."²

The fluid nature of the world's politics presents both opportunities for, and dangers to, world order. Various analytical models suggest that following the "rule of law" is the most effective means of reducing war. This Article uses two models, the practical McDougal-Lasswell³ and the theo-

2. The phrase "rule of law" was coined by A.V. Dicey in the late 1800s. He used the phrase to mean the absolute supremacy of the regular (common) law, and equality before the law while being administered by ordinary courts (officials were not excluded). The phrase today includes the "legitimacy" notion that Dicey's meaning incorporated by referring to the common law—that is, law must arise from the people and be administered by regularly constituted courts. See, e.g., Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Commission on Security and Cooperation in Europe, 29 Int'l Legal Materials 1307 (1990) [hereinafter Copenhagen Document] (the rule of law entails "a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order" and "justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression").
3. See MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961). I considered the first model, the McDougal-Lasswell system, extensively. Though the McDougal-Lasswell approach did not serve decisively in drawing conclusions for this Article, its comprehensive nature provided numerous tools and analytical concepts that insured a thoroughness in the approach. The model forced the user to consider thoroughly all possible factors that could play upon the decision maker. The strength of the model was its "nitty gritty," making one dig into every crevice of the actual situation (past, present, and future), before recommending a course of action based on the findings.
retical Bull model. Using the analytical tools the two models provide, the author concludes that the “rule of law,” if followed, will add significantly to world order.

Using analytical tools provided by the practical McDougal-Lasswell model, this Article examines the past trends, the present situation and key players in the Gulf Crisis and projects future trends. Then, using the theoretical approach, the validity of using “law” to add to world order is examined. Specifically, the practicality of establishing a Grievous Offender Tribunal, and the effect such a Tribunal would have in establishing “a new world order” through the rule of law, are discussed.

The analysis produces a logical progression in the development of the international law of conflict management: have the Security Council place personal responsibility on grievous offenders as the offenses occur, and hold them criminally liable for their actions. The practical ramifications

4. Hedley Bull, Anarchical Society (1977). The second model came from Hedley Bull's Anarchical Society. Without the “nuts and bolts” approach of McDougal-Lasswell, Bull's model examines the “Nature of Order” without placing value on order, or making order a goal or objective. Though Bull concludes the present “state system” is an effective international system, his model does provide the deontological support for the ultimate conclusions drawn in this Article. (Perhaps if he were to write today he would conclude differently). In short, Bull's model shows order exists, and that rules assist in the maintenance of order. By coupling the realities that the McDougal-Lasswell model provides with the subtlety of Bull's conclusions, one may recognize the value to world order of a Grievous Offender Tribunal consistent with the rule of law. See H. Bull, The Anarchical Society xii (1977).

5. To place this Article's recommendations in context, an approach from the practical model is employed. That is, the perspective of the author must be made clear. Though this Article delves into numerous facts and is built upon real world situations, the author acknowledges severe limitations upon a fact pattern that is unfolding as the paper is being written. The author is not privileged to secret communiques, high level diplomatic discussions, military plans or other information obtainable on a “need to know” basis. Hence, as practical as the author wanted this paper to be, in reality the paper must be viewed as theoretical, advocating a position from an observer's—not an advisor's or decision maker's—perspective.

6. The McDougal-Lasswell model provides a framework for problem solving, with the following relevant intellectual tasks: Clarification of goals, description of past trends, an analysis of conditions, projection of future trends, and evaluation of policy alternatives. Each of these sections contain various factors for consideration. The overall process may be viewed as a pie that may be sliced to provide systematic contextual study. Three analyses (value, phase, and functional) contain numerous factors within each “slice”, whose consideration results in a thorough dissection of a problem. See generally McDougal, supra note 3.

7. A “new world order” has become the phrase used by leaders, diplomats, and reporters to describe a world subject to the rule of law, administered and enforced by the United Nations as its Charter originally intended, and where basic freedoms and fundamental (human) rights are shared by all peoples of the earth. See, e.g., President George Bush, Address at United Nations General Assembly (Oct. 1, 1990) in 26 Weekly Compilation Of Pres. Doc. 1496, 1499 (1990).
of such a move are explored in this Article in detail. The outcome is that
the initiation of a Grievous Offender Tribunal would not "just yield any
order," but order that leads to a particular result—an "arrangement of
social life such that it promotes certain goals or values." This is what the
people of the world desire, strive for, and expect. By providing such a
system, law will be used to reduce the potential for war.

II. ANALYSIS OF THE PRESENT SITUATION

[T]he dominant challenge today to us as lawyers is not merely to es-

tablish some legal order, to make law prevail over naked force, but rather
to establish a public order of freedom, a public order in which all the
basic goal values of human dignity may be sought in security and with
abundance. Thus, the theme is set: promote a public order of freedom and human
dignity, keeping in mind the two goals of who or what should be the deci-
sion maker, and upon what type of issues should the decision maker act.
The conditions in the Gulf must be closely examined to determine who
within the United Nations organization is the proper decision maker, as
well as the scope of issues upon which this decision maker should act.

On August 2, 1990, Iraq, under the leadership of Saddam Hussein, in-
vaded Kuwait. In five hours Hussein overran and took control of Ku-
wait. In the months since the invasion, numerous courses of action were
taken, with many more contemplated, to resolve the hostilities. It is quite
possible that before this Article is presented, military or some other ac-
tion may drastically alter the current status quo. Yet, regardless of the
outcome of the Gulf Crisis, the Iraqi invasion of Kuwait provides a dra-
matic case for United Nations development of a personal law enforcement
sanction.

The on-going Gulf Crisis involves a mixture of individuals, states, and
international organizations. To thoroughly understand the Crisis, one
must understand the various people, religions, states, and organizations of
the area, each of which is influenced by centuries of tradition. This Arti-
cle's recommendations, while at times contradictory to common percep-
tions, are made in consideration of what has happened in the past, and
with a view toward the future.

This Article will first discuss the Middle East situation in general. It
will then discuss the recent history of Iraq and explore the life of Saddam

8. BULL, supra note 4, at 4.
10. See Events in the Persian Gulf Debate Featuring Iraqi Ambassador Mohammed Al-
    Mashat and Professor John Norton Moore (C-SPAN television broadcast, Oct. 5, 1990)
    [hereinafter Debate].
Hussein in detail. This Article will then examine the United Nations, looking at both the General Assembly and the Security Council. Towards the end, this Article will discuss the community of states led by the United States in opposition to Iraq. In conclusion, this Article addresses the proper role of law in the process of holding people personally accountable for their war crimes.

III. The Middle East

[When leaders are pessimistic about the long-term future of their regimes and at the same time have high confidence in the strength and ability of their armed forces, then all that they know and all that they fear will conspire to induce them to use their military power while it still retains its presumed superiority. Only thus can today's strength be exploited to improve the prospects for a future which seems unfavorable. To convert a transitory military advantage into a permanent gain of security for the regime, there must be some profitable war in prospect. Profitable wars were rare even before the nuclear age, but once the urgency to act before it is too late is strongly felt, men will easily persuade themselves of the high likelihood of victory, of its small cost, and of its great benefits.]

Though written about the Soviet Union, Luttwak's comment could easily have referred to the past several decades in Iraq, Iran, Libya, Israel, Egypt, Lebanon, Syria and many other countries throughout the Middle East. The absence of an adequate balance of power in the region or sufficient deterrent regional agreements makes the area ripe for conflict. The situation has led to war repeatedly in the past and is likely to do so again.

The Arab-Israeli Wars of 1967 and 1973, the Iran-Iraq War between 1980 and 1988, the Israeli pre-emptive strike on the Iraqi nuclear plant in 1980, the on-going conflict between Libya and Chad, and the continual factional fighting in Lebanon all resulted from leaders who convinced themselves that their strength could be exploited through military action, and the benefits of such action would outweigh any retaliatory response. Certainly, the Iraqi invasion of Kuwait was undertaken based on such assumptions.

Islam, the dominant ideology of the region, has controlled the lives of most of the people of the region for centuries. Usually thought of as a religion by Westerners, Islam is much more than the practice and customs of a religion; it is a political doctrine endowed with a central authority. Based on the belief that the state should be used as an instrument for achieving doctrinal objectives, original Muslims (and fundamentalists

today) believed it was both their individual and collective holy duty to conquer the world in the name of Islam. Not only was force acceptable to accomplish this goal, world public order was to be based on divine legislation accomplished by Jihad, or holy war.\textsuperscript{13}

The law of war was only meant to be temporary, based on the assumption the Islamic state was "capable of absorbing the whole of mankind."\textsuperscript{14} Islamic language reflected such assumptions, thus causing the world surrounding the Islamic state not under its rule to be known collectively as the "territory of war."\textsuperscript{16} "It was the duty of Muslim rulers to bring this 'territory' under Islamic sovereignty whenever the strength was theirs to do so."\textsuperscript{16} Given this historic perspective, events in the Persian Gulf today become more understandable, and considerably more frightening.

IV. IRAQ

In many ways, present day Iraq and Saddam Hussein are one and the same. Were it not for the rise of Islamic fundamentalism throughout Iraq, with its desire for a strong central authority, someone such as Hussein could not have risen to and kept power. Once in power, Hussein introduced the governing Ba'ath Party, which appealed to Arabs everywhere because of its efforts to rebuild a strong Arab Nation.\textsuperscript{17} Iraq sits firmly in the grasp of a man willing to fan the emotional flames of religious and nationalistic passion to keep power. The mixture of religious and political ideologies that revel in heroism and aim at destroying nonmembers invites a ruthless dictator.

Understanding Iraq's recent history is important to understanding the religious, political, and cultural zeal in Iraq, particularly its hatred of Western powers. Prior to World War I, the Middle East was part of the Ottoman Empire, under Turkish rule. Because the Empire treated Arabs

\begin{thebibliography}
\item Id. at xi. Khadduri states that: "Jihad is the Islamic bellum justum and may be regarded as the very basis of Islam's relationships with other nations". But he goes on to say, Jihad is generally used to refer to the individual and collective obligation of Muslims to conquer infidels through the use of force; a holy war waged with the help of God, and for God's benefit. But see Al-Khatib, lecture on Jihad, University of Virginia School of Law, March 7, 1991. Al-Khatib explained Jihad has numerous meanings: a way of life, a total commitment, the taking care of the poor and needy, the rule of law, international law, and Holy War are a few meanings of Jihad. In illustrating the vast differences, Al-Khatib explained that Jihad can be accomplished by four means: heart, tongue, hands, and sword. Anything humans do by those four means that furthers the aims of Islam is Jihad.
\item Id. at 5. Once achieved, the raison d'être of the law of war, would pass out of existence.
\item Id. at 12.
\item Id. (emphasis added).
\end{thebibliography}
as second class citizens, there existed among them a strong desire to create a sovereign "Arab Nation." Hussein Ibn Ali (referred to as "Hussein the Great" among the Arabs) led the struggle to create an "Arab Nation." With the outbreak of World War I, Great Britain and France sought his assistance to defeat the Turks.  

Great Britain and France struck a deal with the Arab leader. In exchange for his assistance, Hussein the Great was to get control of the "Arab Nation" should the West be victorious. When the war ended and time came to fulfill the promise, Great Britain and France had different opinions than did Hussein the Great as to what lands and people the "Arab Nation" entailed. From Hussein the Great's perspective, Britain and France offered him only part of the Arab lands. Additionally, Britain and France placed the intolerable condition that Jews be allowed to administer their own land into the arrangement. Hussein the Great was terribly hurt and offended by this treatment from the West.  

Hussein the Great rejected the offer on the principle that it was not his land to negotiate away, resulting in his banishment to Cyprus. Britain and France then made their offer to the sons of Hussein the Great. Realizing that some land was better than none, the sons accepted the offer and the "lines in the sand" were drawn. The deal created the modern day states of Syria, Jordan and Iraq. However, the divisions were deeply resented by most Arabs. Faisal, the son in charge of Syria, was removed from power within six months. Faisal then moved to Iraq where he was soon made King Faisal. His collaboration with the British, however, never appealed to Arab Nationalists. Thus began a long struggle in Iraq, as well as other newly created Arab states pitting one Arab faction against another for power.  

Yet, the conflicts in the region were not limited to Arab against Arab. During the 1930s, Grand Mufti of Jerusalem Hajj Amin al-Hussaini tried to forge German-Arab cooperation against the British and the Jews. In 1941 the Rashid Ali al-Kailani, with German assistance, led a violent coup against the British. Hajj Amin described the coup as a Jihad and a religious "pan-Arab struggle" against "the greatest enemy of Islam." The British suppressed the rebellion by force, and purged the Iraqi Army of the rebellious soldiers.  

Then, in 1948 the Arabs failed to defeat Israel, and the Iraqis who participated in the war against Israel experienced further humiliation and
shame. Many Arabs, "burning with rage," blamed Western imperialists for the Arab defeat. Arab extremists feeding off this rage sought to revive a pan-Arab nation. They asserted that such a nation would revel in Arab glory, and become the world power they felt an Arab nation deserved to be.

Arab nationalism rose to a fervid pitch in 1956. In Egypt, Gamal Abdel Nasser claimed "victory" after the Suez crisis, and proclaimed a policy "to establish an Arab superpower from the Persian Gulf to the Ocean." Nasser's goal of an Arab superpower blended easily with the Ba'ath ideology—revive old pan-Arab glory through progressive revolutionary methods.

On July 14, 1958, Abd-al-karim Qassim led an extremely bloody military coup in Iraq and established an antimonarchical regime. Ten days later, one of the Ba'ath party founders, Michel 'Aflaq, urged Qassim to join Egypt and Syria under the rule of Nasser in the United Arab Republic. Qassim refused 'Aflaq's suggestion, and 'Aflaq began urging the Ba'ath Party to conduct revolutionary tactics against Qassim. Being mostly well educated, upper middle class, the Ba'ath party members called on "hired guns" to carry out the revolutionary violence 'Aflaq and other party leaders proposed. Saddam Hussein (no relation to Hussein the Great) answered the call.

Though Qassim tolerated the Ba'ath Party, his continued rift with Nasser made the Ba'athist militants determined to get rid of him. On October 7, 1959, Saddam Hussein led an assassination attempt on Qassim, but the attempt failed. Saddam Hussein fled the country. In February of 1963, the Ba'athists and other radicals succeeded in overthrowing the Qassim regime. The Ba'ath Party installed Abd-al-Salam 'Arrif as President. Though 'Arrif was supposed to be a compromise candidate between the Ba'athists and the other radicals, the months following his takeover were filled with bloody purges and fighting for power among the inner groups. In November 1963, 'Arrif overthrew the radical Ba'athist elite, and installed a nationalist, General Hassan al-Baqr as his Vice-President.

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22. Id. at 2-3.
23. Id. at 3.
24. Id. at 3-4. Qassim had been one of the soldiers who had fought against the Israelis.
25. Id. at 4.
26. Id. Iraqi legend, perhaps at the initiation of Hussein, maintains that Hussein was wounded in the assassination attempt, and fled with a bullet in his leg. Unable to seek medical assistance for fear of capture, the legend states that Hussein cut the bullet out of his leg with his own pocket knife. Id.
27. Id.
28. Id. at 4-5.
Under ‘Arrif and Baqr’, Iraq began adopting a pro-Nasser policy. This policy brought Iraq into subsequent wars against Israel, and served to support the Palestinian terrorist organizations. By 1963 Saddam Hussein had returned to Iraq. He soon took charge of the “internal security” of the nation, a euphemism for assassination purges. In 1966 Hussein took part in a Ba’ath internal revolt against ‘Arrif. This revolt failed, largely due to Hussein’s failure to secure the support of traditional military leaders. Hussein was jailed, but he soon bribed his way out and immediately went to work planning the next coup.\(^9\)

In 1968 a two-phase coup by Ba’athists overthrew the ‘Arrif government. The first phase, on July 17, 1968, established a new nationalist regime with Baqr’ as president. On July 30, 1968, Saddam Hussein conducted the second phase, a violent and ruthless purge of all non-Ba’athists from the regime. Soon after, Saddam Hussein became the Deputy Chairman and strong man in the Revolutionary Command Council.\(^8\)

For the next ten years, Hussein consolidated his power and influence by purging the party of disloyal people, thereby making the party members loyal to him, personally. In 1979, Baqr’ “resigned” in a procedure engineered by Hussein. Hussein then placed Baqr’ under house arrest, thus clearing the way to unfettered exercise of power.\(^31\) Predictably, a bloody purge followed wherein Hussein exposed “coup” and conspiracies. The purge led to the execution of 21 people, and the jailing of 47 senior Ba’athists, most of whom were military leaders.\(^32\) Hussein had taken unquestionable control of the country.

In 1980 Iraq initiated a crisis with Iran over the legality of the 1975 Algiers Treaty (resolving issues over the Kurds). Hussein hoped that a war with ancient and religious rival Iran would unite the Arab world behind him.\(^33\) Hussein also hoped to gain support from the Western powers who had hostile feelings towards Iran stemming from the 1979 revolution and hostage crisis. Relying on these assumptions, and having no other substantial military threat in the area to keep it in check, Iraq attacked Iran on September 20, 1980.\(^34\)

To accomplish its goal of uniting the Arab world, with Baghdad as its center, and to hold outside threats at bay, Iraq undertook a massive mili-
tary buildup. Towards that end, Iraq developed and used chemical war-
heads. Additionally, it stockpiled large quantities of plastic explosives, presumably for use in terrorist attacks.

The failure of deterrence and a vulnerable opponent combined to cause Iraq to strike at Iran in 1980, and that same combination caused Iraq to strike Kuwait in 1990. In 1980, Iraq viewed Iran as being vulnerable after its 1979 revolution. The Iranian transfer of power left its military weak, and the Algiers Treaty provided Iraq with the excuse to use force. In 1990, Iraq viewed Kuwait as vulnerable, and the absence of any apparent deterrence threat permitted Iraq to attack again. As a pretense, Iraq stated that “foreigners” within Kuwait were trying to destroy Iraq economically.

A chasm exists between Iraq and the rest of the international community, one that Iraq shows little interest in closing. Though Iraq’s leadership is extremist, this extreme position is what strikes the cords of religious and nationalistic pride. Though Iraq’s responses to challenges from the Western world may seem flippant at times, the responses may reflect fundamental beliefs that they are doing Allah’s work. Perhaps the best example of the rift between Iraq and the West is the treatment of civilians during the Gulf Crisis. Though made through double-talk, Iraq’s lack of adherence to any accepted norms or international legal principles is clear. “We will not accept international law . . . We have to protect our own people and we do not accept your double standards . . . They are our guests and they will contribute to an ideal course of peace, peace, peace.”

Iraq’s recent history is that of a country led by a “despotic Arab

35. Even more chilling, Iraq is within months of developing a biological threat and is striving fervently to obtain a nuclear capability. Confrontation in the Gulf; Sacking of Kuwait is Pressuring U.S., N.Y. TIMES, Sept. 29, 1990, at A4 (reported Iraq may be able to produce biological weapons early next year). William Safire, The Phony War, N.Y. TIMES, Oct. 1, 1990, at A21 (Iraq may produce nuclear weapons within three years, or sooner). William Safire, Survival, N.Y. TIMES, Nov. 5, 1990, at A21. William Safire, in an editorial, tied the hanging of Farzad Bazoft, a British journalist, to Iraq’s effort to get nuclear weapons. Bazoft had disguised himself as a medical technician in an effort to investigate the August 1989 explosion of a munitions plant in Al Qaqaa. What was being produced was HMX, high melting point explosives, used to implode Uranium 235 in nuclear weapons. Safire explained Iraqi technicians are again hard at work, and Iraq is on the verge of obtaining a nuclear capability. See N.Y. TIMES, Dec. 11, 1990, at A12. Most recently, Iraq’s progress toward obtaining a nuclear capability has come under close scrutiny, and expert opinions differ.

36. TASK FORCE, supra note 17, at 6. The Soviet Union was backing Iraq at the time.

37. See Debate, supra note 10.

38. TASK FORCE, supra note 17, at 10-12.

39. Tariq Aziz, Iraqi Foreign Minister, in Nora Boustany, Iraq Offers Choice to Bush: Peace Talks or Disaster, WASH. POST, Aug. 22, 1990, at 24. However, on Dec. 6, 1990 Iraq decided to free the hostages to promote diplomacy. At that time, Iraq apologized for the
power structure,” set on re-establishing a united Arab nation. Iraq will not voluntarily consent to international law or standard unless it is within Iraq's immediate interest to so comply.

V. Saddam Hussein

Saddam Hussein presents the world with a radical, militarized, totalitarian regime, designed to change the status quo. Luttwak's quote, given at the beginning of the Middle East chapter, is particularly descriptive of Saddam Hussein. Hussein possesses confidence in the strength and ability of his armed forces. Even though his future may be bleak, Hussein is exploiting his strength in the profitable world of Middle East oil while he can. He has persuaded himself of victory while ignoring the cost, and sees great benefit in continuing this course of action.

As stated previously, Iraq and Saddam Hussein are one in the same. An examination of Saddam Hussein's life is a walk through the recent history of Iraq. Saddam Husseyn Al-Takriti ("Saddam Hussein") was born on April 28, 1937, and grew up poor in Takrit. His education was very limited, and what little schooling he received occurred while he was between the ages of ten and sixteen. His uncle, HirAllah Talafa, a strong supporter of the Rashid Ali al-Kailani, greatly influenced Hussein. Talafa participated in the pro-Nazi, anti-British rebellion of 1941, and was purged from the military because of his role in the rebellion. Talafa returned to Takrit full of frustration and bitterness toward the British and the royal Baghdad regime.

The Arab defeat at the hands of the Israelis sent more angry officers home to Takrit full of bitterness, frustration, and conspiracies to someday regain Arab superiority. Thus, hatred for the Jews, rage for the Western imperialists, and desires to revive Iraq as the center of pan-Arab power and glory influenced Saddam during his youth.

In 1956, Saddam Hussein and some other Takrit youngsters moved to Baghdad for "schooling." However, Hussein quickly formed the group into a street gang known for their cruelty and violence. In the 1950s Gamal Abdel Nasser began to revive pan-Arab feelings with his aspirations for the Arab world. Hussein watched admiringly. Pan-Arab ideals

captivity, and acknowledged the captivity was not "correct from the humanitarian and practical standpoints." N.Y. TIMES, Dec. 7, 1990, at 1.
40. TASK FORCE, supra note 17, at 1.
41. LUTTWAK, supra note 11.
42. TASK FORCE, supra note 17, at 1-6.
43. Id. at 1-2.
44. Id. at 2-3.
were "fertile ground" for Ba'athist activities, and were in line with the ideals planted in Saddam's mind by HirAllah Talafah.46

Saddam's rise to power began with his link to the Ba'ath Party. The Ba'ath Party enabled him to seek the ideological goal of his uncle, while at the same time enabled him to pursue personal wealth and power. When Qassim refused 'Aflaq's suggestion to join Nasser, the Ba'athists decided to assassinate Qassim. Hussein led the attempt, and fled to Syria when the attempt failed. From Syria he travelled to Egypt to participate in the pan-Arab Nasserist movement, headquartered in Cairo. The movement, based around a Palestinian revolutionary radicalism, was designed to rally Arabs everywhere, irrespective of national leaders, goals or initiatives, and bring them under the control of Nasser. It was during this time that Saddam met 'Abd al-Rahman 'Abd al-Rauf 'Arafat al-Qudwa al-Hussaini (Yassir Arafat), a young revolutionary cousin of the Grand Mufti Hajj Amin al-Hussaini.48

Hussein supported Arafat's opposition to the Palestinian establishment from the outset, and urged Nasser to make Arafat the leader of the Palestine Liberation Organization ("PLO"). Hussein arranged support for the PLO from the Soviet Union, and assisted both in Nasser's backing of Arafat, as well as the Soviet dominance over the Palestinian movement. Thus, began a long relationship between Hussein and the PLO. By the 1970s, Hussein turned the PLO into a tool of his purging operations, and in return, provided the Palestinian terrorists with training, facilities, weapons, intelligence, and diplomatic services (e.g., secured mail pouches) all over the world.

The 1963 overthrow of Qassim provided Hussein the opportunity to return to Baghdad.47 His services as one who could purge the new government of its enemies were in demand, and he quickly began his ascent to the top, despite numerous clandestine military cells within the Ba'ath organization. Hussein was fortunate to have a Takriti boyhood friend (the son of HirAllah Talafa, Hussein's favorite uncle), Adanan HirAllah, as a staff officer in Baghdad. HirAllah prevented the military Ba'athists from assassinating Hussein, and the Takrit connection became a cornerstone of Hussein's eventual power base.48

In 1963, Hussein married Sajida Talafah, the daughter of his favorite uncle. The marriage enabled Hussein to bring HirAllah Talafah back into politics, a move Hussein used very effectively. When Baqr' was installed as Vice-President, Hussein used Talafah, a cousin and old army friend of Baqr', to get Hussein access to the very top of the military-dominated

45. Id. at 3.
46. Id. at 4-6.
47. Id. at 5.
48. Id. at 5-6.
Ba'ath elite—even though Hussein was much younger and never served in the military. Hussein became the chief of internal security, at first directing his efforts for the good of the Ba'athists, but eventually using his position to solidify his own power. An extremely loyal clique developed around Hussein, resulting in widespread fear among those who opposed him.49

When Hussein acted too quickly in 1966 against 'Arrif, he was jailed. He bribed his way out of prison, and escaped to Takrit.50 He immediately went to work planning the next coup, but included plans to involve top military leaders to insure success. At the same time, he established his "security forces" as alternatives to the military to conduct his "post revolution" purges. Hussein began to rely solely on family and Takrit loyalists, those loyal to Saddam Hussein. When 'Arrif was overthrown in 1968, Hussein took over Iraq’s security and installed Baqr’ as the titular president.51

During the Baqr’ reign, Hussein systematically removed disloyal elements from the Ba’ath organization, and transformed it into an organization loyal to Saddam Hussein. He also sought to expand Iraq’s role in international affairs, mainly through the Soviet Union and the support of subversion efforts, in hopes of becoming the region’s dominant power. His efforts to support the PLO resulted from his earlier ties with Arafat, and he was strongly influenced by Nasser’s manipulation of the Palestinians to consolidate pan-Arab power.52

By the mid-1970s, Hussein’s collection of family and Takritis at the top of the government had become so pervasive, he felt compelled to pass a law forbidding the use of family names.53 Hussein consolidated his power to the point that by 1979 Baqr’ “resigned” to allow Hussein to take over as President. Hussein then reorganized government power around key family members and Takriti loyalists.54

49. Id.
50. Id.
51. Id. at 6.
52. Id. at 7-8.
53. Id. at 7. He claimed the use of family names was forced on the Arabs by the Western imperialists. His law was simply a way of concealing the number of family and hometown friends now occupying the highest seats in government.
54. Id. at 7-8. Adanan HirAllah, his childhood friend, became his Minister of Defense; HirAllah Talafah, his favorite uncle, became an “economic transactions” advisor (to acquire nuclear and other sensitive weapons equipment); his half-brothers took over the intelligence service and public security; his oldest son chaired the Revolutionary Command Council; and other sons and daughters were married into families of high ranking generals or government officials.
Hussein’s violent background appears to have taught him that the only real power is brute force. As a result, Hussein built a massive army with an incredibly destructive arsenal, which he has been willing to use to further his goals. He carried on an eight-year war with Iran, during which he used poison gas in contravention to the Geneva treaties. When confronted with uprisings by his own people in Kurdistan, Hussein again used poison gas to quell the disturbances. In need of money because of his long war with Iran, he demanded minimum pricing for oil. When Kuwait did not agree, he invaded the country. While the common man thinks Hussein is a madman, psychologists claim Hussein is predictable and understandable. The problem is that he is “dangerous to the extreme.”

Hussein’s violent background has controlled his psyche, and it has manifested itself in his ruthless control of all people around him. Hussein’s paranoia for his safety (with good reason) causes him to surround himself with “yes men,” but to trust no one. He had his two half-brothers arrested in 1983, and removed them from their minister positions. When his childhood friend, Adanan HirAllah, became too popular because of the war with Iran, Hussein had him killed in a “helicopter accident.” Ex-president Baqr’ met a similar fate in 1983 (through a “car accident”) when his popularity began to rise and Hussein’s popularity fell due to the war with Iran. Another favorite General, Mahir ‘Abd al’Rashied, was forced into retirement after his victory in the southern

55. See Jim Hoagland, Diplomacy, Saddam Style: Look for the Bomb Under the Robe, WASH. POST, Sept. 6, 1990, at A27. An early example of Hussein’s ruthlessness occurred at a “peace talk” Hussein (then Vice Dictator) set up with rebellious Kurds in 1971. The emissary of Hussein was told to secretly tape record the meeting by pushing a record button on a hidden tape player when the Kurd leader was close. At the meeting, the emissary did so, thereby setting off a bomb hidden in the player. The emissary and a servant were killed; the Kurd leader survived. Id. James A. Phillips of the Heritage Foundation says of the current situation, “Saddam understands force. Ultimately, it will not be the embargo, but only the threat of force or its actual use that will force Saddam to give up the booty of his aggression and pull out of Kuwait.” DAILY PROGRESS, Nov. 13, 1990, at 1.

56. His military is estimated to be approximately 1,000,000 soldiers from a population of 17,000,000. Approximately 430,000 soldiers, 5,500 tanks, and hundreds of tons of poison gas are in or near Kuwait.

57. See Debate, supra note 10.

58. Id.


60. Anthony Cordesman, author of Lessons in Modern Warfare: The Iran-Iraq War, says, “When Saddam Hussein is under pressure, he surrounds himself with true loyalists.” Saddam has a reputation for staffing his inner circles of power with members of his extended family, and natives of his hometown. See ARMY TIMES, Nov. 19, 1990, at 12.

61. Id.

theater (his demise would have followed too closely on the heals of HirAl-
lah’s death).63

Though there are numerous instances of Hussein’s brutality, two par-
ticular stories exemplify this. At the outset of his term as President in
1979, Hussein rounded up his adversaries and ordered them to be exe-
cuted. The executions were videotaped. Hussein then made it mandatory
for his staff and government officials to watch the videotape.64 Jack An-
derson reported an even more direct and violent example of Hussein’s
brutality: At a cabinet meeting a minister expressed a view contrary to
that of Saddam Hussein.65 Hussein asked the adviser to step outside the
room to discuss the difference of opinion. Outside the room, Hussein put
a pistol to the adviser’s head and shot him dead.66

Saddam Hussein sees himself as “Nebuchadnezzar II,” determined to
reunite the “Arab Nation.”67 Complete with dreams and visions from Mo-
hammed,68 Hussein has undertaken a personal drive to change the face of

63. See Task Force, supra note 17, at 9; see also Lief, supra note 62, at 32. “He has
murdered a mentor who knew him since infancy, arrested his brothers and killed his cousins
to make sure no one forgets who’s in charge.” Id.

64. See Talking Points, Amnesty Int’l, October 1990 [hereinafter Talking Points]. The
use of video taped executions was used recently by Hussein—he compelled his closest aids
to view the trial and execution of the Ceausescus. See Task Force, supra note 17, at 8.

65. See Talking Points, supra note 64. Other sources report this minister was Riyadh
Ibrahim, Minister of Health. According to these sources, Ibrahim asked Hussein to tempo-
rarily step down from power to help resolve the war with Iran.

66. See Wash. Post, Aug. 13, 1990, at 13. Hussein made it a capital offense to insult him,
to espouse Zionism, to leave the Ba’ath Party, and to encourage others to do so. It has been
reported that Hussein executed 120 army officers for objecting to his invasion of Kuwait.
Hussein informers have infiltrated every facet of Iraqi life, and people cannot even express
their opinions at home. See Talking Points, supra note 64.

To further insure his stranglehold, Hussein has recently replaced LTG Nazir al-Khazraji,
Chief of Staff since 1985, with GEN Hussein Rashid, commander of the Republican Guards.
GEN Rashid is believed to be from Hussein’s hometown of Tikrit. Also dismissed was Oil
Minister Issam Chalabi, who was replaced by Hussein’s cousin and son-in-law, BG Hussein
Kamel. Kamel is also Minister of Industry and Military Industriization, and is believed to
be in charge of the country’s internal security. See Hussein Ousts Chief of Staff Amid Signs

67. Task Force, supra note 17, at 10. In an effort to renew the glory of Babylon and its
powerful king, Nebuchadnezzar, Hussein has tried to rebuild the ancient city with its hang-
ing gardens. However, his drive to rebuild Babylon and revive the imperial power, military
prowess, and vision of King Nebuchadnezzar have been temporarily stalled due to the Gulf
Crisis. See Wash. Times, Aug. 13, 1990, at D4; and John F. Burns, Mideast Tension; New
Babylon is Stalled by a Modern Upheaval, N.Y. Times, Oct. 11, 1990, at A13. He also com-
pares himself with Saladdin, a 12th century Muslim warrior who united much of the Arab
world. However, Hussein ignores that Saladdin was a Kurd. See Task Force, supra note 17,
at 10.

the Middle East and to eliminate the imperialists' "lines in the sand." Disrupting the status quo is essential to such a scheme, which makes his invasion of Kuwait, his refusal to obey sanctions, and his labeling the United Nations as a tool of developed countries to suppress underdeveloped countries, predictable actions when taken in context. It is clear Hussein views military might as the means to his ends and perceives ruthless control as essential to completion of his vision.

Although already perceived as a brutal ruler, Hussein will be at his most dangerous when he feels there is no way out. If he is going to die regardless of what course he takes, he would rather "die for a sheep as he would for a lamb." He possesses the four characteristics that indicate explosiveness: unbounded self-exultation; unconstrained use of aggression; no conscience; and a paranoid outlook. "If he has to lose, everybody loses."

Believing reality comes from power, Hussein presents the world with an example of a leader who has "effective" power as opposed to "legitimate" power. Indeed, his decisions are followed, though this is done out of fear rather than as the result of any "legitimate" process. To Hussein, morality and ethics are simply tools or excuses the powerful use to manipulate

69. In this regard, he adheres to the Ba'ath ideology that all Arab frontiers are of a provisional nature, created by Western imperialists. Hussein intends to fulfill the Ba'ath prophecies and ideology by restoring Baghdad as the center of the Arab world (over Damascus and Cairo) with him as its leader. Note that his appeal to Islamic sentiments and its supra-national identity is reminiscent of Nasser's great campaigns. See Task Force, supra note 17, at 11.

70. See Task Force, supra note 17, at 11-12. Hussein is exploiting three aspects of Arab culture to achieve his ends. First, he emphasizes the commitment pan-Arab glory deserves. Second, he creates incentives for other regimes to dismember existing states under the banner of an anti-imperialist struggle. Third, he exploits the Palestinian cause and the Arab sentiment to "never side with a foreigner against an Arab—at least not in public," long held by Arabs. By referring to the Gulf Crisis as a Jihad, Hussein seeks to render illegitimate Arab regimes opposing Iraq.

71. An Arab saying referring to the fact that Hussein's perspective is that if he is going to go down, he might as well go down for something big. Interviews with Abdel Massadeh, supra note 18.

72. See Post, supra note 34.

73. See Rothman, supra note 34.

74. Professor Moore describes two intersecting spheres of power, an "effective" sphere and a "legitimate" sphere. One should make distinctions between attempts to establish world order, depending on whether the attempt falls primarily in one sphere or the other. The "effective" sphere represents pure force, brute force if necessary, void of moral and social authority. The sphere is termed "effective" because, due to the reality that directives given within the sphere are followed, it excludes many decisions that are followed due to the concept of being just. The "legitimate" sphere represents authority properly used. A third sphere, that of "law," partially intersects with the effective sphere but is wholly subsumed within the authoritative sphere.
the weak. He cites the United States' support of Israel on the West Bank to show that morality is only an instrument used by the strong to maintain the status quo.\footnote{See Razi, supra note 34.} He therefore links his move into Kuwait as an overall solution to the Middle East problems and as an effort to stifle a coalition against him.\footnote{See Post, supra note 34.}

Hussein may be a good tactician, but in the larger perspective, he is a poor strategic thinker.\footnote{Professor Scott Harrop, University of Virginia, Address on The Iraqi Invasion of Kuwait, A U.S. Foreign Policy Perspective (Sept. 5, 1990).} Just as in the war with Iran, Kuwait provided Hussein with battles which he could relay to his people claiming victory. However, just as he did not win a strategic victory over Iran, Kuwait may not provide Hussein an ultimate victory. Similarly, the gas attacks on the Kurds may have solved an immediate problem, but the lasting impressions Hussein made on the world may have been what caused such immediate and overwhelming response against him when he moved into Kuwait. He certainly did not anticipate the unified international response.

One explanation for his severely restricted view of the world has been that during more than ten years as President, Hussein has traveled only to Moscow and Paris in his position as head of state, most likely due to a fear of leaving anyone else in control. According to Professor Harrop, Hussein's iron grip has not united Iraq as much as it has "atomized" Iraq. By splintering the country, destroying communal identities (such as was done in 1988 with genocide of Kurdistan depopulation in Halabja), and by being unyielding in the abuse of power, he maintains a primordial control of the country.\footnote{J.N. Moore, Class lectures at University of Virginia Law School, Charlottesville, VA (Sept. 1990).}

Hussein's ability to reason and even compromise stand out as paradoxical. While he is willing to withstand enormous hardship and pain for a questionable cause (such as the war with Iran), he can turn around and give up hard-earned assets with little hesitation (such as the Shatt al-Arab waterway gained during the war).\footnote{Professor Scott Harrop, University of Virginia, Address on The Iraqi Invasion of Kuwait, A U.S. Foreign Policy Perspective (Sept. 5, 1990).} Contrary to common belief, Hussein is "dynamically interacted with the situation. He can reverse his position."\footnote{Id.} Hussein "is very practical and pragmatic when it comes to transient and temporary compromises" that further his long term objectives.\footnote{See Post, supra note 34.}

While it is unlikely Hussein would voluntarily submit himself to the jurisdiction of a Grievous Offender Tribunal, he has taken unexpected
steps (perhaps for the attention they bring) in the past. As the situation tightens around him, Hussein may see a trial as a stage for his version of the facts, as another possible delaying tactic, or as a life saving measure in front of an overwhelming military force lurching at his borders. A trial may produce an unexpected result, an actual appearance by Hussein, or at least someone on his behalf. Hussein sees himself on the pantheon of great leaders, and he does not want to lose that vision of himself. Hussein’s craving for attention, his need to be at the center of attention, and his desire to have the eyes of the world on him may assist in his eventual demise. A trial would give him that opportunity.

VI. THE UNITED NATIONS

“[T]he United Nations has silenced most of its detractors. A body once scorned as a dithering talk-shop has now mobilized impressively to punish Iraq’s aggression in the Persian Gulf. . . . the U.N. has also offered . . . hopes for a new world order to resolve conflicts by multilateral diplomacy and collective security.”

A. The General Assembly

The post-Cold War environment provides the United Nations with an opportunity to work as its framers (and the League of Nations’ founders) envisioned, and the Iraqi invasion of Kuwait presents the world a precedent setting opportunity. Today, rather than focusing on defending the Fulda gap, the United States and Western powers are confronted with budget limitations, troop reductions, and fluctuating threats resulting from the dramatic changes over the last year. The Soviet Union is immersed in its own economic and political turmoils, and China remains secluded in an effort to resist the winds of change sweeping elsewhere. Each superpower has found the United Nations to be a convenient tool for advancing its own cause, or helping to control belligerents who threaten peace.

The increased role of the United Nations was summarized in a New York Times editorial: “It used to be said that serious questions of international peace and security were beyond the capacity of the United Nations and that its main practical usefulness therefore lay in the economic and social field.” Change is urgently needed. “Without the paralyzing constrictions of the cold war, a greatly improved process is possible. It is

82. Id.
time to make the international system work." The increased hope comes from the actors adopting more objective perspectives, creating room for large consensus measures. The Soviet Union, perhaps acknowledging its own role, recognizes that "the world, through the United Nations, has made unprecedented progress in the peaceful resolution of conflicts."

However, the General Assembly is not designed to be the means of maintaining order. Though peacekeeping missions have been authorized by the General Assembly, such missions have resulted from the Security Council's inability to act. One major drawback to peacekeeping missions is that participation is voluntary. When a country does not feel that it is in its best interest to participate, or when a country wants to withdraw, it is free to do so. Any attempt based on state acquiescence by the General Assembly would undoubtedly result in a situation similar to that feared by proponents of a world criminal court.

How dreadful and antithetical to the intentions of the proponents it would be if our good intentions created nothing more than a politically expedient dumping ground for politically sensitive cases. Likewise, how unfortunate it would be if this complex endeavor had the effect of diverting attention or resources away from more practical and readily achievable means...

For this reason, article 24 of the United Nations Charter confers "primary responsibility for the maintenance of international peace and security" on the Security Council, and gives the Security Council staying power with mandatory compliance under article 25.

B. The Security Council

The United Nations designed the Security Council to be its workhorse for maintaining international peace and security. The United Nations requires parties to seek peaceful settlements, but allows the Security Council to step into the dispute when the Security Council deems necessary under United Nations article 33. Likewise, should the parties fail to settle the dispute, article 37 requires them to take the issue to the Security Council.

85. Id.
87. E.g., when the United States Marine barracks were bombed in Beirut, the United States pulled out of Lebanon.
89. U.N. CHARTER art. 24 ¶ 1.
90. U.N. CHARTER art. 25, ¶ 1.
91. U.N. CHARTER art. 33, ¶ 1-2.
The Security Council is given additional investigatory powers, decision powers, and the authority to call upon members to apply measures to enforce Security Council decisions. Finally, but most importantly, article 25 makes decisions of the Security Council binding on members.

World realities require the Security Council to serve as the governing body for highly controversial matters. As a practical matter, the superpowers have the means of enforcement and are expected to use them. For example, in the Gulf Crisis, the United Nations Secretary General could not have imposed a blockade on Iraq without the Security Council authorizing the superpowers to employ their naval forces. The world's population and power are not distributed equally. As a consequence, the General Assembly's "one State one vote" is neither equitable nor practical, and, therefore, it is not given much credibility by countries with the power to act.

The authority of the Security Council to act, the expectations States have of the Security Council, and the requirement of States to follow the decisions of the Security Council, make it the "authoritative decision maker." In theory, the Security Council has the means, the authority, and the power to enforce the necessary sanctions to create world order. And to the extent it asserts itself successfully in this area, it further anchors itself in the area of "the rule of law."

Reality, however, produces a less than ideal result. The dream of collective self-defense has not materialized under the leadership of the Security Council mainly due to problems stemming from the Cold War. Though the Security Council can authorize measures, actual implementation is left up to individual States. The forces to be made available to the Security Council under article 43 have never been implemented. Having no police or military force of its own, the Security Council is unable to force or direct action unless there is a cooperating state. Building large blocks

92. U.N. Charter art. 37, ¶ 1.
95. Flora Lewis, Foreign Affairs; Are States All Equal?, N.Y. Times, Nov. 10, 1990, at p.23. Flora Lewis writes: The Gulf Crisis is a new test of the community's will and ability to respect laws that all profess in the abstract. But it is also a reminder that law is not self-enforcing. Cynical realpolitik, based on self-interest without standards, was carried much too far. But it cannot be replaced with utter idealism. The "rights" of nations are limited, and the limits must be imposed by those who can.

Id.
96. U.N. Charter art. 43, ¶ 1.
of consenting States when enforcement of sanctions is contemplated thus becomes important, as the Gulf Crisis demonstrated.

In efforts to enforce sanctions against Hussein, the Security Council passed eleven resolutions between August 2, 1990 and November 29, 1990: (1) August 2, 1990: Condemned the invasion of Kuwait and demanded immediate, unconditional withdrawal; (2) August 6, 1990: Initiated trade and financial embargo against Iraq and "occupied" Kuwait; (3) August 9, 1990: Declared Iraq's annexation of Kuwait null and void; (4) August 18, 1990: Demanded the immediate release of foreigners and the right of diplomats to visit their nationals; (5) August 25, 1990: Called on member states with maritime forces in the area to halt and verify cargo bound for Iraq, and to use the Military Staff Committee; (6) September 13, 1990: Reaffirmed Iraqi responsibility for foreigners' safety, and reviewed situation regarding food supplies; (7) September 16, 1990: Condemned Iraqi aggression against diplomatic premises and personnel; (8) September 25, 1990: Imposed air embargo on traffic both into and out of Iraq; (9) October 29, 1990: Asked countries to document human rights violations and economic damage resulting from the invasion. The resolution also demanded Iraq cease taking hostages and demanded Iraq provide foreigners with food and water; (10) November 28, 1990: Condemned Iraq's changing of Kuwaiti demographics and destruction of Kuwaiti civil records; (11) November 29, 1990: Authorized the use of force.

These resolutions do not represent technical violations of international law, these strike at the core principles of world order. The resolutions represent dramatic efforts to force Hussein out of Kuwait, but each relies on Hussein yielding to its effect. Should Hussein continue to hold out, the

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99. Id. at 75-76.
100. Id. at 76.
101. Id.
102. Id.
104. Id. at 112-13.
106. Id.
108. Id. at 298.
109. Id.
logical progression is to go to war. The time is "ripe" for considering all options and taking new action short of war.

One instance where the Security Council could push in a new direction is its Military Staff Committee. Like the Security Council and the United Nations at large, the Military Staff Committee was paralyzed until recently. Then, in October 1990, the Soviet Union suggested reviving it. With varying degrees of enthusiasm, each of the other Security Council members agreed and the Committee has revamped its meetings. The resurgence of the Military Staff Committee is an example of the willingness of the world to reach for approaches and tools never used before.

Though the name "Military Staff Committee" may conjure up images of using military force, a recent statement by General Norman Schwartzkopf, commander of United States forces in Saudi Arabia, shows that military leaders are sometimes the last to advocate the use of force. He said that he was not "dovish," and he certainly was not "hawkish." He considered himself "owlish": wise enough to know the United States should not use the military if the other sanctions might work. The time is appropriate for other initiatives, and the Security Council should be the focal point of action.

111. DAILY PROGRESS, Nov. 15, 1990 at 10. In achieving the resolution authorizing the use of force, Secretary of State James A. Baker III traveled to seven countries and met with leaders of eight countries the first week of November seeking support for a "military resolution." He met with the foreign ministers of Security Council members Ethiopia, Ivory Coast, and Zaire on Nov. 17, 1990 for the same reason. The "administration had decided to seek approval of a U.N. resolution [seeking military force] before the end of [November]" due to the Security Council Chair rotating from the United States to Yemen (which sides with Iraq) on December 1, 1990. The resolution passed on November 29, 1990, with a vote of 12-2 (Cuba and Yemen, China abstained). Id. Also, on Nov. 7, 1990, President Bush ordered nearly a doubling of United States forces in Saudi Arabia, from 230,000 to approximately 400,000, to allow for an "offensive" option. N.Y. TIMES, Nov. 8, 1990, at A1.


VII. Anti-Iraqi Coalition

The last major participant in the Gulf Crisis is the catch-all group of states that form the "anti-Iraqi" coalition. Led by the United States, the anti-Iraqi coalition has taken a firm stand against Hussein's aggression. The coalition has brought the United States and the Soviet Union together; it has put United States forces on the ground in enormous numbers in Saudi Arabia; it has resulted in Arab forces being deployed against other Arabs; and it has created strange "bedfellows" exemplified by Syria and the United States being on the same side.

Only the most dramatic of circumstances would result in such vast realignments of alliances. Naturally, Great Britain expressed outrage similar to that expressed by the United States and it deployed forces to the region. Japan and Germany quickly responded with financial and vocal support for the United States' action. Consistent with the changes in the Soviet Union, the Soviets did not interfere as they have in the past. Perhaps because of their own internal problems, China maintained a low profile. Most extraordinary was the plea for Western military assistance to protect one Arab country from another. The aligning of Western forces with Egyptian, Syrian, Saudi and other Arab forces was indicative of the extreme divisiveness among Arab sentiments and the hostility felt towards Hussein.

Responding to Kuwait's plea for help, and asked by the Saudis to help defend their country from the Iraqi threat, the United States sent forces to Saudi Arabia. This move was permissible under article 51 of the United Nations Charter as collective self-defense. The United States' example has been followed by other countries, though certainly not to the extent of United States deployments. The United Nations Charter also

114. Of course, there are some states such as Yemen and Libya that support Iraq, and others such as Iran and Jordan have leaned in both directions. Participation by these States may eventually prove to be crucial, but to date their activities have not been overwhelming factors.

115. George Will refers to Syria's President Assad as a mass murderer and a certified terrorist "who is devouring Lebanon." Yet, when President Bush went to Saudi Arabia to be with the troops for Thanksgiving, Will met with Syria's President Assad. See DAILY PROGRESS, Nov. 8, 1990.

116. The coalition illustrates how the world of diplomacy operates, where the exchange of favors is "quid pro quo." By siding with the coalition, Egypt has been able to write off billions of dollars in debt, Syria has gained more control in Lebanon, China has received a 30 million dollar loan, and the Soviet Union is to receive help with its economy. See DAILY PROGRESS, Dec. 11, 1990, at A5.

117. U.N. CHARTER art. 51, ¶ 1.
recognizes the ability of states to join in regional enforcement action, and, of course, to engage in individual self-defense.118

What is at issue now is the language of article 51 that nothing impairs the right of self-defense “until the Security Council has taken measures necessary to maintain international peace and security.”119 The United States and other countries have turned to the United Nations to build the coalition against Iraq. By passing resolutions condemning Iraq, it would appear that the Security Council has begun “taking measures necessary to maintain international peace and security.” Should the United States or any other country act independent of Security Council approval and strike Iraq, one could argue that such action is contrary to the intent of the Charter. For this reason, Secretary of State James A. Baker III travelled to many states to obtain support for a resolution authorizing military action.120

VIII. ANALYSIS AND DISCUSSION

To place a recommendation in context, the perspectives and expectations of the various parties must be made clear. The frame of mind of the decision maker with regard to demands and expectations placed on him, with whom and what he identifies, and the compatibility of the sanction with basic community policy, are issues that should be considered. The perspectives of Saddam Hussein are quite different from those of the United States.

Demands are expressions of value, such as positive commitment to minimum order.121 Saddam Hussein has expressed no commitment to a minimum order other than his own ruthless and abusive tactics to maintain control through the use of fear and intimidation. As described before, Hussein’s control is “effective” but not “authoritative.” The United Nations and the anti-Iraqi coalition have expressed their commitment to minimum order through the vehicle of the United Nations. It is in reliance upon that commitment that the coalition of states have passed resolution after resolution in attempts to persuade Iraq to leave Kuwait. The commitment to minimum order also explains the United States’ resistance to pleas from Saudi Arabia and Kuwait to proceed quickly with a military attack.

118. U.N. Charter art. 52; L. Henkin et al., Basic Documents Supplement to International Law 113 (1987) [hereinafter Henkin Supplement].
120. See Wash. Post, supra note 55.
121. McDougal, supra note 3, at 283.
Identification is the process by which one comes to regard oneself as part of an aggregate or group. Saddam Hussein has tried to identify himself as the leader of the “Arab Nation,” but has ignored recent history of the region in doing so. The colonization of much of the Arab world and the subsequent divisions of those lands into political states contradicts Hussein’s claim of “one Arab Nation.” The reality that the Arab States have their own leaders with their own power bases and political agendas flies in the face of Hussein’s claims and explains why his moves are labeled “naked aggression.” The United States and the anti-Iraqi coalition states identify themselves as members of the United Nations, and they are willing to work within the framework of its Charter. The United Nations itself may be characterized as an organization within the world community, dedicated to producing world order.

Expectations are realistic beliefs about the past and realistic forecasts of the future. Realism is achieved through close correspondence with the events, and described as a disinterested observer would report them. Looking to the past, Hussein saw the United States and United Nations agree to a stalemate in Korea; he saw the United States pull out of Vietnam in humiliation; and he saw the United States leave Lebanon in the early 1980s to an emasculated United Nations force. As for his own abilities, Hussein expected a quick victory against Iran, but only fought to a draw after eight years. He accepted huge losses in the war; he used children to man his front lines; he used chemical weapons with impunity; and he returned the Shatt al-Arab opening to the Persian Gulf to Iran after the war. Despite these facts, Hussein claimed “victory.” Hussein projects that he again will be able to claim victory.

Sanctioning has been done historically in an unorganized process. Absent an overall governing body, or given only an ineffective shell such as the League of Nations, or the United Nations for much of its history, states have been forced to rely on ad hoc approaches to sanctioning violators of international law. The result has been an unorganized approach exhibiting varying degrees of success.

122. Id. at 284.
123. TASK FORCE, supra note 17, at 9-12. He also chooses to ignore the historical claims that Jews, Christians, and others have to lands the Ba’athists consider Arab. Concurrent with Hussein Ibn Ali’s struggle to create an independent Arab nation, equally determined Zionists were struggling to create a Jewish nation in the land of Palestine.
124. McDougall, supra note 3, at 287.
125. William Safire quotes the Voice of America in calling the return of Shatt al-Arab an act that “rendered meaningless the loss of hundred of thousands of Iraqi lives in a war lasting eight years.” See DAILY PROGRESS, Nov. 17, 1990, at 4.
126. TASK FORCE, supra note 17, at 12-13.
127. McDougall, supra note 3, at 296.
The current objective is to organize sanctioning into a system. The United Nations, with its "elaborate and complex structure with a multiplicity of organs and affiliated bodies," is a prime example of an organized sanctioning system. The character of the United Nations Security Council has been described as, and its authority places it at the pinnacle of, an authoritative process. The establishment of a Grievous Offender Tribunal by the Security Council would fall squarely within the expectations of the world community.

Furthermore, the tribunal approach is both proportional and compatible. It is proportional in that it has a reasonable possibility of acting upon the international environment. It is compatible because it complements other elements of a comprehensive approach to international security. Additionally, it gives effect to the asserted claims necessary for a functioning international law. And finally, it is a logical extension of the nine principal approaches to controlling international violence, specifically the approach deterring violations of conflict management norms by making their violation criminal acts demanding personal responsibility. The situation presented by Iraq's invasion of Kuwait presents the Tribunal with a paradigm case on which to "cut its teeth." It is difficult to envision a better situation under which to initiate an organized sanctioning system.

A. The Trial of President Bush

The base values used by the sanctioners are generically the same as are available to the violator. It is this phenomenon that causes Iraq to threaten President Bush with war crimes trials at the same time the United States is discussing trying Saddam Hussein. At issue is what means each has at its disposal to effect a particular outcome.

128. Id. at 301.
129. Id. at 22.
130. Id. at 28.
131. J.N. Moore et al., National Security Law 364, at 47-48 (1990) [hereinafter National Security Law]. Those nine approaches are: (1) determining when it is permissible to use force (the old "just war" analysis, or now, making a distinction between aggression and defense); (2) given a use of force, determining what norms govern the conduct of hostilities; (3) determining what obligations exist to pursue a negotiated settlement; (4) using conflict management to encourage dispute resolution as an alternative; (5) deterring violation of certain norms by establishing their violation as criminal acts for which there is personal responsibility; (6) seeking control through collective security; (7) seeking arms control and disarmament; (8) enhancing deterrence through a central strategic or political balance; and (9) looking to national measures for control of use of forces and for conflict management. Id.
132. Id. at 302.
133. The day after the United States raised the issue of trying Hussein for war crimes, Iraq responded by making the same threat about trying President Bush. The Iraqi reaction
For Iraq, it may try Bush in absentia with little hope of ever obtaining personal jurisdiction over him. In fact, two sites, Libya and Algeria, have been mentioned as possible locations for an Iraqi-backed trial of President Bush. In the case of Libya, Muammar Qaddafi has talked of putting President Bush on trial for war crimes, apparently as a diversionary tactic designed to take attention away from Hussein. The purpose of the Algerian trial would also be to shift attention from Hussein to Bush, but the interesting connection is that Algeria may play a vital role in a United Nations-backed trial of Hussein. In any event, neither Libya nor Algeria has the means, nor is it likely they can accumulate the means collectively, to bring President Bush to “justice.”

B. The Trial of Saddam Hussein

The anti-Iraqi coalition desires to use the international forum the United Nations provides to enforce what most of the world’s people have mutually agreed upon and understand. Any United Nations attempt to try Hussein would be an effort to supplement existing rules, and would be in line with what the states of the United Nations would have agreed to had they foreseen this problem. This course of action would be consistent with the notion that aggression is against public policy, that it is something the international community simply will not tolerate.

What differentiates the values and effect of the two different trials (Iraq’s trial of Bush and the United Nations’ trial of Hussein) is authority itself. Expectations that the “community” will make certain decisions in accordance with certain criteria and procedures gives authority to either trial’s sanction. Only when done in conformance with expectations and following proper procedures does any trial become “a dynamic base of effective power.” While Iraq’s trial of Bush would likely gain little international support, a United Nations forum indicting Hussein would provide an open conscience for the world. By gathering and using the authority that the due process of law offers, a “base of effective power” may emerge. It is for these reasons the world must make full use of the availa-

134. Telephone Interview with State Department Official (Dec. 6, 1990) [hereinafter State Dep’t Interview].
135. Id.
136. DOD Interview, supra note 134, State Dep’t Interview, supra note 133. Both the State Department and Department of Defense Officials considered a multi-lateral effort, purposely down playing United States involvement, as the only realistic possibility for actually conducting a trial of Hussein.
137. McDougal, supra note 3, at 303.
ble sanctioning institutions. The world should not let this opportunity become another example of United Nations’ inability to enforce sanctions.\textsuperscript{138}

C. Setting the Stage for Available Options

Strategies are courses of action for managing base values for the achievement of policy objectives. There are four main strategies: diplomatic, ideological, economic, and military.\textsuperscript{139} Each strategy can be analyzed by examining prevention, deterrence, restoration, rehabilitation, and reconstruction. An attempt at the edge of existing legal practices, but in line with organized sanctions and under a proper authoritative decision maker, would fit the various strategies nicely.

The diplomatic strategy is to influence agreement and project policy among the ruling elite. The trial of Saddam Hussein for grievous offenses would serve to bring about agreement among the ruling elite, especially considering the overwhelmingly negative attitudes expressed by most of the world. Ideologically, a trial would serve to influence attitudes of large groups of the world’s population against individuals who violate international law. Economically, the trial itself would not have to be excessive, as evidence against Hussein seems to be abundant and accessible. The effect of a trial would serve as notice to future potential violators that the production, conservation, distribution, and consumption of wealth processes are certainly not enhanced by short-sighted violations of international law. Militarily, a trial may prevent the application of violence that threatens millions of lives and the world economy.

Without trying to analyze each of the five characteristics of each strategy, a general review of the characteristics reveals support for such a course of action. First, prevention supports a trial because within the current framework, decision makers can be influenced to regard themselves as better off by avoiding breaches of order. Further offenses may be prevented by holding Hussein responsible now. Had the world reacted strongly to his earlier use of gas against Iran or against the Kurds, his

\textsuperscript{138} Rudolf von Jhering, in \textit{The Struggle for Law} (1915), ascribes the development of law itself to the persistence in human nature of the impulse to resent aggression, and maintains that one owes the duty to himself and to society never to permit a legal right to be wantonly infringed; see also \textit{Morningstar v. Lafayette Hotel Co.}, 105 N.E. 656, 657 (N.Y. 1914). It is this attitude that should prevail in grievous violations of international law. The failure to act against clear aggression could be argued as constituting custom or “state practice”, just as an affirmative act could help entrench the Nuremberg precedent of trying grievous offenders.

\textsuperscript{139} The following analysis is based on the author’s adaptation of the McDougal-Lasswell Model, \textit{supra} note 3.

\textsuperscript{140} \textit{McDougall}, \textit{supra} note 3, at 345.
power base may have eroded sufficiently to have precluded him from striking Kuwait.

When the probability is high that breaches will occur, deterrence becomes essential. Hussein has shown repeated wrongful use of hostages and forced removal of citizens from their homelands, as well as other atrocities, so the probability remains high such acts will continue. An international trial would serve to deter further wrongdoing and would send a strong message. Additionally, such a trial may well identify, clarify, and publish to other world leaders the difference between aggression and self-defense, which would have a deterrence effect elsewhere. Without a distinguishable difference published to the world, international law will not be able to stop aggression.

Once breaches have occurred, restoration is a “rolling back” of a destructive operation. Though it is unlikely a trial alone would roll back the destruction done in Kuwait, it may provide an initial step or a foothold for other developments. A finding of guilt would provide legal precedent for claims and suits against Iraq.

Similarly, once damage has occurred but hostilities continue, the focus should be on those who have suffered. A trial could provide the moral encouragement to begin the healing process for many Kuwaitis. Finally, reconstruction would support a trial because this is where fundamental institutions are brought into harmony with the overriding goal. Certainly, trial in a legitimately constituted court supported by most of the world’s governments would further bring the United Nations into the process of providing world order.

“Outcomes” are the immediate results obtained by participants in sanctioning activities. A number of positive results would be obtained by striving for increased world order through the employment of personal sanctions for violations of international law. Though the various embargoes and condemning resolutions indicate extreme displeasure with Iraq’s move on Kuwait, those efforts fail to drive home the personal responsibility to Iraq’s leaders, the decision makers. By seeking personal accountability, sanctions would add an immediate accounting, with corresponding evidence on specific charges, to the amorphous condemnations now existing against Iraq. Such accountability may serve as both a “wake up” call to Iraqi leaders who have already violated international law, and as a warning to those leaders who may do so in the future. Just as Churchill

142. McDougal, supra note 3, at 333.
said in World War II, warnings of eventual trials may reduce the brutality once the leadership realizes it is going to be defeated.148

Perhaps the best outcome of imposing personal sanctions early would be that the sanctions would be defined, and have the support of a united world community. One of the perpetual complaints of international law is that it is uncertain, both in application and extent.144 A Security Council tribunal, with authority to investigate grievous violations, would provide consistency of application and the tribunal’s sanctions would be uniform. By employing the tribunal now, the sanctions would be in place, ready for implementation once personal jurisdiction is obtained. The complications that arise after the fact (for example, the Nazis after World War II, or Noriega after Panama) would be severely reduced. The message would be clear: The world stands as an international community condemning aggression. It would also show that the countries of the world intend to abide by article 25 of the Charter and carry out the decisions of the Security Council.146

“Effects” refer to long-term consequences upon the international arena—that is, whether movement is made toward minimal world order.146 That international law has suffered from widespread doubts about its influence, relevance, or even existence has been discussed.147 The desired result is stability, and a Grievous Offender Tribunal would increase stability through the probability that international relations will be peacefully managed.146 International law has long recognized that states have the power to break a treaty, but not a right. And, when they do, they must suffer the consequences. The effect of a personal responsibility sanction would acknowledge one’s power to violate international law, but there is no right and no refuge. When one chooses to violate international law, one must face the consequences.

Whether there has been effective means to impose United Nations sanctions against an individual for violating the United Nations Charter remains uncertain. Because the Security Council does not have a police force, but rather relies on states to enforce its decisions, it is unlikely its

143. See F.M. Buscher, The U.S. War Crimes Trial Program in Germany.
144. “Realpolitik” misperceptions that there is no international law often occur because: there is no “international legislature”; there is no “compulsory jurisdiction”; there is no “sanction for violations”; law is only a “restraint system” and does not assist decision makers with complex national security decisions; international law is “vague and indeterminate”; the real world does not lend itself to morals and legality; and empirical observation reveals law is simply not considered. Richard B. Lillich & John N. Moore, 61 U.S. Naval War College International Law Studies ix (1980).
145. Henkin Supplement, supra note 118, at 105.
146. McDougal, supra note 3, at 333.
148. Id. at 32.
decisions alone will resolve the dispute. About all that can be expected of the Security Council is for it to continue reaching for ways to expand the use of law, economics, and politics to advance world order. By aggressively seeking a new approach such as the tribunal proposed herein, the Security Council would not have to rely on police powers, but can expect the cooperation of States to enforce its decisions. In this way, it should promote cosmos rather than chaos, settle patterns of behavior rather than have unpredictability, and produce agreed rather than forced decisions.  

D. The Grievous Offender Tribunal

Security Council Authority. The Security Council is international in nature, it is a “party” to international conflict, and article 24 of the United Nations Charter confers authority on the Security Council to maintain peace and security. Overall, it may be deduced that since articles 42 and 51 of the Charter give the Security Council power to “take at any time such action as it deems necessary,” including military operations, to restore international peace and security, conducting trials would certainly fall within such a grant of authority. However, such a wide open interpretation is not necessary.

Articles 39 and 41 combine to make a convincing argument for authority to conduct trials. Article 39 states, “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations . . . .” Article 41 states, “The Security Council may decide what measures not involving the use of armed force are to be employed . . . .” A trial provides an ideal means for determining the existence of threats to peace, breaches of peace, acts of aggression, and other “crimes” established by the Nuremberg Principles. Trials also are measures “not involving the use of armed force.” Clearly, the Security Council possesses the authority to conduct trials, and it has the authority to do so now!

Law consists of patterns of authority and patterns of control. The Security Council has authority and the Security Council should therefore establish the Grievous Offender Tribunal as the decision maker. Control exists only where decisions are backed by effective sanctions. Until now, effective sanctions have been missing from efforts to establish world order.

149. Id.
150. HENKIN SUPPLEMENT, supra note 118, at 106.
151. Id. at 110, 112.
152. Id. at 110 (emphasis added).
153. Id. (emphasis added).
155. HENKIN SUPPLEMENT, supra note 118, at 110.
through the "rule of law." A Security Council Grievous Offender Tribunal, backed with military force to apprehend the offender, would create the process and sanction needed to produce order through the "rule of law." The Tribunal would alleviate the helplessness countries often experience in times of international conflict, it would be cloaked in the authority of law and international community ideals, it would promote a sense of international community, it would educate the world (specifically potential violators and heads of state) on the difference between self-defense and aggression, and it would renew attention to international human rights. The Tribunal would combine the best efforts of the past with a logical step to the future by using a power that already exists.

Initially, the Security Council should limit the scope of any tribunal to the most grievous cases, those that involve true threats to world order. The limited resources (people, money, and material) available to the United Nations would be a practical limitation on the tribunal, and politically, the most grievous offenses would probably result in the least resistance. Also, other sanctions are available to settle disputes not arising to threats to world order,156 and the Charter under article 51 does allow individual and collective self-defense until the Security Council affirmatively says "no."157

Admittedly, conducting trials now would be a break from the past, when the Security Council's function has not been to act as a watchdog serving to adjudicate breaches of the peace.158 However, just because the authority has not been used before does not mean it should not be tried. The world is undergoing revolutionary changes, and organizations must adapt with their own significant changes if they expect to continue exerting influence. Implementation of the Security Council offers another advantage: to hold trials now would be to progress significantly from Nuremberg, where only the victors sat in judgment and the losers were the defendants.

Such an argument contains a deontological appeal. There is a rule of law, it is expected that it will be followed, and violators will be punished. The international community will have conferred jurisdiction on the Tribunal. Also, by signing the United Nations Charter, states recognize the scope of authority of the Security Council, and thereby they submit themselves to its jurisdiction; so no compulsory jurisdiction problem exists.

By exercising its authority in conducting trials, the Security Council could forestall potentially dangerous actions on both sides of a conflict.

156. See National Security Law, supra note 131, at 227 & 417.
158. National Security Law, supra note 131, at 274.
For Kuwaitis and other victims of Hussein’s terror, war crime trials will have little value except to prevent future harm. Retribution after the fact is little solace to one of Hussein’s victims. The initiation of war crime trials may be argued as measures utilized by the Security Council to maintain peace and security under article 51, and could be used to stall military action. Ironically though, trials may provide the proper basis for military action. If trials are conducted, and Hussein is convicted, then he could be labeled officially as *hostes humani generis* (common enemy of mankind), or more simply, an “outlaw.” Members of the United Nations could then take military steps to bring him to justice, much in the same way posses had authority to act in past days of the American West.

**The Framework.** “The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.”

The purpose of implementing trial procedures would be to outlaw force as a modality for aggression. To be effective, the jurisdictional principle of universality must be applied, and states must accept and carry out the decisions as required by article 25 of the United Nations Charter.

The Security Council should establish a tribunal similar to the International Military Tribunal used at Nuernberg. First, the Security Council should adopt a charter, forming a Tribunal as was done at Nuernberg. Naturally, the charter for such a tribunal would provide fundamental rights to the accused, such as the right to be present, procedural due process, and to defense counsel. As a practical matter, the tribunal charter should also limit the tribunal to cases involving “grievous offenses.”

Second, a panel of judges should be selected. The selection of judges could be a crucial element of the overall success of the Tribunal. Selecting a group of judges who would represent a multi-lateral effort to impose the rule of law is essential to the tribunal’s success. Any perceptions of the trial as a unilateral effort by the United States would severely weaken the “authoritative” nature of the proceedings. For these reasons, the Tribunal should be held outside the United States, even though the United States is “home” to the United Nations, and its members should be mostly—if not entirely—from countries other than the United States.

A tribunal panel for the trial of Hussein could include judges from the Soviet Union, Kuwait, Saudi Arabia, and perhaps Algeria. As for a site

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159. U.N. *Charter* art. 29.
160. See *National Security Law*, supra note 131, at 379; see also Henkin, *supra* note 1, at 824.
161. U.N. *Charter* art. 25.
162. “Grievous Offenses” are those “ Grave Breaches” defined in the 1949 Geneva Conventions. See *National Security Law*, supra note 131, at 376-77.
163. Algeria may play a key role in any talks or negotiations between Iraq and the West. Abdel Massadeh notes that Algeria is respected in the Arab world, and is viewed as a “mod-
for such a tribunal, the Gulf Cooperation Council should be consulted. That any trial which may occur will be a political action, dictated by the politics of the moment, is readily apparent. What is important is to recognize the framework in which a trial may develop, and wait for the appropriate time to select the actual participants.

The Nuremberg Principles provide sufficient framework to initiate the trials, and the Nuremberg examples may be used for charging purposes. Three main areas were used to cover the spectrum of crimes committed by the participants of World War II: (1) crimes against peace (waging aggression); (2) war crimes (grave breaches of the law of war); and (3) crimes against humanity. Human rights violations, when amounting to “grievous offenses,” should be incorporated here.

Just as was done at Nuernberg, no immunity should be given for heads of state or other government officials, and there should be no statute of limitations. No consideration or theory should prevent the individual from becoming the subject of international law if states, through the Security Council, so wish.

Naturally, the same ex post facto concerns that Nazi leaders raised probably would be raised again. The descriptive phrase nullum crimen sine lege, “without a law there is no crime,” would be argued by lawyers claiming there was not a “body of law” out there when the acts took erate” Arab state by the West. Though Jordanian news reports indicated Algeria was the likely spot for Iraqi-backed war crime trials of President Bush, there was no indication the Algerian government was to be involved in running the proceedings. Interview with Abdel Massadeh, Jordanian, supra note 18.

164. In talking with DOD and State Department and other government officials, the whole area of war crimes trials was so speculative that few people have taken the time to think through the realities of an actual trial. Though a file of evidence against Hussein is being kept, there is frustration with getting the Administration to even accept the idea of a trial. Now, the “box in” concern to diplomatic efforts prevents individuals from justifying the time to explore how such a trial would be conducted.

165. NATIONAL SECURITY LAW, supra note 131, at 370.

166. Id. at 378. The Geneva Conventions on the treatment of prisoners of war authorize a belligerent state to try individual members of enemy forces who violate the provisions of the Convention; they also require the state whose military authorities have committed these violations to bring them to punishment. See HENKIN, supra note 1, at 359.

167. NATIONAL SECURITY LAW, supra note 131, at 379.

168. HENKIN, supra note 1, at 149. The official position of defendants, whether as heads of state, or responsible officials in Government departments, shall not be considered as freeing them from responsibility, or mitigating punishment. Though an individual cannot acquire territory, make treaties, or have belligerent rights under international law, he can commit war crimes, piracy and crimes against humanity. See id. at 362 & 356.

169. Id. at 356.

170. Id. at 365; see also NATIONAL SECURITY LAW, supra note 131, at 369.
But, as the Nuernberg Court held, there is and has been law, what has not been in existence is a court. The Nuernberg trials established that there must be a law against certain behavior to try an individual for such behavior, even if the only applicable law is customary international law. The prosecution need not have given notice regarding who or what would enforce the law or execute punishment. In the present case, the Security Council could partially overcome the last objection by announcing now its intention of trying offenders when hostilities end.

Finally, the number of votes needed to convict, as well as any appellate rights should be considered. The standard set by Nuremberg worked well, and avoided the extensive criticism the Tokyo Trials received. At Nuremberg, three out of four votes were required to convict and sentence. If one judge from each of the previously suggested countries were to sit, a similar procedure could be used here. On the other hand, considering the development of the law since 1946—particularly in light of much of the world moving away from capital punishment—perhaps a larger panel (for instance, twelve) with a requirement for a unanimous decision for death sentences would be more appropriate. In the case of a larger panel, a minimum of two-thirds is suggested to convict and to sentence. If further safeguards are desired, a three-fourths concurrence could be required on sentences in excess of a certain term of years (for instance, ten). This is the procedure used by the United States Military judicial system.

As for any appellate rights, the sole source would be the Security Council itself. Any finding by a Grievous Offender Tribunal established by the Security Council should be considered final and binding, and appeals should be limited to procedural errors or findings of new evidence. Since the Grievous Offender Tribunal would derive its authority from the


172. NUERNBERG TRIALS, supra note 154, at 1448-49.

173. HENKIN, supra note 1, at 363-65.

174. The fairness of the Tokyo Trials was a subject of considerable concern. While the Nuremberg defendants were read or served copies of their charges individually, the Tokyo defendants were served as a group. While there were a range of verdicts and punishments at Nuremberg, the Tokyo results were considerably more uniform—to the detriment of the defendants. All appeals to General MacArthur were denied, and the process was extremely fast. Then, the United States Supreme Court chose not to intervene on many of the cases because the war crimes courts were initiated by an international effort and General MacArthur served as appellate authority in his role as Commander of the United Nations forces, not in any role under United States jurisdiction. An example of the “due process” concern was the appeal to General MacArthur by Defense Counsel Bruce Blakeney. Blakeney alleged, “In no case did the bare seven judge majority agree on a sentence. Death was voted with as few as four votes out of eleven in support.” See D. WELLS, WAR CRIMES AND LAWS OF WAR 67, 75 (1984).
United Nations Charter through the Security Council, no state alone would have authority to overturn a ruling, conviction, or sentence. Administrative matters, such as where a sentence of confinement would be served, or where a death penalty would be executed, should be resolved at the time the Tribunal is initiated.

**Charging Saddam Hussein.** To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously invalid, for in such circumstances the attacker must know that what he is doing is wrong. Aside from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Charging Saddam Hussein would serve several causes. First, it would formally put him on notice of the Security Council's intent to hold him personally liable (as opposed to Iraq in general) for violations of international law. At the same time, it would telegraph the same message to Hussein's "lieutenants" and other individuals throughout the world that they, too, may be held accountable for their actions. Charging would represent to Hussein a united effort by a representative body of the world community to enforce personal sanctions against individuals within Iraq, in addition to the economic and political sanctions being employed against the country. This sanction would force its intended subject to defend himself in court, and the unique personal component of the sanction would act independent of the subject's "resiliency."\(^{175}\)

Hussein's record of international law violations is extensive. In keeping with the political realities necessary to make a Security Council trial effective, those violations committed by Hussein which amounted to grave breaches should be the focus of the charging. A partial list for which he should be tried includes:\(^{176}\) (1) waging war of aggression against Kuwait;\(^{177}\) (2) failure to comply with United Nations resolutions legally binding against him between August 2 and November 29, 1990; (3) violating the 1949 Convention on Civilians (forcing civilians from occupied ter-

\(^{175}\) Hussein has indicated that the United States does not understand the resiliency of the Iraqi people. This suggestion was intended to deflate the importance of economic embargoes by inferring that the Iraqis can cut back, ration goods, and disregard material well-being. Charging individuals with violations of international law places a personal component upon sanctions that embargoes and condemnations fail to capture. *See*, *e.g.*, Mark Fineman, *Iraq Parades Its Defiance of U.N. Embargo*, L.A. TIMES, Sept. 27, 1990, at A1.

\(^{176}\) J.N. Moore & R.F. Turner, Iraqi Aggression and the Future of World Order, a paper delivered in class lecture, University of Virginia School of Law (Fall 1990). For a draft indictment against Saddam Hussein, see Ad Hoc United Nations Criminal Tribunal (plaintiffs) v. Saddam Hussein and the Military, Political and Economic Advisors of Iraq (defendants) submitted by the Commission for the International Due Process of Law to the Secretary General of the United Nations in October 1990.

\(^{177}\) *See* U.N. CHARTER art. 2, para. 4.
ritory, and failure to prevent Iraqi military leaders from improperly caring for civilians within their control);\textsuperscript{178} (4) forced relocation of 500,000 ethnic Kurds and Syrians in late 1980's;\textsuperscript{179} (5) using civilians as shields for military installations and targets;\textsuperscript{180} (6) threatening to let foreigners starve unless food was sent without conditions;\textsuperscript{181} (7) violating the 1961 Vienna Convention on Diplomats;\textsuperscript{182} (8) violating the 1973 Diplomatic Convention on Crimes (to protect Diplomats);\textsuperscript{182} (9) violating the 1979 Convention on Hostage Taking;\textsuperscript{184} (10) threatening first use of chemical weapons (1925 Geneva Protocol);\textsuperscript{186} (11) threatening to mistreat downed airmen;\textsuperscript{186} (12) threatening to use missiles against civilians;\textsuperscript{187} and (13) poisoning water supplies.\textsuperscript{188} Note that the list of offenses begins to resemble the catalog of offensives made by the World War I Commission,\textsuperscript{189} as well as those crimes for which the Nuremberg Trials were conducted. That similar war crime lists already exist (to which Saddam Hussein's actions correlate substantially) serves to prove a long-standing existence of international standards, of expectations of the world community, and of the existence of international laws against such behavior prior to the initiation of a Security Council court. These precedents should eliminate ex post facto arguments.

Charging Saddam Hussein would also help in eliminating mixed signals that have been sent to Hussein. A quick review of several substantial moves or positions taken by various participants reveals the disparity in messages being sent. Consider, the firing of General Dugan, the Air Force Chief of Staff, for his statements that the United States would target Saddam Hussein, his family, and Baghdad.\textsuperscript{190} Though Secretary of Defense Cheney was entirely proper in firing General Dugan, the message sent to Saddam Hussein was that United States military leaders should

\begin{itemize}
  \item \textsuperscript{182} Moore & Turner, \textit{supra} note 176.
  \item \textsuperscript{183} Id.
  \item \textsuperscript{184} Id.
  \item \textsuperscript{185} Id.
  \item \textsuperscript{186} Id.
  \item \textsuperscript{187} Id.
  \item \textsuperscript{188} See \textit{WASH. POST}, Aug. 22, 1990, at 27.
  \item \textsuperscript{189} \textit{National Security Law}, \textit{supra} note 131, at 364-66.
  \item \textsuperscript{190} \textit{Daily Progress}, Sept. 17, 1990, at 1.
\end{itemize}
not make such plans, that such plans are inappropriate, and that the United States may have legal or other problems with making an attack with those objectives in mind. Correct or not, those assumptions may have served to bolster Hussein's position with his own military. At about the same time, the President of France said that all Hussein needed to do was indicate a will to get out, and a negotiated settlement would be possible. Shortly thereafter, President Bush conceded a solution to the Crisis may be tied to Israel and the Middle East.

Then, the United States Congress and the press began making an issue of the necessity for the President to seek permission from Congress before beginning offensive operations. That criticism, of course, paralleled the plea from other states that the United States must act through the United Nations in any offensive military strike. The Soviet Union went so far as to say the United States "must never resort to force." All of these messages can be interpreted as signs of weakness, and Saddam Hussein's comments to a British reporter on November 11, 1990, indicate that is just how he chose to interpret the situation. What is important is Hussein's perception of the message, not the sender's intention. The charging and subsequent trial of Saddam Hussein would send an unequivocal message to him, Iraq, and the rest of the world.

Similarly, Hussein's trial and likely conviction would provide consequences beyond the obvious personal dilemma that it would cause Hussein. First, it would impose a duty on any nation to which Hussein may flee or travel to imprison or extradite him. The mandatory language of article 25 of the United Nations Charter is similar to Article 10 of the Maritime Convention with its "shall" prosecute or extradite provision. This requirement imposes upon states a duty to apprehend a violator if found in their country. Such an imposition would serve to bind the member States to the spirit of the United Nations Charter.

191. George Will complains the Bush Administration is sending "a garbled message." See DAILY PROGRESS, Nov. 8, 1990. President Bush has now retreated from the "linkage" issue, perhaps to simplify the negotiations over getting Iraq out of Kuwait. See CNN Headlines News, television broadcast, Dec. 6, 1990.

192. Id.

193. Martin Indyk, President of Washington Institute for Near East Policy, Lecture, University of Virginia School of Law (1991). At the conclusion of Baker's trip to the Soviet Union in early November, however, the Soviets agreed not to block a United States resolution to authorize force. See Andrew Rosenthal, Mideast Tensions: Buildup in Gulf Seen as a Signal on Use of Force, N.Y. TIMES, Nov. 10, 1990, at 1, col. 5.

194. The effectiveness of any sanctions "depend on his ability to receive the message. It is his perception that is important." Martin Indyk, President of the Washington Institute for Near East Policy, supra note 193.

195. U.N. CHARTER art. 25.

196. MARITIME CONVENTION art. 10.

Furthermore, a trial would combat his whirlwind of propaganda. Hussein has received undue media attention because of: (a) hostage taking; (b) claims that Kuwait is historically part of Iraq; (c) his putting Bush on trial for war crimes; (d) claims of United States imperialism; (e) claims that he is the liberator of Palestine; and (f) his "Robin Hood" image that he is protecting the poor by redistributing excessive Kuwaiti wealth. A trial would serve to educate the world about the difference between self-defense and aggression. It would also keep the "rule of law" at the forefront of world opinion, and reinforce expectations that disputes be resolved in a civil manner.

A judgement by an international tribunal condemning Hussein's actions and tactics may inspire a coup, force him to retire, or restrict his travel thereby limiting his ability to find support. As long as Hussein thinks he can possibly win friends in the international community, he will delay. On November 11, 1990, Saddam Hussein met with a Chinese envoy with the hope that he could convince the Chinese to veto a Security Council resolution authorizing military action. 198 Though Hussein was not completely successful because China abstained on the use of force resolution, the meeting represented his continued hope. Until the world acts decisively in a manner that does not provide Hussein hope of chiseling away at the coalition, he will rely on hope and keep stalling for time. Two options offer the decisiveness needed: A military strike and an international judicial decision. The available diplomatic efforts and resolutions provide loopholes and differing degrees of enforcement that "turn the ball back over to Hussein" to carry as he sees fit.

**Alternatives to Immediate Trial.** While a number of leaders have gone on record supporting criminal trials of Hussein and his accomplices, some experts have expressed concern with such an approach. 199 Recogniz-

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During the C-SPAN television broadcast on the Middle East, most speakers opposed the idea. See supra note 34. Razi called it counterproductive, as he thought it would back Hussein into a corner with no way out. Rothman said if Hussein "has to lose, everybody loses."
ing the political, logistical, and practical difficulties of establishing a Grievous Offender Trial, alternatives should be explored that may accomplish partial objectives on the road to order and establishing the "rule of law."

At a minimum, the Security Council should pass a resolution adopting a charter that establishes a tribunal and declares the Council's intent to prosecute grievous offenders. The tribunal could become the focal point for gathering evidence against offenders. Because memories fade, people die, and evidence is destroyed, the sooner a responsible body begins taking depositions, collecting evidence, tracking witnesses and so forth, the stronger the prosecution will be. Such a move will still send a strong message, and will avoid the in personam problem which an immediate trial would present.

A second alternative to an immediate trial would be a bifurcated investigation initiated to determine facts. As with the first alternative, the function of capturing the moment, preserving evidence, and making factual determinations may prove invaluable at a later date. Though without the authority to make findings of guilt in a criminal sense, a prosecutor could later use the investigation's findings to establish an offender's guilt. Such an investigation might begin with the apparently elementary question of whether aggression did occur. The investigation may delineate the difference between state aggression, which, although perhaps contrary to international law, may not necessarily result in personal culpability by a leader and individual aggression, whereby a leader should stand accountable and face criminal liability for his decisions and actions. Finally, a

That is, Hussein will unleash his arsenal with disregard for who is hurt. George thought a trial would push too far, and Hussein should be left an exit; the West should show a willingness to listen. Post advocated people think beyond the present crisis, and a trial might not be the best solution. See supra note 34.

Beyond the immediate crisis, there are substantial concerns with the Grievous Offender Tribunal approach. Foremost is the precedent such a trial would set where it could be used against all nations. Examples where such a trial may have been sought by some countries of the world are: (1) The United States in Grenada, Libya, and Panama; (2) The Soviet Union in Afghanistan; and (3) Israel in Iraq and Lebanon. Though having the Security Council conduct the trial would remove the inequities that have prevailed in the General Assembly for years, an unfair perception (that "might makes right") may certainly arise among the Third World.

200. One such distinction may be the finding of legitimacy (versus tyranny) of the leader's control. Using the McDougal-Lasswell model, if the leader's control is derived from an authoritative process, then deference may be given to his role as "head of state." If, however, the control is effective control outside the rule of law, then the leader's actions should be judged as any private individual would be judged.
later hearing might establish criminal liability, impose sanctions, or take other corrective measures as necessary.

**Advantages of Proceeding with Trial.** Proceeding with trial would produce a number of advantages, because the "rule of law" would help fashion policy. By taking action on the "rule of law," an entirely new dynamism takes effect. The need to base action on established national objectives disappears as United Nations objectives prevail. When the United Nations announces what the world wants to hear—that the United Nations can and will take action—national policy will usually become subsumed by that of the United Nations.

By taking action in accordance with the "rule of law," the United Nations will serve its own best interests because the decisional performance of an institution affects the respect and influence of that institution. In other words, by making decisions that are authoritative and effective, an institution increases its own stature. The institution gains respect, increasing the likelihood that in the future others will turn to it for authoritative and effective decisions in other difficult situations.

By using the judicial process, the United Nations would also place a timetable on Saddam Hussein, regardless of the nebulous embargoes and malleable diplomatic ultimatums. A trial progresses at the discretion of the fact finder, and such a proceeding would serve as a "punctuation point" in an analytical approach in which steps reinforce each other.

Until now, world order has been an elusive ideal, but institutions like the United Nations stand as evidence of man's continued pursuit of that ideal. To make the seemingly unattainable a reality, the United Nations and other world organizations need to use every tool at their disposal, expand currently accepted practices, and create new approaches to accomplish their objectives. Law exists as a key ingredient to the authoritative process, and proceeding with trial would provide a legitimate context for effective action.

Specifically, the establishment of a Grievous Offender Tribunal would be a logical progressive step in the development of the international law

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201. The muddling of issues that the United States has experienced becomes irrelevant. Whether the United States deploys to defend Saudi Arabia, to stop aggression, or to maintain a cheap supply of oil is not germane to apprehending criminals under authority of the United Nations.

202. NATIONAL SECURITY LAW, see supra note 131, at 25.

203. "Success breeds success." If the United Nations plays a pivotal role in solving the Gulf crisis, such success will have beneficial ramifications for other disputes. Chris Hodges, Confrontation in the Gulf: At the U.N. Many Issues Are Called, but Only One is Chosen: Persian Gulf, N.Y. TIMES Sept. 27, 1990, at 11, col. 1.

204. The idea is taken from Harold Saunders but this is not his approach. Saunders feels a trial would eliminate diplomatic options. Saunders, supra note 34.
of conflict management. Furthermore, an established tribunal would be in conformance with community expectations about proper decision and proper decision makers, as distinguished from decisions based on mere naked power.\textsuperscript{206} The tribunal would combine political legitimacy with social consequences, thereby producing a positive impact on the international law society. The tribunal would also impose a personal, direct sanction on responsible individuals, supported by real, tangible enforcement. The personal nature of a trial should serve as a deterrent factor, if not for Hussein, then for other violators of international law. Of utmost importance would be the effort to enforce sanctions, for without such effort, there is little reason for one to conform to society's expectations. One can expect international law to be considered "law" only so long as it controls behavior.\textsuperscript{206}

IX. CONCLUSION

Law is the continued pursuit of:

the shining but never completely attainable ideal of the rule of law above men . . . . If that ideal be an illusion, to dispel it would cause men to lose themselves in an even greater illusion, the illusion that personal power can be benevolently exercised. Unattainable ideals have far more influence in molding human institutions toward what we want them to be than any practical plan for the distribution of goods and services by executive fiat.\textsuperscript{207}

Though the concept of a rule of law which governs above men remains a shining ideal, man has made significant strides toward achieving that goal, and man's pursuit of that ideal has indeed molded institutions. The "rule of law" arose from a concept of legitimacy, wherein laws had to meet the criteria of being both effective and authoritative. Totalitarian regimes, though effective, were not accepted as authoritative like democratically elected governments adhering to a rule of law, and institutions such as the League of Nations and the United Nations were created as efforts by men to achieve supremacy of the "rule of law."

The Nurnberg Trials established the practice of holding individuals personally liable for war crimes.\textsuperscript{208} Personal accountability for violations of human rights arose from the atrocities of World War II and has pervaded institutions, governments, and courts worldwide. What were once "unattainable ideals" are, today, commonly accepted doctrines—or at

\textsuperscript{205} Moore & Turner, \textit{supra} note 176.

\textsuperscript{206} \textit{National Security Law}, \textit{supra} note 131, at 25.

\textsuperscript{207} Thurman Arnold, \textit{Professor Hart's Theology}, 73 \textit{Harv. L. Rev.} 1298, 1311 (1960).

\textsuperscript{208} \textit{Nuremberg Trials}, \textit{supra} note 154, at 1448-49.
least vigorously sought doctrines—throughout much of the world. By institutionalizing the concepts via the United Nations or other international organizations, the rules become more than just intellectual constructs, they become socially effective. In other words, the rules are legitimized by first being made and communicated, then the international organizations administer, interpret, enforce, adapt, and protect the rules.209 Most likely, there will be even more reliance on institutions such as the United Nations.

The Grievous Offender Tribunal as an alternative should be implemented on two bases. First, the tribunal is within the "rule of law" and would serve as a punctuation point that may lead to a resolution short of war. Second, if war is necessary, the tribunal could provide a legal basis for military intervention that avoids exploitable or questionable justifications by individual States.

By drawing from the trends and projections suggested above, the Grievous Offender Tribunal analysis answers the question set out in this Article: Who or what in the world today is best situated to make authoritative decisions and to identify the types of issues upon which the decision maker should act? Hussein's invasion of Kuwait presented a model case for answering those two questions.

Clearly, the United Nations Security Council is the organization best situated, properly constituted, and sufficiently possessed of authority to act as decision maker. As for the types of issues upon which it should act, the grievous violations of international law, especially the naked aggression in violation of an explicit treaty and the spirit of the United Nations Charter, are proper grounds for Security Council action. Hussein's invasion of Kuwait is ideal turf for implementing a new system because the violator is known, the crimes are horrendous, and nothing less than world order is at stake. By starting with the most egregious of cases, the Security Council can eliminate concern regarding whether and how it should be involved, and can use the opportunity to set precedent. The Nuremberg Trials provide an example of how the Security Council might accomplish such a task. In that situation, once the trials were held, the idea of war crime trials was accepted and the principles derived from the trials became customary international law.

Now is the time to expand the use of law, to move away from victor's justice, and to try violators in an international forum as evidence arises. The Security Council mechanisms contain the political realities (for example, major powers' veto authority) to make such trials and the resulting sanctions workable in today's world. By implementing a Grievous Offender Tribunal, the United Nations would move closer to the

209. See Bull, supra note 4, at 56.
unattainable ideal of the rule of law above man. The world must capture the moment and act now.

X. 1991 Postscript

The year following the development of this Article has truly been a "banner year."\textsuperscript{10} The Gulf War, the failed Soviet coup, the fall of communism, and the announcement of the destruction of tactical nuclear weapons are now history. Though the news has been good for the most part, the tumultuous times have caused many people to encounter difficulty in placing the events into an overarching perspective. Just what the "new world order" is and where it is leading has caused considerable anxiety.

XI. Trends for the Future

A number of trends have become apparent throughout this last year, and a look at their directions—even though they are quite diverse—is useful to this Article.\textsuperscript{11} The \textit{Legal Mix VII} study conducted this year at the Field Artillery School in Fort Sill, Oklahoma, identified four basic political, socio-economic trends that propel us into the future.\textsuperscript{12} The study uses Alvin Toffler’s technique of identifying prevalent trends, projecting them into the future, and then synthesizing the net effect of the multiple interactive trends onto our collective future world. The trends are balkanization, the move toward market economies and democracy, global interdependence, and the information explosion.

\textsuperscript{210} The phrase “banner year” derives from the banner headlines that extend the full length of the six columns on major newspapers. The most banners in a previous year was fifteen, while the dramatic events of this year resulted in over 30 in the first nine months of 1991. WCYK radio broadcast, Charlottesville, VA, Sept. 25, 1991.

\textsuperscript{211} The trends are taken from three main sources. The first two sources are renowned authors, Alvin Toffler and Richard Simpkin, who have been analyzing the undercurrents in world politics, particularly the way states confront one another, for years. The third source is the \textit{Legal Mix VII} study being conducted at the home of the Field Artillery in Fort Sill, Oklahoma. Assigned the task of formulating the force, structure and equipment for the artillery of the future, this study includes extensive work in indentifying the threat, tracking on-going trends, and projecting solutions for the future. All three sources have undertaken the task of capturing the essence of recent momentous occurrences, and their conclusions offer strong support for the conclusions drawn here.

\textsuperscript{212} See id. The far reaching nature of such a study is recognized when one considers it was the \textit{Legal Mix V} study conducted in the late 1970s that controlled how large portions of the Gulf War were fought in 1991. \textit{Legal Mix VII} is shaping forces and doctrine that will be applicable for perhaps decades into the twenty-first century.
A. Balkanization

"The likelihood of low-technology conflict increases with balkanization ...." 213 Modern balkanization represents the tendency for people to identify with, demand recognition, and place political demands via a group with which they freely associate. This trend is prevalent throughout the world; from ethnic groups, including Kurds, Croats, Sieks, Catholics in Northern Ireland, Basque Nationalists, and French-Canadians in Quebec to special interest groups such as farmers in Japan, winemakers in the European Economic Community, and ecology groups in America. At one time this trend was closely associated with and often mistaken for nationalism.

B. Market Economies and Democracy

Those political entities who resist the trend to market economies and democracy condemn their people to backwardness and their military forces to eventual obsolescence in an increasingly technical world. The drive toward market economies is the result of a realization that they are the best means of continually improving the quality of life for the most people. Market economies are a powerful force for political change. 214 Free markets beget free political institutions (democracy) which, in turn, beget individual and human rights. Labor is a commodity, and in a free market the labor force must flow freely to conform to the laws of supply and demand. A free labor force demands free political institutions to protect individual rights.

C. Global Interdependence

Participation in the global market economy will be the only way for governments to meet the growing needs and expectations of their people. 215 Global interdependence grows from the spread of market economies. As different people realize their comparative advantage relative to the remainder of the world, they tend to provide some good or service that they are better at producing than others. The growing linkages that develop between different economies produce a global market economy. Each entity becomes more dependent on others within the global economy. Each entity has a growing stake in the others' good fortune and also stands to lose in the others' misfortune.

213. See LEGAL Mix VII, supra note 211.
215. Id.
D. Information Explosion

"Information-based" economies out-perform others at an ever-increasing rate. The fourth trend, the information explosion, is the premier trend. It ties the other trends together and magnifies their impact on the world. The information explosion has transformed entire market economies. Some modern economies deal primarily in the production and dissemination of information and related services. The information explosion has divorced balkanization from nationalism. Groups of people can now associate with each other freely and frequently across zip codes, state boundaries, national borders, and oceans, whereas previously they could only associate with those with whom they came in physical contact. Global interdependence is facilitated by instantaneous global communications.

E. The Role of Law in the Trends of the Future

Naturally, the law has much to do with each of the trends individually. With balkanization, the rights of individuals as well as the sovereignty of governments are addressed by legal documents and concepts. Market economies are enhanced when corporations, investors, and private individuals can all rely on commercial codes, established procedures, and judicially enforced remedies to contractual obligations.

Global interdependence calls for common understanding and agreements in dealings between people, businesses, and governments—law establishes procedures upon which such common ground may be found. Finally, the information explosion would not expand as rapidly without the safeguards law affords to patents, profit sharing, and the other necessary characteristics of investment.

Law plays perhaps a bigger role in the overall process, a process which is best understood through analogy. The changes in the world today are so enormous and fundamental that the analogy of a nuclear reactor may best represent the dynamics of what is at stake. The world can be viewed as the power plant, while the changes over the last year or so can be viewed as the active components within the walls of the reactor.

If the active components are brought together rapidly, or are not kept in check, an explosion or meltdown may occur. If brought together within the confines of a properly functioning nuclear reactor, the same material that wreaks havoc and unparalleled destruction in one setting now provides the constructive power to light cities for years. The difference of these outcomes is in the control of the nuclear chain reaction.

216. Id.
Just as lead rods are used to soak up excess neutrons in nuclear chain reactions to control the rate of reaction, so must "lead rods" be in place to soak up the excess energy generated when revolutionary change occurs as a result of the four trends propelling the world into the future. Law is one such "lead rod" that needs to be in place to prevent a meltdown.217

By encouraging people to use established procedures, to work through existing institutions, and to remain within the "rule of law," the change that occurs will be both constructive and legitimate.218 The dual purpose of law—proscribing what is to be done on the one hand and establishing the structure or process on the other—is a concept that should now be explored in the context of adding to deterrence.

F. Law's Role in Adding to Deterrence

Select nation-states ruled by tyrants are the potential enemies of the global market economy and the four trends propelling the world toward the future.219 Nation-states have the legal means, as nations, to wage war, while individuals who engage in warlike behavior are bandits, pirates, or common criminals. When individuals control nation-states and act outside their authority, using the resources of the state to their own selfish ends, they become tyrants. Law needs to provide the means to deter tyrants from disrupting world order.

Tyrants can either conform to, withdraw from, or lash out at the trends that threaten the positions of power they have usurped. Those nations apt to lash out in response to the prevalent trends are the enemies upon which both legal efforts and warfighting efforts must be focused. Creating a legal structure that deters tyrants from acting, including for example, regional agreements, coalitions, and embargoes, is logically the best avenue to take. However, the best practical method for deterring tyrants'...
warmaking ventures is to establish a warfighting effort capable of utterly destroying these potential adversaries. By isolating and caging the tyrants, their warmaking means become increasingly irrelevant in a world that turns over technologically at an ever-increasing rate. Thus, law serves on two echelons: First, it proscribes what can and cannot be done; second, it establishes a framework within which legitimate actors can operate to militarily destroy a tyrant who threatens world stability.

G. Law in "Third Wave" Warfare

[A]s a precondition of political and moral acceptability, armies will employ force only in discrete amounts and for specific, achievable purposes, with commanders held accountable for needless collateral damage; force will constitute only one venue among many that states will employ to achieve their aims, with military means integrated with and even subordinate to these other means . . . .

Alvin and Heidi Toffler assert that the Gulf War initiated "Third Wave" warfare. The technological advances produced by Third Wave information-based systems have caused revolutionary changes in military doctrine, and such technological advances, combined with the trends assessment given earlier, demand a reconsideration of the accompanying legal doctrine.

220. Technology used to turn over every fifteen to twenty-five years. Today, the computer technology and information explosion has reduced that period to about seven years. If the world can find ways to deter a tyrant for just seven years, and keep him from obtaining the latest technology during that time, his war-making capability will almost assuredly be out of date and essentially worthless!


222. Alvin Toffler & Heidi Toffler, War, Wealth and a New Era in History, World Monitor, May 1991, at 46. The Tofflers assert that the First Wave of warfare arose out of the agricultural revolution ten thousand years ago. First Wave warfare mirrored the agrarian lifestyles, thereby featuring hand-held and hand-made weapons. Fighting was close-in, done face to face, and weapons such as the pike, sword, axes and battering rams depended on human muscle power.

The industrial revolution, starting in the late 1600s, launched the Second Wave. The concept of mass dominated the Second Wave, and machines replaced human muscle power. Mass production (featuring interchangeable parts), mass conscription, mass education, mass communication, and mass firepower produced the desired result of mass destruction. The atomic weapons that ended World War II epitomized Second Wave technology and thinking, as mass destruction became the central theme in military doctrine.

The Third Wave of warfare is now mutating in parallel with developments in society. As mass production is giving way to customized production, so is mass destruction giving way to smart weaponry that selectively destroys its targets. The Gulf War demonstrated the vast superiority of a Third Wave system over a Second Wave machine. Id.

H. Keeping Law Abreast of Current Technological Advances

Though weapons of mass destruction (products of Second Wave capabilities and mentality) will probably always remain a part of warfare, future conflicts will be decided based on surgical strikes. The Gulf War demonstrated the ability of a Third Wave army to put a smart bomb through an air shaft or an open window. The targets of the future will be the command and control centers, which, as a practical matter, translate into particular individual enemies. This is where law comes into play.

Current United States doctrine, formulated in response to world opinion, outlaws the targeting of specific individuals. Given technological advances that have revolutionized the theory of how to fight wars, legal doctrine must advance to permit the use of the technology for the good of people and world order. Rather than allow tyrants to legally kill 100,000 soldiers who are but their pawns, while others ( neutrals) are prevented from targeting the true cancer, the time has come to turn the tables on those who hide behind the law with impunity. The law should allow targeting of individuals who plan and wage aggressive wars.

The logical progression from this scenario is that if Security Council action allows the leadership to be attacked in war, the Council certainly has the authority, even the duty, to prosecute those individuals, using, if possible, procedural due process in a judicial setting.

I. Keeping the Law Abreast of Current Doctrine

"Irregular operations of every kind constitute the most likely form of future armed conflict; they should be understood and acknowledged for what they are—a way of war!" A fundamental direction of future conflict is toward maneuver or "leverage" warfare, as opposed to attrition warfare. The adherent of the maneuver theory of warfighting focuses
on destroying the enemy's warmaking psyche, minimizing the enemy's ability to resist by exploiting his weaknesses, maximizing one's own capabilities, and seizing and maintaining the initiative. To the statesman, leverage warfare includes the spectrum of initiatives from economic actions (for example, erecting trade barriers, withdrawing aid, and imposing sanctions) to political and diplomatic maneuvers, to quasi-military sanctions such as security assistance programs, shows of force, and joint training exercises with neighboring countries.

One arrow in the quiver of weapons that should not be ignored is the use of law. Placing a tyrant on trial, complete with inscrutable fairness and due process, is consistent with leverage warfare. This is precisely the same conclusion that Richard Simpkin reached at the end of *Race to the Swift*. Simpkin cited the once successful doctrine of declaring someone an outlaw. Such an action met the perpetrator on his own grounds. First, it caused him to be put in "the same legal status as hostile combatants at war with the outlawing state." Second, it gave people certain rights in dealing with the individual, and allowed the state to employ everything from "revolutionary warfare techniques to unrestrained action by organized forces." Again, the dual nature of law in proscribing what is and is not proper, and establishing a process by which the community at large may engage those who do not conform, is evident.

Though the trends identified by Legal Mix VII are interesting in and of themselves, and each trend to a large degree includes a role for law to play, it is the conclusions that can be drawn from the trends that provide insights to the "rule of law" as it relates to the overall process. First, all of the trends are favorable to ideals for which the United States and

aging strengths, one gains such superior positional advantage that wars are often won without even fighting.

230. By "maneuver" the author means to obtain such a superior positional advantage that the outcome of any battle will likely be a foregone conclusion. In maneuver warfare the target is the enemy's warmaking psyche. If that psyche is primarily built around a warmaking machine, as is often the case with tyrants, then the defeat of such armies closely parallels attrition warfare.

231. Simpkin states that the United States must begin seeing future war for what it is. It will rarely be declared. Our foes will seldom give us the time or the catalyst to respond with all our military might. Engagements and wars will be fought and decided without the ire of the public ever being raised. Our ability to respond to these lightning conflicts or showdowns cannot be caged within the historical framework of "war" as the western world has come to know it. The legal definition of war must be expanded to meet the dynamic reality of that phenomenon. Simpkin, supra note 223, at 320. Numerous authors warn of western traditions that severely limit the United States ability to play the world power game.

232. Id. at 321.

233. Id.

234. Id.

235. See Legal Mix VII, supra note 211.
the United Nations stand. In other words, all the trends are favorable provided they occur at a rate of speed that allows the economies, the governments, the institutions, and other factors to adapt to the changing circumstances. The "rule of law" plays an extremely important role in maintaining control over the changing process.

Second, as countries cross the threshold into the democratic, market economy, interdependent, information based arena, they become much less likely to adopt a foreign policy based on aggression. Subsequently, they become less of a threat to the world, and instead, join the community of nations interested in maintaining world order. The conclusion then, is that the threats in today's world are the industrial, mid-technology regimes that are inclined to lash out rather than conform to existing world norms. The "rule of law" should be employed to deter such actors from threatening world stability.

J. Saddam Hussein and the "Rule of Law" in the Future

Saddam Hussein remains in power today, and has yet to answer for his actions. The need to hold him accountable is more important than ever. Though the "rule of law" has made progress over time, it has been exceedingly slow in staying abreast of a rapidly changing world in the last half of the twentieth century.

There have not been war crime trials for individuals planning or waging aggressive wars since the 1940s; yet every decade since has seen innocent people die from such aggression. Just as crimes against peace arose from the Second World War, and the body of human rights law grew from the horrible atrocities committed during that time, now is the time to enlarge the rule of law again.

The world has become educated on environmental issues and stands ready to hold accountable those who wantonly destroy the environment. In addition to the three crimes of World War II fame, eco-terrorism should be added to the charge sheet against Hussein.

236. Among those ideals are freedom, respect for the individual, democracy, and human rights.


238. Consider, for example, that the laws of war were written for the European setting. Certain basic foundations and assumptions were at play, such as a hostile enemy desirous of fighting to the bitter end, yet possessing Judeo-Christian perspectives on life and death. Coalition forces in the Gulf War confronted by overwhelming forces seeking not confrontation, but rather food, shelter, and protection from their own command, did not find the current laws of war particularly helpful in describing Allied obligations to the prisoners.

239. Crimes against humanity, crimes against peace, and war crimes.
Thus, law should be used aggressively in a variety of ways against Hussein. Law should be used the way the politics and morals of our age dictate, growing in accordance with technology, tactics, and enlightened views on living together in an interdependent world. In its prescriptive capacity, the law prohibited Hussein from both the traditional war crimes and eco-terrorism. As for establishing process, the law should be implemented as a deterrent, not only for Saddam Hussein, but for other tyrants as well.

Finally, consider again that the failure to try Saddam Hussein may actually be cited in the future as evidence that it is no longer customary international law procedure to try individuals for planning and waging aggressive war. When someone openly flaunts accepted standards as Hussein has done, action must be taken to maintain the credibility of the system. If the legal world fails to act, the rule of law in the international arena should be subjected to severe, and justifiable, condemnation.

K. Conclusion

The Chinese character for "chaos" has two components. The first component means danger; the second component means opportunity. The chaos of 1990 and 1991 has presented the world with both danger and opportunity. It is significant to note that while the collapse of communism reduces the possibility of an all out nuclear war, it actually increases the probability of regional conflicts.

Rather than wait for a legal system grounded in nineteenth century thinking to catch up to our twentieth century world, the time is right to exploit the present opportunities. The dangers confronting the world are being met head on, and a momentum is under way toward achieving world order. The people of the world stand ready, anticipating formalization of changes proportional to the hazards many of them have just confronted. The United Nations should seize the opportunity, look forward to the twenty-first century, and act now to use the rule of law to the world's advantage. Some ways to improve the "rule of law" that should be implemented immediately include the following: Having the Security Council (or a forum created by the Security Council) try Saddam Hussein for grievous offenses, strengthening the "rule of law" by incorporating new offenses and allowing the targeting or trial of specific individuals, and using law as a tool to deter tyrants in all of their activities. The awesome changes of 1991 give rise to new dangers, but more importantly, the changes provide a unique opportunity to make "rule of law" the primary cornerstone for a new world order.