

1991

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Rex Zedalis

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## Recommended Citation

24 Vand. J. Transnatl. L. 711 (1991).

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# Burning of the Kuwaiti Oilfields and the Laws of War

Rex J. Zedalis\*

## ABSTRACT

*In this Article, the author addresses the question of whether Iraq's destruction of Kuwaiti oilfields constitutes a violation of the laws of war, particularly with respect to article 53 of the Fourth Geneva Convention, known as the Civilians Convention. After an introductory section evaluating the amount and nature of destruction suffered by the Kuwaiti oil industry, the author discusses whether article 53 covers destruction of state-owned oilfields. Although the specific language of the article appears to favor coverage, the history behind article 53 suggests that it protects property of a sort different than the state-owned property destroyed by Iraq.*

*The author then discusses whether article 53 applies to destruction by an occupying power in response to an external military challenge to occupation. In reviewing the history of article 53's application to external challenges to occupation, the author concludes that this article does not apply beyond situations of destruction inflicted during uncontested occupation.*

*Next, the author reviews the military necessity exception of article 23(g) of the Hague Convention for Regulations, which prohibits destruction of enemy property. The author discusses three precedential situations in which the meaning of article 23(g)'s exception was illuminated. This provision is discussed in the context of illegal wars of aggression, reviewing possible justifications for the destruction of Kuwait's oil resources. The author examines various reasons to interpret article 23(g) narrowly and contrasting reasons to interpret the provision broadly. In this section, the author concludes that, even though the exception in article 23(g) is broad enough to include the aggressive nature of the Iraqi war, Iraq may be hard-pressed to justify its destruction of Kuwaiti oil resources because of its objective of territorial aggrandizement.*

*Finally, the author states that Protocol I of 1977 is an extension of the laws of war and could be applicable to the destruction of Kuwaiti oilfields. This Protocol, however, is not universally recognized as part of*

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\* Professor of Law at Tulsa Law School; J.S.D. Columbia 1987.

*customary law, and so the destruction must be dealt with according to the Hague and Geneva laws of armed conflict.*

#### TABLE OF CONTENTS

I. INTRODUCTION . . . . .	712
II. A REVIEW OF THE DESTRUCTION . . . . .	716
III. ARTICLE 53 OF THE CIVILIANS CONVENTION AND STATE-OWNED PROPERTY . . . . .	718
IV. ARTICLE 53 OF THE CIVILIANS CONVENTION AND DESTRUCTION IN RESPONSE TO EXTERNAL MILITARY CHALLENGE TO OCCUPATION . . . . .	724
A. <i>Evolutionary Backdrop of Article 53</i> . . . . .	724
B. <i>Substantive Question of Article 53 and External Challenges to Occupation</i> . . . . .	728
V. THE CONCEPT OF MILITARY NECESSITY . . . . .	733
A. <i>The Historical Precedents</i> . . . . .	735
B. <i>Military Necessity and Illegal Wars of Aggression</i> . . . . .	737
VI. CONCLUSION . . . . .	754

#### I. INTRODUCTION

On August 2, 1990, the Iraqi military forces of President Saddam Hussein invaded the tiny Persian Gulf sheikdom of Kuwait.<sup>1</sup> The ultimate objective of Saddam's campaign may not become known for some time.<sup>2</sup> Little doubt exists, however, that the strained relations between Iraq and Kuwait that led to the invasion were connected with Kuwaiti reluctance to reduce oil production to boost revenues earned by Iraq's oil sales on the international market,<sup>3</sup> a move that would have allowed Iraq to address the debt associated with its eight-year war with Iran. In any case, the world community's response to the invasion was unequivocal. Through a series of resolutions adopted between August 2, 1990 and the end of November 1990, the United Nations Security Council demanded unconditional Iraqi withdrawal from Kuwait, prohibited trade with Iraq, condemned Iraq's violation of diplomatic premises, and criticized

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1. See Bob Woodward & Rick Atkinson, *Mideast Decision: Uncertainty Over a Daunting Move*, WASH. POST, Aug. 26, 1990, at A1.

2. One objective concerned Iraq's interest in physical portions of Kuwait. See Gerald F. Seib, *Iraq Has Shaky Claim to Kuwait*, WALL ST. J., Aug. 13, 1990, at 5. A second objective focused on Iraq's interest in disputed oil near the border shared with Kuwait. See Roger Vielvoye, *Kuwait-Iraq Border Dispute*, 88 OIL & GAS J. 32 (1990). Iraq also may have entertained ambitions with regard to Saudi Arabia.

3. See Michael R. Gordon, *Iraq Army Invades Capital of Kuwait in Fierce Fighting*, N.Y. TIMES, Aug. 2, 1990, A1.

Iraq's treatment of innocent civilians.<sup>4</sup> With Saddam's unwillingness to withdraw peacefully from Kuwait eventually internalized, the Security Council went further and adopted Resolution 678, authorizing member states cooperating with Kuwait to use "all necessary means to uphold and implement" earlier resolutions on the matter should Iraq not withdraw by January 15, 1991.<sup>5</sup> In exercise of that authorization, coalition forces launched Operation Desert Storm one day after that deadline passed.<sup>6</sup>

After a week of coalition bombing, reports surfaced that Iraqi forces had set fire to Kuwait's Al-Wafra oilfield near its border with Saudi Arabia.<sup>7</sup> Reports also circulated of refinery burnings at Mina Abdullah and Shuaiba, both considerably north of the Saudi border.<sup>8</sup> Within a few days, additional reports indicated that Iraq had opened the supply lines connecting mainland refineries at Mina Al-Ahmadi with the deep-draft loading terminal at Sea Island, five miles off the Kuwaiti coast.<sup>9</sup> Concern with the environmental consequences of the burnings and the discharge into the Gulf riveted public attention.<sup>10</sup> Then, within hours of the com-

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4. See S.C. Res. 678, U.N. Doc. S/Res./678 (1990), *reprinted in* 1 U.S. DEP'T ST. DISPATCH, Dec. 3, 1990, at 298; S.C. Res. 677, U.N. Doc. S/Res/677 (1990), *reprinted in* 1 U.S. DEP'T ST. DISPATCH, Dec. 3, 1990, at 298; S.C. Res. 674, U.N. Doc. S/Res/674 (1990), *reprinted in* 1 U.S. DEP'T ST. DISPATCH, No. 5, 1990, at 239-40; S.C. Res. 670, U.N. Doc. S/Res/670 (1990), *reprinted in* 1 U.S. DEP'T ST. DISPATCH, Oct. 1, 1990, at 129; S.C. Res. 669, U.N. Doc. S/Res/669 (1990), *reprinted in* 1 U.S. DEP'T ST. DISPATCH, Oct. 1, 1990, at 128; S.C. Res. 667 (1990), U.N. Doc. S/Res/667 (1990), *reprinted in* 1 U.S. DEP'T ST. DISPATCH, Sept. 24, 1990, at 113; S.C. Res. 666, U.N. Doc. S/Res/666 (1990), *reprinted in* 1 U.S. DEP'T ST. DISPATCH, Sept. 24, 1990, at 112; S.C. Res. 660-665, U.N. Doc. S/Res/660-665, *reprinted in* 1 U.S. DEP'T ST. DISPATCH, Sept. 10, 1990, at 75-76.

5. S.C. Res. 678, U.N. Doc. S/Res/678 (1990), *reprinted in* 2 U.S. DEP'T ST. DISPATCH, Dec. 3, 1990, at 298.

6. See Andrew Rosenthal, *War in the Gulf: The Overview*, N.Y. TIMES, Jan. 17, 1991, at A1.

7. See *Kuwaiti Oil Field, Refineries Ablaze*, TULSA WORLD, Jan. 23, 1991, at A1 [hereinafter *Kuwaiti Oil Field*]. The Al-Wafra field, managed by Texaco, had been producing 135,000 barrels per day before the Iraqi invasion.

8. See Philip Shenon, *Coalition Forces Moving Toward Kuwait Front—10,000 Sorties*, N.Y. TIMES, Jan. 23, 1991, at A1, A4. Mina Abdullah and Shuaiba are two of Kuwait's largest refineries, located south of Kuwait City. *Id.*

9. See Philip Shenon, *Huge Slick Still a Threat To Saudi Water Plants*, N.Y. TIMES, Jan. 28, 1991, at A1.

10. See R.W. Apple, Jr., *Relentless Tide of Oil Fouls Shores of Empty Saudi City*, N.Y. TIMES, Jan. 28, 1991, at A1; John Holusha, *U.S. Companies to Join Bid to Minimize Gulf Oil Spill*, N.Y. TIMES, Jan. 29, 1991, at A11; John Holusha, *War's Hazards for Environment Are Assessed*, N.Y. TIMES, Jan. 24, at D6; Carl Sagan, *Soot Is the Danger in Oilfield Fires*, N.Y. TIMES, Feb. 12, 1991, at A18 (letter to the editor).

mencement of the coalition's ground offensive in February 1991, Iraq reportedly had renewed its oilfield destruction by burning facilities at Rumaila, Bahra, and several other locations.<sup>11</sup> Unlike the condemnation of Iraqi treatment of captured coalition pilots,<sup>12</sup> however, little discussion occurred on whether the destruction of Kuwait's mineral resources amounted to a violation of the laws of armed conflict. This Article examines Iraq's activities in plundering Kuwaiti oil in light of that body of law, especially article 53 of the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons (Civilians Convention), which provides: "Any destruction by the Occupying Power of real or personal property belonging . . . to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."<sup>13</sup>

This Article reaches three conclusions on the basis of examining Iraq's activities in light of the laws of armed conflict. First, article 53's reference to state-owned property seems to cover destruction of Kuwait's state-owned oilfields. Nonetheless, the negotiating history of article 53 suggests the reference may have been designed to encompass property quite distinct from that involved here. Second, article 53 focuses on destruction of property by an occupying power and therefore appears to control directly the instant situation. When considered against the entire range of evidence available, however, the provision does not apply and takes a back seat to article 23(g) of the regulations annexed to Hague Convention IV of 1907 on the Laws and Customs of War on Land.<sup>14</sup> Third, the military necessity exception to article 23(g)'s prohibition may be interpreted best to include reference not only to the military usefulness of the destruction involved, but to the wartime motives, plans, and ambitions of the nation inflicting it. Judged by this standard, Iraq's objective of territorial aggrandizement seriously undercuts its ability to justify the destruction of Kuwait's oil resources. This lack of a justification is significant because Iraqi reparations to Kuwait under Security Coun-

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11. See R.W. Apple, Jr., *Record Number of Raids Flown Over Kuwait—Iraqis Burn Wells*, N.Y. TIMES, Feb. 23, 1991, at A1.

12. See, e.g., *Iraq Broadcasts Interviews With 7 Captured Allied Airmen*, TULSA WORLD, Jan. 21, 1991, at A9.

13. Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, Aug. 12, 1949, art. 53, 6 U.S.T. 3516, 3552, 75 U.N.T.S. 287, 322 [hereinafter *Civilians Convention*].

14. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, annex, art. 23(g), 36 Stat. 2277, 2302, 1 Bevans 631, 648 [hereinafter *Hague Convention IV*].

cil Resolution 687<sup>15</sup> will reflect compensation for destruction illegally inflicted, and determination of a final sum will turn on an assessment of the rules of law involved.<sup>16</sup>

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15. S.C. Res. 687, U.N. Doc. S/Res/687 (1991), *reprinted in* 2 U.S. DEP'T ST. DISPATCH, Apr. 8, 1991, at 236.

16. Article 3 of Hague Convention IV makes it clear that reparations are to be paid for violations of the annexed Regulations. Hague Convention IV, *supra* note 14, at 2290, 1 Bevens at 640. Thus, destruction in violation of article 23(g) is compensable, while that inflicted pursuant to the military necessity exception of that article is a war loss for which reparation need not be made. Security Council Resolution 687 contains language in paragraph 16 providing the Resolution "[r]eaffirms that Iraq . . . is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury . . . as a result of Iraq's unlawful invasion and occupation of Kuwait." What remains unclear, however, is whether the language of Resolution 687 to the effect of liability "under international law" signifies Iraq is liable to the extent that the rules of armed conflict fix liability on it, or whether it is liable for all destruction, including that otherwise excused under military necessity, simply because of the unlawful invasion and occupation of Kuwait. The previous Security Council resolutions that Resolution 687 reaffirms, specifically Resolution 674, *supra* note 4, and Resolution 686, S.C. Res. 686, U.N. Doc. S/Res/686 (1991), *reprinted in* 2 U.S. DEP'T ST. DISPATCH, Mar. 2, 1991, at 142, are not determinative. Resolution 674 suggests the latter sort of reading by its reference that the Council "[r]eminds Iraq that under international law it is liable for any loss, damage, or injury." Resolution 686 can be interpreted, however, as suggesting the former reading by its demand that Iraq "[a]cept in principle its liability under international law for any loss, damage, or injury."

The fascinating question emerging from the juxtaposition of article 3 of Hague Convention IV, which imposes liability for destruction not excused by necessity, and of paragraph 16 of Resolution 687, which could be read as imposing liability for all destruction even if due to military necessity, concerns the interaction between pre- and post-United Nations Charter law on reparations for destruction inflicted during war. Prior to the United Nations Charter, states resolved most claims for reparations politically through negotiation. Of those that were resolved on the basis of international law, the general approach was to tie compensation to instances of violations of the rules of armed conflict. *See generally* WILLIAM W. BISHOP, JR., *INTERNATIONAL LAW: CASES AND MATERIALS* 798-99 (3d ed. 1971) (discussing compensation to the Allied powers following World War I). Thus, any loss resulting from conduct consistent with those rules was not compensable. *Id.* at 799. With article 2(4) of the United Nations Charter and General Assembly Resolution 3314 (Definition of Aggression), war conducted for reasons not sanctioned by the United Nations Charter is illegal and unlawful. The extent to which subsequent injuries require the payment of reparations is unclear. Also, how far the focus of reparation calculation has shifted from the question of violation of the laws of war to the question of aggression versus self-defense remains uncertain. A directly related matter concerns whether the concept of international responsibility for crimes and delicts has developed to the point of requiring reparations for all consequences associated with acts of aggression. If that area of the law has not yet sufficiently crystallized, then the question remains whether Resolution 687, when interpreted as fixing liability for all destruction because of Iraq's aggression, exceeds the Security Council's power under the

## II. A REVIEW OF THE DESTRUCTION

Before discussing the Civilians Convention and the Hague Regulations of 1907, some indication of the level of the destruction suffered by the Kuwaiti oil industry is warranted. The most accurate picture of the devastation is one that places it in the context of the amount of crude oil available, produced, and consumed worldwide.

Though estimates vary, total world resources of crude oil are about one trillion barrels.<sup>17</sup> Roughly sixty million barrels are produced<sup>18</sup> and consumed<sup>19</sup> every day. The single greatest producer of crude oil is the Soviet Union,<sup>20</sup> with a total daily output of approximately twelve million barrels.<sup>21</sup> The United States is the world's greatest consumer,<sup>22</sup> using about fourteen to sixteen million barrels per day (bpd).<sup>23</sup>

Of the total world reserves of crude oil, fifty to sixty percent are in the geologic stratum of the oil-rich Persian Gulf states.<sup>24</sup> Those states collectively tap their reserves at a rate of roughly twelve million bpd,<sup>25</sup> or the equivalent of twenty percent of the world's total daily production.<sup>26</sup> By way of contrast, the United States, the world's second greatest individual producer, taps its own reserves at the rate of about seven to eight million bpd.<sup>27</sup>

Kuwait stores reserves of approximately ninety to one hundred billion barrels of crude.<sup>28</sup> This gives that tiny nation about ten percent of the

United Nations Charter. Attention here would hinge on the Security Council's action and consistency with the purposes and principles of the United Nations Charter. Each of these complex issues is well beyond the scope of the present study.

17. See 1989 ENERGY STATISTICS SOURCEBOOK 123 (PennWell Publishing Co. 1989) [hereinafter 1989 ENERGY STATISTICS] (more than 907 billion barrels in 1989).

18. *Id.* at 89. The total world daily production in 1988 was approximately 56 million barrels. *Id.*

19. *Id.* at 243. The total daily consumption in 1988 was approximately 63 million barrels. *Id.*

20. William L. Fisher, *The Global Dimension of Oil: The Roles of the Three Critical Players*, 25 TEXAS INT'L L.J. 389, 390 (1990).

21. 1989 ENERGY STATISTICS, *supra* note 17, at 89.

22. Fisher, *supra* note 20, at 389.

23. 1989 ENERGY STATISTICS, *supra* note 17, at 243 (1988 consumption per day at over 16 million barrels).

24. *Id.* at 123 (over 571 billion barrels).

25. *Id.* at 89.

26. Total world bpd produced in 1988 was over 55 million, of which the Middle East produced more than 12 million.

27. 1989 ENERGY STATISTICS, *supra* note 17, at 88 (more than 8 million bpd in 1988).

28. *Id.* at 123 (over 91 billion in 1989).

world's reserves and twenty percent of the reserves controlled by the Gulf States. Prior to Iraq's invasion of Kuwait and the imposition of the United Nations embargo, Kuwait was producing crude oil at a rate of roughly 1.5 million bpd,<sup>29</sup> about one-half the rate of Iraq's own prewar production.<sup>30</sup> Kuwait's prewar production level, as well as that of Iraq, was based on shares allocated to each state as members of the Organization of Petroleum Exporting Countries (OPEC). The overall quota level established in 1990 by OPEC's governing council limited the thirteen member states to a total output of no more than twenty-three million bpd.<sup>31</sup> The Saudis largely met the four to five million barrel shortfall in world production resulting from the embargo of shipments from Kuwait and Iraq, which boosted their production from five million bpd to eight million bpd.<sup>32</sup> Following the conclusion of hostilities, OPEC reduced its overall quota by one million bpd to address fears that a worldwide glut would drive prices to unacceptably low levels.<sup>33</sup> OPEC designated Saudi Arabia to absorb most of this loss.<sup>34</sup>

Reports from Kuwait suggest that the Iraqi armed forces damaged or destroyed eighty to eighty-five percent of that state's 950 oil wells.<sup>35</sup> In the Greater Burgan field, the largest within Kuwait and just outside the capitol, apparently every one of the 684 producing wells had been dynamited.<sup>36</sup> The Iraqis set ablaze in excess of five hundred wells throughout the state, resulting in not only a hellish scene of fire and smoke, but also in the loss of four to five million bpd.<sup>37</sup> Estimates of the length of time involved in extinguishing the fires at all of the burning wells and of getting production back on-line range from two to ten years.<sup>38</sup> At a cost perhaps in excess of ten million dollars per well, the total expenditure associated with putting out the blazes and reinstating production could account for as much as five billion dollars of the originally projected one

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29. See Steven Greenhouse, *OPEC Cuts: How Much and Whose?*, N.Y. TIMES, Mar. 11, 1991, at D1, D4.

30. *Id.* Iraqi reserves in 1988 were 100 billion barrels. 1989 ENERGY STATISTICS, *supra* note 17, at 123.

31. See Greenhouse, *supra* note 29.

32. *Id.* at D4.

33. See Steven Greenhouse, *Can OPEC Enforce the New Accord?*, N.Y. TIMES, Mar. 14, 1991, at D8 (new quota set at 22.3 million bpd).

34. See Greenhouse, *supra* note 29, at D4.

35. See Donatella Lorch, *Burning Wells Turn Kuwait Into Land of Oily Blackness*, N.Y. TIMES, Mar. 6, 1991, at A1, A15.

36. *Id.* at A1.

37. See Youssef M. Ibrahim, *Blazes Could Burn for Up to Two Years*, N.Y. TIMES, Mar. 16, 1991, at A4.

38. See Lorch, *supra* note 35, at A1.



hundred billion dollars involved in Kuwaiti redevelopment.<sup>39</sup>

The four to five million bpd lost in the oil well fires in Kuwait equals roughly three times the amount of oil consumed daily in the United Kingdom,<sup>40</sup> twice the amount used in West Germany,<sup>41</sup> and approximately the same amount needed every day to fuel Japan's industrial society.<sup>42</sup> Projections place the eventual loss from the fires at nine to twenty-two billion barrels or ten to twenty-five percent of Kuwait's total reserves.<sup>43</sup> Calculated on the basis of a fifteen to twenty dollars per barrel figure, the revenues lost as a result of the burnings range from 135 to 440 billion dollars. This could reduce total world reserves by two percent.

### III. ARTICLE 53 OF THE CIVILIANS CONVENTION AND STATE-OWNED PROPERTY

The destruction of Kuwaiti oil resources presents the issue of whether the prohibition in article 53 of the 1949 Civilians Convention, outlawing destruction by an occupying power of "property belonging . . . to . . . the State," encompasses the oilfields systematically devastated by the Iraqi army. The plain language of article 53 indicates that the fields, all of which the state-owned Kuwaiti Oil Company controls, are within the protection of that specific provision. The negotiating history of article 53 reveals, however, that the answer to that inquiry is not as clear as may seem.

Article 30 of the International Committee of the Red Cross (ICRC) Stockholm Convention of 1948 served as the model for article 53 of the Civilians Convention.<sup>44</sup> That earlier provision prohibited destruction of property as well, but did so in a general manner, without attempting to reference the public or private nature of the destroyed property.<sup>45</sup> As a

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39. *Id.* at A15 (three million to more than ten million dollars per well); see Ibrahim, *supra* note 37, at A4 (500 wells on fire); see also Youssef M. Ibrahim, *Slow Recovery Is Seen For Kuwait and Iraq Oil*, N.Y. TIMES, Mar. 21, 1991, at D2 (\$15-20 billion to repair oil production in both Kuwait and Iraq).

40. See 1989 ENERGY STATISTICS, *supra* note 17, at 243 (1.7 million bpd in 1988).

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

42. *Id.* (4.7 million bpd in 1988).

43. Compare Ibrahim, *supra* note 37, at A4 (10% of total reserves) with Allanna Sullivan, *Fizzling Out: Even After Fires Die, Kuwait's Oil Fields Will Never Be the Same*, WALL ST. J., Apr. 26, 1991, at A1 (30% of total reserves).

44. Reprinted in 1 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 113 (1949) [hereinafter FINAL RECORD].

45. Article 30, paragraph 2, sentence 2, reads: "Any destruction of personal or real property which is not made absolutely necessary by military operations is prohib-

consequence, some of the delegates at the 1949 Geneva Diplomatic Conference understood that delegates at Stockholm interpreted article 30 of that earlier conference's product as prohibiting destruction of all property, whether private or state-owned.<sup>46</sup> Indeed, Mr. Clattenburg of the United States essentially stated at Geneva that the Soviets tabled a Soviet amendment at Stockholm that specifically prohibited destruction of state-owned property because the language of article 30 was sufficiently general to encompass all property, regardless of who owned it.<sup>47</sup> This issue of private versus public property and the prohibition on destruction focused attention at Geneva. The exact verbal configuration that emerged as article 53 of the Civilians Convention reflects the resolution of that issue as decided by the delegates to the 1949 Conference.

At least three positions on destruction of property were open for consideration at Geneva. The first, unabashedly advocated by the Canadian representative, Mr. Wershof, insisted on confining the prohibition of destruction of property to privately-owned property.<sup>48</sup> The Canadian delegation placed a proposal to that effect before Committee III, the Committee charged with drafting the Civilians Convention.<sup>49</sup> The second position, marking the opposite end of the spectrum and advanced primarily by the Communist bloc, maintained that any adequate prohibition must display recognition of ownership arrangements typifying the nonmarket model.<sup>50</sup> To this end, the Soviets submitted a proposal that would have protected all property from destruction by occupying forces.<sup>51</sup> The third position, situated between the other two, endorsed the validity of a broader approach to the extent its advocates desired to insulate private individuals, or civilians, from the immediate consequences of combat. Given the consonance between this direction and the basic thrust of the effort at Geneva itself, the delegates perceived as quite acceptable a prohibition on the destruction of property available for the instant en-

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ited. . . ." *Id.* at 118.

46. *See, e.g.,* 2A *id.* at 649 (remarks of Mr. Pilloud of the ICRC at the twelfth meeting of Committee III).

47. *Id.*

48. *Id.* at 650.

49. *See* 3 *id.*, Annex No. 233, at 117. This proposal added a third paragraph to the Stockholm Convention, article 30, stating: "The Article relates only to the duties of a Contracting Party towards protected persons in its territory or in territory occupied by it, and towards the property of individual private persons therein." *Id.*

50. *See* 2A *id.* at 649 (remarks by Mr. Morosov of the Soviet Union); *id.* at 650-51 (remarks of Mr. Wu from China, Mr. Szabo from Hungary, and Mrs. Manole of Rumania).

51. *See* 3 *id.*, Annex No. 234, at 117.

joyment and benefit of private persons, but under public ownership because of the political-economic system in place in a particular nation.<sup>52</sup> Professor de Geouffre de la Pradelle of Monaco was the principal architect of this third approach.<sup>53</sup>

The third position eventually prevailed at Geneva primarily because the delegates were reluctant to draft the rules on the protection of civilians in a manner that might encroach upon the laws of land warfare, a topic dealing with military engagement and viewed as beyond the scope of the Conference.<sup>54</sup> To this end, the discussions at Geneva proceeded by considering the provisions of the Stockholm Draft Convention. Thus, the drafters originally focused on the prohibition that became article 53 in the context of examining article 30 of the Stockholm draft.<sup>55</sup> Reflecting the sentiment regarding nonencroachment, Committee III moved the language to draft article 48A, thereby placing the prohibition in the portion of the Convention dealing with occupied territories, rather than leaving it, as had been done at Stockholm, in the more encompassing portion dealing with conduct occurring anywhere in the field.<sup>56</sup>

52. See 2A *id.* at 649-50 (remarks of Professor de la Pradelle of Monaco at the twelfth meeting of Committee III) (destruction causing "direct suffering to private persons"); *id.* at 651 (remarks of Mr. Castberg of Norway) (destruction of state property that "mainly served the needs of individuals").

53. De la Pradelle offered the following substitute language for article 30: "The destruction of real and personal property belonging to private persons, or intended solely for their personal use, is prohibited." *Id.* at 650.

54. See *id.* at 650 (remarks of Mr. Wershof and Mr. Clattenburg); *id.* at 651 (remarks of Mr. Castberg); see also *Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva*, in 2A *id.* at 812, 822 [hereinafter *Report of Committee III*] (the view of avoiding encroachment "carried the day").

55. See *id.* at 822-23; *id.* at 648-51 (records of the twelfth meeting of Committee III); *id.* at 719-21 (records of the thirty-first meeting of Committee III).

56. See *Report of Committee III*, *supra* note 54, at 822-23 (discussing the shift of prohibition from article 30 of Stockholm to 48A of the Draft 1949 Convention); *id.* at 829 (discussing fact that shift to 48A resulted in placement in Part III, Section III, on occupied territories only). The idea of moving the language of prohibition from its position in article 30 of the Stockholm Convention to a newly created article 48A developed in the Drafting Committee of Committee III. This movement resulted from fears both that Stockholm's placement in the more general portion of the Convention would encroach on destruction during open military engagement, see 2A FINAL RECORD, *supra* note 44, at 719-18 (remarks of Colonel Du Pasquier of Switzerland at the thirty-first meeting of Committee III); *Report of Committee III*, *supra* note 54, at 822-23 (discussing shift of second sentence, second paragraph of article 30 of Stockholm), and that it would create ambiguity between the Hague Regulations of 1907 and any Geneva Convention on Civilians, see *id.* at 721 (remarks of Colonel Du Pasquier). The adoption of Drafting Committee proposals, for what ultimately became articles 33 and 53 of the 1949 Civilians Convention, formally moved the language. See 3 *id.*, Annexes nos. 233

With reference to the kinds of property within the scope of the prohibition, reviewing the nature of the discussions at Geneva is more useful than simply noting both that the approach advanced by Professor de la Pradelle prevailed before both Committee III and the Plenary Assembly and that the drafters shifted article 53's location to a more limited portion of the Convention. Subscribing to the approach of prohibiting destruction of state-owned property available for the benefit of private individuals does not indicate that the Committee intended article 53 to protect property of the state having military value. De la Pradelle said as much at the twelfth meeting of Committee III when he referenced "State property . . . of no personal interest to individuals and which it might be useful, from a military point of view, to destroy," and then went on to enumerate "airfields, or transport aircraft . . ." <sup>57</sup> Clattenburg advanced the same position at the Committee's thirty-first meeting. Again, the idea was one of no protection for state-owned property of "direct military value," like "bridges, airfields, shipyards, military roads, and so forth". <sup>58</sup>

Just as the record indicates state-owned property of military value is beyond the protection of article 53, it also indicates that state-owned property of value to private individuals is entitled to exactly the same degree of protection as privately-owned property. About this, the Norwegian delegate, Mr. Castberg, said, "[i]dentical reasons [prevail] for the protection of private and public property where the property [is] such as mainly [serves] the needs of individuals."<sup>59</sup> The reasons for protection turn on the consequences to the civilian population of destruction of either type of property. By establishing a legal standard providing protection for state-owned property of value to the general citizenry similar to the protection provided to private property, the individual, rather than the state, is the actual beneficiary. <sup>60</sup> The difficulty, however, is in determining exactly what kinds of state-owned property "mainly [serve] the needs of individuals," so that protection of this property actually is accorded to the individual, rather than to the state.

With regard to this matter, the negotiating history of article 53 is not terribly explicit. At best, the property that the delegates referred to as

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and 277, at 117, 134; *see also* 2A *id.* at 721 (remarks of Committee III chairman Georges Cahen-Salvador of France setting out Committee III's adoption of the Drafting Committee's proposals); *id.* at 417-18 (adoption of article 48A by the Plenary Assembly is set out).

57. 2A *id.* at 650.

58. *Id.* at 720.

59. *Id.* at 651 (twelfth meeting of Committee III).

60. Mr. de la Pradelle stated that "in protecting the State, it was actually the individual who should be protected." *Id.* at 650.

not to be protected can be contrasted with the kinds of property entitled to protection. The only examples of the former are in the statements offered by de la Pradelle and Clattenburg, during the twelfth and thirty-first meetings of Committee III.<sup>61</sup> Both mention properties that have military usefulness—airfields, aircraft, and shipyards. Clattenburg also includes bridges,<sup>62</sup> an item not as closely tied to a distinct military value. Clattenburg was also the only delegate to offer a reported example of an item of property of the latter sort—property entitled to protection. He did this by way of citing “[h]ouse property belonging to a State, or collectively owned,”<sup>63</sup> in the sentence immediately preceding the one in which he referenced airfields, military roads, shipyards, and bridges.<sup>64</sup>

This juxtaposition suggests the exclusion from protection of all but the most domestic properties. If the article does not protect bridges from destruction, but it does protect house property, then perhaps any item of property that serves to advance military operations is outside the prohibition of article 53. Items that meet basic human needs on a daily basis, however, are within article 53’s prohibition and generally cannot be destroyed, notwithstanding that these properties can serve to support or sustain the armed forces. The distinction is between properties that can facilitate the advancement or promotion of military operations and those that merely assist the maintenance of the personnel comprising the armed services, not as soldiers, but as individuals. Understanding the negotiating history of article 53 in this fashion seems acceptable. The obvious reason for excluding bridges from protection and including housing accommodations appears to be that the first can operate to further military objectives, while the second does nothing but satisfy the most rudimentary needs of citizens.

The report submitted to the Plenary Assembly of Committee III provides some oblique support for interpreting article 53 in the manner set forth above. In the commentary discussing the move of the prohibition ultimately listed in article 53 from article 30 of the Stockholm Convention to article 48A of the draft Civilians Convention, the report by Committee III states that the idea underlying the prohibition is the elimination of disparate protection of property based on the socialized or private character of the economic system of the state in which the destruction

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61. See *supra* notes 57 and 58.

62. See *supra* note 58.

63. 2A FINAL RECORD, *supra* note 44, at 720 (thirty-first meeting of Committee III).

64. See *supra* text accompanying note 58.

occurs.<sup>65</sup> In view of that goal, the focus appears to be on according the same treatment to all property meeting the indispensable requirements of daily life, regardless of the political-economic doctrine that the involved government happens to embrace. Considering that items of property capable of aiding the advancement of military objectives could have been excluded from protection without highlighting the point about removing divergences based on economic systems, that point fairly can be read as focusing on genuinely domestic properties within article 53. To the extent that an item of property could facilitate the promotion of a military operation, it would be situated beyond the protection of that article without regard to the collectivist or private nature of ownership recognized by the state.

Utilizing this approach, one could argue that while state-owned Kuwaiti property destroyed by the Iraqi armed forces is not beyond the protection of article 53 simply because it is not privately owned, the oilfields torched and dynamited by the invading Iraqi army might not be within article 53's protection because they are not the sort of properties essential for daily survival. Emphatically insisting on the irrefutable nature of this position, however, warrants hesitancy because an equally accurate observation is that those same oilfields have a significantly more remote connection to the advancement of military operations than do bridges.<sup>66</sup> Thus, the oilfields could just as easily fall within the protection of article 53. The reasoning would be that items of property without sufficiently proximate value to military objectives are more analogous to protected domestic property than to unprotected types of property. The only factor that might undercut this analogy would be evidence that the drafters at Geneva in 1949 did not envision as protected those properties that could assist in the promotion of military operations, no matter how tenuous the connection between the properties and the operation. Evidence to that effect does not appear in the record of the Diplomatic Conference, and the discussions before the Plenary Assembly reveal nothing designed to depart from the referenced statements made both to and by Committee III on this general subject.<sup>67</sup>

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65. See *Report of Committee III*, *supra* note 54, at 823. The last sentence of the commentary to article 30 states about the new article 48A that "[e]conomic systems under which property has been socialized are therefore placed on the same footing as those under which private ownership has been maintained."

66. See *infra* text accompanying notes 144-45 (crude oil has little military value).

67. See 2B FINAL RECORD, *supra* note 44, at 417-18 (twenty-seventh meeting of Plenary Assembly).

#### IV. ARTICLE 53 OF THE CIVILIANS CONVENTION AND DESTRUCTION IN RESPONSE TO EXTERNAL MILITARY CHALLENGE TO OCCUPATION

Aside from the question of whether state-owned oilfields fall within the category of property protected by article 53 of the Civilians Convention, whether article 53's prohibition on destruction applies to property destroyed by an occupying power in occupied territory in response to an external military challenge to occupation must be considered. Unless one reads the record of the 1949 Geneva Diplomatic Conference as clearly indicating that all property capable of assisting the advancement of military operations is subject to destruction, without regard to how distanced and problematic the connection between the property and the operations, then the relevancy of whether article 53 regulates actions in response to challenges to occupations is apparent. If the conclusion that article 53 does not protect state-owned oilfields is accepted, the only importance of examining the applicability of that provision to instances of destruction taken in response to external challenges to occupation would be in the possibility of an alternative method to bury reliance on the Civilians Convention in castigating Iraq for its destruction of the Kuwaiti oilfields. Given the more likely conclusion that the reference to state-owned property does not clearly include state-owned oilfields, one must examine the matter of article 53's applicability to cases that involve outside challenges to military occupation.

##### A. *Evolutionary Backdrop of Article 53*

With regard to an examination of article 53's applicability to cases involving outside challenges, the place to begin is with a historical review of the development of article 53 of the Civilians Convention. That review indicates that article 53's predecessors in the laws of war appear to have distinguished between not only the nature of the property impacted during wartime, but also the types of activities causing the impact. The Convention made distinctions between the following: military activities that effected a simple taking of property and activities that resulted in its destruction, private property and public property, and public immovable property and that of the movable sort. As a general proposition, prior to the adoption of the Civilians Convention, the international community considered takings more acceptable than destruction, private property received greater protection than that held by public authorities, and immovable property in public hands received greater protection than movable public property.

The most immediate predecessor of the Civilians Convention was the Regulations annexed to the 1907 Hague Convention IV on Laws and Customs of War on Land (the Regulations).<sup>68</sup> The Regulations provided that private property be respected by an occupying power.<sup>69</sup> This obligation translated into a duty to refrain from actually taking this property,<sup>70</sup> with the exception of certain items of military significance.<sup>71</sup> Property of municipalities, as well as property of religious, charitable, educational, artistic, and scientific institutions, received this protection.<sup>72</sup> Movable public property could be taken by an occupying army if it could be used for military operations.<sup>73</sup> No obligation attached to restore this property or make compensation at the end of hostilities, unless that taken involved movable property used in transportation or communication, or involved depots of arms and ammunition.<sup>74</sup> Immovable property, on the other hand, was subject only to use and administration by the occupant.<sup>75</sup> Moreover, use and administration of immovable property had to result in protection of the capital reflected in the property itself.<sup>76</sup> This responsibility clearly connoted, among other things, that upon termination of the occupation, control was to be relinquished to the legitimate sovereign.<sup>77</sup>

The efforts antedating the 1907 Hague attempt at codification of the laws of war concerning treatment of property during wartime proceeded along much the same line. Delineations between public and private, movable and immovable property, and the varying treatment accorded to each with regard to takings, also appeared in the regulations that emerged from the earlier Hague Conference of 1899.<sup>78</sup> With some varia-

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68. See *supra* note 14.

69. Hague Convention IV, *supra* note 14, annex, art. 46, para. 1, at 2306, 1 Bevens at 651.

70. *Id.* annex, art. 46, para. 2, at 2306, 1 Bevens at 651.

71. *Id.* annex, art. 53, para. 2, at 2308, 1 Bevens at 653 (appliances for transmission of news or persons, depots of arms, and munitions of war could be taken).

72. *Id.* annex, art. 56, at 2304, 1 Bevens at 653.

73. *Id.* annex, art. 53, at 2308, 1 Bevens at 652.

74. Compare *id.* annex, art. 53, para. 2, at 2308, 1 Bevens at 652 (requiring restoration or compensation for private appliances for transmission of news or persons, depots of arms, and munitions of war) with *id.* annex, art. 53, para. 1, at 2308, 1 Bevens at 652 (making no reference to a similar obligation for takings of state owned depots of arms and means of transport).

75. *Id.* annex, art. 55, at 2309, 1 Bevens at 653.

76. *Id.*

77. See DORIS A. GRABER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914: A HISTORICAL SURVEY* 190 (1949).

78. Convention with Respect to the Laws and Customs of War on Land, July 29,



tions, the same can be said about the 1874 Brussels Declaration.<sup>79</sup> The two principal, unilateral works that considered the issue, the Oxford Code of 1880<sup>80</sup> and the Lieber Code of 1863,<sup>81</sup> conform in large measure to the various multilateral codes referenced.

With regard to the destruction of property, a practice unequivocally condemned by article 53 of the Civilians Convention, the 1907 Hague Regulations forbade the destruction of enemy property, unless imperatively demanded by military operations.<sup>82</sup> The Regulations also prohibited destruction of certain submarine cables, unless absolutely necessary,<sup>83</sup> as well as the destruction of historic monuments; works of art or science; and municipal, religious, charitable, educational, artistic, and scientific institutions.<sup>84</sup> The delineation between private and public property, which appeared in connection with the matter of takings, was not utilized explicitly with the issue of destruction. Except for the reference to enemy property, almost all of the protected items could be characterized as cultural patrimony. The multilateral and unilateral efforts preceding the 1907 attempt at the Hague to codify the laws of war took a somewhat similar approach in focusing largely on cultural patrimony.<sup>85</sup> The 1880 Oxford Code, however, qualified that protection with a caveat

1899, annex, arts. 23(g), 46, 53-56, 32 Stat. 1803, 1817, 1822-24, 1 Bevans 247, 257, 260-61 [hereinafter Hague Convention II].

79. Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, arts. 6, 7, 32, 38, 4 Martens Nouveau Recueil (ser. 2), at 219, 220, 223-24 [hereinafter 1874 Brussels Declaration].

80. The Laws of War on Land, Sept. 9, 1880, arts. 49-54 [hereinafter 1880 Oxford Code] (prepared by the Institute of International Law), *reprinted in THE LAWS OF ARMED CONFLICTS* 35, 43-44 (Dietrich Schindler & Jiri Toman eds., 1981) [hereinafter LAWS OF ARMED CONFLICTS].

81. Instructions for the Government of Armies of the United States in the Field, Apr. 24, 1863, arts. 31, 34-38, 44 (prepared for the Union forces during the American Civil War) [hereinafter Lieber Code], *reprinted in LAWS OF ARMED CONFLICTS*, *supra* note 80, at 3, 8-10.

82. Hague Convention IV, *supra* note 14, annex, art. 23(g), at 2302, 1 Bevans at 648. Article 23(g) reads: "In addition to the prohibitions provided by special Conventions, it is especially forbidden: (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."

83. Hague Convention IV, *supra* note 14, annex, art. 54, at 2308, 1 Bevans at 653.

84. *Id.* annex, art. 56, at 2309, 1 Bevans at 653.

85. See, e.g., Hague Convention II, *supra* note 78, annex, art. 56, at 1824, 1 Bevans at 261; 1880 Oxford Code, art. 32, *reprinted in LAWS OF ARMED CONFLICTS*, *supra* note 80, at 41; 1874 Brussels Code, *supra* note 79, art. 17, at 221; Lieber Code, art. 34-36, *reprinted in LAWS OF ARMED CONFLICTS*, *supra* note 80, at 8-9. One notable exception was article 51 of the 1880 Oxford Code, which prohibited destruction of means of transport, telegraphs, and landing cables.

for military operations.<sup>86</sup> And again, distinctions between private and public property did not seem instrumental. Beyond focusing on protecting this patrimony, however, the only other attempt to prohibit authorized destruction of property generally was in the 1899 Hague Regulations that, like the 1907 successor Regulations, contained language protecting enemy property from destruction, unless military action demanded otherwise.<sup>87</sup>

At least two possible understandings exist concerning the significance of the prohibition on the destruction of enemy property contained in the 1899 and 1907 Hague Regulations. First, prior to the end of the nineteenth century, the laws of armed conflict restricted takings of property more than destruction of property. An explanation for this seeming incongruity resides in the recognition that takings are likely to occur during relatively peaceful periods, while destruction of property is more likely to occur during the heat and frenzy of battle. Consequently, giving property greater protection from takings than from destruction makes more sense. Because only the most prized and cherished items should be insulated from the impact of active military hostility, the focus of destruction's prohibition is on cultural patrimony.

At the turn of the century, the Hague Regulations completely changed this with prohibitions relative to enemy property. Those prohibitions appeared in section II of the codifications, a section entitled "Hostilities."<sup>88</sup> Furthermore, section III, dealing with occupied territories, went beyond the traditional prohibition against destruction of cultural patrimony to prohibit only confiscation<sup>89</sup> and to require respect<sup>90</sup> for other items of property. Thus, the change effected by the Regulations was strikingly complete. Whereas previously great latitude existed regarding destruction of property during combat, the Hague Regulations generally banned destruction during combat. In contrast stood the anomaly that during periods of calm surrounding occupation, section III of the two sets of

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86. 1880 Oxford Code, art. 53, *reprinted in* LAWS OF ARMED CONFLICTS, *supra* note 80, at 44.

87. Hague Convention II, *supra* note 79, annex, art. 23(g), at 2302, 1 Bevens at 648. Article 44 of the Lieber Code did contain a prohibition on destruction of property, but it concerned only unauthorized destruction. Lieber Code, art. 44, *reprinted in* LAWS OF ARMED CONFLICTS, *supra* note 80, at 44.

88. On the 1907 Regulations, see Hague Convention IV, *supra* note 14, at 2301, 1 Bevens at 647. On the 1899 Regulations, see Hague Convention II, *supra* note 78, at 1817, 1 Bevens at 256.

89. Hague Convention IV, *supra* note 14, annex, art. 46, at 2306-07, 1 Bevens at 651.

90. *Id.*

Hague rules provided only for the protection of cultural patrimony, plus respect for and nonconfiscation of other property.<sup>91</sup>

The second possible understanding of the significance of the prohibition on destruction of enemy property in the 1899 and 1907 Hague Regulations is a variation of the first. This understanding acknowledges the presence in the pre-Hague laws of war of an appreciation for different treatment of takings and destruction. Nonetheless, it maintains that the advent of the enemy property prohibition does not depart from the historical pattern. Here, the second understanding sharply diverges from the understanding described previously. Specifically, it explains the position that the prohibition is not a departure by drawing attention to the caveat contained in the prohibition allowing destruction that is militarily essential. The argument is that the effect of the caveat excepting destruction for military operations means that the prohibition of destruction really only applies to noncombat situations. Destruction during periods of combat should not be controlled tightly. As long as military operations occur that render the destruction essential, destruction is permissible. Conversely, without military operations extant, destruction is prohibited. Because the reference to the destruction of enemy property is phrased as a prohibition, the prohibition simply coincides with the overall thrust of the relevant provision of the appropriate Hague rules. For aesthetic reasons, focus is on the limitations on the means of inflicting injury during combat, rather than on the rights of injury of which combatants may avail themselves.

#### B. *Substantive Question of Article 53 and External Challenges to Occupation*

Iraq's burning of the oilfields and refineries at Al-Wafra, Mina Abdullah, Bahra, Rumaila, Shuaiba, and other locations, and its discharge of oil into the Gulf from the Sea Island terminal, provide the opportunity to develop an understanding of the law concerning destruction of property during wartime. This understanding is even sharper than that just sketched in the preceding subsection. Specifically, Iraq's activities directly involve the above-referenced interpretation of the 1899 and 1907 Hague developments as evidence of an evolution towards more regulation of destruction of property, with article 53 of the Civilians Convention serving as the capstone. If historically the destruction of property not considered cultural patrimony had been left unaddressed

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91. See 2 HOWARD S. LEVIE, *THE CODE OF INTERNATIONAL ARMED CONFLICT* 766 (1986).

because of the likelihood for destruction to occur during periods of active military engagement,<sup>92</sup> the question arises whether movement towards protecting this property signifies that prohibited destruction covers periods other than the relative peace accompanying an occupation of foreign territory. Restated, article 53 of the Civilians Convention prohibits the destruction by the occupying power of property in occupied territory during periods of uncontested occupation, but does it also prohibit destruction in that territory during periods when opposing military action, of a preparatory or full-scale nature, contesting that occupation has been launched?<sup>93</sup> In the instant case, Iraqi destruction began several days after the coalition forces mounted their January 1991 bombing efforts to oust Saddam's forces from Kuwait. Consequently, the destruction, at least presumptively, was responsive in nature.

Several reasons exist about why the prohibition contained in article 53 of the Civilians Convention of 1949 should be limited to the destruction of property during periods of uncontested occupation, and not applied whenever the occupying power destroys property in response to some preparatory or full-scale challenge to occupation. At the outset, any other reading of the provision would be inconsistent with the basic historical acceptance of the distinction between regulating periods of relative calm and those involving active hostile military engagement. That distinction has subjected takings to greater regulation than destruction because decision-making must be more immediate and acute in a hostile military situation. The reverse of this approach suggests that periods of calm should involve regulation of destruction that is as stringent as regulation of takings. Thus, article 53's prohibition on destruction during occupation arguably must be confined to that period during which there is no outside challenge to the occupying power's claim to the territory controlled.

The enemy property's prohibition in the 1899 and 1907 Hague Regulations can be understood as completely changing the pattern evidenced until the close of the nineteenth century,<sup>94</sup> but it still does not seriously controvert the position on article 53. Indeed, the earlier prohibitions explicitly referenced the idea of regulating destruction during hostilities. Nonetheless, by concluding the prohibition of destruction of property during periods of occupation with a caveat like that affixed to the earlier enemy property prohibitions, article 53 of the Civilians Convention sig-

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92. See *supra* notes 88-91 and accompanying text.

93. See MYRES S. McDOUGAL AND FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 601 (1961) (making distinctions between various levels of military activity).

94. See text accompanying *supra* notes 88-91.

nified that an importance attaches to the existence of active military engagement that does not affect periods when combat has ebbed or is absent. From this perspective, the earlier Hague rules did not presage a radical, irreversible departure from the historical pattern. To the contrary, they mark a simple aberration in the ongoing process of codifying the laws of armed conflict.

Another reason for reading article 53 of the Civilians Convention as not extending to destruction associated with challenges to occupation derives both from its placement within the Convention and from the language used to signify its fundamental objective. By placing article 53 in Part III, section III, entitled "Occupied Territories,"<sup>95</sup> and inserting no similar provision in Part II, entitled "General Protection of Populations Against Certain Consequences of War,"<sup>96</sup> the Convention apparently envisions a specific and limited frame of reference that does not extend to destruction connected with hostilities. Confirming the significance of this placement is that at the 1949 Geneva Diplomatic Conference, consideration had originally been given to inserting the prohibitory language of article 53 in Part III, section II of the Convention, but it was ultimately decided that the prohibition was most appropriate for Part III, section III, which served to confine its effect to cases of occupation.<sup>97</sup> Furthermore, because the caveat forming the final clause of article 53 excepts from the prohibition all destructions made necessary by military operations,<sup>98</sup> additional support exists for reading that article as not extending beyond periods of uncontested occupation. Had article 53 been viewed as applicable to more than instances of uncontested occupation, any reference to "military operations" would have been superfluous. All that would have been required to communicate the idea of exceptional situations would have been some allusion to destruction rendered militarily imperative. In going beyond a reference to the military need to destroy public or private property in occupied territory, and citing the concept of military operations, the Civilians Convention confines the prohibition on destruction to periods when no opposing outside forces challenge the occupying power's control.

Commentary with regard to the meaning of article 53 also indicates

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95. See Civilians Convention, *supra* note 13, art. 53, at 3548, 3552, 75 U.N.T.S. at 318, 322.

96. *Id.* at 3526, 75 U.N.T.S. at 296.

97. See *Report of Committee III*, *supra* note 54, arts. 30, 48A, at 822, 829. See also 2A FINAL RECORD, *supra* note 44, at 721 (remarks of Colonel Du Pasquier indicating the prohibition be moved from article 30 to article 48A so as to avoid creating ambiguity with the Hague rules).

98. See *supra* text accompanying note 13.

that the prohibition has been understood as limited in scope. For instance, one well-respected authority examines the prohibition on destruction of public and private property under the topic of military occupation, rather than under the topic of methods of making war.<sup>99</sup> This would suggest recognition of article 53's inapplicability to situations involving preparatory or full-scale challenges to occupation. Another authority takes great pains to distinguish war, which that authority labels "invasion," from occupation, by indicating that, in occupation, the stage of active combat has been terminated, while in war, it continues.<sup>100</sup> That authority discusses the allowable destruction of enemy property in combat situations or a wartime environment without any reference to article 53.<sup>101</sup>

Buttressing these unofficial understandings of the restrictive scope of the Civilians Convention's prohibition on destruction of public or private property by the occupying power is the actual negotiating record of the 1949 Diplomatic Conference. During the early consideration of the prohibition that ultimately found its way into article 53, the representative of the ICRC, Mr. Pilloud, explicitly indicated that retreating forces. Under this provision, could use a scorched earth policy.<sup>102</sup> Since the idea of retreat connotes the existence of preparatory or full-scale military opposition to occupation, Pilloud's observation must have envisioned the prohibition on destruction to apply only in instances when occupation was unchallenged. Once the occupying forces were under hostile attack from outside powers, the prohibition on the destruction of property lost its applicability.

Mr. Maresca, the delegate from Italy, objected to the idea of a scorched earth policy and proposed language of prohibition.<sup>103</sup> In the end, this language was not included in the Convention,<sup>104</sup> but the discussion of the scorched earth policy spawned other evidence confirming that article 53's prohibition on destruction relates only to unchallenged occupation. Specifically, the Soviet representatives favored an approach to the

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99. 2 LEVIE, *supra* note 91, at 766.

100. McDUGAL & FELICIANO, *supra* note 93, at 732-39.

101. *Id.* at 600-10.

102. 2A FINAL RECORD, *supra* note 44, at 649.

103. *See id.* at 651 (twelfth meeting of Committee III). Maresca's proposal would have prohibited "systematic destruction" of property. Mr. Castberg of Norway, seconded the proposal.

104. The drafting Committee of Committee III did not include Maresca's proposal in its draft of article 48A. *See id.* at 720 (remarks of Colonel Du Pasquier at the thirty-first meeting of Committee III). The reason given was that it might have led some to believe nonsystematic destruction was permitted. *Id.*

prohibition on destruction of property that would have outlawed the scorched earth policy by drawing the language of what became article 53 very broadly and situating it in a part of the Convention containing provisions applicable to both occupied territory and to territories of parties to the conflict.<sup>105</sup> Mr. Morosov, the delegate of the USSR, defended the proposal by citing the devastation inflicted on Leningrad in the Second World War and then asked whether it would be appropriate that "such useless destruction . . . be kept within limits only in occupied territories."<sup>106</sup> His desire to extend the prohibition on destruction to territories in which conflict was occurring met with an unfavorable response from a majority of the other representatives.<sup>107</sup> The rejection of the Soviet proposal suggests a sharp distinction between territories under the relative calm of foreign occupation and those in which occupation faces an external military challenge of a preparatory or full-scale character.

Additional evidence to the same effect from the records of the Conference appears in a comment by Colonel Du Pasquier, *Rapporteur* of Committee III. At the opening of the thirty-first meeting of the Committee, Colonel Du Pasquier stated that "even if it was not possible to provide for the protection of property against bombardments or the acts of an invading army (a matter . . . within the scope of the rules of war and of the Regulations annexed to the Hague Convention), [the Drafting Committee felt the Civilians Convention must] arrange for the protection of property in an occupied territory."<sup>108</sup> Since Du Pasquier's statement occurred against a backdrop of earlier expressions of concern that Committee III confine its focus to humanitarian rules, and not undertake to address the rules of active land warfare,<sup>109</sup> this comment can be interpreted as stressing the inapplicability of article 53's prohibition to instances involving an external challenge to occupation.

The 1977 Geneva Diplomatic Protocol I<sup>110</sup> also suggests that the scope of article 53's prohibition should be confined to instances other than situ-

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105. *See id.* (remarks of Mr. Kutienikov of the Soviet Socialist Republic of Byelorussia and Mr. Morosov of the Union of Soviet Socialist Republics).

106. *Id.*; *see also id.* (remarks of Mr. Mevorah of Bulgaria to the same effect).

107. The proposal was rejected by a vote of 17 to 14. *See id.* at 721. In the Plenary Assembly, Committee III's proposed language for article 48A was adopted 32 to 0, with nine abstentions. 2B *id.* at 418.

108. 2A *id.* at 719-20.

109. *See, e.g., id.* at 650 (comments of Mr. Wershof of Canada, Mr. Clattenburg of the United States, and Mr. Castberg of Norway).

110. Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 16 I.L.M. 1391 [hereinafter Protocol I].

ations involving responses within occupied territory to preparatory or full-scale military activities to oust the occupying power. In this respect, article 54 of Protocol I prohibits destruction of those items of civilian property essential for survival.<sup>111</sup> Property in this category generally merits protection whether it is public or private property.<sup>112</sup>

When the 1977 Geneva Conference considered article 54's predecessor,<sup>113</sup> the delegate representing the ICRC, Mrs. Bindschedler-Robert, noted that the provision covered action by at least occupying powers within occupied territory,<sup>114</sup> and that this was plain from the use of the word "destruction," rather than "attack," since "one did not attack what was in one's possession."<sup>115</sup> She further observed that, with regard to occupied territories, the prohibition in Protocol I was a development of article 53 of the Civilians Convention because the prohibition contained in article 53 did not apply to destruction necessary for military operations.<sup>116</sup> This signifies that Conference delegates were aware of the limits of the Civilians Convention. Indeed, had the Civilians Convention not been so limited, the adoption of the prohibition on destruction of civilian property essential for survival would have been an unnecessary duplication because article 53 is an all-encompassing provision that makes no distinction between the kinds of civilian property it protects. Furthermore, from the vantage of textual analysis, Mrs. Bindschedler-Robert's comments underscore the point made above<sup>117</sup> concerning the impact of article 53's caveat for military operations on the basic prohibition regarding public and private property.

## V. THE CONCEPT OF MILITARY NECESSITY

Iraq is a party to the 1949 Civilians Convention.<sup>118</sup> Since the destruction of oil resources in Kuwait was in response to a challenge to Iraq's occupation and because the property destroyed was state-owned property

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111. *Id.* art. 54, at 1414.

112. *Id.* art. 50, at 1413 (producing a definition of "civilian" basically meaning one not a member of the armed forces).

113. The predecessor was article 66 of the Draft Protocol. 3 HOWARD S. LEVIE, PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS 96 (1980) (containing the records of the 1977 Diplomatic Conference).

114. *Id.* at 98, para. 35.

115. *Id.* at 98, para. 36.

116. *Id.* at 99, para. 38.

117. *See supra* text accompanying notes 98-99.

118. DOCUMENTS ON THE LAWS OF WAR 326, 328 (Adams Roberts & Richard Guelff eds., 2d ed. 1989) (listing states that are parties of the Civilians Convention [hereinafter DOCUMENTS]).



of a sort not protected by article 53, this article of the Civilians Convention does not apply to Iraq's activity. Consequently, one must look beyond international conventional law to international customary law to evaluate Iraq's liability for the destruction in Kuwait. One reason to refer to customary law is that Iraq is not a party to the other primary source of relevant conventional law, the 1907 Hague Regulations.<sup>119</sup> As alluded to above, those regulations prohibit the destruction of enemy property during hostilities, and therefore would control destruction by an occupying power of property within occupied territory<sup>120</sup> when this party undertakes destruction in response to preparatory or full-scale military actions challenging control of the occupied territory. Article 154 of the 1949 Civilians Convention clearly indicates that the adoption of the Civilians Convention did not displace the 1907 prohibition,<sup>121</sup> since the prohibition regarding enemy property appears in article 23(g), section II, and the Civilians Convention preserves all of sections II and III of the 1907 Hague Regulations. Furthermore, the Hague Rules codified the existing customary rules regarding land warfare and thus reflect standards that bind Iraq, despite that it is not a party to the Convention enunciating those standards.<sup>122</sup>

The third issue raised earlier, the exceptional situations permitting destruction within occupied territory,<sup>123</sup> becomes relevant at this juncture. Regardless of whether one consults article 53 of the Civilians Convention or article 23(g) of the Hague Regulations, both contain a caveat authorizing departure from the basic stated prohibition. In the case of the former, departure may occur whenever destruction is "rendered absolutely necessary by military operations."<sup>124</sup> The latter, though regarded as a statement of the customary law, refers to destruction "imperatively demanded by the necessities of war."<sup>125</sup> Fortunately, a body of authoritative opinion based on wartime experience has developed around the meaning of the caveat in article 23(g). Given the direct applicability of

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119. *Id.* at 58-59 (listing states that are parties to the 1907 Hague Regulations).

120. Compare 2 LEVIE, *supra* note 91, at 766 (suggesting the prohibition in article 23(g) of the Hague rules applies to state owned property only) with 2A FINAL RECORD, *supra* note 44, at 650 (comment by Professor de Geouffre de la Pradelle that article 23(g) applies to private, as well as state-owned, property).

121. See Civilians Convention, *supra* note 13, art. 154, at 3620, 75 U.N.T.S. at 390.

122. On the codification of customary law of land warfare, see DOCUMENTS, *supra* note 118, at 44.

123. See *supra* text accompanying notes 13-16.

124. See *supra* text accompanying note 13 for the pertinent language of article 53 of the Civilians Convention.

125. See *supra* note 82 for the text of article 23(g) of the Hague rules.

that provision to the destruction of Kuwaiti oil resources, a standard exists against which to measure the Iraqi actions. Nonetheless, since the caveats of both articles 53 and 23(g) allow departure from their prohibitions for military reasons, the same body of opinion could be relevant to determine when destruction of property during periods of uncontested occupation—a pure article 53 case—would be considered permissible.

#### A. *The Historical Precedents*

Generally, the military official's state of mind when making the decision about destruction is one factor in determining whether destruction was lawful under article 23(g)'s reference to military necessity. If the decision made would have been reasonable at that time, given the information then available, it should be considered sufficient to satisfy the standard of necessity, even if it appears questionable in hindsight.<sup>126</sup> Bearing this approach in mind, at least three situations have occurred in which wartime destruction of property has illuminated the meaning of article 23(g)'s caveat concerning action "imperatively demanded by the necessities of war."

The first involves the German Imperial Army's retreat from the occupied portion of Belgium and France in October 1918. Germany's position in the area had been firmly solidified at the beginning of 1918, following the collapse of meaningful opposition in the Soviet Union, with the transfer of forty divisions from the Eastern front. By late summer, the Allies had broken through the German line and a steady stream of United States soldiers began to enter the conflict. Marshall Foch, the Allied commander, launched an offensive that broke through the Hindenberg Line in October. In the face of that success, General Lunderdorff of the Imperial Army directed a German withdrawal.<sup>127</sup> Allegedly to protect retreating forces from the ravages of the Allied onslaught, the German army drenched the ground with mustard gas and systematically destroyed cities and villages as they proceeded toward the German frontier. United States Secretary of State Robert Lansing, in an October 14, 1918 communication to Mr. Oederlin, the Swiss Chargé d'Affaires for German interests, asserted that the German activity was a "direct violation of the rules and practices of civilized warfare."<sup>128</sup> On October 20, 1918, a reply from German Minister of Foreign Affairs Solf

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126. McDOUGAL & FELICIANO, *supra* note 93, at 678-79.

127. See ARTHUR S. LINK, *WILSON THE DIPLOMATIST* 106-07 (New Viewpoints 1974) (1957); CARROLL QUIGLEY, *TRAGEDY AND HOPE* 333-36 (1966).

128. 1 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1918, 358-59 (Supp. 1) (U.S. Gov't Printing Office ed., 1933).

to Mr. Oederlin controverted the assertion of illegality with the suggestion that "[f]or the covering of a retreat, destructions will always be necessary and are insofar permitted by international law."<sup>129</sup> A subsequent communication from Secretary Lansing did not dispute Minister Solf's characterization regarding the state of the law and indicated pleasure in Germany's assurance that illegal activities had not occurred.<sup>130</sup>

The second situation casting light on the military necessity prong of article 23(g) is the retreat of the German 20th Mountain Army (the 20th) in the northernmost Norwegian province of Finmark during the closing months of the Second World War. The retreat occurred in the harsh weather of October and was simultaneous with the evacuation of all civilians in the province, the destruction of all houses or structures that could provide shelter, and the removal or destruction of all food and means of communication and transportation. In the Nuremberg War Crimes trial of *United States v. List*, the commander of the 20th, General Rendulic, was charged with ordering this devastation pursuant to a directive issued by General Jodl of the German High Command.<sup>131</sup> Since the retreat occurred under conditions involving constant engagement with specially trained Soviet ski troops, who had several land routes to press the pursuit, and since Rendulic had limited information concerning exactly which route or routes would be taken, the tribunal held the destruction justified. Rendulic designed this wholesale devastation policy to protect against Soviet flanking efforts. Given the environment and general conditions under which he operated, the Nuremberg Tribunal held that "urgent military necessity" sanctioned the measures taken.<sup>132</sup>

*United States v. Von Leeb*<sup>133</sup> also decided at Nuremberg, provides a final wartime situation clarifying the factual context in which destruction was justified as a military necessity under article 23(g) of the Hague Rules. Here, seven German generals ordered destruction of cities, towns, and villages in the Soviet Union, during wintertime, and in the face of advancing Soviet troops. Again, the idea was to prevent areas previously controlled by the Germans, and anticipated to fall to the advancing Soviet forces, from yielding food or shelter that would protect them from

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129. *Id.* at 379-81.

130. *Id.* at 381-83.

131. See 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 18 759 (U.S. Gov't Printing Office ed., 1950) [hereinafter *Trials of War Criminals*].

132. *Id.* at 1295-97.

133. *Id.* at 2.

the climatic conditions and sustain their efforts to overrun the retreating German army. Indeed, an order issued by General Woehler made the point that "if . . . each town and village is burned down and the hearths and chimneys are demolished, then the enemy . . . will also be surely annihilated. For even the Russian, cannot live in winter without the protection of buildings. . . ."134 On the basis of this evidence, the Tribunal acquitted each of the seven defendants, noting that the charge of "devastation beyond military necessity . . . requires detailed proof of an operational and tactical nature."<sup>135</sup>

On the basis of this record, the issue of whether destruction is "imperatively demanded by the necessities of war" turns on an assessment of all the relevant conditions surrounding the destruction. As a general proposition, destruction designed to protect retreating forces seemingly is legal, at least in principle. Given the reception to German claims that military necessity justified the destructions inflicted during German retreats in the two World Wars, the principle legitimizing this action would be available if the destruction were in a geographically limited area. This area must be in the advance of the enemy forces pressing the retreat or in an area through which the enemy could pass to strike at the retreating forces when more than one route remained open to the enemy and inadequate information existed as to which would be taken. Furthermore, any destruction must have military value and be able to provide protection to the withdrawing forces. Otherwise, the destruction is prohibited.

#### B. *Military Necessity and Illegal Wars of Aggression*

The last point is the most central to the concept of military necessity. Unless destruction furthers some military objective, it is illegal, despite its infliction during a retreat and in an area through which the enemy will pass. Interestingly enough, though the wartime instances recounted above all dealt with destruction during withdrawal from occupied territory, the centrality of the connection between an act of destruction and a military objective suggests the applicability of the concept to the entire range of hostile activities. For example, the 1956 United States Army Field Manual on the Law of Land Warfare provided that some connection must exist between the destruction of property and "the *overcoming* of the enemy's army."<sup>136</sup> The breadth of this language envelopes not only retreats from occupied territory, but all other military action as

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134. 11 *id.* at 307.

135. *Id.* at 541.

136. UNITED STATES ARMY FIELD MANUAL 27-10, para. 56 (1956), *reprinted in* BISHOP, *supra* note 16, at 987 (emphasis added).

well.

The significance of this point cannot be underestimated in the Iraqi destruction case, for the Iraqi purpose for burning the oilfields at Al-Wafra and the refineries at Mina Abdullah and Shuaiba, and for discharging oil into the Gulf from the Sea Island terminal, was not to protect retreating Iraqi forces. At best, the Iraqis intended either to maintain the then extant Iraqi position in Kuwait or to facilitate a weakening of the coalition forces operating the bombing campaign from Saudi Arabia. Only the burning of the oilfields and the refineries at Rumaila, Bahra, and other locations, executed at the onset of the coalition ground offensive in late February 1991, might fall within the classic retreat doctrine.

Several hypotheses have been advanced by analysts to explain the Iraqi army's motivation in undertaking the oil destruction that occurred in mid-January. One theory holds that Iraq designed the burnings of the Al-Wafra field and the Mina Abdullah and Shuaiba refineries to hamper efforts by coalition pilots to locate and bomb Iraqi troops and material emplacements.<sup>137</sup> Presumably, the smoke from the destruction would degrade flying conditions and obscure visual identification and targeting. Another explanation of the January 1991 burnings is that Iraq wished to eliminate resources that would be available to coalition forces when the inevitable ground invasion of Kuwait took place.<sup>138</sup>

The theory offered to explain the discharges into the Gulf from Sea Island is that Iraq's goal was to complicate coalition amphibious assaults<sup>139</sup> and clog desalinization plants in Saudi Arabia supplying fresh water to coalition forces.<sup>140</sup> Analysts have indicated that Iraq probably undertook the oilfield and refinery destructions at Rumaila, Bahra, and elsewhere—all occurring in conjunction with the late February 1991 ground offensive by coalition forces—to protect retreating Iraqi forces moving north toward the Tigris and Euphrates valley.<sup>141</sup> On the other hand, the destruction could have been undertaken to execute Saddam Hussein's threat to waste the oil in the event Iraq's occupation was jeopardized.<sup>142</sup>

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137. Shenon, *supra* note 8, at A1.

138. *Kuwaiti Oil Field*, *supra* note 7, at A1.

139. Shenon, *supra* note 9, at A1.

140. *Id.*

141. This was certainly the position stated with regard to the mid-January destructions. Shenon, *supra* note 8, at A1. The same approach seemingly could be taken with regard to the late February destructions as well. On those destructions, see Apple, *supra* note 11, at A8.

142. *Id.* at A8.

Four points can be made about the possible justifications for the destruction of Kuwaiti oil resources. The first is that article 23(g)'s caveat for destruction "imperatively demanded by the necessities of war" could in no way encompass activities explained on the grounds of spitefulness. To claim that the desire to prevent the rightful owner from regaining possession of something the destroying state covets would legitimize the destruction of property. This is perversion far too absurd to merit analysis. The thrust of the customary rule captured by the Hague codification is to prohibit destructions not related to legitimate military objectives and to protect those that are related. To contend that property has been destroyed because "no one will have it if the acting nation cannot" proffers an argument founded on nothing more than avarice and ill will.

Secondly, the idea of destruction to keep useful resources out of the hands of enemy forces is colorable, but lacks any factual support in this particular case. The staging position of the coalition forces, in the territory of one of the world's most productive oil suppliers, was completely unlike that faced by combatants in any other war.<sup>143</sup> Given the unlimited availability of fuel and lubricants needed to carry out the expedition to oust the Iraqi army from Kuwait,<sup>144</sup> the decision to destroy the oil resources so they would not fall into the hands of the Allies as one that any military officer could think of as demanded by the necessities of war is difficult to conceive.

What makes this conclusion even more ineluctable is the difference between crude oil and refined fuel products. In burning oilfields and refineries, the Iraqis were doing nothing to deny the coalition an item that could sustain the mobility of armored vehicles. With the exception of destruction of stock-piled refined petroleum products, the devastation inflicted on the Kuwaiti oil industry kept nothing out of the hands of the Allies that could have proved of value in the February ground campaign to enforce Security Council Resolution 660.<sup>145</sup> Military transport and fighting vehicles cannot simply drive up to an oilfield, storage tank, or refinery and pump needed fuel into their engines. Yet if the property destroyed is to fall within article 23(g)'s exception, it must have some demonstrable military utility. Without this, nothing ties the destruction to a legitimate military objective.

Third, similar problems exist when considering the goal of fouling the

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143. When operation Desert Storm was launched, the Saudis were producing around 8.5 million bpd. Greenhouse, *supra* note 29, at D4.

144. On Saudi need to import refined products, see Judith Miller, *Saudis Importing Fuel to Fight War*, N.Y. TIMES, Jan. 23, 1991, at A6.

145. See *supra* note 4.

desalinization plants supplying water to the coalition forces in Saudi Arabia as a justification for release of oil into the Gulf. In this case, the existence of military value is less questionable than in the case of the destruction of oil to prevent its falling into allied hands. The harsh, arid nature of the Gulf environment makes potable water a genuinely precious commodity. Were its availability to have been seriously restricted or curtailed altogether, the impact on the troops challenging the Iraqi occupation would have been indubitable. Nonetheless, in view of the unpredictability of the direction, flow, and destination of open sea oil slicks,<sup>146</sup> the releases from Sea Island appear to have been an act of desperation—akin to firing wildly in all directions—as opposed to a decision calculated to create a situation resulting in jeopardizing a specific target. The customary standard reflected in 23(g) of the Hague rules, however, clearly requires a calculated decision of that sort to consider destruction of property permissible.

By explicitly providing that lawful destruction is that which is imperatively demanded, the Hague Regulations suggest the requirement of a degree of certainty regarding the probability that a particular military act will impact its desired target. The very idea that an action is demanded implies not only an urgency regarding the action, but a likelihood that it be productive as well. Two cases from the two World Wars, involving the massacre of survivors of surface vessels sunk by German submarines, confirm this interpretation. Though both cases were outside the context of 23(g), the tribunals noted that the actions involved could not have been justified on the basis of eliminating the possibility that the survivors might transmit information concerning the attacking submarines. The idea was that a variety of other factors could prove just as informative, including oil slicks and debris.<sup>147</sup> The obvious conclusion is that the tribunals perceived the existence of a requirement that to justify military action, it must not be undertaken on the bald hope that it might accomplish its intended task.

The final comment that can be offered about the Iraqi action in Kuwait is more equivocal than the comments above. It deals with the other three possible justifications—covering troops and material emplacements against aerial attack, impeding amphibious assaults against occupied

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146. See Matthew L. Wald, *Currents, Not Man, Will Decide the Spill's Effects*, N.Y. TIMES, Jan. 29, 1991, at A11. Ironically, the Sea Island slick reportedly affected desalinization plants in Kuwait relied on by the Iraqis.

147. See *Hospital Ship "Llandoverly Castle" Case*, 16 AM. J. INT'L L. 708(1) [hereinafter *Llandoverly Castle Case*]; *Peleus Case*, 1 U.N. War Crimes Comm'n, Law Reports of Trials of War Criminals 1 [hereinafter WAR CRIMES REPORTS].

Kuwaiti territory, and covering Iraqi forces retreating from coalition air and ground assault. Without suggesting whether the facts will ultimately indicate that destruction to accomplish any of these objectives was necessary from a military perspective, all three of these justifications clearly are more palatable than the possible justifications discussed above. Protecting troops and material, complicating amphibious landings, and covering retreats are military objectives. Furthermore, they are unlike the justification for clogging the desalinization plants in Saudi Arabia in that they are destructions that could, with a high degree of probability, accomplish the tasks at which they are directed. Smoke from burning oilfields and refineries goes skyward where aircraft fly, and oil dumped from loading terminals into the ocean floats on the navigable water surface where naval vessels maneuver.<sup>148</sup>

Despite the absence of the problems afflicting the other justifications, covering troops and material emplacements, complicating an amphibious assault, and especially protecting retreating forces, all raise the question of whether article 23(g)'s reference to the customary concept of military necessity allows consideration of whether the nation whose forces have destroyed otherwise protected property is in the process of conducting an illegal war of aggression. Perhaps the acquittal at Nuremberg in both the *List* and *Von Leeb* cases,<sup>149</sup> notwithstanding clear Nazi aggression,<sup>150</sup> caused scholars to devote little comment to this matter. Those who have mustered the resolve to take a position have often done so in an oblique fashion and without a great deal of explication.<sup>151</sup> In the balance of this Article, an attempt will be made to demonstrate that an illegal war of aggression is indeed a relevant consideration when determining whether article 23(g) permits destruction of protected property. The effort proceeds by first critiquing some of the possible explanations for why article 23(g)'s reference to destruction "imperatively demanded by the necessities of war" should not be read as envisioning consideration of an illegal,

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148. See *Excerpts from Remarks by General Schwarzkopf*, N.Y. TIMES, Jan. 28, 1991, at A5 (military briefing by General Norman Schwarzkopf) (disputing that the oil slicks would have posed any real problem for an amphibious assault).

149. See *supra* text accompanying notes 131-35.

150. For a determination of Nazi aggression, see *Judicial Decisions—International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946)*, reprinted in 41 AM. J. INT'L L. 172, 186-221 (1947) [hereinafter *Judicial Decisions*].

151. Compare JOHN A. APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES 53 (1954) ("The effect of outlawing aggressive war is to remove the legal excuse . . . of acts otherwise condemned by all penal codes . . .") with H. LAUTERPACHT, *The Problem of the Revision of the Law of War*, 1952 BRIT. Y.B. INT'L L. 360, 378 (1953) ("most of the rules of warfare . . ., operate regardless of the legality of the war.").



aggressive war, and concludes by then presenting the reasons supporting the opposite position. This matter is immensely important, especially in view of the settlement of reparation claims against Iraq, which may turn on the illegal nature of the destruction involved.<sup>152</sup>

The basic explanations for a restrictive reading of article 23(g)'s reference to military necessity must be constructed through creative speculation. The paucity of detailed commentary on reference to the illegal nature of the war in which the destruction at issue has occurred does not yield a well-delineated enumeration of the reasons why aggression is not relevant. Recognizing this complication, at least three explanations exist for maintaining the position that 23(g) should not be read as including reference to the legality of the war involved.

The first explanation for a narrow reading, a reading that confines the notion of military necessity to exclude reference to the illegal, aggressive nature of the war conducted by the state inflicting the destruction at issue, emphasizes that placing commanding officers in a position of dispute with political leaders who entertain illegal ambitions against other nations should be avoided. In the event a military campaign's plan of action were to be subjected to examination that included consideration of the campaign's aggressive nature, officers charged with the task of implementing the plan might find themselves bickering with political leaders responsible for formulating the overall objectives of the campaign. This would result from a sensitivity to the need to conduct activities in accordance with the limitations established by the rules of engagement. The consequences could undermine the kind of discipline required to conduct warfare successfully.

Though this argument has a certain appeal, it fails to consider sufficiently the rejection of superior orders as an unqualified defense for war crimes.<sup>153</sup> More particularly, the above argument is based on the importance of discipline within the military, just like the argument favoring the defense of superior orders. The Nuremberg experience indicates that, while discipline is an extremely important value, it is one balanced against the standards of international law relative to the methods and means of carrying out armed conflict. As a result of this balancing, the superior orders defense has not been favorably received when the act in question was clearly unlawful,<sup>154</sup> or was not somehow demonstrably op-

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152. See *supra* note 16 and accompanying text.

153. See McDUGAL & FELICIANO, *supra* note 93, at 690-99.

154. For cases accepting this proposition, see *Trial of Wielen*, 11 WAR CRIMES REPORTS, *supra* note 147, at 47; *Trial of Renoth*, *id.* at 78; *Peleus Case*, *supra* note 147, at 16. From the First World War, see *Llandoverly Castle Case*, *supra* note 147, at 437-

posed.<sup>155</sup> Since this latter point suggests that the mere potential for wrangling between political leaders and commanding officers has not proved determinative in the context of superior orders, according that potential any influence under article 23(g)'s exception would seem peculiar. Just as an act clearly violative of the laws of war cannot be defended under superior orders, even though the order flows from a political leader, destruction inflicted during the course of a war of aggression cannot be defined as destruction "imperatively demanded by the necessities of war."<sup>156</sup>

The irrationality of war itself provides a second possible explanation for a restricted reading of article 23(g)'s reference to military necessity. In view of war's palpable irrationality, an anomaly would exist if one interpreted the laws of war as subjecting military forces to anything beyond the most rudimentary of constraints. In regulating primordial activity typifying the quintessence of human emotion and frustration, and the antithesis of human logic and temperance, nothing should be demanded except straightforward and practical connections between the goals or objectives of the military and the methods selected for accomplishing them.

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38, in which the court stated that "if . . . an order is universally known to everybody, . . ., to be without any doubt whatever against the law," then superior orders is no defense.

155. *The Einsatzgruppen Case*, in 4 TRIALS OF WAR CRIMINALS, *supra* note 131, at 481. There, the court required that to invoke the defense of superior orders "the opposition of the doer must be constant." To just "mentally rebel" is not enough. For an example of the kind of showing of opposition required, see *Trial of Bauer*, 8 WAR CRIMES REPORTS, *supra* note 147, at 16, 21 (1945).

156. See *Judicial Decisions*, *supra* note 150, at 221 (referring to article 8 of the International Military Tribunal Charter and orders coming from political leaders). It is recognized that this general conclusion has ramifications far beyond that of destruction inflicted by an occupying power in occupied territory. Article 23(g) deals with destruction of property during active military engagement. The argument that the aggressive nature of a war affects the destruction the aggressor can inflict admits that every single act of destruction taken—and not just those in occupied territory inflicted when the aggressor has its status as an occupant challenged—may be examined in light of the illegal nature of the war. This factor alone, however, is not dispositive. Destruction to cover a retreat from territory occupied through a bloodless invasion could be permissible when outside forces press a military campaign to oust the occupier. The explanation rests on the peril to life and limb faced by the retreating forces, versus the absence of destruction accompanying the original aggression and its presence later to protect life and limb. Destruction to cover a retreat ordered by a commanding official who defies directives from political and military superiors to push forward with the campaign of aggression also may be permissible. The explanation here would rest on avoidance of destruction of a potentially greater magnitude versus protection of life and limb in the face of sanctions for contravening explicit orders.

This second argument for a narrow reading has problems that make it equally as unconvincing as the first. The most conspicuous is that article 23(g) itself already reflects expectations regarding rationality. The prohibition on destruction not essential to the attainment of some legitimate military objective serves to require that military forces engaged in armed operations avoid the mindless and unwarranted savagery in which confrontation might otherwise result. A particular act of destruction is entitled to protection only if it is linked to a legitimate military objective and shown to be likely to accomplish the objective itself.<sup>157</sup> The obvious thrust of this requirement is to impose a duty on those in the field to consider painstakingly the means selected for taking war to the adversary.<sup>158</sup> Less obvious, but also evidencing expectations of rationality, is the applicability of Hague Regulation 23(g) to full-scale conflict beyond territories under occupation.<sup>159</sup> Were the irrationality of war to support a restrictive reading of 23(g)'s exception, the article and its injunction that destruction be tied to a military objective likely to be accomplished probably would not have been so extended. By the imposition of rationality, even under these adverse conditions, the suggestion is that 23(g)'s thrust includes interpreting military necessity as referencing whether the nation whose forces inflicted the destruction at issue initiated an aggressive and illegal war. To the extent that this obligates those in command of military forces to proceed in a systematic and reasoned manner, it serves to convert the exemplar of human irrationality in a way already dictated by the plain expressions of article 23.

The third argument supporting this reading is similar to the other two. Specifically, it claims that a restricted reading of 23(g) provides the best fit with the realities of international conflict and is the most appropriate reading of the provision. But, rather than developing the notion of a broad reading creating the possibility for tensions between military and political players, or incongruity with the fundamental irrational nature of armed conflict, the third argument stresses the fact that victors who sit in judgment of the vanquished may engage in capricious and abusive

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157. See *supra* text accompanying notes 142-48.

158. Contrast this requirement with *Kriegsraison geht vor Kriegsmanier*, which basically postulates that the existence of war overrides all legal limits. The statement *inter arma silent leges* (war silences the law) sums up the theory. See William V. O'Brien, *The Meaning of 'Military Necessity' in International Law*, in 1 *WORLD POLITY* 109, 119-27 (The Institute of World Polity ed., 1957).

159. Report to the Conference from the Second Commission on the Laws and Customs of War on Land, reprinted in *THE REPORTS TO THE HAGUE CONFERENCES OF 1899 AND 1907* 137, 145 (James B. Scott ed., 1917) (23(g) applies to hostilities generally).

determinations. The thought is that tribunals comprised of those prevailing in war are likely to find the existence of aggression when called upon to evaluate the propriety of acts of destruction inflicted by those who have been defeated. Obviously, a predilection of this sort seriously complicates the possibility of military necessity ever being invoked successfully.

This argument is not deficient in its logic. The normal reaction may be disgust and contempt when another has compelled one to draw on valued economic and human resources. The deficiency with this third argument is its failure to evidence full appreciation of the structural forces affecting decisions in the international context. Reciprocity is by far the most important force in this respect. The reciprocal character of nation-state relations serves to moderate or check the inclination towards abuse by those assessing the conduct of other actors. Completely aware that in the future they may find themselves before a panel of their peers, nations vested by virtue of victory in conflict with the authority to judge the conduct of others are just as likely to be interested in justice and fairness, and standards promoting these, as in retribution for the unpleasanties they have been compelled to endure. In spinning the complete web of law outlined by the starkly skeletal rules of military engagement, the most powerful incentive to impartiality and even-handedness is the realization that what is advanced as law could be used to evaluate the future conduct of the one by whom it is proffered. The victor may encounter intense pressure to impose exactions on the vanquished for the hardships it has been forced to endure. This pressure, however, is often under control by the longer-term perspective imparted through participation in the international decisional process.<sup>160</sup>

Putting aside the arguments for a narrow, restrictive reading of article 23(g)'s exception for destruction necessitated by the imperatives of war, this Article now turns to the reasons for giving that exception an interpretation that includes consideration of the legality of the conflict started by the nation whose forces inflicted the destruction in dispute. Essentially, five reasons exist for a broad reading. They can be catalogued as based on the following five considerations: a textual analysis of article 23(g); the implications gleaned from other language appearing in both

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160. For reference to the nature of the international decision-making process, see W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict*, 9 CASE W. RES. J. INT'L L. 39, 40-43 (1977); Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949*, *id.* at 205.

the Hague Regulations and Convention IV, to which the Regulations are annexed; the differences between the exception language of 23(g) and that of article 53 of the Civilians Convention; the unattractiveness of results grounded in a narrow reading, and the general influence of the concept of reasonableness on the interpretation of legal standards. The first three of these reasons could be categorized as traditional, in that they turn simply on the language of the international compact of concern; the last two are pragmatic, in the sense that their focus is result-oriented.

The first of the three traditional reasons supporting a broad interpretation of article 23(g)'s exception revolves around the very terms used to express the concept of military necessity. The relevant language discusses destruction imperatively demanded by the necessities of war. The drafters chose the phrase "necessities of war," as opposed to "necessities for war." Thus, one may conclude that the exception indicates a preference for a construction attributing no weight to the matter of the overall conflict being an illegal war of aggression.

That conclusion, however, should not be assumed too quickly. Obviously, reference to destruction demanded by the necessities for war would facilitate the argument that the permissibility of the conflict under international law is a relevant consideration. Nonetheless, if this language had been used in article 23(g), it would have weakened the position that the legality of destruction also hinges on whether it is essential or necessary from a purely operational standpoint. Stated another way, if article 23(g) were to speak of the necessities "for," rather than "of" war, references to the matter of particular military operations demanding destruction would be inappropriate, since no connection would be required between the action taken and the exigencies of battle.

The language that actually appears in article 23(g) can be read in a fashion that supports a broad construction of the necessity exception without having to engage in contortions that too substantially distort the understanding of what is conveyed by certain word arrangements. By permitting destruction, the Hague rules reliance on the preposition "of" has meaning only in regard to the necessities that have "imperatively demanded" action of that untoward and ruinous character. The "necessities" driving the destruction must be those that are extant; this clearly suggests that the exigencies at the very moment the act is taken are those meriting consideration. Since the immediate exigencies, however, are themselves concomitants of all the circumstances surrounding the initial use of force that led to the onset of the war itself, the most thorough conception of the existing necessities would also seem to include the latter circumstances. The attractiveness of this position is enhanced in that

the necessities able to justify destruction must be those rendering this action "imperatively demanded." This strict standard undoubtedly requires linkages of the type alluded to earlier.<sup>161</sup> Beyond that, however, the standard is flexible enough to permit reflection on whether the nation inflicting the destruction engaged its neighbors in an illegal and aggressive war. That a demand must be imperative to be sufficient to support destruction invites reference to a broad and encompassing spectrum of considerations. The determinations about the imperativeness of any demand that prove to teem most with insight, significance, and perspective reflect on the widest array of considerations available. Any comprehension of the expression "imperatively demanded" that reflects on the destruction in issue in a way other than including reference to the legality of the overall conflict is far too parsimonious.

The second of the traditional reasons for reading article 23(g)'s exception as including reference to the legality of the war in which the destruction at issue has occurred is also textual. To this extent, it fits the traditional, conventional mold as well as the reason drawing on the implications from the specific terminology of military necessity fits that mold. The second reason, however, distinguishes itself from the reason focusing on the very words of the necessity exception by virtue of the directness of the evidence drawn upon. The latter arrives at its conclusions about the meaning of "imperatively demanded by the necessities of war" through an effort to decipher the words themselves. The directness of this approach is indubitable. The former case employs a more circuitous route. Basically, movement is from language situated in a variety of other provisions of the Hague Regulations, and Convention IV itself, or from the terms of article 53 of the Civilians Convention and its negotiating history, to an interpretation of article 23(g)'s exception. This kind of effort could not possibly be characterized as anything other than inferential and indirect.

The weightiest piece of textual evidence connoting that article 23(g) should be read broadly concerns the understanding that the behavioral injunctions established by the Hague rules reflect what is acceptable conduct, even after factoring in military necessity. The war crimes tribunal at Nuremberg articulated that point by stating: "Military necessity or expediency do not justify a violation of positive rules. International law is prohibitive law. . . . [t]he Hague Regulations of 1907 make no exception to its enforcement."<sup>162</sup> This conception depicts the Hague rules as

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161. See *supra* text accompanying notes 142-48.

162. The Hostage Case (U.S. v. List), 11 TRIALS OF WAR CRIMINALS, *supra* note 131, at 1256.

currently incorporating what military necessity finds acceptable or prohibited. A departure from this approach occurs only when the rules themselves explicitly qualify a prohibition, as in article 23(g), by express reference to the concept of necessity.<sup>163</sup> In these cases, variation from this qualified prohibition is appropriate whenever necessity exists. If the prohibitions in the Hague rules that are not so qualified proscribe conduct linked to military objectives that the conduct likely will accomplish, then the very concept of military necessity unavoidably must be understood as including considerations far beyond linkage itself. What then is called for is a winnowing of the prohibitory provisions of the Hague rules to determine whether prohibitions exist on conduct connected to military objectives likely to be accomplished. In the event these provisions appear, then the construction of military necessity to include reference to more than linkage alone would certainly be suggested.

An examination of the Hague Regulations of 1907 reveals that provisions prohibiting activity which can be connected to military objectives likely to be accomplished are numerous. The most significant and representative examples include not forcing prisoners of war<sup>164</sup> or inhabitants of occupied territory<sup>165</sup> to undertake tasks affiliated with the operations of war; not forcing inhabitants of occupied territory to divulge information about the military force of the other belligerent;<sup>166</sup> not abusing the use of a flag of truce or the uniform of the enemy;<sup>167</sup> and not employing poison or poisoned weapons<sup>168</sup> or taking the lives of enemy soldiers who have surrendered.<sup>169</sup> In every one of the instances enumerated, distinct military advantages could be gained by violation of the restriction of relevance. In prohibiting conduct of the sort involved, the Hague rules reveal that the doctrine of military necessity gives play to a far wider range of considerations than linkage and likelihood of accomplishing military objectives.

Additional indirect evidence exists which corroborates the idea that prohibitions in the Hague rules imply that a broad reading of military necessity is appropriate whenever express reference is made to that concept. In particular, paragraph 5 of the Preamble to Hague Convention

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163. Necessity also appears in arts. 27, 33, and 54 of the Hague Regulations. Hague Convention IV, *supra* note 14, annex arts. 27, 33, 54, at 2303, 2304, 2308, 1 Bevens at 648, 649, 653.

164. *Id.* annex, art. 6, at 2297, 1 Bevens at 644.

165. *Id.* annex, art. 52, at 2308, 1 Bevens at 652.

166. *Id.* annex, art. 44, at 2306, 1 Bevens at 651.

167. *Id.* annex, art. 23(f), at 2302, 1 Bevens at 648.

168. *Id.* annex, art. 23(a), at 2301, 1 Bevens at 648.

169. *Id.* annex, art. 23(c), at 2302, 1 Bevens at 648.

IV alludes to both the values of humanitarianism and of military necessity. This appears through a juxtapositioning of "the desire to diminish the evils of war," and the notion of a diminution "so far as" military requirements "permit."<sup>170</sup> As to the activities involved in the prohibitions discussed above, the interest in minimizing the unfortunate and deplorable effects of war outweighs the concept of necessity. Since the Convention both recognizes these two competitive values and articulates instances in which military requirements are not seen as pre-eminent to ameliorating the consequences of war, it seems reasonable to expect the existence of other cases in which humanitarianism overshadows authorization of conduct furthering militarily useful purposes reasonably can be expected. If standards for civility in the conduct of military operations do not permit activity tied to military objectives whenever necessity is folded into these standards, then surely standards explicitly conditioned by necessity imply the same result. In the same way that humanitarianism compels avoidance of the kinds of behavior listed throughout the Hague Regulations of 1907, it may also compel the avoidance of property destruction in some instances because the inflicting army acts on behalf of a nation waging a war of aggression against its neighbors. Conduct that facilitates the accomplishment of a military objective is insufficient in both cases to support the legality of the destruction.

The last of the three traditional reasons for giving article 23(g)'s exception a broad reading that allows reference to the legality of the war deals with the difference between 23(g)'s language of exception and that of article 53 of the Civilians Convention. The latter speaks of destruction rendered "absolutely necessary by military operations,"<sup>171</sup> while the former refers to destruction "imperatively demanded by the necessities of war."<sup>172</sup> Interestingly enough, article 53 of the Civilians Convention originally also used "necessities of war," rather than "military operations." That was the case with its predecessor, article 30 of the ICRC's 1948 Stockholm Convention,<sup>173</sup> which served as the basis for the negotiations at Geneva in 1949, as well as with article 48A of the draft Civilians Convention, drafted by Committee III,<sup>174</sup> the Committee charged with the responsibility at the 1949 Diplomatic Conference of writing the Civilians Convention.

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170. *Id.* pmbl., para. 5, at 2279, 1 Bevens at 632.

171. *See supra* text accompanying note 13 (text of article 53).

172. *See supra* note 82 (text of article 23(g)).

173. *See supra* note 45 (text of article 30, paragraph 2, second sentence).

174. 3 FINAL RECORD, *supra* note 44, at Annex No. 277, at 137 (Drafting Committee's proposal).



What is especially informative about the movement at Geneva away from "necessities of war," the kind of phraseology appearing in article 23(g) of the Hague rules, and towards "military operations," is the impetus for the shift. As already observed, the Soviet-bloc particularly desired article 53 of the Civilians Convention to address two concerns: damage to state-owned property and the infliction of senseless destruction. In the end, the Convention protected state-owned property, but a prohibition on scorched earth policy was not forthcoming.<sup>175</sup> Despite the set back on this last front, the Soviets sought to further circumscribe the kinds of destruction an occupant could take by pushing for the change from "necessities of war" to "military operations." Since they made this effort in the context of discussing what they considered to be destruction inflicted by Germany in World War II "without military necessity,"<sup>176</sup> a safe conclusion would be that they understood "military operations" to be a tighter, more stringent standard, limiting the factors reflective of military necessity. If this is correct, the converse suggests "necessities of war" to be a looser standard, susceptible to inclusion of a wider range of factors well beyond mere linkage to a military objective and likelihood of success.

Colonel Du Pasquier offered the only comment with regard to the Soviet proposal for this language change, expressing preference for "necessities of war" because of continuity with the 1907 Hague rules.<sup>177</sup> The Soviet proposal was adopted by a substantially favorable vote.<sup>178</sup> As an aside, while its adoption supports a broad reading of article 23(g) of the Hague Regulations, that should not necessarily be taken to mean the legality of the overall conflict does not apply when relying on article 53 of the Civilians Convention.<sup>179</sup>

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175. On State owned property, see *supra* text accompanying notes 44-67. On scorched earth, see *supra* text accompanying notes 102-07.

176. See 2A FINAL RECORD, *supra* note 44, at 719-20 (remarks of Mr. Morosov of the Union of Soviet Socialist Republics at the thirty-first meeting of Committee III).

177. *Id.* at 721.

178. *Id.* The vote was 22 to 10. *Id.*

179. One possible approach here might be that the Soviets felt impelled to make this proposal for amending language against a backdrop of German destruction on the Eastern Front and that the Germans frequently advocated the *Kriegsraison* theory about war as overriding the usual laws and customs regulating war. Consequently, the Soviets designed the move from "necessities of war" to "military operations" to strike only at that matter. Therefore, article 53 could be read as envisioning reference to the legality of the war when faced with determining military necessity. The use of "military operations" signifies nothing beyond a restriction on reading "necessities of war" as meaning that war overcomes all legal limits on land warfare. On *Kriegsraison*, see O'Brien, *supra* note 158, at 119-27.

When shifting focus from the three traditional reasons for a broad interpretation of article 23(g)'s exception to the two pragmatic reasons, movement is from a language-based approach to a consequentialist or result-oriented approach. The first of the two pragmatic reasons for reading article 23(g) to permit references to whether the nation whose forces inflicted the destruction was engaged in an illegal, aggressive war concerns the unacceptability, irrationality, or perversity of a result produced by a narrow reading of the military necessity exception. This result could be avoided fully by a broad reading.

Giving the military necessity doctrine of article 23(g) an interpretation that precludes reference to the legality of the overall conflict can produce an unfortunate result. When one nation can invade another and then, to consolidate its position and to guarantee insulation of the fruits of its unlawful behavior, engage in the destruction of property by merely demonstrating the existence of a link to a legitimate military objective, members of the world community committed to law-abiding conduct are likely to be seriously disadvantaged. Once an adversary establishes its forces, ousting them often is extremely difficult. Military troops faced with that task not only have to contend with the same impediments encountered by every combatant on the open field, but they also have to overcome the adversary's position of superiority associated with defensive entrenchment. Were the illegality of an invasion not a factor moderating the destruction that could be inflicted by an occupying power to maintain its position, an opponent would be confronted with a substantially complex task.<sup>180</sup> In an attempt to frustrate a challenger, the occupying power could undertake systematic destruction of property located in the occupied territory, increasing the likelihood that opposition to the aggression would fail.

By giving the exception for destruction demanded by military necessity a reading that envisages consideration of the existence of a war of aggression, nations that occupy others through the use of illegal force are placed in the position of being unable to invoke freely article 23(g) to justify destruction inflicted in response to external challenge to occupa-

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180. The Allied forces quickly ousted Iraq from Kuwait, a state it had occupied for almost seven months. Remarks of General H. Norman Schwarzkopf, commander of the coalition forces in the Gulf, suggest, however, that had the Iraqi armed forces avoided concentrating combat units in Kuwait itself, a flanking effort would have been much more difficult, and, because of the preparations for combat in Kuwait, a consequent ground campaign would have been longer, more complex, and much costlier. *Interview by David Frost with General Schwarzkopf* (PBS television broadcast, Mar. 29, 1991). Reports from June 1991 indicated that the coalition forces expected as many as 20,000 casualties.

tion. By striking the first blow and occupying territory of another, a foreign belligerent may be in a position of strengthening its defenses against efforts to remove it, thus compounding the difficulties a challenger would otherwise encounter on the open field of battle. Since the occupation follows from a use of force violative of accepted international legal standards, the ability to invoke 23(g) to protect every act of destruction is markedly undercut. The end product is to place lawless aggression in proper rank with the law-abiding conduct of the other members of the world community. Uses of force perceived as contravening specific provisions of international law can be addressed and disposed of without allusion to other rules of law to rationalize and protect the fruits of inappropriate and objectionable behavior.

In addition, giving military necessity a construction that includes consideration of the legality of the overall conflict produces more than an acceptable or proper acclamation of the importance of law-abiding behavior and deprecation of law violation. As noted above, the exception in article 23(g) for destruction demanded by the necessities of war imposes an element of rationality on an otherwise irrational display of human emotion.<sup>181</sup> To the extent that the general idea of reasonableness suggests an approach directed at a rational result, a broad and liberal reading of article 23(g) is certainly more harmonious with the tenor of the military necessity exception. A reading that leaves aside the matter of the war's legality and restricts the focus to connections and likelihood of success seems incongruent with reality.

The final reason supporting a broad reading of article 23(g), and the second of the two pragmatic reasons, incorporates the idea of reasonableness of interpretation mentioned above. The argument is that the exception for military necessity is to be construed, as all principles of international law are to be construed, in a manner that yields a sensible and useful end product. Reasonableness as a distinct concept is not alien to either the common law<sup>182</sup> or the civil law<sup>183</sup> tradition. Stripped of the doctrinal coatings that make it palatable to legal purists, reasonableness stresses the view that rules of law are normative devices for obtaining

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181. See *supra* text accompanying notes 157-58.

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

183. See *Compañía Swift de la Plata, S.A. Frigorífica*, (Sup. Ct. Arg.) (1973) translation reprinted in 6 *LAW. AM.* 330 (1974) (understanding the nature of law from the social objectives it seeks to secure).

compelling objectives. In its most unadorned form, reasonableness conceives of law as the handmaiden, not the master, of society. Legal rules serve not to paralyze the ability to make the moral judgments implicit in all decisions of social policy, but rather to facilitate the making of decisions in a manner that reflects what these judgments seek to serve. From this vantage, interpretations regarding the provisions of international law regulating the use of military force during combat tend toward the production of results serving the socially imperative goals of promoting law observance and discouraging law violation.

The actual utility of the concept of reasonableness in discerning the meaning of specific legal standards is apparent in the jurisprudence of the international community. For instance, the Vienna Convention on the Law of Treaties<sup>184</sup> provides that the language of international agreements is normally given its usual meaning.<sup>185</sup> In the event that approach results in a meaning that is clearly not reasonable, recourse may be had to methods of interpretation designed to rectify that situation.<sup>186</sup> Phraseology alluding to reasonableness as a vital consideration when construing fundamental legal documents<sup>187</sup> also appears in some of the individual opinions of judges of the International Court of Justice (ICJ). In both the 1951 *Fisheries Case*,<sup>188</sup> and the 1984 *Gulf of Maine Case*,<sup>189</sup> the ICJ appeared somewhat sympathetic to the notion of viewing law against a backdrop of reasonableness. These opinions emphasize how contextual factors influence the international rules governing the conduct of nations. Recognized legal scholars also stress the role of reasonableness. Some are unequivocal in their insistence that the principles of law regulating the use of force be looked at in light of reasonableness,<sup>190</sup> while others ap-

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184. Vienna Convention on the Law of Treaties, *adopted* May 22, 1969, 8 I.L.M. 679.

185. *Id.* art. 31, at 691-92.

186. *Id.* art. 32, at 692 (stating preparatory work of the treaty and the circumstances of its conclusion may be referred to when applying article 31).

187. *See* Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 23 (Azevedo, J. dissenting). Judge Azevedo said of interpretations of the United Nations Charter: "To comply with its aims one must seek the methods of interpretation most likely to serve the natural evolution of the needs of mankind." *Id.* As alluded to above, reasonableness is connected integrally with the needs of people.

188. *Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18) (the surrounding realities must serve as the backdrop against which international law is to be understood).

189. *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Main Area* (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12) (antecedent equitable criteria are those producing an equitable result).

190. *See* McDOUGAL & FELICIANO, *supra* note 93, at 218 ("reasonableness in par-

pear to endorse the idea that factors inherent in the concept of reasonableness have a privileged status in the development of international legal norms.<sup>191</sup>

The Vienna Convention, the intimations from the ICJ, and the positions of leading authorities illustrate a rudimentary and basic notion about all law. As the renowned English legal historian Sir Henry Sumner Maine expressed long ago, the rules that comprise law have always reflected not some antecedent directive mankind is helpless to avoid, but a judgment about how best to achieve the ambitions society sets before itself.<sup>192</sup> To recognize this fundamental fact is to cast a new light on the meaning and content of every legal rule. For if law is but an instrument in a community's endeavor to secure its goals, then law must be understood as directing behavior and establishing standards reasonably suited to its task.

## VI. CONCLUSION

The rules set forth in Protocol I of 1977 have yet to be acknowledged universally as part of the customary law of armed conflict. Therefore, they do not yet constitute a binding obligation on a nonparty like Iraq. Nevertheless, the Protocol contains provisions affecting the kinds of activity in which Saddam Hussein's forces engaged in Kuwait. For instance, article 52 of Protocol I prohibits attacks on objects that do not make an effective contribution to military action or offer a definite military advantage.<sup>193</sup> Article 54, alluded to earlier, follows this by prohibiting military action against objects indispensable to the survival of the civilian population, such as drinking water installations, even though the purpose of the action is to deny the value of the object to an enemy.<sup>194</sup> While a caveat exists for objects used solely to sustain combatants of the opponent, or objects directly supporting an opponent's military action, a proviso exists limiting operations against these targets whenever the result would be to affect the civilian population to the extent that it would

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ticular context," suggested in regard to article 51 of the United Nations Charter); see also, Richard A. Falk, *The Beirut Raid in the International Law of Retaliation*, 63 AM. J. INT'L L. 415, 437-39.

191. CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 157 (P.E. Corbett trans., 3d ed., Princeton Univ. Press 1968) (1960) (speaking of "social ends considered desirable" in the context of the formation of customary law).

192. HENRY S. MAINE, *ANCIENT LAW* 3-17 (Legal Classics Library 1982) (1861).

193. Protocol I, *supra* note 110, art. 52, at 1414.

194. *Id.* art. 54, para. 2, at 1414.

be forced to move away from the area.<sup>195</sup> Finally, article 55 leaves no doubt about the sanctity accorded the natural environment.<sup>196</sup> That provision outlaws all methods or means of warfare that are intended or may be anticipated to cause widespread, enduring damage to the environment.<sup>197</sup>

From the preceding examination of the customary law reflected in Hague Regulation 23(g) of 1907, the 1977 Protocol I clearly is a major extension of the laws of armed conflict to matters previously not dealt with. In the context of the Iraqi destruction of Kuwaiti oil resources, the relevant provisions of the Protocol obviate the need to deal with many of the nettlesome issues surrounding protection of property and the concept of military necessity. To this extent, the opportunity to invoke the Protocol in the future would appear to ease the task confronting international lawyers and, perhaps of greatest importance, illuminate the range of permissible alternatives available to military decisionmakers operating in the field of battle. Until that day, however, ample reason exists to believe that the state-owned property provision of article 53 of the Civilians Convention is to be narrowly construed; that article 23(g) of the 1907 Hague Regulations—and not article 53 of the Civilians Convention—governs destruction inflicted in response to external military challenges to occupation; and finally, that the military necessity exception of 23(g) is broad enough to allow reference to the aggressive nature of the war in which the destruction at issue has occurred. With those propositions as background, there seems little question that Iraq's destruction of Kuwaiti oil resources is most appropriately viewed from the vantage of article 23(g), an article that strongly appears to admit of reference to the legal nature of Iraq's invasion of Kuwait.

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195. *Id.* art. 54, para. 3, at 1414.

196. *Id.* art. 55, at 1415.

197. *Id.* art. 55, para. 1, at 1415.

