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Head of State Criminal Responsibility for Environmental War Crimes: Case Study: The Arabian Gulf Armed Conflict 1990-1991

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**Pace University
School of Law**

**Head of State Criminal Responsibility
For Environmental War Crimes:
Case Study: The Arabian Gulf Armed Conflict
1990-1991**

*A Comparative Study
International Approach v. National Approach*

MESHARI K. EIFAN

Thesis prepared For The Degree
of
Doctor of Juridical Science (S.J.D.)

Under the supervision of:
Professor JEFFREY G. MILLER

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Meshari Eifan

White Plains, New York

October 2, 2007

List of Abbreviations

CPA	Iraqi Coalition Provisional Authority
EJIL	European Journal of International Law
ENMOD	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques
GC	Iraqi Governing Council
ICC	International Criminal Court
ICCPR	International Covenant of Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IEL	International Environmental Law
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
IST	Iraqi Special Tribunal
JCE	Joint Criminal Enterprise
NGO	Nongovernmental Organization
PCIJ	Permanent Court of International Justice
Protocol I	First Protocol Additional to Geneva Conventions of 12 August, 1949, related to the Protection of Victims of International Armed Conflict 1977
SICT	Supreme Iraqi Criminal Tribunal
UNSC	Security Council of the United Nations
U. N.	United Nations
UNCC	United Nations Compensation Committee
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environmental Program
WHO	World Health Organization

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Introduction

Internationally, environmental protection has increased through time. Despite this phenomenon, environmental problems have expanded as developments in technology have occurred. This is true both in peace time and in war time. Warfare, historically, is considered the major enemy of the environment. Pollution and environmental devastation are common consequences of almost every military battle.

The international community's awareness of this sad fact has led that community to try to address this dilemma and to set legal frameworks determining liability for environmental damage caused by military activities. In international law, the responsibility for environmental devastation occurring during armed conflict can be attributed to both states and individuals. While the state's responsibility is civil, the individual's responsibility encompasses both civil and criminal.

By and large, the individual's criminal responsibility for environmental destruction during armed conflict can be enforced on either the international or the national level. This study aims to appraise the legal remedy the international community should take in order to meet its needs on this issue, the protection of the environment during the time of armed conflict.

In addition, the paper aims to provide a comparative study of the existing international criminal law framework and its relation to environmental protection during armed conflict. To approach this objective, the study will review the environmental crisis that occurred during the armed conflict in the Arabian Gulf in 1990-1991 as a case study for determining whether the international community adequately responds to these events.

Thus, this study is divided into five main parts. Part I assesses the justifications for a remedy, the criminal remedy, that is more adequate than the United Nations remedy taken toward Saddam Hussein's actions against the environment, a civil remedy. Part II grapples with when the criminal remedy is warranted. Part III deals with the substantive aspects of international criminal prosecution. Part IV reviews procedural issues pertaining to international criminal prosecution. Part V examines the criminal remedy before interested national judicial bodies, the Kuwaiti and the Iraqi legal systems.

In Part I, this study discusses the question whether the U.N. remedy taken, a civil remedy, was adequate, through six steps: the origin of the problem, the environmental damage that occurred, the remedy taken, the nature of the remedy, the weaknesses of the remedy, the adequacy of the remedy and alternative remedies. In conclusion, this part of the study proposes that a criminal remedy (holding war crimes trials for environmental offenses) should have been used in Saddam Hussein's case as a suitable remedy to accomplish the international community's policy goals.

In Part II, the study encounters several questions: when the criminal remedy is warranted and whether there are clear guidelines controlling international policy regarding the prosecution of environmental offenses, more specifically guidelines determining the gravity of the offense. After concluding that there are no definite guidelines at the international level concerning the gravity of the offense, the study examines the source to which international prosecutors should resort and the international legal basis of this resort.

In Part III, the study appraises the substantive aspects of international criminal prosecution. This part is divided into two questions. The first question grapples with the

international criminal basis for prosecuting superiors. Since Saddam Hussein did not commit *actus reus* of the environmental offenses, the questions that might have been raised are: what are the bases for a superior's criminal responsibility and were they applicable to the case of Saddam Hussein.

Then, the study reviews those international instruments upon which the indictments can be based without prejudice to the defendant's rights, specifically the right not to be tried under retroactive principles. Subsequently, in Part IV, the study examines the procedural aspects of international criminal prosecution by addressing those issues relating to principles of legality, jurisdiction, immunity, the statute of limitations, the right to be tried without undue delay and the surrender of the defendant to international criminal tribunals.

After reaching the conclusion that commencing international criminal prosecution in the case of Saddam Hussein was unlikely to have occurred, Part V of this study directs the process of assessment to the national level. The study's goal in this part is to explore whether national legal systems can be substituted for the international legal system; in other words, whether facing environmental crimes committed during armed conflict is better done at the national level. Therefore, the study will look at both the positive and the negative sides of the question at the national level.

Since both are interested states, the study will include both Kuwaiti and Iraqi legal systems. Kuwait would have been interested in holding this trial since it was the main party harmed, economically and environmentally, by the environmental offenses. On the other side, Iraq would have been interested in having this trial within its judicial legal system because Saddam Hussein was an Iraqi citizen. Referring particularly to the Iraqi

legal system, the study mainly aims to assess the existing system before adopting an ad hoc solution, issuing ad hoc national war crimes legislation. However, reviewing the ad hoc legislation is important to avoid its deficiencies in future Iraqi legislative amendments.

In this part, the research examines common issues between the Kuwaiti and Iraqi legal systems. These issues are: the status of international law within the two systems, the availability of national legislation, the defendant's immunity before national courts, the possibility of inflicting the death penalty and some issues relating to evidence and the defendant's rights.

Reviewing the Kuwaiti legal system, the study will consider Kuwait's international basis to exercise its judicial jurisdiction regarding environmental offenses committed within its territory. Later on, the review will face the first problem within the system, obtaining custody of the defendant and the possibility of extradition of the defendant. Afterward, concluding that the possibility of extradition of the defendant would have been slight, the study will examine the possibility of having held the trial in absentia and executing the Kuwaiti sentence within Iraqi territory.

The review of the Iraq legal system begins with a discussion of Iraq's jurisdictional basis concerning environmental offenses committed in Kuwaiti territories. Then, comments will be made concerning environmental offenses regarding the Iraqi statute issued by the new Iraqi regime after the collapse of Saddam Hussein's regime.

After an overall assessment of the research, this study concluded that both international and national prosecutions for environmental offenses committed during warfare have their own positive and negative sides.

At the international level, substantively, the positive side of the story is represented by the existence of international bases for individual responsibility, criminality and the priority of the international trend to pursue senior offenders. Moreover, the positive side is not exclusive to the substantive aspect, but extends to include the procedural aspect as well. Procedurally, the flexibility of the application of principles of legality, the existence of defendants' rights which are unfamiliar to some national legal systems, and the establishment of an international legal precedent might have been deemed the positive side of this judicial proceeding.

Nevertheless, while certain factors in the international legal system encourage prosecuting war crimes; including environmental offenses, there are shortcomings in addressing this prosecution. These shortcomings include the lack of political will, jurisdictional bases, definitive criminal punishments, and clear guidelines ensuring the fairness of international prosecution.

On the other hand, at the national level, the negative side of prosecution prevails over the positive side. National prosecutions might have some advantages which are not available to international prosecutions. These are the ability to gather evidence, having local judges and prosecutors who apprehend the origin of the problem and the seriousness of the offense, and the prevailing culture and tradition in the region of the offense.

However, other obstacles addressing national prosecutions can be expected. These include the lack of statutes criminalizing the harmful conduct, extradition, the statute of limitations, inability to execute penal sentences issued in absentia and the non-availability of the defendant (being in power.) In addition, both limited national sentences as legal

precedents and the high risk of infringing the defendant's rights can be considered negative factors at the national level.

In the end, the view toward pursuing war crimes, including environmental crimes, differs depending upon the corner from which the view is seen and a battle between different values should be expected. If the desire to accomplish environmental justice is the prevailing goal of the prosecution policy, there is no question, at least to some extent, that achieving the goal will be at the cost of a human rights value, specifically the defendant's rights.

If the human rights value becomes unbeatable, then environmental justice will face some obstacles either nationally or internationally. Therefore, reaching harmony between international and national legal frameworks is a necessity for the near future. This does not suggest that the compromise between the two values, environmental justice and human rights, is impossible, but it is a difficult task to achieve in light of current developments reached by both some national legal systems and the international legal system.

Until a compromise between the two values is reached, and the fact that legal development is not free of suffering is accepted, private interests (defendants' rights) should cede priority to common interests (environmental justice) for at least some period of time.

Chapter I

Devising an Adequate Remedy for Using Environmental Damage as a Strategy in the 1990-1991 Gulf War

Introduction

- I. Environmental Impacts on the Gulf Region**
- II. United Nations Remedy for Environmental Devastation**
- III. The Nature of the United Nations Remedy**
- IV. Difficulties with and Disadvantages of the United Nations Remedy**
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- VI. Arguments against a Criminal Remedy for Environmental Destruction in the Gulf Region**

Conclusion and Observations

Chapter I

Devising an Adequate Remedy for Using Environmental Damage as a Strategy in the 1990-1991 Gulf War

Introduction

On August 2, 1990 Iraqi troops, executing Saddam Hussein's orders, invaded Kuwaiti territory. He based his orders on several justifications. Before the invasion, Iraq claimed that Kuwait had exploited Iraq's diversion by a war with Iran by constructing military and petroleum facilities on Iraqi territory.¹ This claim of sovereignty infringement was not Iraq's only justification; it claimed other theories as well.² However, the international community rejected all of these justifications after the Iraqi's announcement that it annexed Kuwait on August 6, 1990.³

One of the remarkable steps the United Nations took to preserve and maintain its goals was its response to the crisis caused by the then Iraqi president. Before 1945, use of force was legal and often represented a tool to achieve governmental policy. In 1945, however, the international community established the United Nations to maintain international peace and security.⁴ Article (2) of the United Nations Charter requires all

¹ Dr. Abdullah Al-Gneem, *Kowiet Wjood Wa Hodooda* [Kuwait's existence and borders: Impartial facts and Iraqi allegations] 17 (Center for Research and Studies on Kuwait, 3rd ed. 1997)(Arabic).

² Iraq claimed that its annexation of Kuwait represented the justice doctrine requiring Arab states to share wealth "oil" among themselves. Iraq argued that its annexation of Kuwait supported Islamic maxims obligating every Muslim to fight against corrupted rulers. Lastly, Iraq contended that both the state of Kuwait and United Arab Emirates were in a conspiracy against Iraq to increase their production of oil to decrease the price to harm the Iraqi economy. Dr. Abdullah Al-Gneem, *Kowiet Wjood Wa Hodooda* [Kuwait's existence and borders: Impartial facts and Iraqi allegations] 32 (Center for Research and Studies on Kuwait, 3rd ed. 1997)(Arabic).

³ Security Council Resolution (662) provides that "... annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void." See S.C. Res. 662, U.N. SCOR, 45th Sess., 2934st mtg, P.1, U.N. Doc. S/RES/662 (1990).

⁴ Article 1(1) of the United Nations Charter provides "The Purposes of United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention

members to “settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”⁵ The Charter lists several mechanisms for peaceful dispute resolution in lieu of force of arms.⁶

As a general rule, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”⁷ However, the use of force in self-defense has always been recognized as legitimate in international law.⁸

Within the United Nations framework, the Security Council has primary responsibility for maintaining international peace and security.⁹ From 1945 to 1990, the Security Council rarely invoked its power under chapter VII because conflicts during this period usually involved one of the two “superpowers,” the United States or the Soviet Union, or their clients, and both superpowers were permanent Members¹⁰ of the Security Council with veto power. During this period, the only Security Council authorization to

and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.” U.N. Charter art.1, para. 1.

⁵ U.N. Charter art. 2, para. 3.

⁶ U.N. Charter art. 33, para. 1. Although at time states continue to resort to the use of military force against other states to resolve disputes, however, implicating further Charter provisions. U.N. Charter arts. 39-45.

⁷ U.N. Charter art. 2, para. 4. See J. G. Merrills, *The Principle of Peaceful Settlement of Disputes in The United Nations and the Principles of International Law* 49-65 (Vaughan Lowe & Colin Warbrick eds., Routledge 1994).

⁸ The United Nations Charter states “Nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of the right of self-defense shall be immediately reported to the Security Council.” U.N. Charter art. 51. See Adams Roberst, *The Use of Force in The UN Security Council* 133 (David M. Malone ed., Lynne Rienner Publishers, Inc. 2004).

⁹ U.N. Charter art. 24, para. 1. See Max Hilaire, *United Nations Law and the Security Council* 5-24 (Ashgate Publishing Company 2005).

¹⁰ U.N. Charter art. 23, para. 1. See Susan C. Hulton, *Council Working Methods and Procedure in The UN Security Council* 237 (David M. Malone ed., Lynne Rienner Publishers, Inc. 2004); see Pual Kennedy, *The Parliament of Men* 51-76 (Penguin Books Ltd 2007).

use force against a “breach of peace” was in response to North Korea’s attack on South Korea in 1950 (at a time when the Soviet Union was boycotting the Security Council and therefore was unable to cast a veto.)¹¹ After the Soviet Union returned to the Security Council, the General Assembly passed a resolution stating that if the Security Council failed to exercise its primary responsibility for maintaining international peace and security, the General Assembly “shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures.”¹²

Beginning in 1990, with the end of the Cold War and the decline of West-East tension, the Security Council became much more active in authorizing the deployment of military forces. After Iraq invaded Kuwait on August 2, 1990, the Security Council adopted a resolution that it “1) condemns Iraq’s invasion of Kuwait; and 2) demands that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990.”¹³

After Iraq ignored the international community’s resolution, the Security Council resorted to stronger mechanisms by imposing trade sanctions¹⁴ and authorizing forcible maritime interception operations by states acting in defense of Kuwait.¹⁵ Ultimately, the Security Council authorized states “to use all necessary means to uphold and implement”

¹¹ The Security Council recommended that states furnish “such assistance” to South Korea as necessary to repel that attack and restore international peace and security in the area. S.C. Res. 83, U.N. SCOR, 5th Sess., 474st mtg, U.N. Doc. S/RES/83 (1950).

¹² G.A. Res. 377, U.N. GAOR, 5th Sess., 302 mtg, U.N. Doc. (1950).

¹³ S.C. Res. 660, U.N. SCOR, 45th Sess., 2932st mtg, U.N. Doc. S/RES/660 (1990).

¹⁴ S.C. Res. 661, U.N. SCOR, 45th Sess., 2933st mtg, para. 3, U.N. Doc. S/RES/661 (1990).

¹⁵ S.C. Res. 665, U.N. SCOR, 45th Sess., 2938st mtg, U.N. Doc. S/RES/665 (1990).

Security Council decisions that demanded Iraq's immediate and unconditional withdrawal.¹⁶

Under that authority, the United States, leading a multinational coalition in January 1991, commenced an air campaign that concluded 42 days later after coalition ground forces swept through Kuwait and into southern Iraq, setting up a buffer zone between the two states. During that armed conflict, Saddam Hussein used all available tools attempting to prevent the coalition forces from liberating Kuwait. One of these tools was environmental destruction accomplished primarily by releasing and burning oil which caused massive pollution to all environmental elements (hydrosphere, lithosphere, and atmosphere.)¹⁷ This destruction of the environment represented a unique event in the history of warfare.¹⁸

Iraq's invasion of Kuwait was a perfect example of the breach of peace and international security cited by the United Nations Charter and reflects clear violations of both international and regional treaties.¹⁹ It is, as described by the first U.S. President

¹⁶ S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg, para. 2 U.N. Doc. S/RES/678 (1990). See Frank Berman, *The Authorization Model: Resolution 678 and Its Effects in The UN Security Council 153* (David M. Malone ed., Lynne Rienner Publishers, Inc. 2004).

¹⁷ Hydrosphere means the aqueous vapor of the atmosphere. Lithosphere includes the outer part of the solid earth composed of rock essentially like that exposed at the surface, consisting of the crust and outermost layer of the mantle, and usually considered to be about 60 miles (100 kilometers) in thickness. Atmosphere encompasses the whole mass of air surrounding the earth.

¹⁸ A detailed study of the causes and effects of the pollution are included in appendices 2. See *infra* app. 2

¹⁹ For instance, it violates article 2 (4) of U.N. Charter. This article provides "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.... All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations ..." U.N. CHARTER art. 2, para. 4. The invasion infringes the League of Arab States. Article V of the League provides "Any resort to force in order to resolve disputes between two or more member-states of the League is prohibited." Charter of the League of Arab States art. V; In addition, the invasion was a clear violation of Islamic Brotherhood Rules. See Dr. Abdullah Al-Gneem, *Koweit Wjood Wa Hodooda [Kuwait's existence and borders: Impartial facts and Iraqi allegations]* 18 (Center for Research and Studies on Kuwait, 3rd ed. 1997)(Arabic); Indeed, Iraq's invasion of Kuwait implicates the General Assembly's definition of aggression and its examples. G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31 (1974). Art 1, 3(a).

Bush, “a blatant use of military aggression.”²⁰ The legality under international law of the Iraqi invasion of the State of Kuwait is crucial²¹ to establishing Iraq’s responsibility for those environmental impacts. This legality is beyond the scope of this paper.

Chapter I of this thesis examines the sufficiency of the U.N. remedy for the environmental damage caused by Saddam Hussein during the 1990 conflict and whether a better remedy could have been devised. Part I of this chapter briefly surveys the environmental impacts caused by Saddam Hussein during the conflict. Part II describes the U.N. remedy imposed for that deliberate environmental destruction and Part III examines whether this remedy was civil or criminal. Part IV investigates the difficulties and disadvantages of the U.N. remedy. Part V addresses whether the U.N. remedy was sufficient to meet the international community’s need to protect the global environment during armed conflict. Finally, Part VI responds to arguments against the proposed remedy, a criminal remedy.

I. Environmental Impacts on the Gulf Region

Armed conflict is an enemy of the environment. One observer wrote “the worst of all polluters is war.”²² Another said that “[i]t is a truism that warfare is detrimental to the environment.”²³ Although “the environment has been a repeated victim of military strategy,”²⁴ we did little about it. Environmental destruction in war has been caused in

²⁰ Invading Iraqis Seize Kuwait and It’s Oil, N.Y. TIMES, August 3, 1990, at A1, Col. 6.

²¹ Some argue that using the oil during the Gulf armed conflict represents a clear violation of the laws on use of force. A prerequisite for this argument is that the use of force from the beginning must be unjustified and illegal according to international law. See Anthony Leibler, Deliberate Wartime Environmental Destruction: New Challenges for International Law, 23 CAL. W. INT’L L. J. 67 (1992).

²² Elisabeth Mann-Borgese, The Protection of the Marine Environment in the Case of War, in the Future of the International Law of the Environment 105-106 (Rene-Jean Dupuy ed., 1985).

²³ Aruther H. Westing, The Environment Aftermath of Warfare in Viet Nam, 23 NAT. RECOURCES J. 365, 387 (1983).

²⁴ Marc Ross, Environmental Warfare and The Persian Gulf War: Possible Remedies to Combat International Destruction of the Environment, 10 DICK. J. INT’L L. 515, 517 (1992).

many ways.²⁵ The Gulf conflict of 1990-1991 is an ideal example of environmental destruction as a military tactic.

In setting fire to Kuwaiti oil wells, Saddam Hussein invented a new military weapon. He used it to destroy the environment and Kuwaiti property. His attack on oil was unlimited and indiscriminate; it pervaded the entire biosphere. Saddam Hussein's actions exceeded environmentalists' greatest fears.²⁶ He proved that his threat to destroy the environment²⁷ was not a "joke". With regard to Iraqi actions against the environment, the wonder was "What kind of people would do this? That's what we kept asking ourselves in Kuwait City yesterday. Day had been turned into night, so thick was the canopy of smoke as the nation's oil wells burned gold and orange along the black-fringed horizon."²⁸

This environmental crisis was caused on Saddam Hussein's orders. Destruction of oil, a natural resource, was one of the strategic aims of the Iraqi aggression. According to captured Iraqi documents,²⁹ this destruction plan was called the "Deferred Destruction Plan." Therefore, it is clear that the destruction was not inadvertent nor imposed by pressing circumstances nor the result of aerial bombardment by the Coalition Forces as Iraqi authorities claimed.³⁰ In short, it was a premeditated crime and it was calculated as part of the overall strategic plan of the Iraqi invasion.

²⁵ Marc Ross, *Environmental Warfare And The Persian Gulf War: Possible Remedies to Combat International Destruction of the Environment*, 10 DICK. J. INT'L L. 515, 517-520 (1992).

²⁶ *Whatever Happened to....Chemical Weapons*, TIMES, March 11, 1991, at 19.

²⁷ Carlyle Murphy, *Iraqis Said to Set Oil Installation Ablaze*, WASH. POST, February 23, 1991, at A10.

²⁸ Robert Fisk, *Crisis in the Gulf: Something Evil Has Visited Kuwait City*, THE INDEPENDENT, February 28, 1991, at 1.

²⁹ See *infra*. App. 3.

³⁰ Letter dated 17 June 1993 From The Permanent Representative of Iraq to The United Nations Addressed to the President of Security Council, U.N. Doc. S/25976 (1993). ¶ 9, 11.

The extent of the then Iraqi leader's role or involvement in the destruction plan is derived through direct and indirect (circumstantial) evidence. The indirect connection is based upon the following analysis: according to Iraqi documents, since the Republican Guard was responsible for implementing the destruction plan³¹ and these forces received their orders directly from the head of the Iraqi regime, Saddam Hussein masterminded this plan or ordered that it be created. In addition to the indirect connection theory, there were several captured Iraqi documents which indicate that this plan was ordered by the Iraqi leader personally. The plan caused massive pollution in the region.

Hydrosphere pollution was caused by several sources (oil fires, oil lakes and fallen substances). This type of pollution resulted in severe and expected health risks to both human beings and other creatures. Lithosphere pollution resulting from oil lakes caused further damage. Atmosphere pollution was another result of the oil fires and oil lakes. This pollution injured human and animal health without warning. The pollution caused by Saddam Hussein's actions had no temporal or jurisdictional limit in harming the environment.³²

Even fish eggs and larva were affected by air pollution caused by the fire from oil wells. One of the studies reported that some dangerous petroleum materials were found in

³¹ Item 2 of document 5 provides "Appointed sabotage squads to mine the oil wells and power and electricity stations that have been prepared for deferred destruction, and preparing and finalizing all the requirements for their destruction, so that every group is stationed in its designated place in order to blow up these targets as soon as orders are issued." This document is a memo issued 10 days after the invasion by the Command of Nubu-khath Nasr Forces, Republican Guard Infantry Brigades 19, 20, 22 and 23, Artillery Command of Nubu-khath Nasr Forces of Republican Guard, Air Defense Command of Nubu-khath Nasr Forces of Republican Guard, Armored Battalion Command, Nubu-khath Nasr Forces of Republican Guard. This document shows the involvement of the Republican Guard in implementing the Deferred Destruction Plan. See *infra*. App. 3. Doc. 5.

³² A detailed study of the causes and effects of the pollution are included in appendix 2. See *infra*. App. 2.

high concentration on the water surface.³³ It is well established that these materials cause harm to fish eggs and larva.³⁴ Moreover, oil may cover and the block gills of fish causing fish mortality.³⁵

Oil lakes also affect soil adversely. Toxic substances resulting from the oil lakes may accumulate in plant tissue, constituting a carcinogen which causes death to any animal eating such plants.³⁶ Areas within the boundaries of the oil lakes were considered biologically dead.³⁷ After the oil lake dried, oil tar or sludge remained, causing severe disturbances in the physical, chemical, and biological properties of the soil environment.³⁸

Dark coloration of the soil surface leads to greater heat absorption, increased soil temperature, and consequently increased water loss by evaporation.³⁹ A study acknowledged that damages to natural vegetation were caused by the increased temperature of atmosphere and soil, the decrease of photosynthetic activity from the

³³ Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 249 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

³⁴Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 249 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

³⁵ Dr. Lolya Nasser ET AL., Al-Talweth Al-Naftee Fee Al-Bea Al-Bahrya Bdwlal Al-Kwiet [Oil Pollution in Kuwaiti Marine Environment] 47 (Center For Research and Studies on Kuwait, ed 2001)(Arabic).

³⁶ Dr. Rafat Misaak ET AL., Al-Mawareed Al-Tabeaya Wa Al-Semaat Al-Beaya Fee Dwlal Al-Kuwiet [Natural Resources and Environmental Features of the State of Kuwait] 198 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

³⁷ M. El-Din ET AL., Environmental Impacts of Burned Oil Wells and Military Operations on some Desert Plants and Soils of Kuwait, A paper presented to the International Conference on the Effects of the Iraqi Aggression on the State of Kuwait held April 2-6 1994 Kuwait, 175 (Center of the Gulf and Arabian Peninsula Studies, ed. 1996).

³⁸ M. El-Din ET AL., Environmental Impacts of Burned Oil Wells and Military Operations on some Desert Plants and Soils of Kuwait, A paper presented to the International Conference on the Effects of the Iraqi Aggression on the State of Kuwait held April 2-6 1994 Kuwait, 175 (Center of the Gulf and Arabian Peninsula Studies, ed. 1996).

³⁹ M. El-Din ET AL., Environmental Impacts of Burned Oil Wells and Military Operations on some Desert Plants and Soils of Kuwait, A paper presented to the International Conference on the Effects of the Iraqi Aggression on the State of Kuwait held April 2-6 1994 Kuwait, 175 (Center of the Gulf and Arabian Peninsula Studies, ed. 1996).

burning of many oil lakes.⁴⁰ Finally, oil lakes affected the ground water aquifer.⁴¹ Sea water used to extinguish the oil-well fires also contributed to the loss of soil productivity.⁴²

As for the effect on public health, some studies show that asthma and respiratory system problems increased after the pollution occurred.⁴³ These studies concluded that children were more vulnerable to these types of disease than adults.⁴⁴ Also, an increase in allergies of the eyes, skin, and nose was noticed during 1991.⁴⁵ Smoke caused by oil fires reached the U.S. and the former Soviet Union.⁴⁶

A decrease in natural childbirth and an increase of short-weight children were recorded.⁴⁷ One of the studies suggests that air pollution caused by the burning oil wells was one of the causes of increasing natural abortions and of congenital deformities.⁴⁸

These are some of the short term health effects reported after the invasion. Now there is a

⁴⁰ M. El-Din ET AL., Environmental Impacts of Burned Oil Wells and Military Operations on some Desert Plants and Soils of Kuwait, A paper presented to the International Conference on the Effects of the Iraqi Aggression on the State of Kuwait held April 2-6 1994 Kuwait, 174 (Center of the Gulf and Arabian Peninsula Studies, ed. 1996).

⁴¹ See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 271-296 (Center for Research and Studies on Kuwait ed. 2004)(Arabic); See also Dr. Rafat Misaak ET AL., Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlat Al-Kuwiet [Natural Resources and Environmental Features of the State of Kuwait] 202 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

⁴² The amount of sea water used to extinguish oil-well fires was estimated at about 1.5 billion gallons (25,000 gallons daily) Due to temperature increase, water evaporates and salt remains in soil which prevents plant growth. The amount of salt added to soil due to the use of sea water was about 76,500 tons of salt. It cannot be washed out by a little of rain water (100-150 millimeters annually). See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 261,266 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

⁴³ See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 231 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

⁴⁴ See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 232 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

⁴⁵ See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 234 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

⁴⁶ Dr. Abdullah Al-Kandari, Environment and Development 261 (Kuwait University, 1992).

⁴⁷ See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 234 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

⁴⁸ M. Maqseed, The Effects of the Aggressive Iraqi Invasion on the Obstetric Practice in Maternity Hospital of Kuwait, 47 (Kuwait Foundation For the Advancement Science, ed. 1995).

long-term study of 400 families in Kuwait being conducted to examine the long-term effects of air pollution caused by the burning of the oil wells and this study is expected to last from 15 to 25 years.⁴⁹

Sadly, “The newest victims of this war wear no dog tags. They carry no proof of nationality. They espouse no conviction that God or Justice or history is on their side. Indeed they took no side.”⁵⁰ The United Nations Environment Programme (UNEP) cautioned “What is being destroyed today-and the damage which has been and could be caused stay with us-all of us- for a very long time. It will affect generations to come which have had no say in the matter.”⁵¹ It was not surprising that environmental damages caused by Iraq’s invasion of Kuwait were cited clearly in the United Nations Security Council Resolution 687 for the first time in history as compensable damages for which Iraq is liable.⁵²

II. United Nations Remedy for Environmental Devastation

Iraq’s international liability for the environmental damages it caused during the Gulf armed conflict was established by the Security Council Resolution 687 stating “Iraq... is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait.”⁵³

⁴⁹ Dr. Mustafa Al-Desouky, Impact of Oil Well Fires on the Air Quality in Kuwait, a paper presented to Proceedings of an International Symposium held at the University of Birmingham 17th October 1991, 26 (on file with author).

⁵⁰ Ellen Goodman, A Crime Against Humanity and Nature, CHI. TRIB. February 3, 1991, at 4.

⁵¹ United Nations Program, Gulf War Oil spill: UNEP Appeal for International Action, News Release, 1991 No. 1.

⁵² S.C. Res. 687, U.N. SCOR, 45th Sess., 2981st mtg, P.19, U.N. Doc. S/RES/687 (1991).

⁵³ S.C. Res. 687, U.N. SCOR, 45th Sess., 2981st mtg, P.19, U.N. Doc. S/RES/687 (1991).

Iraq accepted this liability in a letter directed to both the Secretary-General and the President of the Security Council three days after Resolution 687 was passed. To create a mechanism to implement Iraq's liability, the Security Council created "a fund to pay compensation for claims that fall within paragraph 16 above [direct loss claims as a result of Iraq's invasion and occupation of Kuwait] and to establish a commission to administer the fund."⁵⁴

Thus, the Security Council directed the Secretary-General to "develop and present to the Security Council for decision... [and] recommendations for the fund to meet the requirement for the payment of claims... and for a programme to implement the decisions, including: administration of the fund, mechanisms for determining the appropriate level of Iraq's contribution to the fund based on a percentage of the value of the exports of petroleum and petroleum products from Iraq not to exceed a figure to be suggested to the Council by the Secretary-General, taking into account the requirements of the people of Iraq, Iraq's payment capacity assessed by international financial institutions taking into consideration external debt service, and the needs of the Iraqi economy; arrangements for ensuring that payments are made to the fund; the process by which funds will be allocated and claims paid; appropriate procedures for evaluating losses, listing claims and verifying their validity and resolving disputed claims in respect of Iraq's liability, and the composition of the commission."⁵⁵

On May 20, 1991 the Security Council passed Resolution 692 adopting the Secretary-General's recommendations to establish the commission and the fund

⁵⁴ S.C. Res. 687, U.N. SCOR, 45th Sess., 2981st mtg, P.18, U.N. Doc. S/RES/687 (1991).

⁵⁵ S.C. Res. 687, U.N. SCOR, 45th Sess., 2981st mtg, P.19, U.N. Doc. S/RES/687 (1991).

administration.⁵⁶ Less than three months later, the Security Council approved the suggestion of the Secretary-General that the fund receive up to 30% of the annual value of petroleum and petroleum products exported from Iraq.⁵⁷

The United Nations Compensation Committee (UNCC), suggested by the Secretary-General and approved by the Security Council, is not “a court or arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims; it is only in this last respect that a quasi-judicial function may be involved.”⁵⁸ The UNCC is a subsidiary organ of the United Nations Security Council.

Establishing the UNCC was a unique and unprecedented event⁵⁹ in international law. The UNCC differs from the mixed claims commissions commonly used to resolve international disputes for over 200 years. First, the UNCC’s commissioners were not chosen by disputing parties, but were appointed by the Governing Council, the supreme body of the UNCC, after nomination by the Secretary-General. Second, the UNCC did not follow adversary procedures permitting parties to appear before panels of commissioners. Importantly, commissioners are independent to ensure impartiality of the process.⁶⁰

⁵⁶ S.C. Res. 692, U.N. SCOR, 45th Sess., 2987st mtg, P.3, U.N. Doc. S/RES/692 (1991).

⁵⁷ S.C. Res. 705, U.N. SCOR, 45th Sess., 3004st mtg, P.3, U.N. Doc. S/RES/705 (1991).

⁵⁸ Report of the Secretary-General pursuant to paragraph 19 of Security Council Resolution (687) 1991, May 2, 1991, U.N. Doc. S/22559.

⁵⁹ See David J. Bederman, *The United Nations Compensation Commission and the Tradition of International Claims Settlement*, 27 N.Y. U. J. INT’L L. & POL. 1, 2 (1994); Stanley J. Glod, *International Claims Arising Iraq’s Invasion of Kuwait*, 25 INT’L L. 713, 719 (1991).

⁶⁰ See Robert C. O’Brien, *The Challenge Verifying Corporate and Government Claims at the United Nations Compensation Commission*, 31 CORNELL INT’L L. J. 1, 9 (1998).

The UNCC consists of three main bodies: the Governing Council, Panels of Commissioners, and the Secretariat. The claims process begins with the Secretariat and ends before the Governing Council. The Governing Council, whose membership reflects the composition of the Security Council at any given time, is charged with “establishing guidelines on all policy matters... Organizing the work of the commission and the procedures to be applied to the processing of claims and to the settlement of disputed claims...”⁶¹ In addition, the “amounts recommended by the panels of commissioners are subject to approval by the Governing Council.”⁶² The Governing Council’s decisions are final and not subject to appeal.⁶³

Panels of commissioners consisting of three members have to “report in writing [to]the Governing Council on the claims received and the amount recommended to be awarded for each claimant.”⁶⁴ The Secretariat provides administrative, technical, and legal services to the Governing Council and panels of commissioners.⁶⁵

Regarding claims resolution, panels of commissioners are required to apply “Security Council Resolution (687) and other relevant Security Council Resolutions, the criteria established by the Governing Council for particular categories of claims, and any

⁶¹ Report of the Secretary-General pursuant to paragraph 19 of Security Council Resolution (687) 1991, May 2, 1991, U.N. Doc. S/22559, at 19, II/M-4.

⁶² Provisional Rules for Claims Procedures, U.N. SCOR, U.N. Compensation Comm’n Governing Council, 47 [su ‘th’] Year, art. 40 (1), U.N. Doc. S/AC. 26/1992/INF. 1 (1992).

⁶³ Provisional Rules for Claims Procedures, U.N. SCOR, U.N. Compensation Comm’n Governing Council, 47 [su ‘th’] Year, art. 40 (4), U.N. Doc. S/AC. 26/1992/INF. 1 (1992).

⁶⁴ Provisional Rules for Claims Procedures, U.N. SCOR, U.N. Compensation Comm’n Governing Council, 47 [su ‘th’] Year, art. 38 (e), U.N. Doc. S/AC. 26/1992/INF. 1 (1992).

⁶⁵ Provisional Rules for Claims Procedures, U.N. SCOR, U.N. Compensation Comm’n Governing Council, 47 [su ‘th’] Year, art. 34, U.N. Doc. S/AC. 26/1992/INF. 1 (1992).

pertinent decisions of the Governing Council. In addition, where necessary, commissioners might apply other relevant rules of international law.”⁶⁶

As a general matter, panels of commissioners are required to reach decisions regarding claims within six months from the date the commissioners receive the claims. However, where claims are “large and complex”, a panel is allowed to review them for up to 18 months. Environmental claims were considered “large and complex claims.” Deadlines were established to file claims.⁶⁷

III. The Nature of the United Nations Remedy

In municipal law, when violation of the law causes environmental damages, administrative, civil, and criminal remedies are available to natural legal persons. Some of these remedies may not be available in international law due to state sovereignty or to the lack of legal structure or political will.

It can be argued that the U.N. remedy imposed on Iraq is civil. However, if international law creates criminal responsibility for violating states, one of the remedies would be payment of compensation. The similarity of the compensatory remedy in criminal and civil actions makes it difficult to determine whether the U.N. liability imposed is criminal or civil.

Both types of liabilities arise from the same legal source: violation of an international obligation. It should be noted that under international law imposing criminal responsibility on a state’s nationals does not prevent imposing any other kind of

⁶⁶ Provisional Rules for Claims Procedures, U.N. SCOR, U.N. Compensation Comm’n Governing Council, 47 [su ‘th’] Year, art. 31, U.N. Doc. S/AC. 26/1992/INF. 1 (1992).

⁶⁷ U.N. Compensation Comm’n, Claims Processing , <http://www2.unog.ch/uncc/clmsproc.htm> (last visited April 1, 2006).

responsibility on the state itself.⁶⁸ In the context of the debate regarding the penal responsibility of states, proponents say that the penal responsibility of states is an international expression of outrage toward a state's policy which is in conflict with internationally accepted norms.⁶⁹ The justification for such a view is that the state's population should either have prevented the commission of the international crime or imposed a liability that would have deterred the decision-maker and stimulated the public to take affirmative action to stop the crime or at least to attempt to prevent its commission.⁷⁰

Although the penal responsibility of states at the international level has no place yet in any international convention,⁷¹ it has been argued that Germany in the wake of World War II was subject to penal responsibility.⁷² Thus, the absence of this responsibility from international conventions has led some to argue that penal responsibility should be found in other sources of international law.⁷³ Others argue that states may be subject to responsibility for international crimes, but that such responsibility is neither civil nor criminal but international.⁷⁴

⁶⁸ Article 4 of the Draft Code of Crimes against the Peace and Security of Mankind lays down "The fact that the present Code provides for the responsibility of individuals for crimes against peace and security of mankind without prejudice to any question of the responsibility of states under international law." Draft Code of Crimes against the Peace and Security of Mankind, 1996, 51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532, corr.1, corr.3 (1996); Rome Statute of the International Criminal Court, art. 25 (4), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (1998).

⁶⁹ M. Cherif Bassiouni, *Introduction to International Criminal Law* 86 (Transnational Publishers 2003).

⁷⁰ M. Cherif Bassiouni, *Introduction to International Criminal Law* 85 (Transnational Publishers 2003).

⁷¹ The concept of the penal responsibility of states was not adopted in the international tribunals' jurisprudence regardless of the source of such tribunal, victorious states agreement (Nuremberg and Tokyo tribunals), U.N. Security Council's decisions (international criminal tribunals for former Yugoslavia and Rwanda), or international treaty (International Criminal Court).

⁷² Robert Friedlander, *The Enforcement of International Criminal Law: Fact or Fiction?*, 17 *Case-W. Res. J. Int'l. L.* 79, 85 (1985).

⁷³ M. Cherif Bassiouni, *Introduction to International Criminal Law* 86 (Transnational Publishers 2003).

⁷⁴ Alain Pellet, *Can a State Commit a Crime? Definitely, Yes!*, 10 *EJIL* 425, 433 (1999).

The impression that the penal responsibility of states might exist on the international level arises from the appearance of two terms, “act of state” and “international crimes,” in the “1996-text of the draft code on states responsibility”⁷⁵ of the International Law Commission (ILC). Article 19 provides:

1. An act of a state which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.
2. An internationally wrongful act which results from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.
3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from:
 - (a) A serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
 - (b) A serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
 - (c) A serious breach on a widespread scale of an international obligation of essential importance for safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.
4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2, constitutes an international *delict*.⁷⁶

Opponents of the penal liability of states claim that such liability violates a fundamental principal of criminal justice requiring that both liability and punishment be inflicted personally.⁷⁷ Thus, the center of this argument is that the penal responsibility of

⁷⁵ Draft Code of Crimes against the Peace and Security of Mankind art. 20 (g), 1996, 51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532, corr.1, corr.3 (1996).

⁷⁶ Report of the International Law Commission, Fifty-Third session (Apr.23-June1 and July 2-Aug.10, 2001), U.N. DOC. A/56/10 and corr. 1 (2001); see also Joseph Weiler et al. eds., *A Critical Anyalsis of the ILC’s Draft Article 19 on State Responsibility* (Walter de Grayter 1989). In its approval text of 2001, the ILC does not recognize the penal responsibility of states.

⁷⁷ M. Cherif Bassiouni, *Introduction to International Criminal Law* 86 (Transnational Publishers 2003).

states allows imposing criminal sanctions on those who play no role in planning, carrying out, aiding and abetting, or committing the prohibited behavior.⁷⁸

The penal responsibility of states does not arise in every case where an international crime is committed. The criminal conduct should be considered a product of state-action. State-action would exist when “collective decision-making and actions by individuals who develop a policy or who execute a policy carry out acts which constitute international crimes under color of legal authority.”⁷⁹ In some cases, when a decision is taken by a dictator, individual criminal responsibility will be sufficient to do justice.

Although a review of existing international law suggests that the penal responsibility of states does not yet exist, even assuming that the penal responsibility of states does exist in international law, the question might be raised: Was Iraq held criminally liable for the environmental consequences that resulted from the Gulf War of 1991? It appears that the remedy taken against Iraq as a result of deliberate environmental destruction is civil for two reasons. First, it seems that Saddam Hussein, as a dictator, made decisions regarding using the environment as a weapon in the war by himself. As a result, in this case, it seems that the “State-action” requirement does not exist since the decision to order the destruction of the environment was not taken collectively.

⁷⁸ Professor Bassiouni poses several questions regarding the penal responsibility of states. These questions are: “1. Can a state criminal responsibility be established without establishing the individual criminal responsibility of decision-makers and of the principal executor? 2. If the individual criminal responsibility of decision-makers and the principal executor is required, (i) what elements of criminal responsibility are applicable to such individuals, and (ii) is a state criminal responsibility a consequence of individual criminal responsibility or is it something separate and apart from it? 3. When a state criminal responsibility is established, can it serve as the basis for establishing the individual criminal responsibility of persons other than decision-makers and principal executors, and in that case (i) what are the elements of this derivative individual criminal responsibility, and (ii) in what way does this derivative criminal responsibility arise? 4. How can state criminal responsibility exist without becoming a form of collective criminal responsibility that would violate fundamental principles of individual justice?”

5. Can penalties for state criminal responsibility be developed that would not penalize individuals who had no part in the conduct for which criminal responsibility is to be imposed? See M. Cherif Bassiouni, *Introduction to International Criminal Law* 88 (Transnational Publishers 2003).

⁷⁹ M. Cherif Bassiouni, *Introduction to International Criminal Law* 85 (Transnational Publishers 2003).

Secondly, under international law, in order to impose criminal liability, the international community is generally eager to ensure that the required international standards for justice are preserved. These standards emphasize which authority should decide that kind of responsibility (Judicial bodies), the standards of proof, and the defendant's rights. In reviewing how the U.N. remedy was imposed, many of the standards assuring fairness in a criminal process were absent. Therefore, the U.N. remedy imposed in Iraq for environmental destruction was not a criminal remedy.

IV. Difficulties with and Disadvantages of the United Nations Remedy

Because it was an innovation, the UNCC faced several difficulties and challenges. Even before the UNCC was established, some contended that the Security Council did not have the authority to establish such a commission since this would make the Security Council a judicial organ to solve disputed claims raised by the invasion.⁸⁰ The argument pointed out that the International Court of Justice (ICJ) is the only judicial body in the United Nations system, making that Court the only mechanism to review and resolve such litigation. However, the argument that the ICJ must review Kuwait's claims against Iraq for environmental damage ignores the obstacles this remedy could have faced.⁸¹

Another obstacle the UNCC had to grapple with was funding. The UNCC's operation was expected to be funded by the sale of Iraqi petroleum. To support this method, the Security Council in 1991⁸² allowed Iraq to sell its oil as a temporary

⁸⁰ See Luan Low, *Compensation for Wartime Environmental Damage: Challenges to International Law after the Gulf War*, 35 VA. J. INT'L L. 405, 471 (1995).

⁸¹ These obstacles are: First, several interested governments such as Iraq, Kuwait, and Saudi Arabia do not accept the ICJ's jurisdiction. Time consumed to review such claims by the Court is another factor supporting exclusion of such an option. Affected states such as Kuwait and Saudi Arabia might not be able to devote an effort to such a litigation process since they were so busy with other burdensome obligations. Shiilpi Gupta, *Iraq's Environmental Warfare in the Persian Gulf*, 6 GEO. INT'L EVNTL. L. REV. 251, 268-269 (1993).

⁸² S.C. Res. 706, U.N. SCOR, 45th Sess., 3004st mtg, P.3, U.N. Doc. S/RES/706 (1991).

exception to the economic sanctions imposed on Iraq as a result of the invasion of Kuwait. Unexpectedly, Iraq refused the UN's scheme.⁸³

To facilitate UNCC operation, it was allowed access to the Working Capital Fund of the United Nations. In 1995, the Security Council adopted Resolution 986 providing Iraq with the so called "oil-for-food" agreement. After some delays, the deal began to function as of December 1996. The amount deducted for the UNCC was later reduced to 25%. On May 23, 2003 when Saddam Hussein's regime collapsed, the Security Council passed Resolution 1483 whereby the amount deducted for compensation was reduced to 5% of the proceeds of the sale of Iraq's petroleum.⁸⁴ As mentioned before, the UNCC does not follow an adversary model. Although in practice it was proved that Iraq had been given some opportunity to be heard in the commission process, some contended that Iraq should have been given more opportunity.⁸⁵

Another challenge the UNCC had to deal with was conflicting interests. On the one hand, a claim should be solved within a required time; while on the other hand, the process requires solving the claims in an unprejudiced manner especially for Iraq.⁸⁶

In addition, one of the disadvantages of the U.N. remedy concerning environmental claims lies in the priority of these claims. Within the UNCC framework, claims were divided into six categories: A, B, C, D, E and F.⁸⁷ Category "F" claims are

⁸³ U.N. Compensation Comm'n, Claims Processing, <http://www2.unog.ch/uncc/clmsproc.htm> (last visited April 1, 2006).

⁸⁴ U.N. Compensation Comm'n, Claims Processing, <http://www2.unog.ch/uncc/clmsproc.htm> (last visited April 1, 2006).

⁸⁵ See Robert C. O'Brien, *The Challenge Verifying Corporate and Government Claims at the United Nations Compensation Commission*, 31 *Cornell Int'l L. J.* 1, 23-29 (1998).

⁸⁶ See Robert C. O'Brien, *The Challenge Verifying Corporate and Government Claims at the United Nations Compensation Commission*, 31 *Cornell Int'l L. J.* 1, 27 (1998).

⁸⁷ The category "A" claims are submitted by individuals who had to depart from Kuwait or Iraq between the date of Iraq's invasion on August 2, 1990 and the date of the cease-fire on March 2, 1991. Category "B" claims are submitted by individuals who suffered serious injury or whose spouse, children or parent died as

claims filed by governments and international organizations for losses incurred in evacuating citizens; damage to diplomatic premises and loss of, and damage to, other government property; and damage to the environment.⁸⁸

In the beginning of UNCC operations, the focus was on the individual's claims (A, B and C), for humanitarian reasons.⁸⁹ Because these claims did not involve a large amount of money and Iraq did not contend its liability for these losses, these claims did not require a detailed review. Thus, the Governing Council adopted its first decision giving these claims priority for review and payment.⁹⁰

Subsequently, the UNCC's focus shifted to D, E and F claims very carefully and in a detailed manner have shifted concentration to these claims.⁹¹ The commission divided these claims into sub-categories depending on the type of loss and the similarity of factual and legal valuation factors. A sub-category of mixed E/F claims was recognized also.

a result of Iraq's invasion and occupation of Kuwait. Category "C" claims are individual claims for damages up to US \$100,000 each. These claims include losses relating to departure from Kuwait or Iraq, personal injury, mental pain and anguish, loss of personal property, loss of bank account, stocks and other securities, loss of income, loss of real property, and individual business loss. Category "D" claims are individuals' claims for damages above US \$100,000 each. These claims relate to loss of personal property, loss of real property, loss of income, and individual business loss. Category "E" are corporations' claims and those of other private legal entities and public sector enterprises. These claims include construction and contract loss, loss from non-payment for goods and services, losses relating to the destruction or seizure of business assets, loss of profits, and oil sector losses. U.N. Compensation Comm'n, The Claims <http://www2.unog.ch/uncc/theclaims.htm> (last visited April 1, 2006).

⁸⁸ U.N. Compensation Comm'n, The Claims, <http://www2.unog.ch/uncc/theclaims.htm> (last visited April 1, 2006).

⁸⁹ Jeffrey Jannuzzo, On Two Fast-Track UN Agreement, *The TIMES* (London), Dec. 24, 1996, at 29.

⁹⁰ Decision Concerning Priority of Payment And Payment Mechanism- Guiding Principles – [Dec.17], U.N. SCOR, U.N. Compensation Comm'n Governing Council, 49 [su 'st'] Year, U.N. Doc. S/AC.26/Dec. 17 (1994).

⁹¹ United Nations Information Service Press Release, United Nations Compensation Commission Appoints Commissioners for the Review of Higher Amount Individual Claims, Corporate Claims and Governmental Claims, U.N. Doc. IK/96/7 (1996).

Environmental claims were classified as “F4” claims. The Commission has received 170 F4 claims seeking US \$ 80 billion in compensation.⁹² “F4” claims were divided into two groups: first, claims related to environmental damages inflicted in the Gulf region as a result of setting fire to oil wells or releasing oil into the Gulf; second, claims by governments outside the region that assisted with the environmental disaster. The deadline for filing environmental claims was January 15, 2002.⁹³

It is important to bear in mind that UNCC’s jurisdiction is limited to “direct loss or damage, including environmental damage and the depletion of natural resources...”⁹⁴ The UNCC decided that direct loss included “any loss suffered as a result of military operations or the threat of military action by either side during the period 2 August 1990 to 2 March 1991.”⁹⁵

The Governing Council established “Criteria for claims.”⁹⁶ Environmental damages, according to the criteria, are the following: “(a) Abatement and prevention of environmental damages, including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters; (b) Reasonable measures taken to clean and restore the environment; (c) Reasonable monitoring and assessment of

⁹² U.N. Compensation Comm’n, Category F Claims, http://www2.unog.ch/uncc/claims/f_claims.htm (last visited April 1, 2006).

⁹³ U.N. Compensation Comm’n, Claims Processing, <http://www2.unog.ch/uncc/clmsproc.htm> (last visited April 1, 2006).

⁹⁴ S.C. Res. 687, U.N. SCOR, 45th Sess., 2981st mtg, P.16, U.N. Doc. S/RES/687 (1991).

⁹⁵ Direct loss or damage includes any loss as a result of: (a) military action by either side; (b) departures of individuals from Iraq or Kuwait during the period from Aug.2, 1990 to March 3, 1991; (c) actions by Iraqi governmental officials, employees, or agents; (d) civil disorder; and (e) hostage taking. Decision taken by the governing Council of the United Nations Compensation Commission during its third session, at the 18th meeting, held on 28 November 1991, as revised at the 24th meeting held on 16 March 1992: Criteria for Additional Categories of Claims, U.N. Doc. S/23765 (1992).

⁹⁶ Decision taken by the governing Council of the United Nations Compensation Commission during its third session, at the 18th meeting, held on 28 November 1991, as revised at the 24th meeting held on 16 March 1992: Criteria for Additional Categories of Claims, U.N. Doc. S/23765, at 1051 (1992).

the environmental damage for the purpose of evaluating and abating the harm and restoring the environment; (d) Depletion of or damage to a natural resource.”⁹⁷

Kuwait argued that its environmental claims should have been given priority over other claims since they were mentioned clearly and independently in the Security Council resolution.⁹⁸ However, mentioning these environmental damages in a Security Council resolution was not sufficient to advance the rank of environmental claims for payment priority.⁹⁹

After reviewing the nature of the U.N. remedy and its shortcomings, the question is, assuming that the U.N. remedy constitutes a civil remedy, does it suffice or should we turn to a criminal remedy as well?

V. The Sufficiency of the United Nations Remedy

In Iraq’s case, recognizing the existence of a dictatorship in Iraq during the period of environmental destruction, the assumption is that the decisions taken regarding environmental destruction were taken by the then Iraqi President, Saddam Hussein. The responsibility of the then President of Iraq is the core of this paper.

There is no question that other members of the former Iraqi government could have been found liable for the environmental damage that resulted from the Gulf War 1991. The basis of such a responsibility varies depending on the other government members’ involvement in taking and implementing the decision for environmental

⁹⁷ Decision taken by the governing Council of the United Nations Compensation Commission during its third session, at the 18th meeting, held on 28 November 1991, as revised at the 24th meeting held on 16 March 1992: Criteria for Additional Categories of Claims, U.N. Doc. S/23765, ¶ d (1992).

⁹⁸ S.C. Res. 674, U.N. SCOR, 45th Sess., 2950st mtg, P.8, U.N. Doc. S/RES/674 (1991). See Dr. Badrya Al-Awadee, Al-Mswolia A-Dwlia Lliraq An Al-Dmaar Al-Beaee [International Responsibility of Iraq concerning Environmental Destruction], 64 Journal of The Gulf and Arabian Peninsula Studies 17, 29 (1992) (Arabic).

⁹⁹ S.C. Res. 687, U.N. SCOR, 45th Sess., 2981st mtg, P.19, U.N. Doc. S/RES/687 (1991); For the Payment Procedure Priority, It is available at <http://www2.unog.ch/uncc/paymproc.htm> (last visit July 17, 2007).

destruction. The basis of the responsibility of the then President of Iraq will be discussed later in this paper.¹⁰⁰

This part of the paper argues that the U.N. remedy for the environmental destruction caused by Saddam Hussein's orders does not meet the current policy the international community adopted for protection of the environment. In this part of the paper, the focus will be on the international community's policy for environmental protection. In other words, how important is the environment in the international community's view? And what is the best remedy to serve this policy?

The importance of the environment has been established by the highest judicial body in international law. The International Court of Justice (ICJ) stated, in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, "[T]he environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn."¹⁰¹ The Court's statement reflects the increase in the importance of environmental protection on an international level.

International protection of the environment is constantly increasing both in peace time and in war time. During peace time, protection extends to many of the environmental elements (atmosphere, water, land, and endangered species) at international, regional, and national levels.¹⁰² Such protection is beyond the scope of this paper which focuses on the international trend to move beyond the traditional civil

¹⁰⁰ See *infra* Ch. III.

¹⁰¹ Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 241, para. 29 (8 July).

¹⁰² For the International level developments, see Lakshman Guruswamy, *International Environmental Law* (Thomson Business 2003); For regional and national developments under the United States and the Kuwaiti legal systems, see Nada Al-Duaij, *Environmental Law of Armed Conflict* 195-208, 242-290 (Transnational Publishers, Inc. 2003).

remedy, against responsible states, to individual criminal responsibility in the case of deliberate environmental destruction during armed conflict.

Even though international environmental law (IEL) has emerged and focuses on protection of the environment during peace time,¹⁰³ while environmental protection during armed conflict has developed through the laws of war,¹⁰⁴ the two regimes interact. As a result, developments in one regime contribute to developments in the other. Therefore, it has been argued that IEL should be considered in any process of interpretation of the laws of armed conflict.¹⁰⁵ Environmental protection in war time, however, has developed more slowly. Probably one of the main reasons for this slow development is that the law of war is based on a remedy taken in case of the occurrence of a violation. The responsibility attached to environmental violation during armed conflict time is usually criminal. Thus, such a remedy often touches upon a sensitive doctrine recognized in international law, that of state sovereignty, particularly criminal jurisdiction.

In the past, environmental protection during armed conflict depended indirectly on the laws of war. Protection of the environment was not the main purpose for enacting these international instruments. The main reason was to humanize the tools and means of

¹⁰³ International environmental law was not meant to be applied during armed conflict because its creation was a response to accidental events that occurred during peace time. See Anthony Leibler, *Deliberate Wartime Environmental Destruction: New Challenges for International Law*, 23 Cal. W. Int'l L. J. 67, 70-71 (1992).

¹⁰⁴ Developments of laws of war prove that fact. The first international warfare instrument dealing with environmental protection expressly is the Protocol I additional to Geneva Conventions. On the one hand, most international conventions dealing with environmental problems rarely mention the case of warfare. Probably, those conventions assume the occurrence of the problem in question during peace time.

¹⁰⁵ R. Malaviya, *Laws of Armed Conflict and Environmental Protection: A Analysis of their Inter-Relationship*, ISIL Year Book of International Humanitarian and Refugee Law (2001).

war.¹⁰⁶ In the past, protection of the environment could have been achieved indirectly through the prohibition on chemical warfare,¹⁰⁷ and the protection of objects which are considered important to the civilian population.¹⁰⁸

Since 1972, when the United Nations held a conference on the human environment in Stockholm, the international community has begun to pay more attention to environmental issues and environmental protection has begun to gain its own independence.¹⁰⁹

Although the Stockholm Declaration¹¹⁰ that resulted from the Conference is not a binding instrument, it was a first step toward more protection for the environment on the international level. The Declaration is the cornerstone on which the idea of environmental

¹⁰⁶ Michael Howard, *Constraints on Warfare in The Laws of War* 1, 8 (Michael Howard et. al. eds., Yale University Press 1994).

¹⁰⁷ See Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 94 LNTS 65 (1925). See also Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land arts. 23, 36, 187 CTS 227 (1907).

¹⁰⁸ The 1949 Geneva Convention protects objects indispensable to the survival of the civilian population, private and public property, and works and installations containing dangerous forces. Geneva Convention relative to the Protection of Civilian Persons in Time of War art. 53, 75 UNTS 287 (1949). See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 56, 1125 UNTS 3 (1977). Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 4 (1), 249 UNTS 240 (1954).

¹⁰⁹ The Conference brought forth a declaration called the Stockholm Declaration that proclaims that "...2. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights and the right to life itself." It adds "...2. The protection and improvement of the human environment is a major issue which affects the well-being of the peoples and economic development throughout the world; It is the urgent desire of the peoples of the whole world and the duty of all Governments." In principle 7, the declaration imposes on states an obligation to "take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to human living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea." However, the states, according to Principle 21, "have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction." Concerning any harm that might result; Principle 22 of the Declaration urges states to develop rules controlling the civil responsibility that resulted from any violation. Principle 26 of the Stockholm Declaration provides that "Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement, in the relevant international organs, on the elimination or complete destruction of such weapons." Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972).

¹¹⁰ Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972).

protection was laid in both peace and war time. Later on, the movement from the civil responsibility of the state to criminal responsibility of the individual is reflected in international legal instruments.¹¹¹

Five years after the Stockholm Declaration, responding to the conduct of the United States military armed forces' against the environment in the Vietnam War, two steps were taken in the context of environmental protection during armed conflict. The first was adoption of Protocol I additional to the Geneva Conventions of 1949, relating to the Protection of Victims of International Armed Conflict.¹¹² Protocol I deals with environmental protection in several articles and considers environmental destruction during international armed conflict a violation of the laws of armed conflict.¹¹³

The second step taken was the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) adopted by the U.N. General Assembly in 1976 and opened for signature in 1977.¹¹⁴ Although this Convention kept to the traditional remedy against a state violating the Convention's provisions, it is a remarkable step affirming environmental protection when a military

¹¹¹ Rome Statute of the International Criminal Court art. 8 (2)(b)(iv), UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (1998); Draft Code of Crimes against the Peace and Security of Mankind art. 20 (g), 1996, 51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532, corr.1, corr.3 (1996).

¹¹² Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3 (1977).

¹¹³ Article 35(3) provides "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." Article 55(1) prescribes "Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of the method or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population." Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 35 (3), 55 (1), 1125 UNTS 3 (1977).

¹¹⁴ Article I(1) provides that "Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party." Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques art. I (1), 31 UST 333, 1108 UNTS 152 (1977).

action is about to be taken. These two steps paved the way for the notion that deliberate environmental destruction as a military strategy during armed conflict violates the common conviction of the international community.

Consequently, the United Nations Convention on the Law of the Sea (UNCLOS)¹¹⁵ began an endeavor to particularize environmental protection globally by focusing on a specific element, water. Protection of other specific elements has also occurred, including the atmosphere, the ozone layer,¹¹⁶ biological diversity,¹¹⁷ climate change,¹¹⁸ and endangered species.¹¹⁹

The importance of the UNCLOS is rooted in its unique features. It authorizes states to use criminal sanctions to protect the marine environment, imposing an obligation to protect and preserve it.¹²⁰ The Convention calls upon states to adopt laws that prevent, reduce, and control pollution of the marine environment from land-based sources, seabed activities, vessels, and the atmosphere.¹²¹

The Convention authorizes monetary and stricter penalties against violations.¹²² Although it is not clear whether the UNCLOS is applicable during armed conflict, since its terms were drafted broadly,¹²³ the argument that the UNCLOS is applicable during

¹¹⁵ United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N.Doc. A/CONF. 62/122.

¹¹⁶ Convention for the Protection of the Ozone Layer, TIAS No. 11,097; 1513 UNTS 323; 26 ILM 1529 (1987).

¹¹⁷ Convention on Biological Diversity, 1760 UNTS 79; 31 ILM 818 (1992).

¹¹⁸ Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22 (1998).

¹¹⁹ Convention on the Conservation of Migratory Species of Wild Animals, 19 ILM 15 (1980); ATS 1991/32; BTS 87 (1990), Cm. 1332 (1979). Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 UST 1087; TIAS 8249; 993 UNTS 243 (1973).

¹²⁰ United Nations Convention on the Law of the Sea art. 192, Dec. 10, 1982, U.N.Doc. A/CONF. 62/122.

¹²¹ United Nations Convention on the Law of the Sea arts. 207-212, Dec. 10, 1982, U.N.Doc. A/CONF. 62/122.

¹²² United Nations Convention on the Law of the Sea art. 230 (1), Dec. 10, 1982, U.N.Doc. A/CONF. 62/122.

¹²³ For instance, article 194 (2) stipulates “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and

armed conflict can be made.¹²⁴ This Convention shows the international trend toward criminal responsibility in the field of environmental protection and the existence of a criminal remedy in the minds of drafters and negotiators of international conventions.

Protection of the environment during armed conflict was not absent when the U.N. Charter of Nature¹²⁵ was adopted by the U.N. General Assembly in 1982. Even though a U.N. General Assembly resolution is not binding, it might serve as supportive and as disclosing evidence of predominant international rules.¹²⁶ Two decades after the Stockholm conference, the United Nations held its second conference on environment and development at Rio de Janeiro. This Conference witnessed the birth of a second environmental declaration called the Rio Declaration.¹²⁷ This Declaration was more definite and expressive than the Stockholm Declaration on environmental protection during armed conflict.¹²⁸

their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.” From the previous provision, it is possible to apply it to marine activities. United Nations Convention on the Law of the Sea art. 194 (2), Dec. 10, 1982, U.N.Doc. A/CONF. 62/122.

¹²⁴ John B. Hattendorf, *Maritime Conflict in The Laws of War* 98, 114 (Michael Howard et. al. eds., Yale University Press 1994).

¹²⁵ Principle 5 of the Charter provides “Nature shall be secured against degradation caused by warfare or other hostile activities.” World Charter for Nature princ. 5, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51 (1982); 22 ILM 455 (1983).

¹²⁶ The International Court of Justice noted that General Assembly resolutions are not binding; however, these resolutions can “provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.” Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, ICJ report 1996 I.C.J. 226, 254-255 (July 8, 1996).

¹²⁷ Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

¹²⁸ Principle 24 provides “Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.” Rio Declaration on Environment and Development princ. 24, U.N. Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

The Rio Declaration did not overlook the necessity for environmental protection during armed conflict.¹²⁹ A noteworthy feature of the Rio Declaration was Principle 15 that provides “In order to protect the environment, a precautionary approach shall be widely applied by states according to their capabilities. Where there is a threat of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”¹³⁰

Even though it is obvious that such a clause is meant to apply to those national guidelines or policies governing activities that might harm the environment, especially industrial activities, there is no evidence that this approach does not apply to military activities. In any case, this principle shows the new approach that the international community has begun to adopt.

This approach is called the precautionary principle. Even though the precautionary principle is new, it has not affected the traditional remedy for any violation of the Declaration, the state’s responsibility. The precautionary principle is “a policy for action in the face of uncertainty.”¹³¹ It has been argued that this approach is part of international customary law.¹³²

The precautionary principle is stricter in the sense that it focuses on preventing the occurrence of adverse activities, while the traditional remedial approach centers on the question of what should be done after environmental damage has occurred. These

¹²⁹ Principle 23 of the Rio Declaration states “The environment and natural resources of people under oppression, domination and occupation shall be protected.” Rio Declaration on Environment and Development princ. 23, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

¹³⁰ Rio Declaration on Environment and Development princ. 15, U.N. Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

¹³¹ Nicolas De Sadeleer, *Environmental Principles – From Political Slogans to Legal Rules* 221 (Oxford University Press 2002).

¹³² Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* 260-86 (Kluwer Law International 2002).

approaches are, to some extent, similar to the approaches of tort and criminal laws. Criminal law aims mainly to prevent harm from occurring. It is precautionary or preventive, while tort law focuses more on the victim's compensation and is remedial,¹³³ although retribution and deterrence can be viewed as other goals of tort law.¹³⁴

Criminal law aims to “prevent harm to society, more specifically, to prevent injury to the health, safety, morals and welfare of the public order.”¹³⁵ In other words, criminal responsibility is imposed to achieve either general or specific deterrence.¹³⁶ Deterrence's goal is to prevent adverse consequences from occurring. Preventing such consequences is the essence of the precautionary principle of the international community.

Therefore, any legal remedy taken toward deliberate environmental destruction should recognize the contemporary international community's precautionary or preventive policy. Such a remedy should focus more on deterrence than on the victim's compensation. In 1996, issuing its final Draft Code on Crimes against the Peace and the Security of Mankind, the International Law Commission (ILC) adopted the preventive approach by recognizing the notion that deliberate environmental destruction during international armed conflict is a war crime.¹³⁷ Finally, international efforts to protect the

¹³³ Michael Bayles, *Principles of Law, A Normative Analysis* 276 (D. Reidel Publishing Company 1987).

¹³⁴ Michael Bayles, *Principles of Law, A Normative Analysis* 210-216 (D. Reidel Publishing Company 1987).

¹³⁵ Wayne R. LaFare, *Criminal Law* 10 (3ed, West Group 2000).

¹³⁶ Specific deterrence means to prevent the criminal himself from committing a crime in the future, while general deterrence is meant to deter others through punishing the criminal.

¹³⁷ Article 20 (g) provides the fruit of 24 years of development regarding environmental protection during armed conflict. Article 20 (g) provides “Any of the following war crimes constitute a crime against the peace and the security of mankind when committed in a systematic manner or on a large scale: (g) in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.” Draft Code of Crimes against the Peace and Security of Mankind art. 20 (g), 1996, 51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532, corr.1, corr.3 (1996).

environment were crowned by the inclusion of environmental protection during armed conflict in the Rome Statute of the International Criminal Court.¹³⁸

This movement towards criminalization of environmental destruction during armed conflict is not unique in international law. The emergence of international criminal law is a fact at the current time.¹³⁹ It is a movement toward criminal protection for the environment during armed conflict does not affect or prejudice the civil responsibility of states regarding environmental damage caused by warfare.

Again, to best accomplish deterrence against environmental damage, the stake of potential violators must be raised and the responsibility must be narrowed and personal. The required remedy must attack the defendant's interests, monetary or non-monetary. Thus, remedies must be directed toward real defendants, those who made decisions resulting in environmental destruction, to deter others from making such environmentally harmful decisions in the future.

Unlike municipal jurisdiction, international law does not offer many remedies which narrow the responsibility for environmental destruction. The lack of remedy is due to the structure of international law and to other hindrances such as state sovereignty. The legal remedies anticipated under international law, whether civil or criminal remedies, assume that the conduct constitutes an international crime. These remedies, including national remedies, will be examined in light of the circumstances of Iraq's case.

¹³⁸ Article 8(2)(b)(iv) provides "...2. For the purpose of this Statute, "war crimes" means:... (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: ... (iv) Intentionally launching an attack in the knowledge that such attack will cause..... injury to damage to.... widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated..." Rome Statute of the International Criminal Court art. 8 (2)(b)(iv), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (1998).

¹³⁹ See Theodor Meron, *Is International Law Moving towards Criminalization?* 9 EJIL 18 (1998), <http://www.ejil.org/journal/Vol9/No1/index.html> (Last visited June 30, 2006). See Antonio Cassese, *International Criminal Law* 16 (Oxford University Press 2003).

If this proposition is applied to the U.N. remedy for environmental destruction in the Gulf War, unfortunately the remedy was directed toward the wrong defendant, the Iraqi people. Thus, in this case and in future cases, neither deterrence nor retribution will be accomplished since in fact the responsibility was transferred from the then president of Iraq to the Iraqi people. The compensation was paid from the public's pockets.

In order to narrow down the responsibility in the case of Saddam Hussein several remedies were proposed. They shared a common feature in that all of them were directed toward the then Iraqi president. The first suggestion did not differ much from the U.N. remedy. This remedy was to pursue Saddam Hussein civilly before municipal courts other than Iraqi courts.¹⁴⁰

This remedy would not have been enforceable against Saddam Hussein if he had lacked the funds to pay compensation, especially after his capture. In addition, even assuming he had had the funds, such a remedy might have posed a serious question regarding compensation already paid under the U.N. remedy, for that could amount to a double recovery by claimants for the same damage.

A second proposal was extremely aggressive and most widely unlawful. It has been argued that, in the case of Saddam Hussein, assassination should have been an option.¹⁴¹ The proposal relied on military means to pursue political objectives and, assuming it was permissible under international law, was not helpful. One of the goals of a legal regime is to let people know what is wrong and to determine wrongful behavior by imposing a legal remedy. Assassination is per se extra legal. Moreover, it is generally

¹⁴⁰ Jordan Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage Taking*, 31 VA. J. INT'L L. 351 (1991).

¹⁴¹ Chris Anderson, *Assassination, Lawful Homicide and the Butcher of Baghdad*, 13 Hamline J. Pub. L. & Pol'y 291 (1992).

available only during armed conflict. This option, assuming its legality, would not have been available after the capture of Saddam Hussein. In 2003, because he was no longer at war with the Coalition, killing him extra legally would not have constituted assassination, but would instead have been an act of cold-blooded murder. In addition, this suggestion would have raised a serious question: who would have been in charge of applying this remedy? Did the U.N. Security Council or any state have this right? Such a proposal would have created international tension and a threat to international peace and security. The same dilemma would have occurred if Saddam Hussein were expelled.¹⁴²

Holding a criminal trial was the only acceptable remedy remaining in the case of Saddam Hussein. While there may be some impediments to criminal prosecution generally,¹⁴³ they were not present in the case of Saddam Hussein. Although, this option had proponents¹⁴⁴ and there was discussion of the idea of having an international criminal trial of Saddam Hussein,¹⁴⁵ the U.N. Security Council failed to take action for several

¹⁴² Alfred Rubin, *Milosevic and Hussein on Trial*, 38 *Cornell Int'l L. J.* 1013, 1017 (2005).

¹⁴³ Common hindrances facing international criminal trials are either the lack of political will or peace agreements concluded following the cease fire in any armed conflict. See Anthony Leibler, *Deliberate Wartime Environmental Destruction: New Challenges for International Law*, 23 *CAL. W. INT'L L. J.* 67, 118 (1992); Captain Peter Masterton, *The Persian Gulf War Crimes Trials*, 1991-JUNE *ARMY LAW* 7, 18 (1991).

¹⁴⁴ The U.S. Senate approved a bill asking the Bush administration to propose an international tribunal that would try Iraqi war criminals. See Richard Berkes, *Senate Urges War-Crimes Trials*, *N.Y. Times*, Apr. 19, 1991, at A8. A group of lawyers claims that Saddam Hussein should be brought to justice, See *Lawyers Ask Trial of Hussein Before War Crimes Tribunal*, *N.Y. Times*, June 6, 1991, at A4. Saddam Hussein's criminal responsibility was raised by the Prime Minister of Luxemburg at the meetings of heads of governments of the European Community. Philippe Sands et al., *The Gulf War: Environment as a Weapon*, 85 *AM. SOC'Y INT'L L. PROC.* 214, 229 (1991).

¹⁴⁵ The question of having a criminal trial derives its existence from the U.N. Security Council resolution (674) that requests from all nations gathering documents show evidence of war crimes, human rights violations, and economic damages perpetrated by Iraqi authorities and occupying forces during the Iraqi occupation of Kuwait. See Michael Greenberg, *Creating an International Criminal Court*, 10 *B.U. INT'L L. J.* 119, 120 (1992). It has been argued that the U.N. Security Council could have established an international tribunal in its cease-fire resolution. See Howard Levie, *War Crimes in the Persian Gulf*, 1996 *St. Louis-Warsaw Transatlantic L. J.* 153, 136 (1996).

reasons.¹⁴⁶ As a result of this failure, some conclude that the failure to establish an international criminal court for the Gulf War will be a serious precedent in international law against criminal prosecution for environmental damage during armed conflict.¹⁴⁷

After obtaining custody of Saddam Hussein, this remedy should have been reconsidered for several reasons. First, assuming that deliberate environmental destruction is an international crime,¹⁴⁸ the maxim, “no crime without punishment,” should be followed. Therefore, some believe that establishment of such an international criminal court is a peremptory norm under international law.¹⁴⁹

Additionally, in a criminal trial, the stakes are very high since the responsibility is personal. Thus, there is a probability that the chance for deterrence through a criminal case will be greater than through a civil case.¹⁵⁰ It has been said that a criminal remedy does not deter in all cases; this has been proved by an increase in recidivism.¹⁵¹ The response to this argument is that it is impossible to have a general rule providing effective deterrence in all cases. There are a number of factors influencing any criminal, having to do with the criminal himself or with his circumstances. Therefore, a criminal remedy might not work in some cases, while working in others.

The criminal remedy meets the current international policy protecting the environment. Such a policy requires a tool prohibiting harmful action, not a policy

¹⁴⁶ It has been stated that the Bosnia crisis is one of the events that caused the international community to overlook the establishment of criminal tribunals. See James Robbins, War Crimes: The Case of Iraq, 18 *FALL FLETCHER F. World AFF.* 45, 57 (1994).

¹⁴⁷ Major Arian De Saussure, The Role of Law of Armed Conflict during the Persian Gulf War: an overview, 37 *A.F.L. Rev.* 41, 69 (1994).

¹⁴⁸ This paper concluded in chapter III that Saddam Hussein’s action against the environment could have been prosecuted internationally only based upon those provisions protecting property in the Geneva Conventions of 1949. See *infra* Ch. III.

¹⁴⁹ Louis Beres, Iraq: Crimes and International Law: The Imperative to Punish, 21 *DEN. J. INT’L L. & POL’Y* 335 (1993).

¹⁵⁰ See Michael Bayles, Principles of Law, A Normative Analysis 280 (D. Reidel Publishing Company 1987).

¹⁵¹ Michael Bayles, Principles of Law, A Normative Analysis 283 (D. Reidel Publishing Company 1987).

requiring care or remedy when the action is taken.¹⁵² Criminal remedy is crucial to accomplish deterrence, retribution, and education. Criminal remedy is meant to prevent harmful actions to the environment from being committed. More likely, international prosecution of crimes against the environment will constitute an importantly persuasive precedent in the field of international law. This precedent will enhance and strengthen the field of international criminal law regarding environmental violations.¹⁵³

Saddam Hussein's case concerning the environment was a clear case, in light of both the intentionality of his behavior and the seriousness of the damage. Hopefully, such an egregious case will not often occur on the international level. As a result, the opportunity to apply international criminal law to protect the environment will not occur again in the near future. This would require taking this unique opportunity to protect the environment by a stronger tool, the criminal remedy. Unfortunately, even though Saddam Hussein's case was a unique chance for the international community to express a strong policy, this chance was lost.

Finally, assuming that deliberate environmental destruction during the armed conflict of the Gulf War is an issue that threatened international peace and security,¹⁵⁴ or that the prohibition of massive and international environmental destruction without military necessity was *jus cogens* norm,¹⁵⁵ Saddam Hussein's action should have been addressed with a strong tool to preserve the Rule of Law. For all the above reasons, a

¹⁵² Michael Bayles, *Principles of Law, A Normative Analysis* 281 (D. Reidel Publishing Company 1987).

¹⁵³ Antonio Cassese, *International Criminal Law* 37 (Oxford University Press 2003); See generally Claire Harris, *Precedent in the Practice of the ICTY in Essays on ICTY Procedure and Evidence* 263 (Richard May et al eds. 2001).

¹⁵⁴ Anthony Leibler, *Deliberate Wartime Environmental Destruction: New Challenges for International Law*, 23 *CAL. W. INT'L L. J.* 67, 91 (1992).

¹⁵⁵ The author argues that *cogens* norms need criteria to be identified. One of these criteria is the state community interest that preservation of a sound environment serves as a typical example of these interests. Eva Uhlmann, *State Community Interests, Jus Cogens And Protection of the global Environment: Developing Criteria for Peremptory Norms*, 11 *GEO. INT'L. ENVTL. L. Rev.* 101, 109 (1998).

criminal remedy was a peremptory remedy that should have been taken by the international community.

VI. Arguments against a Criminal Remedy for Environmental Destruction in the Gulf Region

Although the criminal remedy has its advantages, it has been criticized as well. For instance, in the case of Saddam Hussein, several arguments have been made against prosecuting war crimes. Some of those arguments lost their merit after the collapse of Saddam Hussein's regime and his capture.¹⁵⁶

One of the arguments raised against establishing war crimes trials is that "...identifying specific individuals (for prosecution) is very difficult."¹⁵⁷ Such an argument is not new in international law. This argument did not prevent the establishment of special tribunals at Nuremberg, in the former Yugoslavia, and in Rwanda. Generally, a trial can be designated to be specific concerning those offenses and criminals over which the tribunal would have jurisdiction.

At the Nuremberg trials, the four big powers (the United Kingdom of Britain, the United States, France and the Union of Soviet Socialist Republics) made it clear that the tribunal would have jurisdiction over major criminals "whose offenses have no particular geographical location whether they be accused individually or in their capacities as members of organizations or groups or in both capacities."¹⁵⁸ While other criminals "will

¹⁵⁶ These arguments are: the difficulty of extraditing Saddam Hussein while he was in power, the fear that changing the political system in Iraq would lead to a political regime allied to Iran and the lack of political will to hold the trial. See Louis Beres, *Iraq: Crimes and International Law: The Imperative to Punish*, 21 DEN. J. INT'L L. & POL'Y 345 (1993); See also for general arguments against international criminal prosecution. John F. Murphy, *Civil Liability for The Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. Hum. RTS. J. 1, 14 -17 (1999).

¹⁵⁷ Elaine Sciolino, *U.S. Said to Withhold Evidence of War Crimes Committed by Iraq*, N.Y. Times, Jul. 6, 1992, at A6.

¹⁵⁸ The Charter of Nuremberg Tribunal art. 1, 82 UNTS 279; 59 Stat. 1544; 3 Bevans 1238; 39 AJILs 258 (1945).

be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of those liberated countries and of the free Governments that will be created therein.”¹⁵⁹

Environmental offenses committed during the Gulf War involved thousands of defendants. Thus, bringing these criminals before one jurisdiction would have been so heavy a task that it would probably have caused the failure of the process. There is no question but that this process would require cooperation among several countries and international organizations. But this argument does not apply to a criminal prosecution of Saddam Hussein.

A second argument against criminal prosecution was that the creation of a criminal tribunal would have raised “the risk of visiting “victor’s justice” upon the loser of a conflict.”¹⁶⁰ Such an argument assumes that the tribunal judges would represent only those countries that were against Iraq in the war. To minimize this risk, it has been suggested that some of the tribunal judges should have been from countries that took no part in the conflict.¹⁶¹

Another argument claimed against holding war crimes trials is the difficulty of the evidence-gathering process.¹⁶² This argument might have been valid in other cases, but not in the case of environmental offenses committed by the then president of Iraq. These

¹⁵⁹ The Charter of Nuremberg Tribunal, 82 UNTS 279; 59 Stat. 1544; 3 Bevens 1238; 39 AJILs 258 (1945) Preamble.

¹⁶⁰ Richard Falk, *The Environmental Law of War: A Introduction*, in *Environmental Protection and the Law of War: A “Fifth Geneva” Convention on the Protection of the Environment in the Time of Armed Conflict* 172 (Galen Plant ed. 1992).

¹⁶¹ Mark J. T. Caggiano, *The Legitimacy of Environmental Destruction in the Modern Warfare: Customary Substances over Conventional Form*, 20 B.C. ENVTL. AFF. L. Rev. 479, 506 (1993).

¹⁶² John F. Murphy, *Civil Liability for The Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 22 (1999).

offenses are well documented in both aspects, plan and effect.¹⁶³ Moreover, they have been subjected to a lengthy investigative process.¹⁶⁴

The last argument was that of cost. It has been said that the cost of the trial would have outweighed the benefits of the trial.¹⁶⁵ In response, it has been argued that the trial was important since it might have played a role in shaping Iraq's future policy concerning its treatment of people and the environment.¹⁶⁶ Finally, it is a fact that:

“[T]he prohibition of the now documented barbarous activities of Iraq falls under a “peremptory” rule of international law, which is an absolutely binding rule allowing no form of degradation whatsoever.”¹⁶⁷

In any case, it should be noted that the availability of the criminal remedy in cases of deliberate environmental destruction during armed conflict is not a decisive or conclusive factor in determining whether to resort to this remedy at the international level. By and large, the question of whether to use this option should be left to the prosecutor's discretion in light of his priority policy. This discretion should be enforced through an internationally prudent policy in order to avoid international tension. This policy will be the core of the next chapter.

Conclusion and Observations

Warfare is an enemy of the global environment. The contemporary example of this notion was the Gulf War of 1990-1991, in which Saddam Hussein invented a new

¹⁶³ Hussein Mal Allah, *Mojremo Al harb Al-irquoon w Jraemhom kilal Al-ehotel Al-Iraqi Likuweit* [Iraqi War Criminals and their crimes in the Iraqi's invasion of Kuwait], (Center for Research and Studies on Kuwait 1995). (Arabic); Dr. Abdullah Al-Gneem ET AL., *Tadmeer Abar Alnfet fee alwthaeq Aliraqya* [Destruction Oil Wells in Iraqi Documents] (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

¹⁶⁴ After the Kuwait liberation, the Kuwaiti Government decided to establish a special division within the Public Prosecution Office. The sole task of that division is to investigate and gather evidence concerning Iraq's violation of international humanitarian law, including those offenses relating to environment.

¹⁶⁵ Captain Peter Masterton, *The Persian Gulf War Crimes Trials, 1991-JUNE ARMY LAW* 7, 18 (1991).

¹⁶⁶ Captain Peter Masterton, *The Persian Gulf War Crimes Trials, 1991-JUNE ARMY LAW* 7, 19 (1991).

¹⁶⁷ Louis Beres, *Iraq: Crimes and International Law: The Imperative to Punish*, 21 *DEN. J. INT'L L. & POL'Y* 340 (1993).

weapon against the environment called oil. Using that weapon, he caused massive pollution in the region, extending to the hydrosphere, lithosphere and atmosphere.

Addressing environmental impacts and other damage, for the first time in its history, the U.N. Security Council established a Commission to determine the scope of Iraq's responsibility and to establish fair compensation for the damages it caused. Because the penal responsibility of states does not exist at the current time in international law, the Security Council's remedy is a civil remedy.

The Security Council's remedy faced several difficulties and disadvantages resulting from lack of cooperation by the Iraqi Government and the low priority of environmental claims. Moreover, the remedy probably would not have served the contemporary goals of the international community's policy of deterring future environmental damages from armed conflicts.

As an alternative, it is proposed that a criminal remedy should have been sought against the real culprit, the then Iraqi leader, Saddam Hussein. A criminal remedy would have reflected the importance the international community places on environmental protection. In addition, this remedy could have been a tool to narrow the responsibility as a required prerequisite for deterrence, complimenting the precautionary approach the international community has begun to adopt for environmental protection.

This remedy against Saddam Hussein would have served as a persuasive precedent in international criminal law. Applying this remedy to Saddam Hussein's destruction of the environment would not have encountered the obstacles common in international criminal remedies. Because the availability of a criminal remedy for the environmental devastation of war does not determine when such a criminal remedy will

be warranted, the determination should be left to international prosecutors, guided by prudent prosecutorial policy.

Chapter II

International Crimes and International Prosecutorial Policy

- I. International and Domestic Prosecutors: Similarities and Differences**
- II. Prosecutorial Considerations under International Law**
 - 1. Sufficiency of Evidence**
 - 2. The Gravity of the Crime**
- III. The International Legal Basis for Adoption of Domestic Prosecutorial Considerations**
 - 1. The “Gravity of the Offense” and Domestic Considerations**
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Conclusion and Observations

Chapter II

International Crimes and International Prosecutorial Policy

International prosecution differs from national prosecution due to differences in the structures of international and domestic law. It is necessary to understand similarities and differences between both domestic and international prosecutions. With that understanding, we can review the legal considerations and determine whether an international prosecution is warranted in a particular case. Since some of these considerations are not sufficiently clear under international law instruments, however, it is important to find a well-developed basis as a guide for international prosecutors in making the decision as to whether or not to prosecute.

Before adopting a basis for international prosecutors' decisions to prosecute, a legal basis for it should be established under the framework of international law. This chapter will be divided into three parts. In Part I, the similarities and differences between international and domestic prosecutions will be explored. In Part II, the considerations international prosecutors use in making the decision to prosecute will be reviewed, including sufficiency of evidence and gravity of the crime under international law.

In Part III, because the latter consideration is not sufficiently clear within the framework of international criminal law, international prosecutors must look to how domestic legal systems deal with it. Therefore, the study reviews the international basis for adoption of domestic factors determining the gravity of the crime. Finally, domestic factors determining when a crime is grave are explored and applied to the case of Saddam Hussein's actions against the environment.

I. International and Domestic¹⁶⁸ Prosecutors: Similarities and Differences

An increase in harmful actions against the environment is well known, both during peacetime and in time of armed conflict. Environmental crimes committed during peacetime might include illegal dumping of domestic waste, trafficking in toxic waste, smuggling of substances that deplete the ozone layer, trafficking in nuclear materials and illegal trade in and poaching of endangered species.¹⁶⁹

Environmental crimes committed during peacetime are left to domestic authorities. These violations are controlled by domestic policies and jurisdictions.¹⁷⁰ On the other hand, environmental offenses committed during international armed conflict can be prosecuted by either domestic or international prosecutors. In addressing environmental offenses in war, there is interaction between international and domestic courts and prosecutors. International and domestic prosecution share common features and differ in some characteristics. In the context of criminal justice, both judges and prosecutors exercise wide discretion in their actions.¹⁷¹ Such discretion is not exclusive to judges and prosecutors. Defendants, in some domestic systems, might have such

¹⁶⁸ For the purpose of this paper, domestic law or prosecution means legislation or prosecution relating to the practice of one state's jurisdiction. In federal states, domestic law or prosecution means federal legislation or prosecution.

¹⁶⁹ Svend Soyland, *Criminal Organizations and Crimes against the Environment: a Desk study*, United Nations Interregional Crime and Justice Research Institute (June 2000).

¹⁷⁰ These crimes are left to national jurisdiction. Thus, they cannot be reviewed by an international court or tribunal unless they are deemed to be international crimes. The Rome statute does not confer upon the International Criminal Court jurisdiction to review those environmental violations that occurred during internal armed conflict. See Rome Statute of the International Criminal Court art. 8 (c), UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (1998). However, those crimes committed during internal armed conflicts were included within the war crimes in the ILC' Draft since the term that was used was "In case of armed Conflict." Draft Code of Crimes against the Peace and Security of Mankind art. 20 (g), 1996, 51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532, corr.1, corr.3 (1996).

¹⁷¹ Edmond Gabbay, *Discretion in Criminal Justice* (4th ed., London 1995).

powers.¹⁷² The same can be said of the international level.¹⁷³ Conferring prosecutorial discretion upon both domestic and international prosecutors is essential.

International prosecutors have discretion at both the investigative and the prosecutorial stages. Such discretion may involve: whether to initiate an investigation based on information a prosecutor already has, whether to proceed to trial, with what offense to charge the defendant, what evidence to use, and whom to prosecute.

Discretionary prosecutorial powers are necessary for several reasons. Prosecution of violations of the laws of war following armed conflict could involve thousands of defendants and hundreds of crimes, making it impossible to prosecute all violators. The limited resources available to a prosecutor adds to that impossibility, emphasizing the necessity for the prosecutor to exercise discretion.¹⁷⁴

In addition, prosecutorial power “forms the cornerstone of prosecutorial independence.”¹⁷⁵ A prosecutor, in some domestic legal systems, is part of the executive, as in the United States. This prompts the view that “prosecutorial discretion is needed to insulate the prosecutor from political interests and to prompt impartiality and independence.”¹⁷⁶ Moreover, it has been argued that “[T]he exercise of discretion may also function as an informal means of testing public reaction to a change in enforcement

¹⁷² Under the United States legal system, a defendant has the right to exercise his discretion in fundamental issues such as having a lawyer, accepting a plea, appealing his conviction and waiving his constitutional rights such as the right to a jury trial and the privilege against self-incrimination.

¹⁷³ See Christopher Ford, *Judicial Discretion in International Jurisprudence: Article 38(1)(c) and “General Principles of Law,”* 5 *DUKE. J. COMP. & INT’L L.* 35 (1994).

¹⁷⁴ Luc Cote, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law,* 3 *J. INT’L CRIM. JUST.* 162, 176 (2005).

¹⁷⁵ Mathew Brubacher, *Prosecutorial Discretion within the International Criminal Court,* 2 *J. INT’L CRIM. JUST.* 71, 77 (2004).

¹⁷⁶ Mathew Brubacher, *Prosecutorial Discretion within the International Criminal Court,* 2 *J. INT’L CRIM. JUST.* 71, 77 (2004).

practice that may lead to legislative revision in the area.”¹⁷⁷ Finally, such discretion is required to “individualize justice.”¹⁷⁸

Accepting the prosecutor’s discretionary power does not mean that this power is absolute. Thus, considerations bounding the exercise of this power are necessary. Yet, before examining these considerations, the differences between international and domestic prosecutions should be clarified.

In determining whether to initiate an investigation, an international prosecutor should consider international public policy. At the ICC, therefore, “[T]he prosecutor may still determine that a full investigation is not warranted if taking into account the gravity of the crime and the interests of victims, there are nevertheless substantial reasons to believe that an investigation would not serve the interests of justice.”¹⁷⁹

The term, “the interests of justice” is vague. The term may include the question whether initiating an investigation will have any effect on the political environment of the state over which the prosecutor is exercising jurisdiction.¹⁸⁰ Balancing political and legal considerations may place the prosecutor in a dilemma in some circumstances. Weighting political interests over legal interests may affect the credibility of the criminal justice process.

Unlike domestic prosecutors, an international prosecutor often must create a cooperative environment with states that are interested in the prosecution. To fulfill his duties, an international prosecutor must follow a prudent policy in the investigation,

¹⁷⁷ Leslie Griffin, *The Prudent Prosecutor*, 14 *GEO. J. LEGAL ETHICS* 259, 265 n.22 (2001).

¹⁷⁸ Wayne R. LaFave, *The Prosecutor’s Discretion in the United States*, 18 *AM. J. COMP. LAW* 532, 533-35 (1970).

¹⁷⁹ Mathew Brubacher, *Prosecutorial Discretion within the International Criminal Court*, 2 *J. INT’L CRIM. JUST.* 71, 81 (2004).

¹⁸⁰ Mathew Brubacher, *Prosecutorial Discretion within the International Criminal Court*, 2 *J. INT’L CRIM. JUST.* 71, 82 (2004).

during trial, and after the trial in order to execute the trial's sentence.¹⁸¹ It has been said that "[T]he principal problem with the enforcement of international humanitarian law through the prosecution and punishment of individuals is that the implementation of this method ultimately hinges on, and depends upon, the goodwill of the states."¹⁸² Moreover, unlike domestic prosecutors, an international prosecutor's power to initiate an investigation depends upon how the case reached the prosecutor.¹⁸³

Under domestic jurisprudence, prosecutorial power differs from one legal system to another.¹⁸⁴ The national prosecutor's power to charge is not free of tension.¹⁸⁵ Domestic prosecutors have a wider power to decide whether to initiate an investigation than do international prosecutors. For instance, domestic prosecutors are not supervised by courts in their decision not to go to trial, as they are at the international level.¹⁸⁶

¹⁸¹ Mathew Brubacher, Prosecutorial Discretion within the International Criminal Court, 2 J. INT' CRIM. JUST. 71, 93-94 (2004).

¹⁸² Antonio Cassese, On the Current Trends Towards Criminal prosecution and Punishment of Breaches of International Humanitarian Law, 9 EJIL 2 (1998), <http://www.ejil.org/journal/Vol9/No1/index.html> (last visited June 30, 2006). (Examining advantages and disadvantages of international trials in the ad hoc International Criminal Tribunal for the former Yugoslavia and Rwanda. He argues that state sovereignty is a major obstacle to the effective enforcement of international criminal justice.)

¹⁸³ Under the ICC statute, a Prosecutor may receive *notitia criminis* through a referral by the Security Council, or by a state or any other resources such as nongovernmental organizations, U.N. organs or crime victims. After receiving the information from any source other than the Security Council or a state, the prosecutor may initiate an assessment whether a *prima facie case* exists or not. If a prosecutor believes that a *prima facie case* exists, he must submit the case to the Pre-trial Chamber for authorization before launching an in-depth investigation. See Rome Statute of the International Criminal Court art. 53 (1), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (1998).

¹⁸⁴ In common-law system countries such as the United States, prosecutors have tremendous powers in all criminal justice stages including the sentencing process. See Bennett Gershman, The New Prosecutors, 53 U. PITT. L. REV. 393 (1992); See also Cynthia Kwei Yung Lee, Prosecutorial Discretion, Substantial Assistance and the Federal Sentencing Guidelines, 42 UCLA L. REV. 105 (1994). While in civil-law system countries, a prosecutor's power shrinks when a decision to charge is taken. In sum, a prosecutor's status before the court is equivalent to a defense's attorney's status.

¹⁸⁵ Theodora Galacatas, The United States Department of Justice Environmental Crimes Section: A Case Study of Inter-And Intrabranh Conflict over Congressional Oversight and the Exercise of Prosecutorial Discretion, 64 FORDHAM L. REV. 587 (1995).

¹⁸⁶ After the initiation of an investigation, although the international prosecutors' power to decide whether to prosecute or drop the case is broad, such power is supervised judicially. See Rome Statute of the International Criminal Court art. 53 (3), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (1998).

In addition, the domestic prosecutor's decision not to prosecute can be based on several justifications such as: the attitude of the victim, the cost of the trial, undue harm to the suspect; alternative procedures providing the potential for adequate punishment, effective civil sanctions, the willingness of the suspect to cooperate in achieving other system goals, or informal administrative procedures that more satisfactorily achieve the objectives underlying the criminal statutes.¹⁸⁷ Some of these justifications are available for international prosecutions, while others are not.

Domestic and international prosecutors' powers interact with each other. For instance, within the framework of ad hoc international criminal tribunals, international prosecution has primacy over domestic prosecution, while, within the framework of the International Criminal Court, primacy is given to domestic prosecution.¹⁸⁸ After examining the similarities and differences between domestic and international prosecutions, this study will examine aspects of international prosecutorial power. The legal considerations reviewed in this part are the sufficiency of the evidence and the gravity of the offenses in light of the case of Saddam Hussein's actions against the environment. Before reviewing these considerations, it should be clear that the purpose of

¹⁸⁷ For more information, see Frank Miller, *Prosecution, the Decision to Charge a Suspect with a Crime* (Little, Brown and Company 1969).

¹⁸⁸ This relationship is noticeable in the supremacy of the jurisdiction. In the ad hoc international criminal tribunals for the former Yugoslavia and for Rwanda, tribunals have a primacy jurisdiction over national courts and at any stage of the proceeding, tribunals may request national courts to defer to the competence of the tribunals. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 9 (2), SC res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993); See also International Criminal Tribunal for Rwanda Statute art. 8 (2), SC res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994). While in the ICC, the Court is considered complementary to national criminal jurisdictions. See Rome Statute of the International Criminal Court art. 1, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (1998).

reviewing these considerations and focusing on environmental offenses is to propose a guideline for ICC prosecutors.¹⁸⁹

II. Prosecutorial Considerations under International Law

International prosecution decisions take into account several considerations, both political and legal. Some of these considerations pertain to the authority of the U.N. Security Council, the Assembly of States Party to ICC, and jurisdiction or public policy interests¹⁹⁰ while others relate to the sufficiency of evidence and the gravity of the crime. The two latter considerations will be the focus of the following part.

1. Sufficiency of Evidence

The first question an international prosecutor must ask in determining whether to prosecute is whether there is sufficient evidence to secure conviction. Under most domestic laws, the question of the sufficiency of evidence is left to the prosecutor to decide. However, such a position is not true in international criminal law jurisprudence. Even under international criminal statutes governing international criminal courts (ICC and ad hoc tribunals), the position differs.

Under ad hoc international criminal tribunal statutes, a question regarding evidence may arise twice before any international prosecutor. First, the prosecutor considers the evidence when he decides whether to initiate an investigation regarding

¹⁸⁹ In applying these considerations to Saddam Hussein's case, it does not follow that there are available international bases for criminality in his case regarding the environment. Thus, using the terms "crimes against the environment" or "environmental crimes" means actions which are criminal under international law, regardless of the legal term. Therefore, "environmental crimes" might mean either those actions against the environment that are criminal under the ICC Statute or those actions deemed criminal as crimes involving destruction of property.

¹⁹⁰ Mathew Brubacher, *Prosecutorial Discretion within the International Criminal Court*, 2 J. INT'L CRIM. JUST. 71, 93-94 (2004).

specific facts he has received.¹⁹¹ Second, the prosecutor again considers evidence when he has to decide whether to prosecute. There is no doubt that the standard between the two stages, initiating an investigation and initiating a prosecution, differs.

However, in determining whether to prosecute, the prosecutor's view regarding evidence is not sufficient since "Upon determination that a *prima facie* case exists, the prosecutor shall prepare an indictment containing a concise statement of facts and the crime or crimes with which the accused is charged under the statute. The indictment shall be transmitted to a judge of trial chamber."¹⁹² The judge of trial chamber can confirm or dismiss the indictment.¹⁹³ The judge's decision depends upon whether he is satisfied that a *prima facie* case has been established by the prosecutor.

Under the ICC statute, the prosecutor resolves the question of evidence in three stages. The first and third stages are similar to those stages under ad hoc tribunal statutes mentioned above. Between these two stages, initiating an investigation and prosecuting, there is an additional stage in the International Criminal Court's statute. The statute distinguishes between two kinds of investigations, preliminary investigation and in-depth

¹⁹¹ Art. 18(1) of the ICTY statute provides "The Prosecutor shall initiate investigation *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed. Art. 17(1) of the ICTR statute is identical to art. 18(1) mentioned above. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 18 (1), S.C. Res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993); See also International Criminal Tribunal for Rwanda Statute art. 17 (1), S.C. Res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994).

¹⁹² Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 18 (4), S.C. Res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993); See also International Criminal Tribunal for Rwanda Statute art. 17 (4), S.C. Res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994).

¹⁹³ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 19 (1), S.C. Res. 827, U.N. SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993); See also International Criminal Tribunal for Rwanda Statute art. 18 (1), S.C. Res. 955, U.N. SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994).

investigation. Initiation of a preliminary investigation is left to the prosecutor's discretion,¹⁹⁴ while an in-depth investigation requires the prosecutor to get judicial authorization.¹⁹⁵ Such approval is required only when a prosecutor decides to initiate an investigation *proprio motu*.¹⁹⁶ Such approval is not required when the case reaches the prosecutor through the U.N. Security Council or a state party.¹⁹⁷

Returning to the standard of evidence the prosecutor applied in deciding whether to prosecute under ad hoc tribunal statutes; "*prima facie case*" is the standard.¹⁹⁸ This standard should be understood in conjunction with the standard provided by article 47 of Rules of Procedure and Evidence.¹⁹⁹ Judge Gabrielle Kirk McDonald, in explaining the standard the trial judge should apply in reviewing the prosecutor's decision to prosecute, stated "Although the meanings are close, I am not completely convinced that "*prima facie case*" fits exactly the standard of "reasonable grounds."²⁰⁰ The "reasonable

¹⁹⁴ Article 104 of the ICC's Rules of Procedure and Evidence Provides that "1. In acting pursuant to article 53, paragraph 1[initiation of an investigation], the prosecutor shall, in evaluating the information made available to him or her, analyze the seriousness of the information received...." Rules of Procedure and Evidence of the International Criminal Court art. 104, ICC-ASP/1/3, at 10, and Corr. 1 (2002), U.N. Doc. PCNICC/2000/1/Add.1 (2000).

¹⁹⁵ Rome Statute of the International Criminal Court art. 15 (3), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (1998).

¹⁹⁶ Rome Statute of the International Criminal Court art. 61 (7), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (1998).

¹⁹⁷ Rome Statute of the International Criminal Court art. 13 (a)-(b), UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (1998). Such approval disappeared in the Special Court for Sierra Leone Statute. See art. 47 of The Special Court for Sierra Leone Rules of Procedure and Evidence. *Reprinted in* John Jones & Steven Powles, *International Criminal Practice* 1001 (Transnational Publishers Inc. 2003).

¹⁹⁸ Article 18 (4) of the ICTY's statute provides "Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber." Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 18 (4), S.C. Res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993).

¹⁹⁹ Article 47 (E) of the ICTY Rules of Procedure and Evidence provides " The reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, in applying the standard set forth in Article 19, paragraph 1, of the Statute, whether a case exists against the suspect." ICTY Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.37 (2006)

²⁰⁰ John Jones, *The Practice of the International Criminal Tribunal for former Yugoslavia and Rwanda* 186 (Transnational Publishers 1998).

grounds” standard is a prosecutorial standard used in determining whether to prosecute. According to this standard, a prosecutor has to have reasonable grounds to believe that an accused committed the action charged with the existence of the required *mens rea*.

Judge McDonald adds “[T]he *prima facie case* has the same meaning provided by the Draft statute for an international criminal court adopted by ILC.”²⁰¹ Under that Draft, *prima facie case* is understood to be a credible case which would, “if not contradicted by the Defense” be a sufficient basis upon which to convict the accused on the charge.²⁰² In connection with this standard, whether there is sufficient evidence, Saddam Hussein’s case will be discussed in the next chapter of this research.²⁰³

2. The Gravity of the Crime

After satisfying the requirement for sufficiency of evidence, the international prosecutor must determine whether the criminal actions in question are grave enough to trigger the jurisdiction of the international criminal tribunals.

Internationally, the gravity of the crime is an issue which plays a significant role in different parts of the criminal justice process. It may affect the admissibility of the case before the International Criminal Court²⁰⁴ and the prosecutorial power. If the gravity of the crime is so great compared to the interests of justice, the prosecutorial power may be reviewed by the Pre-trial Chamber. The prosecutor’s decision not to proceed with

²⁰¹ Quoted in John Jones, *The Practice of the International Criminal Tribunal for former Yugoslavia and Rwanda* 96 (Transnational Publishers 1998).

²⁰² John Jones, *The Practice of the International Criminal Tribunal for former Yugoslavia and Rwanda* 96 (Transnational Publishers 1998).

²⁰³ See *infra* Ch. III.

²⁰⁴ Article 17(1)(d) of the ICC statute provides “ Having regard to paragraph 10 of the preamble and article 1, the Court shall determine that a case is inadmissible where:…The case is not of sufficient gravity to justify further action by the Court.” See Rome Statute of the International Criminal Court art. 17 (1)(d), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (1998).

prosecution is not effective until it is confirmed by the Pre-trial Chamber.²⁰⁵ Thus, the prosecutor is bound to proceed with either the investigation or the prosecution if the Pre-trial Chamber does not agree with the prosecutor's decision not to proceed.²⁰⁶

Since "the gravity of the crime" is a very important factor in the process of international criminal justice, this factor's meaning should be made clear for prosecutors investigating international crimes, particularly environmental crimes that require investigative skills and special training. The gravity of environmental crimes should be understood since many international judges, as well as domestic judges, are not well versed in environmental protection and therefore may not be sensitive to the seriousness of environmental crimes.

Some judges may believe that environmental cases are more appropriately handled by means of international settlements than by criminal prosecution. This attitude may affect their ability to consider punishment adequate to achieve deterrence as a primary goal for prosecution. At the international level, the gravity of the offense is determined on a case-by-case basis without clear guidelines. For example, it has been ruled that:

"[I]n order for violation of international humanitarian law to be "serious" within the meaning of the Statute [ICTY Statute], two elements must be fulfilled. First, the alleged offense must be one which constitutes a breach of a rule protecting important values. Secondly, it must also be one which involves grave consequences for the victim."²⁰⁷

²⁰⁵ Rome Statute of the International Criminal Court art. 53 (3) (b), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (1998).

²⁰⁶ Rules of Procedure and Evidence of the International Criminal Court art. 110(2), ICC-ASP/1/3, at 10, and Corr. 1 (2002), U.N. Doc. PCNICC/2000/1/Add.1 (2000).

²⁰⁷ The charge in this case was plundering a village. Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 1154 (November 16, 1998).

Unfortunately, the Tribunal in the previous case did not provide guidelines outlining when those consequences are “grave.” However, the Tribunal adopted the value of the stolen property as a standard for determining whether the violation was “serious.”²⁰⁸ Nevertheless, where the gravity of the crime is important, there is no single international criminal instrument providing a benchmark for criminal gravity. The importance of the gravity of the crime is also vital in the sentencing stage, since a sentence may be appealed by the prosecutor or by the convicted person on the grounds of disproportion between the crime and the sentence.²⁰⁹

Although adoption of a policy in pursuing prosecution is not new for the international community,²¹⁰ in order to avoid tension between domestic jurisdiction and international judicial intervention, guidelines instructing international prosecutors concerning the gravity of the crime are critical. The purpose of these guidelines is to establish a priority policy for the pursuit of prosecution and to protect human rights.²¹¹

²⁰⁸ The Tribunal dismissed the charge based on the fact that “the evidence before the Trial Chamber fails to demonstrate that any property taken from the detainees in the Celebici prison-camp was of sufficient monetary value for its unlawful appropriation to involve grave consequences for the victims.” Prosecutor v. Delalic, Judgment, Case No. IT-96-21-T, Judgment, ¶ 1154 (November 16, 1998).

²⁰⁹ Rome Statute of the International Criminal Court arts. 78 (1), 81 (2), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (1998); Rules of Procedure and Evidence of the International Criminal Court art. 145 (1)(c), ICC-ASP/1/3, at 10, and Corr. 1 (2002), U.N. Doc. PCNICC/2000/1/Add.1 (2000).

²¹⁰ Eighth United Nations Congress on the Prevention of the Crime and the Treatment of the Offenders calls upon such guidelines. It argues that “...17. In countries where prosecutors are vested with discretionary functions, the law or the published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution of a waiver of prosecution.” U.N. Doc. A/CONF. 144/28/Rev. 1 at 189(1990).

²¹¹ Under the Universal Declaration of Human Rights, Article 7 provides “ All [including defendants] are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc A/810 at 71 (1948). Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 21(1), S.C. Res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993); See also International Criminal Tribunal for Rwanda Statute art. 20 (1), S.C. Res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994); see the Special Court for Sierra Leone Statute art. 17 (1), S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg, U.N. Doc. S/Res/1315 (2000).

Moreover, the guidelines will be useful for international prosecutors since international criminal law, substantive and procedural, is not yet well-developed.

An international prosecutor has only one place to seek guidelines concerning the exercise of prosecutorial discretion: the domestic level. In the criminal justice process, the exercise of prosecutorial discretion in domestic legal systems is the appropriate discipline from which to extract prosecutorial guidelines at the international level. Before examining these domestic considerations regarding the concept of “the gravity of the crime,” the basis for adoption of domestic considerations in the international legal system should be established.

III. The International Legal Basis for Adoption of Domestic Prosecutorial Considerations

Article 38 (1)(c) of the International Court of Justice statute provides that “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: the general principles of law recognized by civilized nations.”²¹² Relying on these “general principles” as a source, the drafters of the Permanent Court of International Justice statute intended to avoid a situation in which the Court would announce that the claim is *non-liquet*, i.e, it could not be upheld or rejected, because of the lack of international rules governing the issue in dispute.²¹³ Although neither the Permanent Court of International Justice nor the International Court of Justice has issued a judgment based on such a source,²¹⁴ this does not undermine the source’s

²¹² Statute of the International Court of Justice, 3 Bevens 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945).

²¹³ Hugh Thirlway, *The Sources of International Law in International Law* 130 (Malcolm Evans eds., Oxford University Press 2003).

²¹⁴ Hugh Thirlway, *The Sources of International Law in International Law* 131 (Malcolm Evans eds., Oxford University Press 2003).

importance. This source is expected to play an important role in developing international law on both the procedural and the substantive sides.

This source can be interpreted in several ways. It might mean that these rules can be derived from a comparison among different domestic legal systems and the discovery of those considered common to all or to a majority of those systems.²¹⁵ Another interpretation is that these general principles are those rules applied by the ICJ, including rules applicable directly to international legal relations such as *pacta sunt servanda*, i.e., what has been agreed to must be respected.²¹⁶ Some have classified these rules into three groups: general principles of interpretation, procedural standards of fairness and substantive general principles.²¹⁷

Accepting the view that general principles are those derived from national legal systems, it has been said that they can be identified through three approaches: a comparative approach, a categorical approach and a mixed approach.²¹⁸ A comparative approach requires conducting a comparative-law project. Thus, “general principles,” according to this approach, are rules which are recognized by all major systems of law and are applied by the most representative systems of domestic law. Such an approach has been criticized as being burdensome.²¹⁹

The categorical approach focuses on those principles which are “inherent in the very nature of law and might be discernible from a single legal system or without

²¹⁵ See Hugh Thirlway, *The Sources of International Law in International Law* 131 (Malcolm Evans eds., Oxford University Press 2003).

²¹⁶ See Hugh Thirlway, *The Sources of International Law in International Law* 132 (Malcolm Evans eds., Oxford University Press 2003).

²¹⁷ Wolfgang Friedmann, *The Use of “General Principles” in the Development of International Law*, 57 *AM. J. INT’L L.* 279, 287 (1963).

²¹⁸ Christopher Ford, *Judicial Discretion in International Jurisprudence: Article 38(1)(c) and “General Principles of Law,”* 5 *DUKE. J. COMP. & INT’L L.* 35, 66-81 (1994).

²¹⁹ Christopher Ford, *Judicial Discretion in International Jurisprudence: Article 38(1)(c) and “General Principles of Law,”* 5 *DUKE. J. COMP. & INT’L L.* 35, 68 (1994).

reference to any municipal system at all.”²²⁰ A third approach would adopt those rules which are inherent in the legal order and which have been examined by judges to evaluate their character as a candidate for these general principles.²²¹

This paper adopts the categorical approach in identifying those principles which fall within the concept of “general principles recognized by civilized nations.” As a matter of fact, these principles are recognized as a source in international law and furnish international law with many procedural and substantive rules in different fields of law. The international rules governing contracts provide an example.²²²

Per contra, there is no doubt that “Direct translation between domestic and international jurisprudence may well do violence to the real values and policies served by principles ostensibly accepted at both levels.”²²³ Therefore, these domestic principles can be adopted only as long as they do not contradict international standards of fairness and the structure of international law, especially if they serve internationally recognized interests regarding the protection of human rights, such as defendants’ rights to be equal before the law.

In the context of international criminal law, Professor Mohammed Cherif Bossiouni has stated that “Increasingly, comparative criminal procedure furnishes international law with general principles of law, which are identified from national laws

²²⁰ Christopher Ford, *Judicial Discretion in International Jurisprudence: Article 38(1)(c) and “General Principles of Law,”* 5 DUKE. J. COMP. & INT’L L. 35, 74(1994).

²²¹ Christopher Ford, *Judicial Discretion in International Jurisprudence: Article 38(1)(c) and “General Principles of Law,”* 5 DUKE. J. COMP. & INT’L L. 35, 75(1994).

²²² See Lord McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 BRIT. Y. B. INT’L L. 1, 16 (1957).

²²³ Christopher Ford, *Judicial Discretion in International Jurisprudence: Article 38(1)(c) and “General Principles of Law,”* 5 DUKE. J. COMP. & INT’L L. 35, 77(1994).

with norms of general part and the procedural part of domestic criminal law and which apply to the direct enforcement system.”²²⁴

An international resort to domestic criminal laws is common as shown in the practice of international judicial bodies such as tribunals and courts. Such a resort occurs in the several stages of criminal justice proceedings such as crime concept and sentence.²²⁵ More recently, the “general principles” source was adopted expressly in the Rome Statute. Article 21(1)(c) provides that “The Court shall apply:(c) Failing that, general principles of law derived by the Court from the national laws of the legal systems of the world including, as appropriate, the national laws by which the States would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.”²²⁶

The motive for the establishment of procedural safeguards such as the prosecutorial guidelines derived from domestic criminal laws based on the “general principles” source is the desire to protect human rights. This desire allows international law to borrow from an area of law which was formerly governed exclusively by domestic laws.

²²⁴ M. Cherif Bassiouni, *Introduction to International Criminal Law* 5 (Transnational Publishers 2003).

²²⁵ For instance, in respect of crime concept, article 5 of the Special Court for Sierra Leone statute provides “The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law...” See the Special Court for Sierra Leone Statute art. 5, S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg, U.N. Doc. S/Res/1315 (2000); regarding the sentence adoption, article 24(1) of ICTY statute states “ 1. ...in determining the terms of imprisonment, The Trial Chambers shall have recourse to the general practice regarding prison sentences in the Courts of the former Yugoslavia.....” Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 24 (1), S.C. Res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993); See also International Criminal Tribunal for Rwanda Statute art. 23 (1), S.C. Res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994).

²²⁶ Rome Statute of the International Criminal Court art. 21 (1)(c), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (1998).

For instance, several procedural guarantees in international criminal justice owe their existence to domestic legal systems. Their adoption has been accomplished through the judicial experience more than through the legislative process. These guarantees are varied and belong to all stages of judicial proceedings. Examples of these safeguards are the right to life, liberty, and security; the right to be recognized before the law and to equal protection of the law; the right to be free from arbitrary arrest; the right to be free from torture, and cruel, inhuman, and degrading treatment and punishment; the right to be presumed innocent; the right to a fair trial; the right to legal assistance; the right to a speedy trial; the right to appeal; the right to be protected from double jeopardy and the right to be protected from *ex post facto* laws. The rules of evidence have passed through a similar progressive process as well.²²⁷

In conclusion, taking into account the common practice international criminal law draw upon to domestic criminal justice systems, and concepts the desire to protect human rights in international prosecutions, specifically the right to equal application of the law, requires adopting international prosecutorial guidelines defining the gravity of the crime from the domestic law source of “General Principles.”

1. The “Gravity of the Offense” and Domestic Considerations

At the outset, it should be clear that the presence of other considerations affecting the decision to prosecute, such as the availability of investigative and litigation resources, the existence of non-criminal remedies and the anticipated ends of the criminal

²²⁷ M. Cherif Bassiouni, Introduction to International Criminal Law 591-626 (Transnational Publishers 2003).

prosecution, is assumed.²²⁸ As with international law, under domestic jurisprudence, if a crime is deemed serious, this characteristic can affect many aspects of the criminal justice process, especially the procedural side. The gravity of the crime affects statutory limitations for both the prosecution and the execution of the sentence,²²⁹ the jurisdiction of judicial and investigative bodies,²³⁰ the defendant's rights,²³¹ the prosecutor's power to dismiss or drop the case,²³² custody,²³³ the speed of both the investigation and the trial,²³⁴ the manner of the investigation²³⁵ and both the available punishment and the process of sentencing.²³⁶

²²⁸ Professor Gershman divides these considerations into legal, political, experimental and ethical considerations. See Bennett Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 *FORDHAM URB. L. J.* 513 (1992).

²²⁹ In the French criminal justice system, there is a statute of limitations on initiating prosecution. Such limitations depend on whether the offense is serious: if the offense is serious, such prosecution should be brought within ten years, while if the offense is minor, the prosecution should be brought within one year from the day when the offense was committed. C.PR.PEN. arts. 7, 9 (fr.). In addition, in serious crimes, an issued sentence should be executed within 20 years, while minor offenses' sentences should be executed within 2 years. C.PEN. arts. 133-2, 133-4 (fr.).

²³⁰ In the Kuwaiti criminal justice system, if a felony is committed, the case will be investigated by the Public Prosecution Office before the first instance court for felonies, while when a misdemeanor is committed, the case will be investigated by the police officers before the first instance court for misdemeanors. Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 17 of 1960, arts. 4, 7, 9 (Kuwait).

²³¹ Due to the gravity of the offense, several defendants' rights are affected. For instance, under the U.S. criminal justice system, the defendant's right to be tried by a jury does not apply in the case of petty offenses. See *Cheff v. Schnackenberg*, 284 U.S. 373, 86 S. Ct. 1523, 16 L. Ed. 2d. 629 (1966). Under the Kuwaiti system, the right to legal assistance does not attach when the trial concerns a minor offense. Moreover, the Kuwaiti Criminal Procedure Code does not confer upon a defendant the right to appeal where the punishment does not exceed 40 Diner as fine (\$120). Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 17 of 1960, arts. 4, 5, 7, 9 (Kuwait). In French criminal jurisprudence, generally, a defendant has the right to appeal his or her conviction based on either factual or legal grounds. However, this right is limited to the legal grounds in minor offense convictions. See Catherine Elliott, *French Criminal Law* 49 (William Publishing 2001).

²³² Under Japanese criminal jurisdiction, the prosecutor has the power to dismiss or drop the case when it is minor due to its consequences. KEISOHO [Japanese Criminal Procedure] art. 248 (Japan). The same provision is in the German system; see StPO [Germany Criminal Procedure Code] art. 153 (F.R.G.)

²³³ The French prosecutors can confine a suspect if the offense is serious. Catherine Elliott, *French Criminal Law* 25 (William Publishing 2001).

²³⁴ In the case of serious crimes, the power to expedite the investigation can be given to the French prosecutor if the suspect was caught shortly after the commission of the offense, if the suspect was found in possession of incriminating objects soon after the commission of the offense, or if the offense was committed in a private home. C.PR.PEN. art. 53 (fr.).

Moreover, the gravity of the crime can be one of those factors that guide pre-trial judges in deciding the issue of pretrial or provisional release.²³⁷ Also, the gravity of the crime should be considered by prosecutors when they have to decide whether to enter into a guilty plea agreement with any potential defendant.²³⁸

This part of the paper assumes that general principles are derived from domestic legal systems. However, the methodology of extracting these principles from domestic systems is based on the categorical approach which focuses on the nature of the national law and does not require attributing those principles to any specific domestic legal system. Thus, it is enough that these principles or considerations are inherent in the nature of any domestic criminal law.

Some of these considerations may not apply in some circumstances (crimes), while they may apply in others. The importance of these considerations varies from one territory to another²³⁹ and from time to time. Whether prosecutors adopt any of these considerations as policy or guidelines governing the power of the prosecution differs depending on how much the domestic legal system has developed in that country.

²³⁵ Under French criminal law, “A social investigation destined to shed light on the personality of the offender is compulsory for serious offenses.” See Catherine Elliott, *French Criminal Law* 36 (William Publishing 2001).

²³⁶ See Catherine Elliott, *French Criminal Law* 51 (William Publishing 2001).

²³⁷ Within the United States laws, see 18 U.S.C.A. § 3142 (g)(1). While under the ICC statute, the Pre-trial Chamber, in determining whether to release the defendant, will consider the following questions: Whether there are reasonable grounds to believe that the defendant has committed the crime with which he is charged, whether it is necessary to hold the defendant to ensure his appearance at the trial, and whether holding the defendant will prevent him from obstructing or endangering the investigation or the court proceedings, whether holding the defendant will prevent him from continuing with commission of the crime or related crimes. See Rome Statute of the International Criminal Court arts. 58 (1), 60 (2), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (1998). See ICTY Rules of Procedure and Evidence art. 65 (b), UN Doc. IT/32/Rev.37 (2006).

²³⁸ U.S. Principles of Federal Prosecution, Section 9-27-420 (A)(3), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm (Last visited July 1, 2006).

²³⁹ William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: the Limits of Comparative Criminal Procedure as an Instrument to Reform*, 54 OHIO ST. L.J. 1325 (1993). (arguing that an attempt to limit prosecutorial discretion in the U.S. to the European Model is unlikely to work).

In countries that have an undeveloped legal system, these general principles, upon which prosecutorial considerations concerning the gravity of the crime are based, do not require direct adoption by the domestic legislatures for a decision as to whether to prosecute. Therefore, these considerations can be indirectly extracted from either legislation or policy.

So, these considerations might be adopted expressly by prosecutors in some countries, while in others these considerations are in the prosecutor's minds but not in their manuals. In the latter case, prosecutors resort to both laws and legislative history in order to determine when the crime is considered grave or serious. On the other hand, some countries have developed specific considerations for environmental crimes, while other countries are satisfied with general considerations controlling prosecutorial decision or discretion towards all kinds of crimes including environmental crimes.

By and large, these considerations can be used in either direction, either for prosecution or to dismiss the case. Some of these considerations are meant to be used only against the decision to prosecute.²⁴⁰ There is no doubt that some domestic considerations are not suitable for adoption at the international level mainly because of the structure of the international legal system.²⁴¹

²⁴⁰ In England, the Code of Crown Prosecutors provides examples of these considerations, such as whether the court is likely to impose a nominal penalty, whether the defendant has already been made the subject of a sentence and whether any further conviction would be unlikely to result in the imposition of an additional sentence or whether the offense was committed as a result of a genuine mistake or misunderstanding of the law. However, these considerations do not include the gravity of the crime. See the Code of Crown Prosecutors § 5.10, http://www.cps.gov.uk/victims_witnesses/code.html. (last visited July 2, 2006).

²⁴¹ These considerations are, for instance, whether a defendant voluntarily disclosed violations, whether a defendant (corporation) has its own compliance program, whether a defendant (corporation) has taken any internal disciplinary action toward negligent employees, whether there is any concealment of misconduct or falsification of required records or whether there has been tampering with monitoring or control equipment. These considerations assume that there is a complete legal system regarding environmental problems and that it has been issued by a legally recognized legislature.

In some countries, such as England, Australia and South Africa, these considerations are called “Public Interest” considerations. Some public interest considerations have no relation to the issue of the gravity of the crime.²⁴² However, the above countries have reduced the prosecutorial screening stage to a couple of questions. The first inquiry concerns the sufficiency of evidence, while the second is reached when a prosecutor answers the first question in the affirmative. The second question is whether the public interest requires the decision to prosecute.²⁴³ The public interest can be measured through examining several considerations, some of them relating to the gravity of the crime.

Moreover, in order to extract general principles, “In certain cases it may be necessary to examine some of the non-Western legal systems, such as Muslim or Hindu Law, now actively represented in the family of nations.”²⁴⁴ Gravity considerations are present as well in certain religious legal systems such as the Islamic Criminal Justice system.²⁴⁵ Some countries, such as Australia, set criteria determining which one of the suspects should be the target of the prosecution.²⁴⁶

²⁴² Those factors are the age of the defendant, whether the defendant tried to pay the compensation, and whether details that could harm sources of information or national security....etc may be made public. See the Code of Crown Prosecutors § 5.10 (g)(h)(i), http://www.cps.gov.uk/victims_witnesses/code.html. (last visited July 2, 2006).

²⁴³ See the Code of Crown Prosecutors available at http://www.cps.gov.uk/victims_witnesses/code.html. (last visited July 2, 2006); In Australia, see Public Prosecution Policy available at http://www.dpp.sa.gov.au/03/prosecution_policy_guidelines.pdf#search='Public%20Policy%20Prosecution%20Australia' (Last visited July 3, 2006). In South Africa, see Prosecution Policy, http://www.npa.gov.za/default_06.htm (Last visited July 3, 2006).

²⁴⁴ Wolfgang Friedmann, The Use of “General Principles” in the Development of International Law, 57 AM. J. INT’L L. 279, 285 (1963).

²⁴⁵ The Islamic Criminal Justice system consists of two parts: substantive and procedural. The substantive part deals with acts punishable by the Koran or by the *Kalifah’s* order (the ruler’s legislation). The procedural part governs the procedural part of the enforcement process. Both parts, “rather than a uniform and unequivocal formulation of the law, are a scholarly discourse consisting of the opinions of religious scholars, who argue, on the basis of the text of the Koran, prophetic tradition and the consensus of the first generations of Muslim scholars, what the law should be.” Rudolph Peters, *Crime and Punishment in Islamic Law, Theory and Practice from the Sixteenth to the Twenty-First Century* 1 (1st ed., Cambridge 2005). See also Dr. Ghaouti Benmelha, *Ta’azir Crimes in The Islamic Criminal Justice System* 219 (M.

Again, these considerations should not be viewed as exclusive considerations and an application of them should not be done strictly. Some considerations might apply in some circumstances, while they might not in other circumstances. In sum, these considerations will serve as a luminous tool to seek and to do justice. In this part of the paper, the considerations reviewed are: the impact of the crime, the manner of its commission, *mens rea*, and motive.

a. The Impact of the Crime

The first consideration determining whether the crime is serious is the harm or damage resulting from the commission of the offense. The more serious harm leads to the charge of a more serious offense, assuming the similarity of the elements of the offense except for the resulting damage.²⁴⁷ The consideration of harm might not apply in some offenses that do not result in harm when just committed.²⁴⁸ The extent of the harm may affect the classification of the offense and the sentence.²⁴⁹ This consideration is shown clearly in those policies governing prosecutorial decisions.²⁵⁰

Cherif Bassiouni ed., Ocean Publishers Inc. 1982). See also Mathew Lippman ET AL., *Islamic Criminal Law and Procedure, An Introduction* (Praeger 1988).

²⁴⁶ See Australian Public Prosecution Policy, http://www.dpp.sa.gov.au/03/prosecution_policy_guidelines.pdf#search='Public%20Policy%20Prosecution%20Australia' (Last visited July 3, 2006).

²⁴⁷ For instance, in any legal system, murder is punishable more seriously than the attempt to murder. A defendant in either case, murder or attempted murder, has committed the same conduct; however, the punishment is different due to the consequences of the offense (the death of the victim). This is true as well in environmental offenses. Under the U.S. legal system, specifically within the Clean Water Act, compare between 33 U.S.C.A. § 1319 (C)(2)& (C)(3).

²⁴⁸ These crimes are various such as tampering with monitoring equipment or destroying records required by the law to be held.

²⁴⁹ Article 330 of the China Criminal Code provides that “A person who, in violation of the provisions of the Law on the Prevention and Treatment of Infectious Diseases, causes the spread or a great risk of the spread of an infectious disease of Class A under any of the following circumstances, shall be sentenced to fixed-term imprisonment of not more than three years of criminal detention and; if the result is especially serious, to fixed-term imprisonment of not less than three years and not more than seven years.” China Criminal Code art. 330 (P.R.C.).

²⁵⁰ In South Africa, England, Australia and United States, public policies regarding prosecution adopt the nature and seriousness of the offense as one of the factors that should be considered by prosecutors in deciding whether to prosecute or not. See the guidelines of the Code of Crown Prosecutors,

More importantly, in international environmental offenses, the impact of the crime may affect the question as to the existence of an international crime. Under international jurisprudence, deliberate environmental destruction during armed conflict does not constitute an international war crime unless the impact of the crime is serious.²⁵¹

In determining when the harm or damage is gross in the context of crimes, a prosecutor has to consider both actual and potential harm, and short and long-term effects to both the environment and to human health.²⁵² In addition, a prosecutor has to take into account the social and economic impact of the offense.²⁵³

http://www.cps.gov.uk/victims_witnesses/code.html. (last visited July 2, 2006); South African Prosecution Policy, http://www.npa.gov.za/default_06.htm (Last visited July 3, 2006); see Australian Prosecution Policy,

http://www.dpp.sa.gov.au/03/prosecution_policy_guidelines.pdf#search='Public%20Policy%20Prosecution%20Australia' (Last visited July 3, 2006); U.S. Principles of Federal Prosecution, Section 9-27-420 (A)(3), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm (Last visited July 1, 2006).

²⁵¹Deliberate environmental destruction that does not meet certain requirements concerning the harm that occurred is not criminal behavior under international law. Nevertheless this requirement regarding the seriousness of the harm appears in all international legal instruments dealing with environmental destruction during international armed conflict. The rigidity of this requirement differs from one legal text to another. For instance, the ENMOD Convention provides that “Each State Party to this convention undertakes not to engage in military or any hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of the destruction, damage or injury to any other State Party.” “Widespread” encompasses an area on the scale of several hundred square kilometers. “Long-lasting” means that environmental impact would last for a period of months or approximately a season. “Severe” would require that the environmental damages involve serious or significant harm to human life, natural and economic resources or other assets. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques art. I (1), 31 UST 333, 1108 UNTS 152 (1977). On the other hand, the meaning of these requirements (widespread, long-lasting and severe) differs from the meaning of the same adjectives required by other international instruments (Protocol I, Draft Code of Crimes against the Peace and the security of Mankind and the ICC statute.) These instruments require that any environmental destruction during international armed conflict should be widespread, long-term and severe. In other words, these adjectives should be present concurrently. Plus, the meaning of these adjectives is more rigid than the ENMOD meaning mentioned above. For differences between ENMOD and Protocol I. See Yoram Dinstein, Protection of the Environment in International Armed Conflict, 5 Max Planck Yearbook of United Nations Law 523, 542 (2001).

²⁵² Environmental impact might mean dead fish from polluted water, loss of threatened or endangered species or their habitats that may be irreplaceable; contamination of land, air and water; poor plant health due to the pollution; and an impact on flora, fauna and the ecosystem, while the human impact may include looking at death, serious injury or other health problems such as persistent respiratory problems or the spread of disease.

²⁵³ The economic impact may include replenishing fish stocks, effects on business and employment, crop damages, loss of tourism and the costs of cleanup.

In terms of the impact resulting from the 1990-91 Gulf War, there was massive environmental destruction. Such severity is unique on several grounds. First, the environmental pollution occurred as a result of more than one pollution source, both the oil fires and the oil lakes.

Secondly, the pollution affected all of the environmental elements including the atmosphere, the hydrosphere, the lithosphere, the biota and the public health. In terms of atmospheric impact, the concentration level of sulfur dioxide exceeded the safe levels recommended by the World Health Organization (WHO).²⁵⁴ Also, hydrocarbons were found in a high concentration in some areas of Kuwait.²⁵⁵ One of the effects of smoke from the fires was a decrease in the regional temperature.²⁵⁶ This drop is due to the increased concentration of pollutants in the atmosphere which diminished the amount of sunlight stored by the soil.²⁵⁷

Plants were victimized by the oil-well fires. Oil rain killed plants in Kuwaiti territory.²⁵⁸ Higher temperatures in the areas surrounding the oil wells caused the destruction of vegetation.²⁵⁹ Soot caused by the oil-well fires hindered the growth of

²⁵⁴ Dr. Zain Al-Dean Gneemee, Al-Athar Al-Beayia LL Gazoo Al-Iraqi Ldwlat Al-Kowiet [Environmental Impacts of Iraqi Aggression for the State of Kuwait] 17 Center of the Gulf and Arabian Peninsula Studies Journal 20, 31 (1992)(Arabic).

²⁵⁵ Dr. Zain Al-Dean Gneemee, Al-Athar Al-Beayia LL Gazoo Al-Iraqi Ldwlat Al-Kowiet [Environmental Impacts of Iraqi Aggression for the State of Kuwait] 17 Center of the Gulf and Arabian Peninsula Studies Journal 20, 32 (1992)(Arabic).

²⁵⁶ Dr. Yosef Al-Ebraheem ET AL., Al-eqtasadyaat Alarbia Wa Al-Kazoo al-Iraqi to Kowiet [Arabic Economies and Iraqi Invasion to the State of Kuwait] 29 (Arabic Planning Institution, December 1992 ed.)(Arabic).

²⁵⁷ Dr. Yosef Al-Ebraheem ET AL., Al-eqtasadyaat Alarbia Wa Al-Kazoo al-Iraqi to Kowiet [Arabic Economies and Iraqi Invasion to the State of Kuwait] 29 (Arabic Planning Institution, December 1992 ed.)(Arabic).

²⁵⁸ A Rapid Assessment of the Impacts of the Iraq-Kuwait conflict on Terrestrial Ecosystems, A Report prepared for the United Nations Environment Program (UNEP) by Gaafar Karrar ET AL. 37 (UNEP,Regional Office for West Asia, Sep. 1991).

²⁵⁹ A Rapid Assessment of the Impacts of the Iraq-Kuwait conflict on Terrestrial Ecosystems, A Report prepared for the United Nations Environment Program (UNEP) by Gaafar Karrar ET AL. 41 (UNEP,Regional Office for West Asia, Sep. 1991).

plants.²⁶⁰ Lack of oxygen due to heat was an additional source of loss of vegetation.²⁶¹ As for the impact on the lithosphere, oil lakes played a role in affecting the soil adversely. Some toxic substances resulting from the oil lakes accumulated in plant tissue and constituted a carcinogen which kills any animal eating those plants.²⁶² Areas within the boundaries of the oil lakes were considered biologically dead.²⁶³ After drying, oil tar or sludge remained, causing severe disturbances in the physical, chemical, and biological properties of the soil environment.²⁶⁴

With regard to the effect on public health, some studies showed that asthma and respiratory system problems increased after the pollution occurred.²⁶⁵ These studies concluded that children were more vulnerable to these kinds of disease than adults.²⁶⁶ Also, an increase in allergies of the eyes, skin, and nose was noticed during 1991.²⁶⁷ As

²⁶⁰ A Rapid Assessment of the Impacts of the Iraq-Kuwait conflict on Terrestrial Ecosystems, A Report prepared for the United Nations Environment Program (UNEP) by Gaafar Karrar ET AL. 41 (UNEP,Regional Office for West Asia, Sep. 1991).

²⁶¹ Dr. Zain Al-Dean Gneemee, Al-Athar Al-Beayia LL Gazoo Al-Iraqi Ldwlat Al-Kowiet [Environmental Impacts of Iraqi Aggression for the State of Kuwait] 17 Center of the Gulf and Arabian Peninsula Studies Journal 20, 34 (1992)(Arabic).

²⁶² Dr. Rafat Misaak ET AL., Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlal Al-Kuwiet [Natural Resources and Environmental Features of the State of Kuwait] 198 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

²⁶³ M. El-Din ET AL., Environmental Impacts of Burned Oil Wells and Military Operations on some Desert Plants and Soils of Kuwait, A paper presented to the International Conference on the Effects of the Iraqi Aggression on the State of Kuwait held April 2-6 1994 Kuwait, 175 (Center of the Gulf and Arabian Peninsula Studies, ed. 1996).

²⁶⁴ M. El-Din ET AL., Environmental Impacts of Burned Oil Wells and Military Operations on some Desert Plants and Soils of Kuwait, A paper presented to the International Conference on the Effects of the Iraqi Aggression on the State of Kuwait held April 2-6 1994 Kuwait, 175 (Center of the Gulf and Arabian Peninsula Studies, ed. 1996).

²⁶⁵ See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 231 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

²⁶⁶ See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 232 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

²⁶⁷ See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 234 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

for the economic impact, the cost of the burned oil was estimated at approximately 200 billion dollars.²⁶⁸

b. The Manner of the Commission

By and large, the manner of commission of the offense should be considered as well in determining the gravity of the offense. Although the manner plays a role in determining the harm or damage that results from the offense, it becomes more important when the offense does not cause any harm at all. In determining this matter, there are several factors which can be classified by the manner of the commission of the offense such as the nature of the weapon²⁶⁹ (in case of environmental offenses, the pollutant), the crime scene or location,²⁷⁰ the time of the crime²⁷¹ and the commission of the offense by more than one person. Some national criminal laws aggravate an offense solely because it was committed by more than one person.²⁷²

In the Gulf War of 1991, the way the offense was committed has contributed to the massive pollution. The first point to be noticed is the use of oil as a weapon. This weapon accomplished two fundamental aims of Iraq's then President, targeting his

²⁶⁸ Dr. Yosef Al-Ebraheem ET AL., *Al-eqtesadyaat Alarbia Wa Al-Kazoo al-Iraqi to Kowiet* [Arabic Economies and Iraqi Invasion to the State of Kuwait] 29 (Arabic Planning Institution, December 1992)(Arabic).

²⁶⁹ In environmental offenses, what kind of pollutant was used? How great was the concentration of pollutants? How many pollutants were used? All these questions must be reviewed by a prosecutor in determining the gravity of the offense. In Italy for instance, if the waste is highly radioactive, the punishment is aggravated. Organized Environmental Crime in EC Member States, final Report, at 334 (2003), http://ec.europa.eu/environment/crime/pdf/organised_member_states.pdf (Last visited July10, 2006).

²⁷⁰ In the context of the location of an environmental crime, commission of the crime in an area with a fragile ecosystem is graver than commission of the crime in an area with a fairly stable ecosystem.

²⁷¹ With regard to the time of commission of an environmental crime, commission of an environmental crime during a low flow period of time should make the crime graver than commission during a high flow period.

²⁷² The French Penal Code aggravates theft when the offense is committed by two persons or more. C.PEN. art. 311-4-1 (fr.). *Kanon Al-Jazaa* [The Sanction Law], Law No. 16 of 1960, art. 221 (6) (Kuwait).

opponents' wealth and their environment. It is well established that oil is a substance that is very dangerous to water, air and soil.²⁷³

The concentration of the pollution is another consideration for this review. Some estimated the flow of oil at 60 million barrels,²⁷⁴ others reckoned it at 24 million.²⁷⁵ The flow of oil formed approximately 570 oil lakes around the country.²⁷⁶ Some of these lakes were 5 kilometers in length and 500 meters in width.²⁷⁷ They covered a space of 49 Km/square.²⁷⁸ The depth of these lakes ranged from 60 to 120 Cm.²⁷⁹

The amount of oil burned was estimated at 2.5 to 6 million barrels daily.²⁸⁰ Assuming that 2.5 million barrels were burned daily, the resulting substances were; 20-40 thousand tons of black smoke, 250 tons of carbon monoxide, 20 thousand tons of sulfur dioxide, 1500 tons of toxic substances, and 500 tons of nitric oxide.²⁸¹ Soot and oil mist were noticed on soil as a result of the burning oil.²⁸²

²⁷³ See *infra*. App. 2.

²⁷⁴ Dr. Abdullah Al-Kandari, Environment and Development 266 (Kuwait University 1992).

²⁷⁵ Dr. Rafat Misaak ET AL., Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlal Al-Kuwiet [Natural Resources and Environmental Features of the State of Kuwait] 192 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

²⁷⁶ Dr. Rafat Misaak ET AL., Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlal Al-Kuwiet [Natural Resources and Environmental Features of the State of Kuwait] 192 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

²⁷⁷ Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 258 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

²⁷⁸ Dr. Rafat Misaak ET AL., Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlal Al-Kuwiet [Natural Resources and Environmental Features of the State of Kuwait] 192 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

²⁷⁹ Dr. Abdullah Al-Kandari, Environment and Development 266 (Kuwait University 1992).

²⁸⁰ Dr. Mustafa Al-Desouky, Impact of Oil Well Fires on the Air Quality in Kuwait, a paper presented to Proceedings of an International Symposium held at the University of Birmingham 17th October 1991, 18 (on file with author).

²⁸¹ Dr. Zain Al-Dean Gneemee, Al-Athar Al-Beayia LL Gazoo Al-Iraqi Ldwlat Al-Kowiet [Environmental Impacts of Iraqi Aggression for the State of Kuwait] 17 Center of the Gulf and Arabian Peninsula Studies Journal 20, 23 (1992)(Arabic).

²⁸² A Rapid Assessment of the Impacts of the Iraq-Kuwait conflict on Terrestrial Ecosystems, A Report prepared for the United Nations Environment Program (UNEP) by Gaafar Karrar ET AL., at 30, (UNEP,Regional Office for West Asia, Sep. 1991).

Three types of oil flames were formed: black smoke, white smoke, and a clean flame without smoke.²⁸³ In addition, the means used to set the fire in the oil well heads is a particularly wicked one. The means was dynamite, used to ensure either the fire or the flow.²⁸⁴

According to captured Iraqi documents,²⁸⁵ it is estimated that the number of actors used to execute this operation and cause so great an impact is thousands of individuals, including military, technical, and non-military personnel. This fact indicates the seriousness of the crime and its intentionality.

c. *Mens Rea*

Another general principle in determining the gravity of a crime arises from the fact that an intentional offense is graver than an unintentional offense, whether such offenses are based on recklessness, negligence or strict liability.

In most offenses, such as those relating to life (murder and assault), property (property destruction and arson), as against the environment, when a crime is committed intentionally, the punishment is more serious. Thus, the intention of the offender is an indicator of the gravity of the crime.²⁸⁶ In the same context, the French Penal Code stipulates that “There is no serious crime or major crime in the absence of an intention to commit it.”²⁸⁷

²⁸³ Jassem Al-Besharah, *The Kuwaiti Oil Fires and Oil Lakes: Facts and Numbers*, a paper presented to Proceedings of an International Symposium held at the University of Birmingham 17th October 1991, at 14; Dr. Abdullah Al-Kandari, *Environment and Development* 266 (Kuwait University 1992).

²⁸⁴ Jassem Al-Besharah, *The Kuwaiti Oil Fires and Oil Lakes: Facts and Numbers*, a paper presented to Proceedings of an International Symposium held at the University of Birmingham 17th October 1991, at 14 (on file with author).

²⁸⁵ See Dr. Abdullah Al-Gneem ET AL., *Tadmeer Abar Alnfet fee alwthaeq Aliraqya* [Destruction Oil Wells in Iraqi Documents] (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

²⁸⁶ Under the U.S. legal system, specifically within the Clean Water Act, compare between 33 U.S.C.A. § 1319 (C)(1) - (2).

²⁸⁷ C.PEN. art. 121-3 (fr.).

In the Gulf War of 1991, it was reported by the Australian Foreign Minister that there is “Credible evidence that the spill was deliberately engineered by the Iraqis.....These particular environmental consequences are not to be attributed ...to the inadvertent effect of artillery action or things of this kind.”²⁸⁸

Iraq tried to deny the link between the environmental impact and its actions by claiming that the oil fires were caused by Coalition forces and that, even if environmental destruction had been caused by Iraqi troops, “military personnel and civilians were brought to trial for acts committed in Kuwait and the competent courts pronounced sentences against them, up to and including capital Punishment...”²⁸⁹

The response to these claims is the following. First, the plan to set fire to the oil wells is documented in materials captured after the liberation of Kuwait. Secondly, holding trials of low-ranking military personnel does not exempt the real defendant, the then president of Iraq, from responsibility as long as this responsibility is proven. Internationally, it is well-established that calling the person who commits the crime to account does not exonerate the person who orders the commission of the crime.

Concerning *mens rea*, it has been ruled that the *mens rea* of the accused can be inferred from general circumstances.²⁹⁰ Based upon Saddam Hussein’s orders, Iraq had set a plan for environmental destruction in motion long before the beginning of the war. This plan can be inferred from the threat of Iraq’s then president to destroy the

²⁸⁸Anthony Leibler, *Deliberate Wartime Environmental Destruction: New Challenges for International Law*, 23 CAL. W. INT’L L. J. 67, 128 n.266 (1992).

²⁸⁹Letter dated 17 June 1993 From The Permanent Representative of Iraq to The United Nations Addressed to the President of Security Council, U.N. Doc. S/25976 (1993). ¶ 9, 11.

²⁹⁰Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 386 (November 16, 1998).

environment if the Coalition forces compelled the Iraqi forces to withdraw from Kuwait.²⁹¹

The plan to commit this environmental disaster was discovered after the liberation of Kuwait. Such a plan is well-documented in evidence seized after the liberation. These documents, in addition to linking Saddam Hussein to this plan, contain details about destruction groups, the names of group members, specific missions for each group, the substances used to blow up the oil wells and the names of commanders who had the power to issue orders to execute the plan.²⁹²

Moreover, some of the documents seized are dated prior to 1991, proving how the plan was arranged from the beginning. In addition, the number of oil wells set on fire refutes Iraq's argument that the pollution which resulted was a foreseeable consequence of armed conflict or an unplanned event. All this evidence and these events in their general circumstances serve to prove the intentionality of the crimes committed based upon Saddam Hussein's orders.

d. Motive

As a general rule in criminal law jurisprudence, a motive is not considered in deciding whether a crime has been committed.²⁹³ However, in some domestic legal systems, it is well established that motive can be deemed one of the factors that play a

²⁹¹ Carlyle Murphy, *Iraqis Said to Set Oil Installation Ablaze*, WASH. POST, February 23, 1991, at A10.

²⁹² For those documents. See Dr. Abdullah Al-Gneem ET AL., *Tadmeer Abar Alnfet fee alwthaeq Aliraqya* [Destruction Oil Wells in Iraqi Documents] (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

²⁹³ Wayne R. LaFave, *Criminal Law* 12 (3ed, West Group 2000).

role in aggravating the offense. For instance, under the German criminal justice system, a crime is aggravated when an environmental offense is committed or if the defendant was driven by “greed for profit.”²⁹⁴ Motive is included in prosecutorial policies especially when the motive has a discriminatory basis.²⁹⁵

In England, in the sentence stage, the Magistrates must determine first whether the gravity of the crime requires more than the punishment within their powers. If the crime is so grave, they must transfer the case to the trial court for sentencing. One of the factors determining the gravity of the crime is the motive of the defendant.²⁹⁶ The same can be said when the crime is committed with a wicked motive such as vengeance. The adoption of reprisal as a basis for criminalization is not new in the international law field as well.²⁹⁷

Understanding Saddam Hussein’s motive for actions committed against the environment during the Gulf War of 1990-1991 raises the question of military necessity which is essential to prove the defendant’s motive and to determine the nature of the breach of the rules of armed conflict. Thus, considering the environment as public property, it is illegal to destroy public property unless there is a military necessity justifying such destruction.²⁹⁸ This characteristic, whether a grave breach or not, imposes

²⁹⁴ See StGB [German Criminal Code] art 330 (F.R.G.).

²⁹⁵ See the Code of Crown Prosecutors, http://www.cps.gov.uk/victims_witnesses/code.html. (Last visited July 2, 2006).

²⁹⁶ Organised Environmental Crime in EC Member States, final Report, at 446 (2003), http://ec.europa.eu/environment/crime/pdf/organised_member_states.pdf (Last visited July 10, 2006).

²⁹⁷ Article 55 (2) of Protocol I provides that “Attacks against the natural environment by way of reprisals are prohibited.” Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 55 (2), 1125 UNTS 3 (1977).

²⁹⁸ Article 53 of Geneva Convention IV provides “Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.” Geneva Convention relative to the Protection of Civilian Persons in Time of War art. 53, 75 UNTS 287 (1949).

stricter obligations on states regarding the criminal responsibility of those who violate the laws of armed conflict.²⁹⁹

The principle of necessity requires that military actions involving the use of force must be reasonably necessary to achieve the desired goals.³⁰⁰ The purpose of such a requirement of necessity basically is to avoid undue or unnecessary injury or suffering. The military necessity doctrine is subjective.³⁰¹ As a result, such justification is widely criticized by commentators.³⁰² Consequently, it is often difficult, if not impossible, to determine when the military action or tactic is excessive.³⁰³

The customary law of armed conflict rejects the argument that any military action that causes victory is deemed necessary.³⁰⁴ For instance, using certain weapons is strictly prohibited even if refraining from using these weapons would cause the loss of the war.³⁰⁵ Regarding environmental destruction during the time of armed conflict, it is settled that the four main principles - humanity, discrimination, proportionality and necessity - are applicable to this kind of destruction whether the destruction was caused

²⁹⁹ Article 147 of Geneva Convention IV states “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention:..... extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.” In addition, article 146 of the same Convention provides “.....Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case.” Geneva Convention relative to the Protection of Civilian Persons in Time of War art. 147, 75 UNTS 287 (1949).

³⁰⁰ See Ingrid Detter Lupuis, *The Law of War* 336 (1987).

³⁰¹ See Ingrid Detter Lupuis, *The Law of War* 335 (1987).

³⁰² It has been argued that the military necessity concept is broad. See Richard A. Falk, *Revitalizing International Law* 168, 169 (1989).

³⁰³ Donald Wells, *War Crimes and Law of War* 11 (1984).

³⁰⁴ Sheldon Cohen, *Arms and Judgments* 35 (1988).

³⁰⁵ Sheldon Cohen, *Arms and Judgments* 35 (1988).

intentionally or recklessly.³⁰⁶ The common practice proves that environmental destruction should be taken into account when the question, “Is there a military necessity to execute a military action or tactic?” is raised.³⁰⁷ The ICJ states that:

“States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.”³⁰⁸

Therefore, achieving limited military gains is not justified by necessity if the environmental damages are gross.³⁰⁹ Evaluating the decision of Iraq’s then President regarding the environment during the Gulf War in light of the question as to whether there was a military necessity requires examining those arguments produced by some commentators to justify Iraq’s action.

While Saddam Hussein did not actually plead military necessity, such a claim would most likely fail if he had done so. The first justification for blowing up the oil wells is to hinder the efforts of the Coalition’s pilots to locate and bomb Iraqi troops.³¹⁰ The response to such an argument is that any military action used, under the necessity doctrine, should be capable of regulation and limitation.³¹¹ Blowing up oil wells does not satisfy this requirement because the military goal in this case would depend entirely on

³⁰⁶ Richard Falk, *The Environmental Law of War: A Introduction*, in *Environmental Protection and the Law of War: A “Fifth Geneva” Convention on the Protection of the Environment in the Time of Armed Conflict* 84 (Galen Plant ed. 1992).

³⁰⁷ See generally Bernard Schafer, *The Relationship between International Laws of Armed Conflict and Environmental Protection: The Need to Reevaluate What Types of Conduct are Permissible during Hostilities*, 19 *CAL. W. INT’L L. J.* 287 (1989).

³⁰⁸ *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 , ¶ 30 (July 8).

³⁰⁹ Jonathan Edwards, *The Iraqi Oil “Weapon” in the 1991 Gulf War: A Law of Armed Conflict Analysis*, 40 *NAVAL L. REV.* 118 (1992).

³¹⁰ Philip Shenon, *Coalition Forces Moving toward Kuwait Front... 10,000 Stories*, *N.Y. Times*, Jan. 23, 1991, at A1, A4.

³¹¹ Philip Shenon, *Coalition Forces Moving toward Kuwait Front... 10,000 Stories*, *N.Y. Times*, Jan. 23, 1991, at A1, A4.

the wind which is unpredictable. Consequently, there is no ability to regulate such an action.

The second argument that has been made to justify the setting of these fires is to eliminate resources that would otherwise be available to Coalition forces on the ground.³¹² It would seem that this argument has merit. However, the argument fails because of the unlimited availability of the fuel needed to carry out the war and because the Coalition forces could not have used the oil because it was not refined.³¹³ Even if we assume that the Coalition forces could have refined the Kuwaiti oil, a review of Iraqi documents³¹⁴ shows that the manner of the commission of the crime, blowing up the oil wells, was not meant to prevent Coalition forces from using the oil. It was meant instead to destroy this natural and financial resource. Otherwise, the goal, preventing Coalition forces from using the oil wells, could have been accomplished by means of destroying the oil well heads, without the need to set the oil on fire. In addition, the tremendous time Coalition forces would have needed to refine Kuwaiti oil is another factor supporting the exclusion of the possibility that Coalition forces would use the Kuwaiti oil.

Moreover, it has been contended that the means, blowing up oil wells, was not in proportionality to the objectives sought.³¹⁵ In the absence of military necessity, Saddam Hussein's motive for committing this action should have been determined by both the present and historical circumstances existing at the time of the crime.

³¹² Rex J. Zedalis, *Burning of the Kuwait: Oilfields and the Laws of War*, 24 VAND. J. TRANSANT'L L. 711, 739 (1991).

³¹³ Rex J. Zedalis, *Burning of the Kuwait: Oilfields and the Laws of War*, 24 VAND. J. TRANSANT'L L. 711, 739 (1991).

³¹⁴ See *infra*. Ch. III. Sec. (I)(d). See *infra*. App. 3.

³¹⁵ Jonathan Edwards, *The Iraqi Oil "Weapon" in the 1991 Gulf War: A Law of Armed Conflict Analysis*, 40 NAVAL L. REV. 118, 120-121 (1992).

Historically, Iraqi administrations, including Saddam Hussein's regime, showed their desire to annex Kuwait for financial advantage, since annexation would give them control of Kuwaiti oil.³¹⁶ Moreover, one of the arguments Saddam Hussein used to justify his invasion of Kuwait was that both Kuwait and the United Arab Emirates were conspiring against Iraq to increase their production of oil, thus decreasing the price and harming the Iraqi economy.³¹⁷ This argument demonstrated Saddam Hussein's desire to annex Kuwait to improve the Iraqi economy by controlling Kuwait's share of oil in the market and to pay Iraq's debt which was a result of its war against Iran. In addition, Saddam Hussein threatened³¹⁸ to blow up Kuwaiti oil wells if an attempt to liberate Kuwait was made. Taking into consideration all the above circumstances, one can conclude that Saddam Hussein's main concern was the oil and his desire to retaliate against his enemy, Kuwait, by inflicting greater injuries, destroying Kuwait's main natural and financial resource, as reprisal for the United Nations effort to liberate Kuwait and enhance the rule of law at the international level. In sum, the destruction of the environment was driven by one motive - reprisal.

If one reaches the conclusion that military necessity was absent in Iraq's actions, it is logical to conclude that the destruction must be deemed a grave breach of the laws of armed conflict. This grave breach is a war crime that triggers the Universal Jurisdiction doctrine.³¹⁹ As a result:

“...[A] nations bound by the 1949 Geneva Conventions, are required by existing international treaty obligations to search out and prosecute or

³¹⁶ See *infra*. App. 1.

³¹⁷ See Ch. I note 2.

³¹⁸ Carlyle Murphy, *Iraqis Said to Set Oil Installation Ablaze*, WASH. POST, February 23, 1991, at A10.

³¹⁹ See Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074, U.N.GAOR, 28th Sess., Supp. No. 30, at 78, U.N.Doc. A/9030 (1973).

extradite persons alleged to have committed “grave breaches” of these Conventions.”³²⁰

Conclusion and Observations

Prosecutorial discretion differs between domestic and international levels. There is no question that, internationally, prosecutorial discretion is essential. However, this discretion should not be absolute. Therefore, proposing legal considerations in determining when international prosecution is warranted is necessary to avoid international tension and to protect human rights.

In terms of legal considerations, an international prosecutor, before pursuing a criminal charge, must resolve two questions: the sufficiency of the evidence and the gravity of the offense. The scheme for evaluation of the evidence differs between ad hoc international criminal tribunals and the framework of the International Criminal Court. In light of the evidence required, it is enough for international prosecutors, to pursue a criminal case, to have a credible case which would be sufficient to convict an accused.

As a second requirement, an international crime must be sufficiently grave in order to commence an action or prosecution before international criminal tribunals or courts. In spite of the fact that the gravity of the offense is an important element in international criminal practice, there is no single international instrument providing guidelines to clarify for international prosecutors under what circumstances the criminal actions in question may be considered grave.

As a result of this legal absence, a resort to domestic criminal justice systems, as well developed sources of law, becomes necessary. It is motivated by the desire to protect

³²⁰ John Norton Moore, War Crime and the Role of Law in the Gulf Crisis, 31 VA. J. INT’L L. 403, 404 (1991).

human rights. The phenomenon of resorting to national systems is a legally recognized necessity in international criminal law.

An examination of domestic legal systems brings us to the conclusion that several considerations, including damage, intent, the manner of commission, *mens rea* and motive are common considerations for domestic prosecutors who must decide whether the offense in question is grave. An evaluation of Saddam Hussein's case against the environment in light of these considerations shows that Saddam Hussein's actions against the environment are grave crimes and grave breaches of the laws of armed conflict. This situation would trigger the Universal Jurisdiction doctrine.³²¹

³²¹ The Universal Jurisdiction principle means that each state is required, based upon an international customary obligation, to look for and to prosecute individuals accused of international crimes without the need to link such authority to a territorial or national nexus concerning committed crimes or their parties.

Chapter III

Substantive Aspects of
International Criminal Prosecution

- I. The International Basis of Criminal Responsibility**
 - 1. Superior Responsibility Based on an Unlawful Order**
 - 2. Principles of Joint Criminal Enterprise (JCE)**
 - 3. Command Responsibility**
 - 4. Saddam Hussein's Role in the Environmental Offenses**
- II. International Legal Sources of Criminality**
 - 1. Geneva Convention IV (relating to the Protection of Civilian Persons in Time of War) 1949**

Conclusion and Observations

Chapter III

Substantive Aspects of International Criminal Prosecution

Substantive analysis of Saddam Hussein's liability for international environmental crimes raises two issues. The first is whether he satisfied the *actus reus* aspect of the crime, i. e., whether he can be vicariously liable for the environmental crimes of his subordinates acting under his direction. The second issue is whether Saddam Hussein's criminal responsibility requires that the actions committed by his subordinates against the environment be criminal. If so, by which international instruments are their actions to be considered criminal?

I. The International Basis of Criminal Responsibility

Although the issue of whether an individual may enjoy rights and incur obligations under international law is not yet settled,³²² it is a different question than whether an individual can be criminally liable for international crimes.³²³ Individual criminal responsibility for international crimes is currently the universally accepted norm.³²⁴ An individual's international criminal responsibility may arise during both peace time and war time. During armed conflict, crimes can be committed by both subordinates and superiors. In the context of the responsibility of superiors, both military

³²² Mark S. Korowicz, *The Problem of the International Personality of Individuals*, 50 AM J. INT'L L. 533 (1956); Leslie C. Green, *International Law* 91 (1984).

³²³ The International Military Tribunal at Nuremberg held that "[C]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." See NAZI CONSPIRACY And JUDGMENT of THE IMT 66 (1947) *Quoted in* M. Cherif Bassiouni, *Introduction to International Criminal Law* 65 (Transnational Publishers 2003).

³²⁴ See Farhad Malekian, *International Criminal Responsibility of Individual in International Criminal Law*, Vol. I, 153, 57 (M. Cherif Bassiouni ed., 1999).

and political leaders may be included.³²⁵

In the wake of World War I, the first attempt to try individuals responsible for the war, including heads of state, was begun by establishing the Commission on the Responsibility of Authors of the War. This Commission was charged with considering certain questions about the origins of the war.³²⁶ The Commission concluded, “All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs [of] States, who have been guilty of the offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.”³²⁷

On 28 June 1919, the Treaty of Versailles ended World War I.³²⁸ For a number of reasons, the provision regarding prosecuting the German Emperor, William II, included

³²⁵ In some cases, it has been held that the responsibility of a person who can affect the decision to commit the crime is graver than the responsibility of the executor. Prosecutor v. Martić, Case No. IT-95-11-R6, Decision of Trial Chamber I- Review of indictment pursuant to Rule 61 (March 6, 1996).

³²⁶ The commission’s task was to determine: “1. The responsibility of the Authors of the war. 2. The facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their Allies, on land, on sea, and in the air during the present war. 3. The degree of responsibility for those offences attaching to particular members of the enemy forces, including members of the General Staff, and other individuals, however highly placed. 4. The constitution and procedure of a tribunal appropriate for the trial of these offences. 5. Any other matters cognate or ancillary to the above which may be raised in the course of the inquiry, and which the Commission finds it useful and relevant to take into consideration.” See M. Adatci & S. Tachi, Commission on The Authors of the War and the Enforcement of Penalties, 14 AM. J. INT’L L. 95 (1920).

³²⁷ M. Adatci & S. Tachi, Commission on The Authors of the War and the Enforcement of Penalties, 14 AM. J. INT’L L. 95, 117 (1920).

³²⁸ The Treaty of Versailles (1919) was the peace treaty which officially ended World War I between the Allied and Associated Powers (France, Russia, Italy, Britain, United States) and Germany. In the treaty, Germany recognized the Allied Powers’ right to prosecute and punish those individuals who violated the laws and customs of war. The pertinent articles in the treaty are 227-230. Article 227, relating to the responsibility of the head of state, provides “The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan....” The treaty contains as well articles 228-230 which imposed on Germany obligations concerning extradition, production of documentary and other evidence, and the personal jurisdiction of the military

in the treaty, was not implemented,³²⁹ “[T]he failures of post-World War I justice were transformed into a partially valid precedent because that was what was needed to justify raising expectations of the international society.”³³⁰

No doubt, the failure to bring those who were responsible for World War I to international justice contributed to the subsequent direct enforcement of international criminal law rules, including those relating to individual criminal responsibility, after World War II. The desire to deter the occurrence of war crimes was motivated by the atrocities committed in World War II.³³¹ Since the criminal trials of World War II, the appearance of provisions relating to the criminal responsibility of the head of state in international instruments has increased. These international instruments may take the form of international criminal tribunals’ statutes, draft codes, or international treaties.³³²

tribunal. See Treaty of Versailles signed June 28, 1919. Art. 228 available at <http://history.acusd.edu/gen/text/versaillestreaty/vercontents.html> (Last visited June 30, 2007).

³²⁹ Those grounds were “[1] The political climate of that time was not prepared for the prosecution and punishment of individuals of other states; [2] there was no expressly pragmatic consent by all the greater powers of the time for the establishment of an international criminal court; [3] the principles of international criminal law were not clear to the international legal community as a whole; [4] public opinion in Germany was against any form of prosecution of its individuals.” See Farhad Malekian, *International Criminal Responsibility of Individual in International Criminal Law Vol. I*, 153 (M. Cherif Bassiouni ed., 1999); In addition, another factor contributing to this failure is the refusal of the Government of the Netherlands to surrender William II of Hohenzollern based on the argument that the Versailles treaty was not binding since the Netherlands was not a party to the treaty. See Rerigiusz Bierzanek, *War Crimes: History and Definition in International Criminal Law, Vol. III*, 87,92 (M. Cherif Bassiouni ed., 1999); while others believe that the non-establishment of a criminal tribunal after World War I has also been attributed to “...the World “was not internationally mature,”...improper drafting of the war crimes clauses the priority of the Allies to maintain peace and political agendas which prevailed over the justice norms.” M. Cherif Bassiouni, *World War I: “The War to End All Wars” and the Birth of a Handicapped International Criminal Justice System*, 30 *DENV. J. INT’L L & POL’Y* 244, 289 (2001).

³³⁰ M. Cherif Bassiouni, *World War I: “The War to End All Wars” and the Birth of a Handicapped International Criminal Justice System*, 30 *DENV. J. INT’L L & POL’Y* 244, 290 (2001).

³³¹ M. Cherif Bassiouni, *International Criminal Investigations and Prosecutions: From Versailles to Rwanda in International Criminal Law Vol. III*, 31, 39 (M. Cherif Bassiouni ed., 1999).

³³² Affirmation of the Principles of International Law Recognized by the Charter of Nuremberg Tribunal, G.A. Res. 95 (I), U.N. Doc. A/236 (Dec. 11, 1946); Convention on the Prevention and Punishment of the Crime of Genocide art. IV, 78 U.N.T.S. 277 (1951); Convention on the Suppression and Punishment of the Crime of Apartheid art. III, (Nov. 30, 1972), <http://www.unhchr.ch/html/menu3/b/11.htm> (Last visited June 29, 2007); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious

Before examining these instruments, a distinction should be drawn between the question of responsibility, a substantive question, and the question of immunity, a procedural question.³³³ The former question concerns whether heads of states can be guilty of committing international crimes, while the latter focuses on whether judicial proceedings can be commenced against heads of states.³³⁴

The statutes of almost all international criminal tribunals contain provisions rejecting the status of head of state as the basis for immunity, mitigation, or exoneration.³³⁵ The best examples of these tribunals are the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR).³³⁶ Moreover, the International Criminal Court statute or Rome Statute, which is the fruit of an international treaty, adopts the view that the status of the accused does not affect the question of his or

Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 7 (2), S.C. Res. 827, U.N. SCOR 48th Sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993); Statute of the International Tribunal for Rwanda art. 6 (2), S.C. Res. 955, U.N. SCOR 49th Sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994); Rome Statute of the International Criminal Court art. 27 (1), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (2002).

³³³ Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (2002) ICJ Reports, 14 April 2002. ¶ 60.

³³⁴ For the immunity issue, see *Infra* Ch. IV, Sec. III.

³³⁵ For instance, article 7 of IMT Charter provides “The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating.” See Charter of the International Military Tribunal, 82 UNTS 279; 59 Stat. 1544; 3 Bevens 1238; 39 AJILs 258 (1945); This norm, with the exception of the “mitigating role,” has been recognized as one of the rules of international law by the United Nations General Assembly. See Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 5 U.N. GAOR Supp. (No. 12) at 11, U.N. Doc. A/1316 (1950); 1950 ILC Yb 374, vol. II; 44 AJIL 126 (1950).

³³⁶ Article 7(2) of ICTY statute provides “The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.” Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 7 (2), S.C. Res. 827, U.N. SCOR 48th Sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993); Statute of the International Tribunal for Rwanda art. 6 (2), S.C. Res. 955, U.N. SCOR 49th Sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994).

her criminal responsibility.³³⁷ In addition, several international treaties emphasize the same doctrine.³³⁸

By and large, although legal norms for the criminal responsibility of heads of state for war crimes exist, it has been said that “[T]he hard task is to implement those norms by bringing those criminals before courts.”³³⁹ Thus, the availability of legal norms alone is not sufficient under the regime of international law to bring these norms into practice before judicial organs. A decision to commence an international criminal prosecution is a decision with political and legal dimensions.

Only political reasons can justify the International Military Tribunal’s prosecutions of Admiral Erich Raeder, appointed Chancellor (Head of State) as successor to Adolph Hitler, and other German high-ranking officials,³⁴⁰ while the Japanese Emperor Hirohito was not indicted before the Far East Military Tribunal.³⁴¹ In any case, this paper is concerned only with the legal side of the story.

³³⁷ Rome Statute of the International Criminal Court art. 27 (1), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998). The International Law Commission, in both drafts concerning these crimes against Peace and the Security of Mankind, adopted the notion that the head of state can no longer defend himself from criminal responsibility by claiming that because of his or her status he is not responsible. Draft Code of Crimes Against the Peace and Security of Mankind art. 7, 1996, 51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532, corr.1, corr.3 (1996); Draft Code of Offences Against the Peace and Security of Mankind art. 3, 1954, 9 UN GAOR Supp. (No. 9) at 11, U.N. Doc. A/2693 (1954); 45 AJIL 123 (1951).

³³⁸ For instance, article IV of the Convention on the Prevention and Punishment of the Crime of Genocide provides “Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” Convention on the Prevention and Punishment of the Crime of Genocide art. IV, 78 U.N.T.S. 277 (1951).

³³⁹ Farhad Malekian, *International Criminal Responsibility of Individual in International Criminal Law*, Vol. I, 153, 189 (M. Cherif Bassiouni ed., Transnational Publishers, Inc. 2ed 1999).

³⁴⁰ M. Cherif Bassiouni, *Introduction to International Criminal Law* 73 (Transnational Publishers 2003).

³⁴¹ For reasons not to indict the Japanese Emperor, see Kerry Creque O’Neill, *A New Customary Law of Head of State Immunity: Hirohito and Pinochet*, 38 STAN. J. INT’L L. 289, 299-306 (2002).

Under the current rules of international criminal law, the criminal responsibility of a superior, including a head of state, can be based either on an act or a failure to act, as summarized by the United Nations Secretary-General's report:

A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the unlawful behavior of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.³⁴²

In addition to these statute-based grounds, a third basis has emerged through ad hoc practice of international criminal tribunals (ICTY and ICTY). This basis is called "Joint Criminal Enterprise" or "Common Plan."³⁴³

As a result, the criminal responsibility of the superior, including a head of state, can be assigned by claiming that his or her involvement in the commission of the international crime in question was direct involvement by: (1) issuing an unlawful order; (2) participating in a criminal common plan; or (3) indirect involvement through his or her failure to either prevent the commission of the offense or punish the responsible subordinates." These three theories for the criminal responsibility of the superior will be examined in depth in the following part of this chapter.

³⁴² Report of The Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, ¶ 56; Prosecutor v. Delalic et al., Case No. IT-96-21 (November 16, 1998) ¶ 333.

³⁴³ Guenael Mettraux, *International Crimes and the Ad Hoc Tribunals* 292 (Oxford University Press 2005).

1. Superior Responsibility Based on an Unlawful Order

The criminal responsibility of a superior, including a head of state, may arise from various actions.³⁴⁴ One of those actions is issuing an unlawful order by a superior to his subordinates to commit an action which is considered a violation of the laws of war. This form of responsibility is considered a form of accessorial responsibility.³⁴⁵

The superior's order to his subordinates to commit an offense was reaffirmed as a basis for criminal responsibility after World War I.³⁴⁶ During World War II, the Allies³⁴⁷ announced their intention to punish individuals of the Axis³⁴⁸ forces who were "guilty of or responsible for these crimes [committed in occupied territories], whether *they have ordered them*, perpetrated them, or participated in them"(emphasis added).³⁴⁹ After the cessation of hostilities, article II (2) of the Control Council Law No. 10, governing the trials of World War II criminals, implemented this intention by including this basis.³⁵⁰

³⁴⁴ Participation in the commission of the crime can be, as summarized by the ICTY, through planning, instigating, ordering, committing, or aiding and abetting. See *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-1 (August 2, 2001) ¶ 610.

³⁴⁵ Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 103 (2005).

³⁴⁶ Rerigiusz Bierzanek, *War Crimes: History and Definition in International Criminal Law*, Vol. III, 87,91 (M. Cherif Bassiouni ed., Transnational Publishers, Inc. 2ed 1999).

³⁴⁷ The Allied powers were the Union of Soviet Socialist Republics, the United States of America and the United Kingdom.

³⁴⁸ The Axis countries were Nazi Germany, Fascist Italy and Imperial Japan.

³⁴⁹ Editorial Comment: *Retribution for War Crimes*, 37 AM. J. INT'L L. 81, 84 (1943).

³⁵⁰ It provides "...Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or *ordered* or abetted the same"(emphasis added). See Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, 3 Official Gazette Control Council for Germany 50-55 (1946).

An order, as a basis for the charge of criminal responsibility, appears in most of the World War II trials without objections or denial of it as grounds for the charge.³⁵¹ In some cases, the responsibility even included unexecuted orders.³⁵² An example of an unlawful order is the execution of partisans on suspicion only and without proof.³⁵³ The defense of misinterpretation of orders by subordinates was raised during the World War II trials. This defense, however, does not appear to have been accepted by the British Military Court at Hamburg, in *Trial of Karl-Heinz Moehle*.³⁵⁴

³⁵¹ See count I in Trial of Gerhard Friedrich Ernst. Law Reports of Trials of War Criminals, Vol. VI, Trial of Gerhard Friedrich Ernst, Case No.36, P. 111; Trial of Albert Kesselring. Law Reports of Trials of War Criminals, Vol. VIII, Case No.44, P. 9; See Law Reports of Trials of War Criminals, Vol. VIII, Trial of Wilhelm List and others "The hostage Case", Case No.47, P. 35; See Law Reports of Trials of War Criminals, Vol. XII, The German High Command Trial, Case No.72, P. 2-3.

³⁵² The United States Military Tribunal at Nuremberg held, in *The Hostage Case*, that "The order was clearly unlawful and so recognized by the defendant. He contends, however, that no captured Commissars were shot by troops under his command. This is, of course, a mitigating circumstance but it does not free him of the crime of knowingly and intentionally passing on a criminal order." See Law Reports of Trials of War Criminals, Vol. VIII, Trial of Wilhelm List and others "The hostage Case", Case No.47, P. 90 However, this rule is not absolute. Concerning the responsibility of the superior who issued an unlawful order that was impossible to carry out, the British Military Court, in *Trial of Generaloberst Nickolaus Von Falkenhorst Case*, held that "The question of the state of mind of the accused when he issued the order becomes important from the point of view of *mens rea*, because if he knew that the order could not be carried out, then no question of criminality should arise." See Law Reports of Trials of War Criminals, Vol. XI, Trial of Generaloberst Nickolaus Von Falkenhorst, Case No.61, P. 29.

³⁵³ Providing examples of unlawful orders, the United States Military at Nuremberg, in *The German High Command Trial*, laid down that "[the defendant] held the executive power for his area, and it was his duty to exercise it for the protection of the population. He was obligated not to deport them, not to despoil them of their property, nor to send both those innocent and those guilty of aiding the so-called bands to concentration camps.....The orders to do those things were criminal orders, and they were fully implemented by him." See Law Reports of Trials of War Criminals, Vol. XII, The German High Command Trial, Case No.72, P. 121.

³⁵⁴ The responsibility for unexecuted orders was raised in this case. The order was "(1) No attempt of any kind must be made at rescuing members of ships sunk, and this includes picking up persons in the water and putting them in lifeboats, righting capsized lifeboats and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews. (2) Orders for bringing in captains and chief engineers still apply. (3) Rescue the shipwrecked only if their statements would be of importance for your boat. (4) Be harsh, having in mind that the enemy has no regard for women and children in his bombing attacks on German Cities." The charge was "he [the accused],....., when senior officer of the 5th U-boat Flotilla, in violation of the laws and usages of war, gave orders to commanding officers of U-boats who were due to leave on war patrols that they were to destroy ships and their crews." The Defence argued that the order was ambiguous and that it prohibited saving crews but was not an order to kill them. However, the defendant was found guilty and sentenced to five years imprisonment. See Law Reports of Trials of War Criminals, Vol. IX, Trial of Karl-Heinz Moehle, Case No.54, P. 76-78.

After the World War II trials, the international obligation of states to criminalize the conduct of those who ordered a crime became part of international customary law.³⁵⁵ Later on, charges based on orders continued to play a role in ad hoc international criminal tribunals.³⁵⁶ Subsequently, the “Individual’s responsibility based on an order” rule has been reaffirmed in several international criminal instruments.³⁵⁷

Rules governing criminal responsibility based on an order under the jurisprudence of ad hoc tribunals are not fundamentally different from those established during the World War II trials. Under ICTY jurisprudence, commission of a crime by an order means “A person in a position of authority using that position to convince another to commit an offense.”³⁵⁸ While the ICTR views giving an order as “[A] third form of participation, implies [implying] a superior-subordinate relationship between the person

³⁵⁵ Geneva Convention IV article 146(1) provides “The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or *ordering* to be committed, any of the grave breaches of the present Convention defined in the following Article”(emphasis added). Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287 (1949).

³⁵⁶ The U.N. Commission of Experts laid down that “A person who gives the order to commit a war crime or crime against humanity is equally guilty of the offence with the person actually committing it. This principle, expressed already in the Geneva Conventions of 1949, applies to both the military superiors, whether of regular or irregular armed forces, and to civilian authorities.” See Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 7 (1), S.C. Res. 827, U.N. SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159, (1993); Statute of the International Criminal Tribunal for Rwanda art. 6 (1), S.C. Res. 955, U.N. SCOR 49th sess., 3453rd mtg. U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994); The Special Court for Sierra Leone Statute art. 6 (1). S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg. U.N. Doc. S/Res/1315 (2000).

³⁵⁷ Draft Code of Crimes against the Peace and Security of Mankind art. 2 (3), 51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532, corr.1, corr.3 (1996); The same occurs with the International Criminal Court statute. Rome Statute of the International Criminal Court art. 25 (c)(3), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998).

³⁵⁸ Prosecutor v. Radislav Krstic, Case No. IT-98-33-1 (August 2, 2001) ¶ 610.

giving the order and the one executing it, with the person in a position of authority using such position to persuade another to commit an offence.”³⁵⁹

The actual presence of the superior while the crime is committed is not necessary for conviction.³⁶⁰ Responsibility can be imposed on the person who gave the order upon proof that he directly or indirectly intended that the crime be committed.³⁶¹ In other words, the *mens rea* of the person who issued the order matters, not that of the person who executed the order.³⁶² Even a person who ordered an act or the omission of an act with awareness of the substantial likelihood that a crime would be committed in the execution of that order holds the required *mens rea* for responsibility based on that order.³⁶³ There is no requirement for the specific form of order and it need not be given directly by the superior to the subordinate.³⁶⁴ Moreover, the superior’s responsibility includes all that naturally results from the commission of the act in question.³⁶⁵

To overcome the difficulty of proving environmental offenses, some have suggested the creation of a presumption by which commanders are deemed to have ordered crimes committed by subordinates although proponents of this proposition admit

³⁵⁹ Prosecutor v. Rutaganda, Case No. ICTR-96-3 (December 6, 1999) ¶ 39; Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T (June 7, 2001) ¶ 30; Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T (December 1, 2003) ¶ 763; Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T (January 22, 2004) ¶ 594; Prosecutor v. Akayesu, Case No. ICTR-96-4-T (September 2, 1998) ¶ 483.

³⁶⁰ Prosecutor v. Tadic, Case No. IT-94-1-T (May 7, 1997) ¶ 691.

³⁶¹ Prosecutor v. Blaskici, Case No. IT-95-14-T (March 3, 2000) ¶ 278; Prosecutor v. Kordic and Cerkezi, Case No. IT-95-14/2-T (February 26, 2001) ¶ 386; Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T (June 7, 2001) ¶ 31; Prosecutor v. Stakic, Case No. IT-97-24 (July 31, 2003) ¶ 445.

³⁶² Prosecutor v. Blaskici, Case No. IT-95-14-T (March 3, 2000) ¶ 282.

³⁶³ Prosecutor v. Blaskici, Case No. IT-95-14-T, Appeal Judgment (July 31, 2004) ¶ 42; Prosecutor v. Stakic, Case No. IT-97-24 (July 31, 2003) ¶ 445.

³⁶⁴ Prosecutor v. Blaskici, Case No. IT-95-14-T (March 3, 2000) ¶ 281; Prosecutor v. Kordic and Cerkezi, Case No. IT-95-14/2-T (February 26, 2001) ¶ 388.

³⁶⁵ Prosecutor v. Tadic, Case No. IT-94-1-T (May 7, 1997) ¶ 692.

that such an approach would violate the principle of the presumption of innocence.³⁶⁶

Adoption of this approach is an unsettled question, and the debate continues among international and regional judicial authorities.³⁶⁷

2. Principles of Joint Criminal Enterprise (JCE)

This form of responsibility holds an individual responsible for all crimes committed pursuant to a common plan or design involving the commission of a crime, if the individual participated with others in the common design. Thus, even if the crime was committed by particular participants, other participants in the design may be held responsible.³⁶⁸

In the World War II trials, a similar term, called “common design,” was used. “Common design” is defined as “a community of intention between two or more persons to do an unlawful act.”³⁶⁹ Under international ad hoc criminal tribunals jurisprudence, JCE became a regular form of responsibility for political and military leaders.³⁷⁰

JCE is a form of liability which is not explicitly described by the tribunal’s statute but is implicit in Article 7/1 of the ICTY statute and in the World War II trials.³⁷¹ The

³⁶⁶ William A. Schabas, *An Introduction to the International Criminal Court* 84 (Cambridge University Press 2001).

³⁶⁷ Although the European Court of Human Rights permitted this approach in some cases, article 67 of the Rome statute rejects it. For the European Court of Human Rights view, see *Salabiaka v. France*, Series App. No. 141-A, 7 October 1988; *Pham Hoang v. France*, Series App. No. 243, 25 September 1992, ¶ 28; see as well Rome Statute of the International Criminal Court art. 66, U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998).

³⁶⁸ *Prosecutor v. Krnojelac*, Case No. IT-95-27 (March 15, 2002) ¶ 82.

³⁶⁹ See Law Reports of Trials of War Criminals, Vol. XV, *The Dachau Concentration Camp Trial*, Case No.60, P. 14.

³⁷⁰ Guenael Mettraux, *International Crimes and the Ad Hoc Tribunals* 292 (Oxford University Press 2005).

³⁷¹ The ICTY Chamber held that “Joint criminal enterprise” liability is a form of criminal responsibility which the Appeals Chamber found to be implicitly included in Article 7(1) of the Statute. It entails individual responsibility for participation in a joint criminal enterprise to commit a crime.” *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-1 (August 2, 2001) ¶ 610.

conclusion, reached by the ICTY, that JCE derived its existence from the practice of the World War II trials, has been criticized.³⁷² Before examining the required elements for this basis of criminal liability, it is necessary to distinguish between this concept and other concepts which might cause confusion due to the similarity of their elements.

The first concept which might be compared to JCE is the conspiracy concept. Conspiracy as a substantive crime appears in several international instruments criminalizing conduct such as the international drug trade, slavery, apartheid, and money laundering.³⁷³ In the World War II war crimes trials, conspiracy was considered a substantive crime (conspiracy to commit a crime against peace) and as a theory of liability under which each defendant could be convicted for any acts committed by co-conspirators “in the execution of such a plan.”³⁷⁴ However, the Nuremberg and Tokyo trials rejected conspiracy as a substantive crime in war crimes and crimes against humanity.³⁷⁵

Both conspiracy and joint criminal enterprise require the existence of an agreement. The difference is that joint criminal enterprise, unlike conspiracy, requires

³⁷² Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 113 (2005) (arguing that the World War II trials support the second category “Camp Concentration” but not the rest).

³⁷³ Richard P. Berrett & Laura E. Little, *Lessons of Yugoslavia Rape Trials: A Role for Conspiracy in International Tribunals*, 88 MINN. L. REV. 30, 58 (2003).

³⁷⁴ Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 117 (2005).

³⁷⁵ Richard P. Berrett & Laura E. Little, *Lessons of Yugoslavia Rape Trials: A Role for Conspiracy in International Tribunals*, 88 MINN. L. REV. 30, 58 (2003); see *Law Reports of Trials of War Criminals*, Vol. VI, *The Justice Trial*, Case No.35, P. 5; the ICTY statute provides for conspiracy in only the genocide charge. See art. 4 (3) (b) of the ICTY Statute. *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* art. 4 (3)(b), S.C. Res. 827, U.N. SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993).

that each defendant participate in an action in furtherance of the agreement.³⁷⁶ Consequently, conspiracy is viewed as an easier basis on which to prosecute than JCE since the former does not require proof of participation in an action.³⁷⁷ In addition, unlike conspiracy, joint criminal enterprise is not a substantive crime.³⁷⁸

The second concept which is similar to JCE is the criminal organization basis used in the World War II trials.³⁷⁹ According to this basis, the prosecutor must establish that the accused “became or remained a member of the [criminal] organization with knowledge that it was being used for the commission of [criminal] acts.”³⁸⁰ Thus, the criminality of the organization must be proved first. Then, the prosecutor must prove that the accused freely joined the organization and that he or she knew the organization was a tool through which crimes were committed.

Although both concepts have a common feature, collective responsibility, the JCE theory does not require the existence of an organization. Moreover, to be convicted based on JCE, an accused, unlike a criminal organization, must participate in the commission of the crime. In sum, the criminal organization charge is a membership charge or offense. During the World War II trials, there was debate as to whether an accused must hold a leading position in the criminal organization in order to convict him or her based upon

³⁷⁶ Prosecutor v. Multinovic, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction- Joint Criminal Enterprise, Appeal Decision (May 21, 2001) ¶ 23.

³⁷⁷ Richard P. Berrett & Laura E. Little, Lessons of Yugoslavia Rape Trials: A Role for Conspiracy in International Tribunals, 88 MINN. L. REV. 30, 34-35 (2003).

³⁷⁸ Allison Marston Danner & Jenny S. Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 CAL. L. REV. 75, 119 (2005).

³⁷⁹ The concept of “Criminal Organizations” adopted in Nuremberg Charter (Articles 9, 10.) however, it was not included within those rules adopted by General Assembly. John R.W.D. Jones & Steven Powles, International Criminal Practice 410 (Transnational Publishers, Inc 2003).

³⁸⁰ See Law Reports of Trials of War Criminals, Vol. IX, The Flick Trial, Case No.48, P. 28.

this position.³⁸¹ In conclusion, the argument that joint criminal enterprise amounts to either conspiracy or organizational responsibility is rejected by the ICTY.³⁸²

While under international criminal ad hoc tribunals' jurisprudence, situations in which a JCE-based conviction can be accomplished are divided into three categories.³⁸³ The so-called Concentration Camp cases are most pertinent here because they are a precedent for charging Saddam Hussein in his actions against the environment. This category, derived from the World War II trials, is represented by "[A] 'Systemic' form of joint criminal enterprise. It is a variant of the basic form, characterized by the existence of an organized system of ill-treatment. An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise."³⁸⁴

³⁸¹ See Law Reports of Trials of War Criminals, Vol. VII, The Trial of Obersturmbannführer Rudolf Franz Ferdinand Hoess, Case No.38, P. 11; for a review regarding the emergence of the concept see Law Reports of Trials of War Criminals, Vol. XIII, The Trial of Ulrich Greifelt and others, Case No.73, P. 42-67.

³⁸² Prosecutor v. Milutinovic ET AL., Case No. IT-99-37-AR72, Appeal Decision on Dragoljub Ordanic's Motion Challenging Jurisdiction- Joint Criminal Enterprise (May 21, 2003) ¶ 23, 25.

³⁸³ "The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result." The second category is the so-called extended responsibility which "concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example is a common purpose or plan on the part of a group to forcibly remove at gun-point members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians." See Prosecutor v. Vasiljevic, Case No. IT-98-32, Appeal Judgment (February 25, 2004) ¶ 97, 99.

³⁸⁴ Prosecutor v. Vasiljevic, Case No. IT-98-32, Appeal Judgment (February 25, 2004) ¶ 98.

More than one participant, the existence of a common purpose, and the participation of the defendant in that common purpose are the three requirements for the JCE *actus reus*. The participants need not be organized in a military, political, or administrative structure and the common plan need not be previously arranged or organized.³⁸⁵

The required element of participation “[I]nvolves the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of the provisions (for example, murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose.”³⁸⁶ Moreover, the difference between participating in a joint criminal enterprise as a co-perpetrator or as an aider and abettor depends upon the depth of involvement.³⁸⁷ Lastly, it has been ruled, regarding the required *mens rea*, that “With regard to the basic form of joint criminal enterprise what is required is the intent to

³⁸⁵ Prosecutor v. Tadic, Case No. IT-94-1-T, Appeal Judgment (July 15, 1999) ¶ 227; Prosecutor v. Krnojelac, Case No. IT-95-27 (March 15, 2002) ¶ 79.

³⁸⁶ Prosecutor v. Vasiljevic, Appeal Judgment, Case No. IT-98-32 (February 25, 2004) ¶ 100.

³⁸⁷ The Court provided that “Participation in a joint criminal enterprise is a form of “commission” under Article 7(1) of the Statute. The participant therein is liable as a co-perpetrator of the crime(s). Aiding and abetting the commission of a crime is usually considered to incur a lesser degree of individual criminal responsibility than committing a crime. In the context of a crime committed by several co-perpetrators in a joint criminal enterprise, the aider and abettor is always an accessory to these co-perpetrators, although the co-perpetrators may not even know of the aider and abettor’s contribution. Differences exist in relation to the *actus reus* as well as to the *mens rea* requirements between both forms of individual criminal responsibility: (i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design. (ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.” Prosecutor v. Vasiljevic, Case No. IT-98-32, Appeal Judgment (February 25, 2004) ¶ 102.

perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators).”³⁸⁸

3. Command Responsibility

Command responsibility is described in the statement, “Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility.”³⁸⁹ This responsibility requires “a balance” between military necessity and the dictates of justice or humanity.³⁹⁰ Criminal command responsibility is imposed in order to ensure respect for the rules of armed conflict by controlling commanders.³⁹¹ Command responsibility, which originated in national military law, gradually became the basis of the international law on responsibility. Nationally, it can be traced back to 500 B.C.³⁹²

At the international level, the dubious legality and uncertainty about this responsibility was one cause of the failure to establish an international criminal tribunal after World War I.³⁹³ As a result, command responsibility, or “failure to act”

³⁸⁸ Prosecutor v. Vasiljevic, Case No. IT-98-32, Appeal Judgment (February 25, 2004) ¶ 101.

³⁸⁹ Law Reports of Trials of War Criminal, prepared by the United Nations War Crimes Commission (1948), Volume IV, Case No. 21, Trial of General Tomoyuki Yamashita, 35 (1946).

³⁹⁰ It has been said that “The Customary International Legal norms that have evolved reflect a balance of the principles of military necessity and humanity. With respect to the first principle, a modern army requires delegation of authority and control and a large degree of decentralization to function effectively. [H]e [commander] has a right to assume that details entrusted to responsible subordinates will be legally executed. At the same time, the military commander is not permitted, solely through his delegation of authority and control, to escape criminal liability for war crimes committed by subordinates.” Lieutenant Commander Weston D. Burnett, *Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra*, 107 MIL. L. REV. 71, 131 (1985).

³⁹¹ The U.S. Supreme Court in the General Yamashita case stated that, “The law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.” *In Re Yamashita*, 327 U.S. 1, 348-49 (1946); see also *Prosecutor v. Hadzihasanovic ET AL.*, Case No. IT-1-47-AR72, Appeal Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility (July 16, 2003) ¶ 16.

³⁹² For the developing history of the command responsibility doctrine, see Major William Huges Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973).

³⁹³ M. Cherif Bassiouni, *Introduction to International Criminal Law* 298 (Transnational Publishers, Inc 2003).

responsibility, existed for the first time internationally only after World War II.³⁹⁴ Since World War II, many international instruments dealing with criminal aspects of international law contain a provision explicitly governing command responsibility.³⁹⁵ In short, under contemporary international criminal law, command responsibility is a well-established norm of international customary and conventional law.³⁹⁶

The doctrine of command responsibility emerged from the leading case, the General Yamashita case,³⁹⁷ after World War II. It developed through subsequent international cases held before international ad hoc criminal tribunals. Examining this basis requires reviewing the Yamashita case and concept under the ad hoc tribunals' jurisprudence.

The doctrine of command responsibility was not enunciated in the Far East Tribunal Charter, but was developed through the trials conducted according to the Charter.³⁹⁸ One of those cases was that of General Tomoyuk Yamashita. Tomoyuk Yamashita, formerly Commanding General of the Fourteenth Army Group of the

³⁹⁴ Although the Nuremberg trials have been criticized, the trials have had their positive aspects in establishing new international criminal rules. Command responsibility is one of them. M. Cherif Bassiouni, *The Nuremberg Legacy: Historical Assessment in War Crimes: The Legacy of Nurneberg* 291 (Belinda Cooper ed., TV Books, LLC. 1999).

³⁹⁵ Draft Code of Offences against the Peace and Security of Mankind art. 3, 1954, 9 UN GAOR Supp. (No. 9) at 11, U.N. Doc. A/2693 (1954); 45 AJIL 123 (1951); Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 86 (2), 1125 UNTS 3 (1977); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 7 (3), S.C. Res. 827, U.N. SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993); Statute of the International Criminal Tribunal for Rwanda art. 6 (3), S.C. Res. 955, U.N. SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994); Draft Code of Crimes against the Peace and Security of Mankind art. 6, 1996, 51 U.N. GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532, corr.1, corr.3 (1996); the Special Court for Sierra Leone Statute art. 17 (1). S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg, U.N. Doc. S/Res/1315 (2000).

³⁹⁶ *Prosecutor v. Delalic et al.*, Case No. IT-96-21 (November 16, 1998) ¶ 333.

³⁹⁷ *Law Reports of Trials of War Criminal*, prepared by the United Nations War Crimes Commission (1948), Volume IV, Case No. 21, Trial of General Tomoyuki Yamashita, 35 (1946).

³⁹⁸ Major Michael Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 176 (2000).

Imperial Japanese Army in the Philippine Islands, was “charged with unlawfully disregarding and failing to discharge his duty as commander to control the acts of members of his command by permitting them to commit war crimes.”³⁹⁹ The basis of the charge was not an unlawful order issued by the defendant, but the prosecutor’s theory that the defendant must have known of the crimes committed by his subordinates in the Philippine Islands and that he failed to prevent them. The various crimes include starvation, execution without trial, torture, murder, rape, and the burning and demolition of large numbers of buildings, places of business, places of worship, and educational institutions without adequate military necessity.⁴⁰⁰

The defense argued that the basis of the charge, command responsibility, was not recognized by international law and did not constitute a war crime and that consequently the Commission did not have jurisdiction to try his client. In addition, the defense contended that the prosecutor had failed to establish a link between the defendant’s act and the alleged crimes or at least to establish that the defendant knew about the alleged crimes.⁴⁰¹

The evidence presented in the trial concerned the crimes committed by the defendant’s subordinates. It established that the alleged crimes were widespread with regard to both space and time. By stipulation, both the prosecutor and the defense agreed that the defendant occupied the commanding position at the time the crimes were

³⁹⁹ Law Reports of Trials of War Criminal, prepared by the United Nations War Crimes Commission (1948), Volume IV, Case No. 21, Trial of General Tomoyuki Yamashita, 35 (1946).

⁴⁰⁰ Law Reports of Trials of War Criminal, prepared by the United Nations War Crimes Commission (1948), Volume IV, Case No. 21, Trial of General Tomoyuki Yamashita 1, 4 (1946).

⁴⁰¹ Law Reports of Trials of War Criminal, prepared by the United Nations War Crimes Commission (1948), Volume IV, Case No. 21, Trial of General Tomoyuki Yamashita 1, 28-29 (1946).

committed. The prosecutor tried only a few times to prove the connection between the defendant's act and the committed atrocities.⁴⁰²

The Commission's verdict was issued 7th December 1945. The Commission commented on the Prosecutor's evidence by stating:

"The prosecutor presented evidence to show that the crimes were so extensive and widespread, both as to time and area, that they must either have been willfully permitted by the accused, or secretly ordered by the accused.....Nevertheless, where....., revengeful actions are widespread, and there is not [an] effective attempt by a commander to discover and control the criminal acts, such commander may be held responsible, even criminally responsible."⁴⁰³

The Commission's statement indicates that it attributed knowledge to the defendant because of the widespread nature of the offences. A staff judge who daily reviewed a summary of the evidence stated "The pattern of....destruction of property is widespread in point of time and of area to the extent a reasonable person must logically conclude the program to have been the result of deliberate planning."⁴⁰⁴ It seems, as well, that the Commission was not convinced by the defendant's argument that, during

⁴⁰² The evidence is summarized in the following paragraph: On the sixth day of the trial, Narciso Lapus, imprisoned by the United States as a collaborator, attempted to connect Yamashita directly to the commission of atrocities on the islands. As private secretary to General Artemio Ricarte, an elderly compatriot of the legendary Emilio Aguinaldo, around whom the Japanese had hoped to rally the Filipino people, Lapus insisted he had gained information that would incriminate Yamashita. That ruthless, cruel officer, he swore, had notified Ricarte twice in October 1944 that he had ordered his officers "...wipe out the whole Philippines if possible..." He also testified that Ricarte had informed him that Yamashita had refused to modify that order. The old general, according to Lapus, also claimed that Yamashita had rejected one appeal by arguing that "war is war and the enemy should not be given quarter" See Richard L. Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* 84 (Scholarly Resources Inc. 1982); See also A. Frank Reel, *The Case of General Yamashita* 120-123 (The University of Chicago Press 1949).

⁴⁰³ Law Reports of Trials of War Criminal, prepared by the United Nations War Crimes Commission (1948), Volume IV, Case No. 21, Trial of General Tomoyuki Yamashita, 35 (1946).

⁴⁰⁴ *Quoted in* Major William Huges Parks, *Command Responsibility for War Crimes*, 62 *Mil. L. Rev.* 1, 32 (1973); The Canadian Regulations 10 (4) make the following provisions:" (4). Where there is evidence that more than one war crime has been committed by members of a formation, unit, body, or group while under the command of a single commander, the court may receive that evidence as prima facie evidence of the responsibility of the commander for those crimes." Canadian Law Concerning Trials of War Criminals by Military Courts *Reprinted in* Law Reports of Trials of War Criminal, prepared by the United Nations War Crimes Commission (1948), Volume IV, Annex, P.128.

the war, communication between him and his subordinates was cut off. The Commission's statement, "willfully permitted by the accused or secretly ordered by the accused," is confusing as to the basis of the charge. Is it "an order" or is it a "failure to act"? The evidence presented regarding the defendant's act and the alleged crimes supports the order basis.

The Commission convicted the defendant and sentenced him to death. After the Supreme Court of the Philippine Islands rejected the defendant's petition on appeal, the defendant petitioned the Supreme Court of the United States. The latter Court reviewed the defendant's arguments concerning the legality of the establishment of the Commission and the legality of the charge, "failure to act." The Court did not review the issue of the sufficiency of evidence.⁴⁰⁵

The Court derived its view of the commander's duty to prevent the commission of the crime from several international conventions,⁴⁰⁶ rejecting the defendant's arguments. Although he was in agreement with the Court on the issue of the legality of the establishment of the Commission, Justice Murphy, in his dissenting opinion, rejected the

⁴⁰⁵ As a response to the defendant's argument concerning the legality of his charge, the Court responded: "But it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by 'permitting them to commit' the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial." *In Re Yamashita*, 327 U.S. 1, 15-16 (1946).

⁴⁰⁶ *In Re Yamashita*, 327 U.S. 1, 15-17 (1946).

existence of the theory of command responsibility in international law.⁴⁰⁷ On 23rd February 1946, the defendant was executed.⁴⁰⁸ The noteworthy point of this case is the evidence presented and the way the Commission inferred the defendant's *mens rea* from several facts including the number of illegal acts, their location, their scope and the time during which they occurred.

At least two objections might be raised to the theory of command responsibility. The first objection is to linking commanders to all crimes committed by their subordinates.⁴⁰⁹ Consequently, conspiracy is viewed as an easier basis for a superior's criminal responsibility for a subordinate's conduct than command responsibility.⁴¹⁰ The argument based on command responsibility is more difficult because the prosecutor has to prove that subordinates committed crimes, but conspiracy liability can be established without the need to prove that others committed underlying offenses.⁴¹¹ The second objection concerns those offenses requiring a specific intent.⁴¹²

Although command responsibility based on the "failure to act" theory was not included in the Geneva Conventions of 1949, in 1977 the Protocol I Additional to the

⁴⁰⁷ Justice Murphy, in his dissenting view, stated that "... International Law makes no attempt to define the duties of a commander of any army under constant and overwhelming assault; nor does it impose liability under such circumstances for failure to meet the ordinary responsibilities of command. The omission is understandable. Duties, as well as liability to control troops, vary according to the nature and intensity of the particular battle. To find unlawful deviation from duty under battle conditions requires difficult and speculative calculations...." In *Re Yamashita*, 327 U.S. 1, 30-42 (1946).

⁴⁰⁸ Law Reports of Trials of War Criminals, prepared by the United Nations War Crimes Commission (1948), Volume IV, Case No. 21, Trial of General Tomoyuki Yamashita, 2 (1946).

⁴⁰⁹ William A. Schabas, *An Introduction to the International Criminal Court* 83 (Cambridge University Press 2001).

⁴¹⁰ Richard P. Berrett & Laura E. Little, *Lessons of Yugoslavia Rape Trials: A Role for Conspiracy in International Tribunals*, 88 MINN. L. REV. 30, 34-35 (2003).

⁴¹¹ Richard P. Berrett & Laura E. Little, *Lessons of Yugoslavia Rape Trials: A Role for Conspiracy in International Tribunals*, 88 MINN. L. REV. 30, 47-53, 56 (2003).

⁴¹² It has been argued that no command responsibility can be imposed in crimes requiring specific intent, such as murder, or genocide, unless the command has such intent. Guenaël Mettraux, *International Crimes and the Ad Hoc Tribunals* 306 (Oxford University Press 2005).

Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, filled the gap by including the doctrine of command responsibility in its provisions.⁴¹³

Unlike the Joint Criminal Enterprise basis, the command responsibility is explicitly provided in the ICTY statute.⁴¹⁴ The statute does not distinguish between command responsibility and superior responsibility. The former is mainly meant to address the responsibility of indirect superiors such as the commander in chief while the superior responsibility encompasses the responsibility of the direct superior of the criminal subordinates.⁴¹⁵ Therefore, it is logical to assume that rules controlling the superior responsibility are applicable to command responsibility with the exception of rules requiring or assuming a direct or close relation between the superior and subordinates.

⁴¹³ Article 86 (2) provides “The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.” Article 87 provides those duties the commander shall fulfill. Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3 (1977).

⁴¹⁴ Article 7 (3) provides “The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.” Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 7 (3), S.C. Res. 827, UN SCOR 48th Sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993).

⁴¹⁵ For instance, the International Criminal Court Statute makes this distinction. Rome Statute of the International Criminal Court art. 28, U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998); see as well The Canadian Crimes against Humanity and War Crimes Act defines a military commander as “a person effectively acting as a military commander and a person who commands police with a degree of authority and controls comparable to a military command.” While a superior is “a person in authority, other than military commander.” Crimes against Humanity and War Crimes Act S. C. 24 § 5.4 (2000)(Can.).

Command responsibility can be raised only when there is a legal duty or obligation to act.⁴¹⁶ Moreover, as a general rule, members of the armed forces are subject to national military laws and to international regulation of armed conflicts. However, non-military personnel, including political leaders, are not subject to international laws of armed conflict unless an agency relationship can be established between those persons and the armed conflict.⁴¹⁷

Although command responsibility is the legal and logical concomitant to the defense of “obedience to superior orders,”⁴¹⁸ conviction of the subordinate does not relieve the commander of responsibility. On the other hand, exonerating the subordinate based on the defense of “obedience to superior orders” does not necessarily support conviction of the superior because orders can be either wrongly understood or wrongly applied.

Under the ICTY jurisprudence, there are three elements of superior responsibility “(i) the existence of a superior-subordinate relationship; (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.”⁴¹⁹

⁴¹⁶ Prosecutor v. Delalic et al., Case No. IT-96-21 (November 16, 1998) ¶ 334.

⁴¹⁷ Prosecutor v. Delalic et al., Case No. IT-96-21-A, Appeal Judgment (February 20, 2001) ¶ 196; Prosecutor v. Musema, Case No. ICTR-96-13-A (January 27, 2000) ¶ 148.

⁴¹⁸ M. Cherif Bassiouni, Crimes against Humanity 449-83 (Kluwer Law International 1999); see also D’Amato, Superior Orders vs. Command Responsibility and Levie, “Some Comments on Professor D’Amato’s Paradox,” 80 AM. J. INT’L L. 604-II (1986).

⁴¹⁹ Prosecutor v. Delalic et Al., Case No. IT-96-21 (November 16, 1998) ¶ 346. The source of the three conditions is International Committee of the Red Cross (ICRC) commentary regarding Geneva Protocol I. See ICRC commentary ¶ 3543 available at <http://www.icrc.org/ihl.nsf/COM/470-750112?OpenDocument> (last visited July 15, 2006).

The superior-subordinate relationship requires a hierarchical relationship, direct or indirect, and the prosecutor must show that the accused has exercised “effective power” over those said to be his or her subordinates and to have committed crimes.⁴²⁰ “Effective control” means that the superior, whether *de jure* or *de facto*, military or civilian, has the power or authority to prevent the offense or to punish subordinates. This effective control does not need to be permanent.⁴²¹ Based on this standard, two or more superiors can be held criminally liable for the same crime if it can be shown that the perpetrator was under both of their commands at the relevant time.⁴²²

The fact that the superior might have been *de jure* superior to the offender, or that he had the ability to give orders, is not enough or conclusive to prove that he had effective control. Other relevant factors can be considered to determine whether there was a superior-subordinate relationship.⁴²³ The superior-subordinate relationship must be distinguished from a lower form of influence or authority. Some individuals may be respected enough to persuade others to follow them, exercising some influence over these others. This lower level of influence, however, is not sufficient to prove a superior-subordinate relationship.⁴²⁴

Regarding the temporal existence of the superior-subordinate relationship, the majority of the ICTY Appeal Chambers believe that there should be a perfect temporal

⁴²⁰ Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Appeal Judgment (July 3, 2002) ¶ 50.

⁴²¹ Prosecutor v. Kunarac, Case No. IT-96-23-T, 22 February 2001, ¶ 399; Prosecutor v. Stakic, Case No. IT-97-24 (July 31, 2003) ¶ 459; Prosecutor v. Blaskici, Case No. IT-95-14-T (March 3, 2000) ¶ 300; Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Appeal Judgment (July 3, 2002) ¶ 50; Prosecutor v. Delalic et al., Case No. IT-96-21-A, Appeal Judgment (February 20, 2001) ¶ 251-252; Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T (December 1, 2003) ¶ 771.

⁴²² Prosecutor v. Blaskici, Case No. IT-95-14-T (March 3, 2000) ¶ 303; Prosecutor v. Krnojelac, Case No. IT-95-27 (March 15, 2002) ¶ 93.

⁴²³ Prosecutor v. Kunarac, Case No. IT-96-23-T (February 22, 2000) ¶ 396.

⁴²⁴ Prosecutor v. Delalic et al., Case No. IT-96-21-A, Appeal Judgment (February 20, 2001) ¶ 263, 266.

coincidence between the time of the commission of the crime and the existence of a superior-subordinate relationship.⁴²⁵ This view overlooks the fact that responsibility is based on whether a superior failed to prevent the crime or to punish the offender. The latter should include a defendant who was not the subordinate's superior at the time the offense was committed but was the subordinate's superior subsequently when the offense could have been punished but was not. Consequently, command responsibility should be enforced on those who failed to punish the offender even if their superior-subordinate relationship existed only after the commission of the crime.⁴²⁶

In addition to the requirement for a superior-subordinate relationship, it must be shown that the superior, military or civilian, knew or had reason to know that the subordinate had committed the crime or was about to do so.⁴²⁷ The knowledge requirement is satisfied either by actual knowledge or knowledge putting the superior on notice of the probability of the commission of such an offense.⁴²⁸ Actual knowledge means that a superior was aware that a relevant crime had been committed or was about to be committed. Such awareness can be proved either by direct or circumstantial evidence.⁴²⁹

⁴²⁵ Prosecutor v. Hadzihasanovic, Case No. IT-01-47-AR72, Appeal Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (July 16, 2003) ¶ 45.

⁴²⁶ Prosecutor argues in his brief before the trial court. Prosecutor v. Hadzihasanovic, Case No. IT-01-47-AR72, Appeal Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (July 16, 2003) ¶ 43.

⁴²⁷ The court derived the mental element from the Commission of Experts Report which provides "The forms of command's knowledge are "It is the view of the Commission that the mental element necessary when the commander has not given the offending order is (a) actual knowledge, (b) such serious personal dereliction on the part of the commander as to constitute willful and wanton disregard of the possible consequences, or (c) an imputation of constructive knowledge; that is, despite pleas to the contrary, the commander, under the facts and circumstances of the particular case, must have known of the offences charged and acquiesced therein." Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674; see as well Prosecutor v. Delalic ET AL., Case No. IT-96-21-A, Appeal Judgment (February 20, 2001) ¶ 222.

⁴²⁸ Prosecutor v. Delalic et al., Case No. IT-96-21-A, Appeal Judgment (February 20, 2001) ¶ 223.

⁴²⁹ Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-T (February 26, 2001) ¶ 427.

The information which puts the superior on notice regarding the risk of the offense is not required to be in a specific form and it can be oral or written. There is no need for specific information. It is enough that the information simply be in general.⁴³⁰ In determining whether a superior had knowledge, several factors should be considered. These factors were derived from the final report of the Commission of Experts for the former Yugoslavia Tribunal.⁴³¹ Regarding the commander's knowledge "one might consider a number of indices, including: ...the number of illegal acts; the type of illegal acts; the scope of illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; the widespread occurrence of the acts; the tactical tempo of operations; the modus operandi of similar illegal acts; the officers and staff involved; and the location of the commander at the time."⁴³² Some of these factors are reminiscent of those factors adopted in the Yamashita case.

The third requirement is the superior's failure to prevent or punish. This means that the superior failed to take reasonably necessary measures to do so. The required measures are those which are foreseeable in all circumstances and are within the

⁴³⁰ Prosecutor v. Delalic et al., Case No. IT-96-21-A, Appeal Judgment (February 20, 2001) ¶ 238; failure to obtain such information or the argument that a superior "should have known" or that the superior failed to exercise his duty to be informed of the criminal behavior of his subordinate are not valid grounds to base the responsibility under the command responsibility doctrine. Prosecutor v. Delalic ET AL., Case No. IT-96-21-A, Appeal Judgment (February 20, 2001) ¶ 222-241. However, some national military legislation has adopted a different view. See for instance Canadian law, under which criminal negligence in failing to obtain the information regarding the violations is sufficient. Crimes Against Humanity and War Crimes Act S. C. 24 § 5.1.b (2000)(Can.).

⁴³¹ Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780, U.N. Doc, S/1994/674 (1992).

⁴³² Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780, U.N. Doc, S/1994/674 (1992).

superior's power.⁴³³ Necessary and reasonable measures, of course, vary from case to case and the urgency with which a commander is expected to act depends partly on the seriousness and nature of the offense.⁴³⁴

Failure to act can include “failure to control troops, disregard of troop conduct, acquiescence in troop activity, dereliction of duty, general complicity (incitement, approval, aiding and abetting, accessory responsibility, conspiracy), failure to educate troops or suppress crime, failure to prosecute troops who violate the law, failure to enforce the law generally, failure to maintain troop discipline, failure to investigate incidents, failure to report incidents to higher authorities...”⁴³⁵

It is enough for a superior to fail to prevent or punish a crime. Although the duty to prevent concerns future crimes of subordinates while the duty to punish concerns past crimes of subordinates, punishing is not enough if prevention was available, but was not undertaken.⁴³⁶ The duty to prevent encompasses both that the superior knew that a crime was planned or that he had reasonable grounds to suspect that a crime would be committed.⁴³⁷

⁴³³ Prosecutor v. Krnojelac, Case No. IT-95-27 (March 15, 2002) ¶ 95; Prosecutor v. Delalic et al., Case No. IT-96-21-A, Appeal Judgment (February 20, 2001) ¶ 226.

⁴³⁴ Prosecutor v. Aleksovski, Case No. IT-95-14/1 (June 25, 1999) ¶ 81; Prosecutor v. Blaskici, Case No. IT-95-14-T, Appeal Judgment (July 31, 2004) ¶ 72.

⁴³⁵ Jordan Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 176 (1972) *Quoted in* Lieutenant Commander Weston D. Burnett, *Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra*, 107 MIL. L. REV. 71, 132 (1985).

⁴³⁶ Prosecutor v. Blaskici, Case No. IT-95-14-T (March 3, 2000) ¶ 336; Prosecutor v. Blaskici, Case No. IT-95-14-T, Appeal Judgment (July 31, 2004) ¶ 83.

⁴³⁷ Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-T (February 26, 2001) ¶ 445.

Nevertheless, causation is not required.⁴³⁸ Between the failure to act and the commission of the crime, such a nexus might be considered “inherent in the requirement that the superior failed to prevent the crimes which were committed by the subordinate.”⁴³⁹

Finally, the ad hoc international criminal tribunals split on the issue of whether a commander can be found guilty for the same crime on two grounds, command responsibility and other bases of responsibility such as an order. Even ICTY Chambers differ in this regard.⁴⁴⁰ On the upper level, rejecting an approach which considers the position of the accused, as a commander, an aggravating circumstance in the sentencing stage, the ICTY Appeal Chamber gave indictment priority to the active basis such as an order.⁴⁴¹ On the other hand, the ICTR convicted the same defendant based on two theories for the same conduct.⁴⁴²

4. Saddam Hussein's Role in the Environmental Offenses

Several questions might have been raised regarding whether Saddam Hussein intentionally committed crimes against the environment. Were his actions driven by pressing military circumstances? Did Saddam Hussein order a premeditated plan to be set in motion to commit those crimes? Was there a connection between the crimes and the

⁴³⁸ Prosecutor v. Delalic et al., Case No. IT-96-21 (November 16, 1998) ¶ 398.

⁴³⁹ Prosecutor v. Blaskic, Case No. IT-95-14-T (March 3, 2000) ¶ 339.

⁴⁴⁰ In Kordic and Cerkez case, the Court convicted Cerkez in both counts, while in Blaskic, the Court rejected such approach. See Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-T (February 26, 2001) ¶ 842; Prosecutor v. Blaskic, Case No. IT-95-14-T (March 3, 2000) ¶ 337.

⁴⁴¹ Compare between Prosecutor v. Blaskic, No. IT-95-14-T, Appeal Judgment Case (July 31, 2004) ¶ 91 & Prosecutor v. Furundizja, Case No. IT-95-17/1-T (December 10, 1998) ¶ 283.

⁴⁴² Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T (January 22, 2004).

activities of the Coalition forces? The answers to these questions can be found in Iraqi documents captured in Kuwait after the liberation of Kuwait.⁴⁴³

Saddam Hussein's case is similar to the case of most of the Nuremberg defendants. As put by Telford Taylor, Chief Prosecutor at the Nuremberg trials:

Few of the defendants committed atrocities with their own hands, and in fact they were rarely visible at or within many miles of the scene of their worst crimes. They made plans and transmitted orders, and the most compelling witnesses against them were the documents which they had drafted, signed, initialed, or distributed.⁴⁴⁴

To be admitted before international criminal tribunals, documentary evidence must be relevant and authentic, and have probative value.⁴⁴⁵ Iraqi documents captured after the liberation of Kuwait are likely to satisfy the above requirements for admission of evidence. Without question, Iraqi documents are relevant. They have probative value because they contain the plans for destruction and the names of the perpetrators.⁴⁴⁶ Concerning the authenticity of the documents, because originals were seized and because they were signed by well-recognized Iraqi officers, they would have been accepted before the court.⁴⁴⁷ This part will examine the destruction plan and the link between that plan and Saddam Hussein in light of those documents.

The destruction of Kuwaiti oil, a natural resource, was one of the strategic aims of the Iraqi aggression. According to captured Iraqi documents, this destruction plan was

⁴⁴³ This evidence was documented in detail through several references. See *Devastating Oil Well As Revealed by Iraqi Documents- Economic and Environmental Damage and Kuwaiti Efficacy in Protecting Oil Wealth*, Prepared by A Panel of Specialists (Center for Research and Studies on Kuwait 1997).

⁴⁴⁴ Telford Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10*, at 68 (G.P.O., Aug. 15, 1949).

⁴⁴⁵ See *infra*. App. 5.

⁴⁴⁶ All Iraqi documents show the sending persons and the receiving persons. In addition, all the documents show those individuals who are responsible for ordering and executing the destruction plan.

⁴⁴⁷ See *infra*. App. 3.

called the "Deferred Destruction Plan."⁴⁴⁸ Therefore, it is clear that the destruction was not inadvertent or imposed by pressing circumstances or the result of aerial bombardment by the Coalition forces as Iraqi authorities claimed. In short, it was a premeditated crime. It was calculated as part of the overall strategic plan of the Iraqi invasion.

Document 2⁴⁴⁹ proves that the task of the Destruction Guard Team, established by the Iraqi regime during the invasion, was not only to safeguard the oil wells against any internal or external danger, but to safeguard the explosives attached to the wells to guarantee their detonation. Document 3 required "...immediate consideration, prevention of infringements, and continuous surveillance in order to preserve these installations."⁴⁵⁰ In other words, all actions possible were to be taken to preserve the wells while they were in Iraqi possession, but all actions possible were to be taken to destroy them when they were to escape Iraqi possession.

A careful review of Iraqi documents reveals that the mechanism for implementing the "Deferred Destruction Plan" was accurate and comprehensive. A number of steps were planned to guarantee its execution. These steps were: identifying and preparing the targets designated for destruction; preparing materials and equipment used for destruction; selecting types of destruction methods; naming the destruction elements and specifying their responsibilities and duties; selecting the destruction guard groups; nominating the ignition groups; conducting drills of the destruction operations;

⁴⁴⁸ See *Devastating Oil Well As Revealed by Iraqi Documents- Economic and Environmental Damage and Kuwaiti Efficacy in Protecting Oil Wealth*, Prepared by A Panel of Specialists 28 (Center for Research and Studies on Kuwait 1997).

⁴⁴⁹ See *infra*. App. 3. Doc. 2.

⁴⁵⁰ See *infra*. App. 3. Doc. 3.

nominating patrols for follow up; and timing the implementation of the plan and its mechanism.⁴⁵¹

Identifying the targets was the first step in the plan. The targets, according to Iraqi documents, were oil wells and other oil installations including assembly centers and oil terminals. In addition, vital strategic installations such as power stations, water desalination plants, and petro-chemical industries were included as targets for destruction.⁴⁵² This step included determining suitable sites for the placement of explosives at the control valves at the underground well heads. These valves control the flow of oil from the well. Destroying them was calculated to result in a flow of oil so strong that it would be impossible to stop the leakage or to extinguish the resulting fire.⁴⁵³ This experience drew on the assistance of Field Engineering Corps personnel.⁴⁵⁴

Preparing the targets for destruction required two diagrams for placing and fixing the explosive charges at the head of the well.⁴⁵⁵ This process required daily inspection to ensure the presence of the explosives and the safety of the circuit. Materials and equipment used in the plan showed the intentionality of the offense. Explosives or filling bursting charges, electric destruction wires, igniters or kindlers, an ignition fuse, a safety cord, explosion capsules, a detonator, sand bags, and a wireless set were the materials used.⁴⁵⁶ In addition to daily inspection, an experiment was conducted on the explosive

⁴⁵¹ See *Devastating Oil Well As Revealed by Iraqi Documents- Economic and Environmental Damage and Kuwaiti Efficacy in Protecting Oil Wealth*, Prepared by A Panel of Specialists 53 (Center for Research and Studies on Kuwait 1997).

⁴⁵² See *infra*. App. 3. Doc. 9 Para. 1.

⁴⁵³ See *infra*. App. 3. Doc. 11.

⁴⁵⁴ See *infra*. App. 3. Doc. 10 Sec. (b) Sub.Sec. "Suggestion" Fourth.

⁴⁵⁵ See *infra*. App. 3. Doc. 13.

⁴⁵⁶ See *infra*. App. 3. Doc. 13.

charges to check for their safety and degree of explosiveness.⁴⁵⁷ Two basic methods of destruction were used as well as other alternatives.

These methods showed the keenness of the Iraqi regime to successfully achieve the plan. One of the two basic methods was an electric deferred-destruction circuit⁴⁵⁸ while the second method is called an "Ordinary Deferred-Destruction Circuit."⁴⁵⁹ Other alternatives were: destruction by the artillery batteries, destruction by direct or indirect shelling by tanks, and destruction by shots fired from the destruction guard in case other methods were impracticable.

To exercise full control and to limit responsibility to assure success of the deferred-destruction plan destruction personnel were named and their responsibilities and duties were specified. For instance, the "Destruction Guard Group" was established during the invasion. These groups of one or two infantry companies and one field engineering company were assigned to each oil compound.⁴⁶⁰

These groups had their own structure and mission. Every destruction group had a commanding officer whose title was Commanding Officer of the Destruction Guard or Commanding Officer of Protection. This Commanding Officer received the orders for

⁴⁵⁷ See *infra*. App. 3. Doc. 21.

⁴⁵⁸ This method operates by connecting a group of neighboring wells in a certain area, an oil assembly depot, or a number of destruction points in the vital installations to an electric destruction circuit. This was done through a network of electric wires which was connected to the detonator.

⁴⁵⁹ An ordinary method operates by using an ignition cord. This method was used when there were enough wires available for the electric circuit.

⁴⁶⁰ See *Devastating Oil Well As Revealed by Iraqi Documents- Economic and Environmental Damage and Kuwaiti Efficacy in Protecting Oil Wealth*, Prepared by A Panel of Specialists 111 (Center for Research and Studies on Kuwait 1997).

destruction and had other jobs.⁴⁶¹ In addition, other groups, called the "Regiment's Destruction Groups" or the "Ignition Groups," were established for each target. These groups were responsible for implementing orders for detonation or ignition. Assigning any other jobs to personnel of the destruction groups was prohibited. Prohibition shows the insistence of the Iraqi regime that the destruction plan should be implemented quickly and with maximum success. Moreover, these groups were headed by commanding officers.⁴⁶²

These groups conducted explosion experiments in order to determine the plan's positive and negative points. Times were set for these groups to implement the plan. According to Iraqi documents, the plan was to be carried out to prevent oil resources and other facilities from falling into enemy hands it and when the enemy threatened to end the Iraqi occupation.⁴⁶³

In case communication was disrupted and contact became impossible, the Commanding Officers in charge of destruction would make the decision. Otherwise, the plan would be implemented in the following sequence: the Division Commander would issue the destruction order to the Brigade Commander who in turn would issue it to the

⁴⁶¹ These jobs are: securing protection for the site against any attack by saboteurs or infiltrators, controlling wayfarers and refugees within the site, reporting the activities of preparing and fitting the targets, ensuring the presence of sentries day and night to foil possible enemy attempts to neutralize the plan, and when destruction orders were given, submitting a detailed report describing the effect and success of the destruction carried out.

⁴⁶² See *Devastating Oil Well As Revealed by Iraqi Documents- Economic and Environmental Damage and Kuwaiti Efficacy in Protecting Oil Wealth*, Prepared by A Panel of Specialists 141 (Center for Research and Studies on Kuwait 1997).

⁴⁶³ See *infra*. App. 3. Doc. 5.

Commander of the Destruction Guard Force who would relay it to the Commander of the Ignition Regiment Group.⁴⁶⁴

These steps are clear evidence that the destruction of oil and the petroleum infrastructure was intentional. The remaining question is whether there was a link between this plan and the then Iraqi leader, Saddam Hussein. In other words, did Saddam Hussein issue the order to commit these offenses? If not, is it possible that these offenses were committed without his knowledge? Would he have been responsible under the doctrine of command responsibility?

The extent of the Iraqi leader's role in the destruction plan is derived through direct and indirect (circumstantial) evidence. The indirect connection is based upon the following analysis: according to Iraqi documents, since the Republican Guard was responsible for implementing the destruction plan⁴⁶⁵ and these forces received their orders directly from the head of the Iraqi regime,⁴⁶⁶ Saddam Hussein masterminded this plan or ordered that it be created.

In addition to the indirect connection theory, there are several captured Iraqi documents which indicate that this plan was ordered by the Iraqi leader personally. For

⁴⁶⁴ See *infra*. App. 3. Doc. 4, 6.

⁴⁶⁵ (Document 5)The pertinent document item 2 provides "Appointing sabotage squads to mine the oil wells and power and electricity stations that have been prepared for deferred destruction, and preparing and finalizing all the requirements for their destruction, so that every group is stationed in its designated place in order to blow up these targets as soon as orders are issued." This document is a memo issued 10 days after the invasion by the Command of Nubu-khath Nasr Forces, Republican Guard Infantry Brigades 19, 20, 22 and 23, Artillery Command of Nubu-khath Nasr Forces of Republican Guard, Air Defense Command of Nubu-khath Nasr Forces of Republican Guard, Armored Battalion Command, Nubu-khath Nasr Forces of Republican Guard. This document shows the involvement of Republican Guard in implementing the Deferred Destruction Plan. See *infra*. App. 3. Doc. 5.

⁴⁶⁶ See *Devastating Oil Well As Revealed by Iraqi Documents- Economic and Environmental Damage and Kuwaiti Efficacy in Protecting Oil Wealth*, Prepared by A Panel of Specialists 39 (Center for Research and Studies on Kuwait 1997).

instance, Document 4 notes in its introduction that the directives concerning the destruction of oil wells and vital installations were “*at the orders of our leader the President in his meeting with the Armed Forces General Command on 13/1/1991*”(emphasis added).⁴⁶⁷ The same statement is prescribed in Document 6 which provides “*The leader our President ...in the meeting of the Armed Forces General Command on 13 January 1991 ordered the following:.....Oil installations prepared for destruction are to be blown up when the situation is too dangerous, in order not to leave them intact to the enemy as they should be completely devastated*” (emphasis added).⁴⁶⁸

In terms of the Iraqi documents, Saddam Hussein might have been responsible according to several theories. The basic theory is that Saddam Hussein issued the orders for destruction. It is clear that the orders for destruction were unlawful since they were issued without legal limitations or justifications such as military necessity.⁴⁶⁹ The only incentive for destruction was “*not to leave them [oil installations] intact to the enemy as they should be completely devastated*”(emphasis added).⁴⁷⁰ Saddam Hussein was responsible even though he was not present when the crimes were committed. These orders need not be in specific forms. Moreover, the message of the orders was clear. As a result, the defense of misinterpretation of these orders by subordinates would have been a long-shot defense.

⁴⁶⁷ Document 4 is a memo 2/122 dated 25/1/1991 and sent by Captain Amir Sotyati Mutlak, PP. Commander, Commando Battle Group, Division 42, and addressed to all companies. See *infra*. App. 3. Doc. 4.

⁴⁶⁸ Document 6 is a memo issued on 18 January 1991 by Lt. Colonel (Armor) Ghidan Khalf Abdullah, Commander of the Ninth Tank Battalion and addressed to all companies. See *infra*. App. 3. Doc. 6.

⁴⁶⁹ All Iraq documents show no “military necessity” requirement on the execution of the destruction plan. See *infra*. App. 3.

⁴⁷⁰ See *infra*. App. 3. Doc. 6.

As an alternative basis for responsibility, Saddam Hussein might have been assigned responsibility based on Common Design or Criminal Joint Enterprise (JCE). From the structure of the groups, their missions and the steps of the plan, it is obvious that “systemic form” exists here. Therefore, the court might have been convinced that a common plan was present and Saddam Hussein was part of this plan. The participation attributed to him was forming the plan and shaping the groups, or at least facilitating the plan by providing all available materials and technical assistance to the criminals.

The final basis of responsibility would have been command responsibility. This form of responsibility requires three elements. First, the superior-subordinate relation must exist between the accused and the executor of the offense. Indeed, Saddam Hussein, as the formal Iraqi president or leader of Iraqi forces, was the superior of any individual belonging to the Iraqi forces. From the Iraqi documents, this authority was not *de jure*, but *de facto*. This could have been inferred from statements contained in Iraqi documents mentioning his orders.

The second requirement for command responsibility is the extent of knowledge held by the accused. The prosecutor must prove that the accused knew or had reason to know his subordinate was about to commit such acts or had already done so. If the court would respect documents indicating a link between Saddam Hussein and the destruction plan,⁴⁷¹ it might have been sufficient for a court to make this finding. If not, the court might have been convinced that Saddam Hussein was involved through constructive knowledge. The court could have found Saddam Hussein’s constructive knowledge based upon several factors, such as: the number of illegal acts; the type of illegal acts; the scope

⁴⁷¹ See *infra*. App. 3. Doc. 4, 6.

of illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; the widespread occurrence of the acts; the tactical tempo of operations; the modus operandi of similar illegal acts; the officers and staff involved; and the location of the commander at the time.⁴⁷²

The crimes committed were extensive and widespread in terms of time and area. They involved the explosion of more than 700 oil wells and other illegal acts. In terms of time, the plan had been constructed at the beginning of the invasion and was executed at the end of the invasion. This plan, from construction through execution, lasted about 8 months.⁴⁷³

As mentioned before, the involvement of Republic Guard troops, the closest military troops to Saddam Hussein, and the high rank of the commanders (General and Colonels of different main sectors) participating in the deployment of the team in different roles, including planning, preparing, and executing,⁴⁷⁴ support the conclusion that Saddam Hussein was aware of the plan.

Concerning the modus operandi or pattern of commission of the crimes, there was similarity among all these illegal acts. This similarity can be seen in the methods used to

⁴⁷² Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780, U.N. Doc, S/1994/674 (1992).

⁴⁷³ A review of Iraqi documents shows that the earliest document relevant to the destruction plan was dated August 12, 1990, ten days after the invasion. This proves that the plan was established by the occurrence of the invasion or during the first days of the invasion. See *infra*. App. 3. Doc. 5.

⁴⁷⁴ The high-rank of the commanders can be inferred from several Iraqi documents. See *infra*. App. 3. Doc. 3, 5, 6, 10 and 11.

blow up the oil wells. All the explosions were created by the same type of explosive charges placed at the same location at each oil well.⁴⁷⁵

Regarding the geographical location of these illegal acts, they occurred in two parts of the Kuwaiti territory, the southern and northern parts of the country where the oil wells were located. In sum, these illegal acts and the damage they caused were widespread around the country. It is hard to claim that they were committed without the knowledge of the Iraqi leader. Finally, Saddam Hussein's location when the crimes were committed was not essential, since it is unlikely that a head of state would be at the scene of a war crime.

The last requirement of command responsibility is the superior's failure to take the necessary remedy either to prevent the crime from occurring or to punish the culprits. There is no doubt that Saddam Hussein was capable of stopping or preventing the crime from occurring, if he knew a subordinate was about to commit a crime. Saddam Hussein had complete authority to issue an order to prevent the occurrence of the crime. In addition, he had a legal obligation to act in order to stop the crime. If Saddam Hussein knew of the crime only after its commission, he was required to punish the culprits. He punished none of the culprits. The required remedy depends on the time of the defendant's knowledge; if the defendant knew before the commission of the crime, the defendant's claim that he or she punished the culprits is not an acceptable defense.

Saddam Hussein's knowledge before the commission of the crime, as mentioned before, could have been derived from several factors. Moreover, it could have been

⁴⁷⁵ See *infra*. App. 3. Doc. 13.

proved through his well-known threat before the beginning of the liberation war that if the United States forced him to leave Kuwait, he would burn up Kuwait's oil.⁴⁷⁶ Moreover, he clearly knew of the commission of the crime subsequently; the whole world knew from news reports and pictures.

II. International Legal Sources of Criminality

All the previous theories of responsibility are not sufficient if acts attributed to Saddam Hussein's subordinates were not criminal under international law. Under international law, the bases of criminality are:

(1) existing international conventions which consider the act in question an international crime; (2) recognition under Customary International Law that such conduct constitutes an international crime; (3) recognition under general principles of international law that such conduct is or should be deemed violative of international law and about which there is a pending draft convention before the United Nations; and (4) prohibition of such conduct by an international convention though not specifically stating that it constitutes an international crime and which is also recognized in the writings of scholars as such.⁴⁷⁷

The intention of the international community is a decisive factor in identifying the causes of criminality.⁴⁷⁸ To avoid a dilemma of whether there is a violation of principles of legality, this paper adopts the proposition that international crime is "any conduct which is designated as a crime in a multilateral convention recognized by a significant

⁴⁷⁶ Carlyle Murphy, *Iraqis Said to Set Oil Installation Ablaze*, WASH. POST, February 23, 1991, at A10

⁴⁷⁷ M. Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE. W. RES. J. INT'L L. 27, 28 (1983).

⁴⁷⁸ It should be foreseeable that the objectives of international criminal conventions are not only to criminalize certain conduct either at the international or national levels, but also to impose a duty to prosecute or extradite on states. Punishing those found guilty of international crimes, creating an environment of international judicial cooperation between states in criminal matters, setting a priority of exercising jurisdiction between states, and excluding a defense of superior orders can be considered other objectives of these conventions. Friedl Weiss, *Time Limits for the Prosecution of Crimes against International Law*, 53 BRIT. Y.B. INT'L L. 163 (1982).

number of states.”⁴⁷⁹ In addition, international crimes, unlike domestic crimes, require either an international or a transnational element; the act in question must have been committed against the international community or have affected the interests of more than one state.

Traditionally, international crimes are divided into several categories: crimes against peace, the crime of genocide, crimes against humanity, and war crimes.⁴⁸⁰ Violation of the laws on the use of force (crimes against peace) and violation of the laws on human rights (crimes against humanity) are not applicable to the case of Saddam Hussein’s crimes against the environment for several reasons.⁴⁸¹ This leaves war crimes

⁴⁷⁹ M. Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE. W. RES. J. INT’L L. 27, 29 (1983).

⁴⁸⁰ Rome Statute of the International Criminal Court art. 5, U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998).

⁴⁸¹ Crimes against peace are those acts conducted in violation of the laws on the use of force. Even though it has been argued that the use of oil during the Gulf War in 1990 represents an example of the use of force, this argument does not find support and clear evidence in international conventional law. See Anthony Leibler, *Deliberate Wartime Environmental Destruction: New Challenges for International Law*, 23 CAL. W. INT’L L. J. 67 (1992). Crimes against humanity are those acts which are deemed a serious violation of human rights. There are some views that link environmental protection to human rights. As a result of this linkage, an argument has been made that environmental devastation can be fought through provisions within the ICC framework dealing with genocide and crimes against humanity. See Linada A. Malone & Scott Pasternack, *Defending the Environment – Civil Society Strategies to Enforce International Environmental Law* 234-37 (Island Press 2006). In spite of the fact that linking the environment and human rights has its advantages, in some cases, a conflict between the two values is expected. For instance, the right of each family to decide the number and spacing of its children might be contradicted by the sustainable development concept which requires lowering the national birthrates. Dinah Shelton, *The Environmental Jurisprudence of International Human Rights Tribunals in Linking Human Rights and the Environment* 1, 1-2, 22 (Romina Pichlotti & Jorge Daniel eds., 2003). Moreover, it is said that “While the environment is known to have an impact on human health, little has been accomplished to include health criteria in the mushrooming international instruments on environmental protection so as to identify those environmental hazards that have a direct- and detrimental- bearing on human health. Katarina Tomasevski, *Environmental Rights in Economic, Social and Cultural Rights* 257, 267 (Kluwer Academic Publishers 1995). Nevertheless, human rights, including the right to have a clean environment, are various; developments in international criminal law have not yet reached the notion that protecting the environment is protecting a human right. Indeed, reaching the conclusion that the existing international law regime is not adequate to protect the environment, an argument has been made that environmental crimes should be prosecuted when they were conducted to accomplish another atrocity, such as genocide or crimes against humanity. Tara Weinstein, *Prosecuting attacks that destroy the Environment: Environmental Crimes and Humanitarian Atrocities?*, 17 GEO. INT’L ENVTL. L. REV. 697 (2005).

as the only viable basis for criminal prosecution of Saddam Hussein for environmental damages caused by his destruction of the Kuwaiti oil and petroleum infrastructure.⁴⁸²

Reviewing the actions of Saddam Hussein's subordinates during the invasion leads to the conclusion that Iraq's violations of the laws of armed conflict are many and can be categorized into three major groups: initiation of aggressive war; abuse of Kuwaiti citizens, foreigners, diplomatic personnel, and prisoners of war; and property damage and confiscation.⁴⁸³ In this part, the focus will be on those offenses committed against the environment, which primarily fall into the third category.

This paper concludes that the only source of law that could have been expected to define criminality in the case of Saddam Hussein's actions against the environment is found in provisions of the Fourth Geneva Convention of 1949 protecting property. Other conventions might be applicable to other and future cases, but not to the case of Saddam Hussein for several reasons.⁴⁸⁴

⁴⁸² In addition to these disciplines, the laws on the use of force and the laws on human rights, there is a third discipline, the International Environmental Law regime. This regime emerged following the World War II era and in response to the occurrence of serious accidents that had occurred. The fruit of this regime is the establishment of care standards and levels of liability in order to minimize a future environmental crisis and to clarify their legal framework. In considering the environmental devastation that has occurred in armed conflict, the International Environmental Law regime left to the laws of armed conflict the task of minimizing the possibilities that these actions would occur. Moreover, the International Environmental Law discipline failed to address the individual's criminal responsibility at the international level and left the use of a criminal remedy in some cases to national policies. A detailed study of the weakness of the of the international environmental law regime is included in appendix 4. See *infra*. App. 4.

⁴⁸³ Thomas R. Kleinberger, *The Iraqi Conflict: An Assessment of Possible War Crimes and the Call for Adoption of an International Criminal Code and Permanent International Criminal Tribunal*, 14 N.Y.L. SCH. J. INT'L L. & COMP. L. 69, 77-102 (1993).

⁴⁸⁴ These conventions are the Protocol I additional to the Geneva Conventions of August 12, 1949, the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques and the Convention for the Protection of Cultural Property in the Event of Armed Conflict. Protocol I would not apply to the Saddam Hussein case since Iraq was not party to the Protocol and these provisions protecting the environment were not considered part of international customary law at least when the actions were committed. The ENMOD Convention does not provide for a basis for criminality and the subject matter of the Cultural Property Convention does not cover oil wells. See *infra*. App. 6.

1. Geneva Convention IV (relating to the Protection of Civilian Persons in Time of War) 1949⁴⁸⁵

The first attempt to define war crimes was during the trials that followed World War II.⁴⁸⁶ The Control Council Law No. 10 Article II (1)(b) provides:

War Crimes [are] [a]trocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.....⁴⁸⁷

Wanton destruction of property, as a war crime, was included within the war crimes list prepared by the Commission on the Responsibility of the Authors of World War I⁴⁸⁸ Indeed, the destruction of property as a war crime had been identified even before World War I.⁴⁸⁹

After the horrors committed during World War II, the need for rules which protect victims became exigent. As a result, four Geneva Conventions were signed in 1949 by sixty- four nations. Those conventions extended protection to the wounded and sick in the

⁴⁸⁵ Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1949).

⁴⁸⁶ Rerigiusz Bierzanek, *War Crimes: History and Definition in International Criminal Law*, Vol. III, 87,93 (M. Cherif Bassiouni ed., Transnational Publishers, Inc. 2ed 1999).

⁴⁸⁷ Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, 3 Official Gazette Control Council for Germany 50-55 (1946).

⁴⁸⁸ Rerigiusz Bierzanek, *War Crimes: History and Definition in International Criminal Law*, Vol. III, 87, 91 (M. Cherif Bassiouni ed., Transnational Publishers, Inc. 2ed 1999).

⁴⁸⁹ At the initiative of U.S. President Theodore Roosevelt in 1907, the Hague conference was held. This conference resulted in four conventions that control the means of war. The first convention (Huge I) is related to asphyxiating gases, the second convention (Huge II) dealt with the use of expanding bullets, the third convention (Huge III) prescribes the rights of neutral powers and persons, and the fourth convention (Huge IV) describes the laws and customs of war on land. The conclusion of those conventions is restriction of the means that can be used during the armed conflict. The relevant convention, here, is the fourth. Although this convention does not explicitly protect the environment, this protection might be gained through indirect means. For instance, article 23 (g) prohibits destruction of property without military necessity. Article 3 of the fourth convention imposes monetary compensation for any violation of the convention provisions. This convention does not provide a basis for criminal responsibility and no one had been held liable according to article 3.

field (Geneva I), the wounded and sick at sea (Geneva II), prisoners of war (Geneva III), and civilians (Geneva IV). Principles stipulated by the Geneva and Hague conventions formalize the modern law of armed conflict.⁴⁹⁰ Both Kuwait and Iraq are parties to the Geneva conventions and are bound by their terms, including property destruction offenses.⁴⁹¹ The focus here will be on the Fourth Geneva Convention, primarily concerning civilian protection. Article 53 of Geneva Convention IV provides:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.⁴⁹²

Violation of article 53 is considered a grave breach of the Geneva Convention and these grave breaches are deemed criminal.⁴⁹³ The only accepted justification for property destruction during armed conflict is military necessity. As mentioned before, while the Iraqi regime could have claimed this justification, it did not exist.⁴⁹⁴ Therefore, the only remaining question is whether the elements of the offense, the destruction of properties, were present.

To establish violation of Article 53, several requirements are necessary. These requirements are divided into categories. The first category includes general requirements

⁴⁹⁰ Col. James P. Terry, *The Environment and the Laws of War: The Impact of Desert Storm*, 45 *NAVAL WAR COLLEGE REV.* 62 (1992).

⁴⁹¹ States party to the Geneva Conventions are available at <http://www.icr.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visit July 20, 2007).

⁴⁹² Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1949).

⁴⁹³ Article 147 provides “Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention..... and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.” Article 146 requires the contracting parties or states to enact domestic legislation criminalizing the grave breaches of the convention. Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1949).

⁴⁹⁴ See *supra*. Ch. I. Sec. IV.

such as the existence of both armed conflict and the nexus between armed conflict and the alleged crimes or actions.⁴⁹⁵

The existence of armed conflict is a precondition to the application of the article. An armed conflict exists “Whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”⁴⁹⁶ Moreover, the second general requirement is the existence of a nexus between the alleged crimes and the armed conflict. This nexus exists when the crime is committed because of the armed conflict or as a result of the armed conflict.

Both requirements, armed conflict and nexus, are present in the case of the Iraqi invasion of Kuwait. It is clear from decisions issued by the U.N. Security Council that Iraq’s invasion or occupation of Kuwait was “...a resort to armed force between States.”⁴⁹⁷

In addition, the crime against the environment committed by the Iraqi forces requires a nexus between the criminal act and armed conflict. Explaining this requirement, the ICTY Trial Chamber ruled that “There must be an obvious link between the criminal act and the armed conflict. Clearly, if a relevant crime was committed in the course of fighting or the take-over of a town during armed conflict, for example, this would be sufficient to render the offense a violation of international humanitarian law.

⁴⁹⁵ Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-T (February 26, 2001) ¶ 22-35.

⁴⁹⁶ Adam Roberts, What is a Military Occupation?, 53 BRIT. Y.B. INT’L L., 249, 274 -275 (1984).

⁴⁹⁷ Prosecutor v. Tadic, Case No. 94-1- AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeal Chamber (October 2, 1995) ¶ 79-84.

Such a direct connection to actual hostilities is not, however, required in every situation.”⁴⁹⁸

In applying this requirement to Saddam Hussein’s case, it was likely that a court would have found that this nexus requirement had been met. From earlier discussion,⁴⁹⁹ most of the Iraqi documents suggest that Saddam Hussein’s action, blowing up oil wells, was committed in the course of fighting. In addition, this action, as previously mentioned, was part of a policy or strategy followed by Saddam Hussein during the Gulf War of 1991. All Iraqi documents showed that this action was committed based upon a deliberate destruction plan ordered by Saddam Hussein. This plan was deferred during the invasion until the appropriate time for its execution. That time was the time of war as one of the Iraqi documents suggests.⁵⁰⁰

In addition to the general requirements, Article 53 protects only property within occupied territories. The ICTY Trial Chamber states:

Article 53 describes the property that is protected under the Convention in terms of the prohibitions applicable in the case of an occupation. Accordingly, an occupation is necessary in order for civilian property to be protected against destruction under Geneva Convention IV. The only provisions of Geneva Convention IV which assist with any definition of occupation are Articles 2 and 6. Article 2 states: "The Convention shall also apply to all cases of partial or total occupation . . . even if the said occupation meets with no armed resistance" while Article 6 provides that Geneva Convention IV "shall apply from the outset of any conflict or occupation mentioned in Article 2."⁵⁰¹

⁴⁹⁸ Prosecutor v. Delalic et al., Case No. IT-96-21 (November 16, 1998) ¶ 193.

⁴⁹⁹ See Ch. III. Sec. (I)(d).

⁵⁰⁰ See *infra*. App. 3 Doc. 5.

⁵⁰¹ Prosecutor v. Ivica Rajic, Case No. IT-95-12, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence (September 13, 1996); See also Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-T (February 26, 2001).

The protection of property conferred by the Geneva conventions is less than the protection conferred by the Hague Conventions because Article 53 protects only property in occupied territory from destruction by an occupying power, while the Hague Convention protects enemy property more generally.⁵⁰² Occupied territory is defined as existing “when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”⁵⁰³ There is no doubt that Iraq’s action in interfering with Kuwait’s territory is considered an occupation.⁵⁰⁴

Property encompassed by Article 53 includes “real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations.”⁵⁰⁵ This raises the question of whether natural resources, such as oil, soil, forest, or air, are considered property.

⁵⁰² It is held that “...[i]n order to dissipate any misconception in regard to the scope of Article 53, it must be pointed out that the property referred to is not accorded general protection ; the Convention merely provides here for its protection in occupied territory. The scope of the Article is therefore limited to destruction resulting from action by the Occupying Power. It will be remembered that Article 23(g) of the Hague Regulations forbids the unnecessary destruction of enemy property; since that rule is placed in the section entitled “hostilities,” it covers all property in the territory involved in a war; its scope is therefore much wider than that of the provision under discussion, which is only concerned with property situated in occupied territory...” See *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-T (February 26, 2001) ¶ 337.

⁵⁰³ Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land art. 42, 187 CTS 227 (1907); Adam Roberts, *What is a Military Occupation?*, 53 BRIT. Y.B. INT’L L. 249, 274 -275 (1984).

⁵⁰⁴ This fact can be inferred from these words prescribed by the Security Council’s decisions concerning the Kuwait-Iraq case. These decisions include either the word “invasion” or “occupation.” See for instance, S.C. Res. 660, U.N. SCOR, 45th Sess., 2932st mtg, U.N. Doc. S/RES/660 (1990); S.C. Res. 661, U.N. SCOR, 45th Sess., 2933st mtg, para. 3, U.N. Doc. S/RES/661 (1990); S.C. Res. 662, U.N. SCOR, 45th Sess., 2934st mtg, P.1, U.N. Doc. S/RES/662 (1990); S.C. Res. 665, U.N. SCOR, 45th Sess., 2938st mtg, U.N. Doc. S/RES/665 (1990).

⁵⁰⁵ *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-T (February 26, 2001) ¶ 191.

The Hague Conventions or Regulations, as part of international customary law,⁵⁰⁶ considered forests and agricultural estates as protected properties.⁵⁰⁷ In addition, raw materials were included within the meaning of property in the World War II trials.⁵⁰⁸ During the World War II trials, protecting the environment through the provisions for protecting properties was obvious.⁵⁰⁹ Therefore, it is reasonable to conclude that these materials are included within the meaning of properties.

Offenses against property, like other war crimes, can be committed through plunder or destruction. Destruction of property can be done through the means of explosive “dynamite.”⁵¹⁰ To be a war crime, destruction of property must be extensive and committed wantonly.⁵¹¹ The standard of the extent of the damage is determined by the facts of the case. A single act might be sufficient in some cases.⁵¹²

In determining when the destruction of property is extensive, the ICTY Trial Chamber ruled:

[T]he crime of extensive destruction of property as a grave breach comprises the following elements, either: (i) Where the property destroyed is of a type accorded general protection under the Geneva Conventions of 1949, regardless of whether or not it is situated in occupied territory; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction; or (ii) Where the

⁵⁰⁶ Law Reports of Trials of War Criminals, Vol. X, The Krupp Trial, Case No.58, P. 133.

⁵⁰⁷ Hague Convention (IV) article 55 provides “The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.” Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land, 187 CTS 227 (1907).

⁵⁰⁸ See Law Reports of Trials of War Criminals, Vol. X, The Krupp Trial, Case No.58, P. 69.

⁵⁰⁹ For instance, monuments were considered property during these trials. See Law Reports of Trials of War Criminals, Vol. IX, The Trial of Karl Lingens, Case No.51, P. 67.

⁵¹⁰ See Law Reports of Trials of War Criminals, Vol. IX, The Trial of Hans Szabados, Case No.49, P. 59.

⁵¹¹ Prosecutor v. Blaskić, Case No. IT-95-14-T (March 3, 2000) ¶ 157.

⁵¹² Prosecutor v. Blaskić, Case No. IT-95-14-T (March 3, 2000) ¶ 157.

property destroyed is accorded protection under the Geneva Conventions, on account of its location in occupied territory; and the destruction occurs on a large scale; and (iii) the destruction is not justified by military necessity; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.⁵¹³

In applying the previous requirements for violation of article 53 to Saddam Hussein's action during the invasion, one sees that all the required elements to establish offenses are present. First, the action was taken extensively since it was taken on a large scale on occupied territory with the intent to destroy without the legally accepted justification of military necessity. Second, the offense was directed toward natural resources and the environment which is included within the meaning of property according to conventional, customary and judicial international law. Finally, this action was committed during an international armed conflict and with a link or connection to this armed conflict.

However, the Fourth Geneva Convention contains no provisions for penalties. Therefore, the question that might have been raised here is procedural; does conviction based upon this Convention violate the principles of legality? This issue will be reviewed in the next chapter.⁵¹⁴

Conclusion and Observations

In international law, criminal responsibility concerning the violation of the laws of armed conflict encompasses both superiors and subordinates. Superior responsibility includes political and military leaders. This responsibility can be based upon issuing unlawful orders, joint criminal enterprise and command responsibility.

⁵¹³ Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-T (February 26, 2001) ¶ 341.

⁵¹⁴ See *infra*. Ch. IV, Sec. I.

The theory of unlawful orders requires that a superior use his position which has empowered him with the authority to be followed by subordinates. This use entitles him to issue orders for which he is responsible as long as *mens rea* is present.⁵¹⁵ The joint criminal enterprise theory, developed by ad hoc international criminal tribunals, requires the existence of an organized system of ill-treatment.⁵¹⁶ Under the theory of command responsibility, a superior is criminally responsible if he knew or had reason to know that a subordinate was about to commit a criminal action or had done so and he failed to take the necessary and reasonable measures to prevent that act or to punish the perpetrator.⁵¹⁷

Applying any of these theories to Saddam Hussein's actions, supported by documentary evidence captured after the liberation of Kuwait, it is reasonable to conclude that the then Iraqi president was criminally responsible for the environmental devastation that occurred during the Gulf War of 1991.⁵¹⁸

As a prerequisite for the then Iraqi president's criminal responsibility, actions committed by Saddam Hussein's subordinates against the environment must be criminal under international law. If the view that international criminality requires an international conventional basis is accepted, that basis exists in Article 53 of the Fourth Geneva convention provisions protecting properties.⁵¹⁹ The argument that conviction based upon this convention might violate the principle of *nulla poena sine lege* or no punishment without a law authorizing it will be examined in the next chapter.

⁵¹⁵ See *supra*. Ch. III, Sec. I (a).

⁵¹⁶ See *supra*. Ch. III, Sec. I (b).

⁵¹⁷ See *supra*. Ch. III, Sec. I (c).

⁵¹⁸ See *supra*. Ch. III, Sec. I (d).

⁵¹⁹ See *supra*. Ch. III, Sec. II (a).

Chapter IV

The Procedural Aspects of International Criminal Prosecution

- I. The Legality Issue**
- II. The Jurisdiction Issue**
 - 1. The International Court of Justice**
 - 2. International Criminal Court**
 - 3. Ad Hoc Tribunals' Jurisdiction**
- III. The Immunity Issue**
- IV. The Statute of Limitations Issue**
- V. The Right to Be Tried Without Undue Delay**
- VI. The Issue of the Transfer of Defendants to International Tribunals**

Conclusion and Observations

Chapter IV

The Procedural Aspects of International Criminal Prosecution

International custom has recognized the right of a victorious power to bring to trial individual members of enemy armies accused of violating international laws of war.⁵²⁰ Recently, this right to prosecute has been exercised by the United Nations Organization.⁵²¹

Assuming that the political will to try the now-deceased Saddam Hussein for environmental offenses had existed internationally, several procedural issues might have arisen if a trial had been proposed. These issues would have involved the legality of punishment, jurisdiction, immunity, a statute of limitations, the right to be tried without undue delay and the issue of the transfer of the defendant to an international tribunal. These issues are analyzed separately in this chapter. Part I deals with the principle of legality in the context of international law. Part II reviews the capability of the existing international judicial bodies to try Saddam Hussein's case. Parts III and IV grapple with the issues of the defendant's immunity and the statute of limitations. Part V reviews the right to be tried without undue delay, a right which is not recognized by some national legal systems. Finally, in Part VI, the discussion focuses on the ability of international tribunals to gain custody of defendants.

⁵²⁰ Rerigiusz Bierzanek, *War Crimes: History and Definition in International Criminal Law*, Vol. III, 87, 89 (M. Cherif Bassiouni ed., Transnational Publishers, Inc. 2ed 1999).

⁵²¹ This right is confirmed by creating international criminal tribunals (Former Yugoslavia and Rwanda) by the U.N. Security Council to try the suspected war criminals.

I. The Legality Issue

The principle of legality is one of the fundamental principles in national criminal justice systems around the world. Its source is Roman law.⁵²² This principle prohibits retroactive penal legislation. This prohibition includes creation both of new offenses, “*Nullum Crimen Sine Lege*,” and of new punishments, “*Nullum Crimen Poena Legali*,” presumably heavier punishments.⁵²³ This part of the paper concerns the second pillar of the principle, *Nullum Crimen Poena Legali*, or no punishment without existing law.

The purposes of the principle are various.⁵²⁴ In the context of international criminal law, the importance of the principle is shown by the number of international instruments including it. For instance, article II, paragraph 2 of the Universal Declaration of Human Rights of 1948 provides:

Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed.⁵²⁵

Other international and regional human rights instruments contain this principle.⁵²⁶

Recognizing its importance, the ICTY Trial Chamber wrote, “Without the satisfaction of these principles [no crime and punishment without law] no criminalization process can be

⁵²² M. Cherif Bassiouni, *Introduction to International Criminal Law* 183 (Transnational Publishers 2003).

⁵²³ The principle of legality is not applicable to legislation which is deemed to be in favor of the accused. Dr. Fayez Al-Zafeery & Dr. Mohammed Abu-Zoubar, *Al-Wajeez Fee Shrah Al-Qwa'ed Al-Amaa* [The Handbook of Explaining General Rules] 134 (2003).

⁵²⁴ The purposes are “to enhance the certainty of the law, provide justice and fairness to the accused, achieve the effective fulfillment of the deterrent function of the criminal sanction, prevent abuse of power and strengthen the Rule of Law.” See M. Cherif Bassiouni, *Introduction to International Criminal Law* 180 (Transnational Publishers 2003).

⁵²⁵ Universal Declaration of Human Rights, U.N. GAOR, 3rd Sess., 183 plen. Mtg., U.N. Doc. E/CN.4/AC.1/SR.2 (1948).

⁵²⁶ International Covenant of Civil and Political Rights art. 15, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); 999 U.N.T.S. 171; 6 ILM 368 (1967); Convention for the Protection of Human Rights and Fundamental Freedoms art. 7, ETS 5; 213 U.N.T.S. 221(1950); African Charter on Human and Peoples' Rights art. 7, O.A.U. Doc. CAB/LEG/67/3 rev. 5; 1520 U.N.T.S. 217; 21 ILM 58 (1982); American Convention on Human Rights art. 9, O.A.S. Treaty Series No. 36; 1144 U.N.T.S. 123; 9 ILM 99 (1969).

accomplished and recognized.”⁵²⁷ The importance of the principle in the Rome Statute is manifested by its occurrence in several provisions of the Statute.⁵²⁸

Nationally, the principle of *nullum crimen poena legali* requires that the punishment for a criminal act must be prescribed in advance in a written law enacted by a competent legislature.⁵²⁹ Internationally, while the application of the principle of *nullum crimen poena legali* partly reflects the national application,⁵³⁰ it does not apply in the same strict sense. This was reaffirmed recently when the ICTY Trial Chamber provided that “It could be postulated, therefore, that the principles of legality [*nullum crimen poena legali*] in international criminal law are different from their related national legal systems with respect to their application and standards.”⁵³¹ As a result, the ICTY Appellate Chamber ruled that “individual criminal responsibility is not barred by the absence of treaty provisions on punishments for breaches.”⁵³²

There are several reasons for applying this principle differently in national and international law regimes. These reasons relate to the nature of the international law

⁵²⁷ Prosecutor v. Zejnil Delali, Case No. IT-96-21-T, Judgment (Nov. 16, 1998) ¶ 402.

⁵²⁸ Articles 11, 22, 23 and 24 of the Rome statute. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (1998).

⁵²⁹ Dr. Fayez Al-Zafeery & Dr. Mohammed Abu-Zoubar, *Al-Wajeez Fee Shrah Al-Qwa'ed Al-Amaa* [The Handbook of Explaining General Rules] 99 (2003).

⁵³⁰ Several national rules relating to the legality principle such as (1) the requirement of strict judicial interpretation, (2) if the text is not explicit, the judge cannot create law, and (3) if the text is ambiguous, it must be interpreted in favor of the accused, were reaffirmed by ICTY. See Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment (Nov. 16, 1998) ¶ 410-413. Moreover, it is ruled that the principles of legality do not apply to procedures and evidence matters. See Prosecutor v. Dusko Tadic, Case No. IT-99-I-A-R77, Appeal Chambers Judgment on Allegations of Contempt against Prior Counsel Milan Vujin, (January 31, 2000) ¶ 24. It seems that the Court did not consider the issue broadly. In some cases, issuing an evidence rule imposing upon the accused a heavier burden of proof concerning his excuse or defense, like military necessity, may affect the existence of the offense which violates the principle of legality. Therefore, excluding a defense explicitly or implicitly, by imposing a heavier burden of proof, represents a clear violation of the principle. For instance, during the World War II trials, excluding the defense of “superior orders” was a clear violation of the principle of legality. M. Cherif Bassiouni, *Introduction to International Criminal Law* 159 (Transnational Publishers 2003).

⁵³¹ Prosecutor v. Zejnil Delali, Case No. IT-96-21-T, Judgment (Nov. 16, 1998) ¶ 405.

⁵³² Prosecutor v. Dusko Tadic, Case No. IT-94-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995) ¶ 128.

system. Among international law sources, the principle applies only to conventions. Since these conventions are drafted by diplomats, who are not experts in the field of international criminal law, and since there is no uniformity of drafting techniques, it is reasonable to expect that these conventions will not meet the principal requirement that they be specific and unambiguous in respect of punishments.⁵³³

Lack of uniformity in the punishment policy between states also contributes to the absence of penalty provisions in international conventions.⁵³⁴ The assumptions of international law that international criminal rules will be enforced through national systems, and that these national systems will redraft the rules in styles that satisfy the requirements of different states are additional factors that lead to different applications of the principle of legality in the national and international contexts.⁵³⁵

In international criminal law, it is not necessary for an individual to know in advance the precise punishment for a crime, so long as his actions constitute a crime of extreme gravity for which there will be severe punishment.⁵³⁶ This does not completely address the seriousness of the Fourth Geneva Convention's lack of penalty provisions for crimes against property. If Saddam Hussein had been charged with environmental war crimes in a special international tribunal, he could have raised the legality issue, even if the instrument creating the tribunal had prescribed a punishment.

To address this issue at the international level, a commentator argued that “[The absence of specific penalties provisions in international criminal instruments] confirms a

⁵³³ M. Cherif Bassiouni, *Introduction to International Criminal Law* 201 (Transnational Publishers 2003).

⁵³⁴ Antonio Cassese, *International Criminal Law* 157 (Oxford University Press 2003).

⁵³⁵ M. Cherif Bassiouni, *The Sources and Content of International Criminal Law in International Criminal Law*, Vol. I, 3, 103 (M. Cherif Bassiouni ed., Transnational Publishers, Inc. 2ed 1999).

⁵³⁶ Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May- July 26 1996' U.N. Doc. A/51/10, at 29-30.

customary rule of international practice that penalties by analogy [to national punishments] are valid.”⁵³⁷ A problem with this approach might occur, however, when there is no national legislation criminalizing the conduct which is considered an international crime. While national systems differ in adopting the analogy approach, differences between national and international systems discussed earlier suggest that this is of little importance in using it at the international tribunal.⁵³⁸

A problem in resorting to national sentencing systems is illustrated by Rwanda. The ad hoc international criminal tribunal for Rwanda accepted the view that “The principle of legality concerning the punishment will be respected if the international tribunals harmonize their sentences with those in force in the territories where the crimes were committed.”⁵³⁹ The tribunal statute contained reference to the practice of sentencing within territories where the crimes were committed.⁵⁴⁰ This reference, incorporating national sentence systems, led to various difficulties and uncertainties.⁵⁴¹

⁵³⁷ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 158 (Kluwer Law International 1999).

⁵³⁸ In terms of the permissibility of analogy in criminal matters including penalties, the application of the principle differs among national criminal justice systems. The treatment of the principle can be divided into three directions. The first group of states permits judicially created crimes through interpretative analogy while the second group allows analogy for foreseeable analogous crimes. Followed by most national modern criminal justice systems, the third group of states disallows using analogy entirely, including the penalties issue. M. Cherif Bassiouni, *Introduction to International Criminal Law* 179-180 (Transnational Publishers 2003).

⁵³⁹ Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 *MICH. J. INT'L. L.* 783, 824 (1995).

⁵⁴⁰ Statute of the International Criminal Tribunal for Rwanda art. 23, S.C. Res. 955, U.N. SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 *ILM* 1598 (1994).

⁵⁴¹ Regarding these problems, professor Schabas said, “Neither the Statute nor the Rules of Procedure and Evidence suggested a timeframe for the application of ‘general practice.’ Was the reference to the law at the time of the crime, or to the law at the time of the trial? Nor was it evident whether the Statute contemplated the actual practice of the court in sentencing offenders, or simply the legislation in force.” In addition, reviewing the practice of both tribunals in sentencing issue, the author concluded that this approach results in more severe sentences. Therefore, the principle of legality, instead of being in favor of the accused, became prejudicial to the interests of the accused. See William A. Schabas, *Preserve Effects of the Nullus Poena Principle: National Practice and the Ad Hoc Tribunals*, *EJIL* Vol. 11 No.3 521, 26 (2000).

To avoid these difficulties, judicial decisions held that the approach was not mandatory.⁵⁴²

The Rwandan experience suggests that leaving punishments for international crimes to national legal systems might not serve the interests or goals which international criminal law aims to accomplish. Probably, this is because the objectives of international criminal law, regarding punishment, differ from those of domestic laws.⁵⁴³ Moreover, even within national systems, the objectives of punishments differ from one territory to another or within the same jurisdiction from time to time.⁵⁴⁴ Therefore, this difference does not sustain the certainty of law as an objective of international criminal law. Rwanda's objection, in the Security Council, to excluding the death penalty punishment from its international tribunal statute represents the best example of this contradiction in goals.⁵⁴⁵

In the context of direct enforcement or international criminal trials, Professor Mohammed Cherif Bassiouni said that “[T]he requirements of the principles of legality, *nulla poena sine lege*, is that the penalty be specific.”⁵⁴⁶ Since the principle of *nullum crimen poena legali* does not apply to some sources of international law, such as custom

⁵⁴² Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgment and Sentence (Sep. 4, 1998) ¶ 23.

⁵⁴³ Although Rwanda claimed, supporting an argument for including the death penalty within the ICTR statute, that it would be unfair to expose suspected war criminals tried before its national courts to execution, while others tried before the international tribunal would be subject only to life imprisonment, it appears that the real motive for Rwanda's argument was revenge on those criminals who were at the same time political opponents. See William A. Schabas, Preserve Effects of the *Nulla Poena* Principle: National Practice and the Ad Hoc Tribunals, EJIL Vol. 11 No.3 521, 27 (2000). On the contrary, the U.N. position was formulated out of fear that this punishment would be used as a tool for extralegal execution of political opponents. William A. Schabas, War Crimes, Crimes against Humanity and the Death Penalty, 60 ALB. L. Rev. 733, 740 (1997).

⁵⁴⁴ Antonio Cassese, International Criminal Law 157 (Oxford University Press 2003).

⁵⁴⁵ See William A. Schabas, Preserve Effects of the *Nulla Poena* Principle: National Practice and the Ad Hoc Tribunals, EJIL Vol. 11 No.3 521, 27 (2000).

⁵⁴⁶ M. Chreif Bassiouni, The Sources and Content of International Criminal Law *in* International Criminal Law, Vol. I, 3, 103 (M. Chreif Bassiouni ed., Transnational Publishers, Inc. 2ed 1999).

and laws created by precedents,⁵⁴⁷ and since national sentencing systems might not achieve the goals of the international criminal law system, then international customary law might be a suitable source to determine a fair and globally accepted punishment for international crimes, including war crimes, consistent with the legality principle.

Although during the World War II trials several authorities considered the death penalty acceptable for those convicted of war crimes,⁵⁴⁸ this is not the case in current international law. Developments occurring in international human rights instruments have caused a change in the trend of the international community toward appreciation of the death penalty as an appropriate punishment for war crimes.⁵⁴⁹ This development has led to the abolition of the death penalty in recent international criminal trials, ad hoc tribunals and the ICC, and in some national legal systems.⁵⁵⁰

The Universal Declaration of Human Rights of 1948, for instance, did not make any exception to the right to life.⁵⁵¹ On the contrary, article 2 of the European Convention

⁵⁴⁷ Machteld Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* 216 (Transnational Publishers 2002).

⁵⁴⁸ See William A. Schabas, *International Sentencing: From Leipzig (1923) to Arusha (1996) in International Criminal Law*, Vol. III, 171 (M. Cherif Bassiouni ed., Transnational Publishers, Inc. 2ed 1999).

⁵⁴⁹ William A. Schabas, *War Crimes, Crimes against Humanity and the Death Penalty*, 60 ALB. L. Rev. 733, 769-70 (1997).

⁵⁵⁰ It can be inferred from the trend of international instruments relating to human rights, the right to life and the right not to be subject to cruel, inhuman, and degrading treatment or punishment. For countries' position toward the death penalty, see William A. Schabas, *The Abolition of the Death Penalty in International Law* 155-210 (Cambridge University Press 2002); Rome Statute of the International Criminal Court art. 77, U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 24, S.C. Res. 827, U.N. SCOR 48th sess., 3217th mtg. at 1-2 (1993); Statute of the International Criminal Tribunal for Rwanda art. 23, S.C. Res. 955, U.N. SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994).

⁵⁵¹ Universal Declaration of Human Rights art. 3, U.N. GAOR, 3ed Sess., 183 plen. Mtg., U.N. Doc. E/CN.4/AC.1/SR.2 (1948). The only exception which can be inferred regarding punishment from the Declaration is article 5 which stipulates "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Since the death penalty is a controversial issue in international law, it is logical to assume that the death penalty would not fall within the prohibition of Article 5 unless it were applied in an arbitrary manner.

on Human Rights made the death penalty an exception to this right.⁵⁵² Both the Convention for the Prevention and Punishment of the Crime of Genocide and the Fourth Geneva Convention impose upon states a duty to inflict effective or appropriate penalties regarding their violation.⁵⁵³

Later on, the death penalty disappeared from instruments constituting international criminal judicial bodies.⁵⁵⁴ It does not follow from this international movement toward elimination of the death penalty, that all national legal systems have eliminated this penalty. But the movement suggests that this penalty will not be acceptable to an international criminal tribunal created by the U.N. Organization. Thus, it is probable that punishment for those who commit war crimes, including crimes against property, would not have reached the level of death penalty punishment if an ad hoc international criminal tribunal had been created in Saddam Hussein's case. Inclusion of the death penalty in the statute of a contemporary ad hoc criminal tribunal violates the principle of *nullum crimen poena legali*.

II. The Jurisdiction Issue

Jurisdiction means "A court's power to decide a case or issue a decree."⁵⁵⁵ Jurisdiction is a precondition for any court to try any case and the existence of jurisdiction is an aspect of international as well as of national prosecution. However,

⁵⁵² European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2 (1), Nov. 4, 1950, 78 U.N.T.S. 222, 224 (entered into force Sep. 3, 1953).

⁵⁵³ Convention for the Prevention and Punishment of the Crimes of Genocide art. V, Dec. 9, 1948, 78 U.N.T.S. 277, 280 (entered into force Jan. 12, 1951); Geneva Convention Relative to the Protection of the Civilians in Time of War art. 147, Aug. 12, 1949, 75 U.N.T.S. 287, 388 (entered into force Oct. 21, 1950).

⁵⁵⁴ Rome Statute of the International Criminal Court art. 77, U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 24, S.C. Res. 827, U.N. SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993); Statute of the International Criminal Tribunal for Rwanda art. 23, S.C. Res. 955, U.N. SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994).

⁵⁵⁵ Black's Law Dictionary 855 (7th ed. 1999).

since a complete judicial system does not exist in the international criminal law regime and since principles of legality do not apply to the jurisdiction issue,⁵⁵⁶ in most international war crimes cases, the court's jurisdiction was established after the commission of the crime. This phenomenon will gradually disappear after the creation of the ICC.

Examining the jurisdiction issue under international law requires reviewing the existing international judicial bodies and their capacity to try the case of Saddam Hussein. This does not negate the possibility of a trial of Saddam Hussein within a national judicial system. Indeed, some war crimes trials have been conducted before either internationally modified municipal courts, ad hoc national tribunals or domestic courts.

A comparison of national and international trials for international crimes leads to the conclusion that guarantees of impartiality in the punishment of war crimes can be achieved in one of three ways: (1) an International Criminal Court; (2) appropriate modifications of the organization of the municipal courts; or (3) a system of quasi-international courts.⁵⁵⁷ The existing international courts which will be reviewed in this part of the paper are the International Court of Justice, the International Criminal Court and the Ad Hoc International Tribunals for both the former Yugoslavia and Rwanda.

1. The International Court of Justice

The International Court of Justice or the ICJ is the principal judicial organ of the United Nations Organization. The Court is a permanent court to which states may bring

⁵⁵⁶ Machteld Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege* and the Subject Matter Jurisdiction of the International Criminal Court 210 (Transnational Publishers 2002).

⁵⁵⁷ H. Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT'L L. 58, 80 (1944).

their disputes and which is empowered to provide United Nations organs and specialized agencies with advisory opinions. The Court's decision is binding on the parties in a case, but not otherwise. The Court is a treaty-based institution, created and regulated by the United Nations Charter and the Statute of the Court. Therefore, the Court's jurisdiction is governed by these instruments.

Article 34 (1) of the Statute of the Court limits the Court's jurisdiction by providing that "Only States may be parties to cases before the Court."⁵⁵⁸ As a result, no individual or non-governmental organization may bring a case before the Court against an individual, a non-governmental organization, or a state. Some argue, however, that the jurisdiction of the International Court of Justice should be open to cases brought by states against individuals.⁵⁵⁹ Nevertheless, the Court does not have a jurisdictional basis upon which to decide criminal cases.⁵⁶⁰ Perhaps the Court may consider criminal cases against states, if and when the criminal responsibility of states becomes a recognized norm under international law. The ICJ could not have tried Saddam Hussein's case due to lack of subject matter jurisdiction.

2. International Criminal Court

Since the Nuremberg and Tokyo trials, it has taken the international community nearly fifty years to create international institutions to bring individuals responsible for international crimes to account. In 1994, the International Law Commission submitted a

⁵⁵⁸ Statute of the International Court of Justice art. 34 (1), 3 Bevens 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945).

⁵⁵⁹ Mark W. Janis, *Individuals and the International Court in The International Court of Justice-Its Future Role after Fifty Years* 205, 209-12 (A.S. Muller ET AL. eds., Martinus Nijhoff Publishers 1997).

⁵⁶⁰ Since the only parties before the Court are states and since the criminal responsibility of states does not exist at the international level at the current time, the Court has no jurisdiction to review this type of case.

draft statute for an international criminal court to the United Nations General Assembly. After several years of negotiations, the General Assembly convened a Diplomatic Conference of Plenipotentiaries, which met in Rome from June 15 to July 17, 1998, to finalize and adopt an international convention establishing an international criminal court. After receiving the required sixty ratifications, the International Criminal Court Statute, or so-called Rome Statute, entered into force in April 2002.⁵⁶¹

The ICC is the first attempt of the international community to create a criminal court with a general jurisdictional scope and application. Unlike the ICC, the International Military Tribunal at Nuremberg had a personal jurisdiction⁵⁶² while ad hoc tribunals, such as those in the Yugoslavia and Rwanda, have territorial and personal jurisdiction.

Before examining the International Criminal Court's jurisdiction, it is important to understand that a state's jurisdiction is determined differently from an international tribunal's jurisdiction. Under international law, a state may exercise its criminal jurisdiction based on several principles.⁵⁶³ However, international tribunals derive their competence only from the instruments creating them. Thus, the jurisdiction of international tribunal is not confined to the jurisdictional bases principles applicable to

⁵⁶¹ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998).

⁵⁶² Article 6 of Nuremberg Charter provides "The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes..." See Nuremberg Charter art. 6, 82 UNTS 279; 59 Stat. 1544; 3 Bevans 1238; 39 AJILs 258 (1945).

⁵⁶³ These grounds are: the Territorial Principle, the Active Personality Principle, the Passive Personality, the Protective Principle, and the Universal Jurisdiction. See Ilias Bantekas & Susan Nash, *International Criminal Law* 143-160 (Cavendish Publishing 2003).

states.⁵⁶⁴ The reason behind this distinction is as summarized by the Appeal Chamber of the International Criminal Tribunal for Former Yugoslavia:

A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its "judicial character", as shall be discussed later on. Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.⁵⁶⁵

The ICC has narrower jurisdiction than the state with respect to the same crimes committed in the state's territory. Unlike ad hoc criminal tribunals, national jurisdiction has priority over the ICC in exercising the judicial function.⁵⁶⁶

It is important to understand the distinction between admissibility and jurisdiction before the ICC. The difference is that:

“Jurisdiction refers to the legal parameters of the Court's operation, in terms of subject matter (jurisdiction *rationiae materiae*), time (jurisdiction *ratione temporis*), and space (jurisdiction *ratione loci*) as well as over individuals (jurisdiction *ratione personae*). The question of admissibility

⁵⁶⁴ Ilias Bantekas & Susan Nash, *International Criminal Law* 163 (Cavendish Publishing 2003).

⁵⁶⁵ Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (October 2, 1995) ¶ 11.

⁵⁶⁶ Such function is derived from the statement provided by article 1 of the Court Statute, “An International Criminal Court is hereby established. It shall be complementary to national criminal jurisdictions...” See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90. The reason for the difference between the jurisdiction of ICC and that of ad hoc tribunals, in relation to the national jurisdiction, is that ad hoc tribunals have been established by the U.N. Security Council resolution while the ICC has been established by an international treaty where a degree of compromise is expected. In other words, the ad hoc tribunals' jurisdiction is imposed while ICC jurisdiction is an issue which depends upon the state's will.

arises at a subsequent stage, and seeks to establish whether matters over which the court properly has jurisdiction should be litigated before it.”⁵⁶⁷

Even though the Court might have jurisdiction over a particular matter, it may refuse to admit the case because the accused is being charged before the national courts or because the offense is not so grave that it requires the Court to take an action. In sum, the admissibility question allows the Court discretion, while the jurisdiction question is confined by bright-line rules. However, these two questions sometimes overlap.⁵⁶⁸ ICC jurisdiction can be classified into several aspects; territorial, personal, subject matter, and temporal.

In light of the territorial jurisdiction, the Court has jurisdiction over the states parties’ jurisdiction. The Court may exercise jurisdiction over the non-party states, if the U.N. Security Council refers the case to the Court.⁵⁶⁹ In the context of commencing the proceeding before the Court, even though non-state actors might approach a state party to bring a case before the Court or a prosecution might seek information from governmental organizations or an NGO,⁵⁷⁰ the notion that a non-state actor cannot bring a case before the Court has been criticized.⁵⁷¹ As an alternative, governmental organizations or an NGO might play the role of *amicus curiae* or a friend of the Court.⁵⁷²

⁵⁶⁷ William A. Schabas, *An Introduction to the International Criminal Court* 68 (Cambridge University Press 2004).

⁵⁶⁸ William A. Schabas, *An Introduction to the International Criminal Court* 68-69 (Cambridge University Press 2004).

⁵⁶⁹ Rome Statute of the International Criminal Court art. 13 (b), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998).

⁵⁷⁰ Rome Statute of the International Criminal Court 44 (4), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90(1998).

⁵⁷¹ Linada A. Malone & Scott Pasternack, *Defending the Environment – Civil Society Strategies to Enforce International Environmental Law* 234-37 (Island Press 2006).

⁵⁷² International Criminal Court Rules of Procedure and Evidence art. 103 (3), ICC-ASP/1/3, at 10, and Corr. 1 (2002), U.N. Doc. PCNICC/2000/1/Add.1 (2000).

The Court's personal jurisdiction encompasses those who ordered that the crimes be committed, persons acting with a common criminal purpose or plan, and commanders who failed to prevent or punish their subordinates who committed the statute crimes.⁵⁷³

In terms of subject matter jurisdiction, the Court's statute provides:

For the purpose of this Statute, "war crimes" means: (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:(iv) Intentionally launching an attack in the knowledge that such attack will cause..... injury to damage to.... widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated...⁵⁷⁴

There is no need to examine whether these requirements, "widespread, long-term and severe," are met by the environmental consequences resulting from Saddam Hussein's action against the environment during the Gulf War of 1991 because there are other legal obstacles, explained below, preventing the applicability of the ICC statute in the Saddam Hussein case. However, even if we assume that these obstacles did not exist and that the environmental consequences resulting from Saddam Hussein's action did not meet the above requirements of the Statute, the attempt to inflict such damages could have been another basis for indictment.⁵⁷⁵

In terms of temporal jurisdiction, article 11(1) of the statute provides "The Court has jurisdiction only with respect to crimes committed after the entry into force of this

⁵⁷³ Article 25 (3) (b), (d) deal with order and common plan bases while article 28 of the Statute deals with the command responsibility. Rome Statute of the International Criminal Court 25 (3) (b), (d), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998).

⁵⁷⁴ Rome Statute of the International Criminal Court 8 (2) (b) (iv), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998).

⁵⁷⁵ Knut Dormann, *Elements of War Crimes, Under the Rome Statute of the International Criminal Court: Sources and Commentary* 162 (Cambridge University Press 2003).

Statute.”⁵⁷⁶ In addition, article 24(1) of the statute states “No person shall be criminally responsible.....under this Statute for conduct prior [to] the entry into force of the Statute.”⁵⁷⁷ The statute has been criticized for preventing the Court from addressing atrocities, committed before its entry into force.⁵⁷⁸ In harmony with the provisions of article 11(1), it has been said that, “Unless an International Criminal Court is already in existence at the time of the cessation of hostilities, those who link the punishment of all war crimes to the establishment of such a court run the danger of sacrificing the substance of an urgent task for what may well prove to be the shadow of its intricate machinery.”⁵⁷⁹

A review of the Court’s statute shows that, although the Court might have a basis for both subject matter and personal jurisdiction, it could not have tried Saddam Hussein’s case concerning the crimes committed against the environment. First, neither Iraq nor Kuwait is a party to the ICC statute.⁵⁸⁰ Even though the case could have reached the Court through referral by the U.N. Security Council, temporal jurisdiction would have prevented the Court from trying the case as all offenses against the environment during the Iraqi invasion were committed before the entrance of the Statute into force in April 2002.

⁵⁷⁶ Rome Statute of the International Criminal Court art. 11 (1), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998).

⁵⁷⁷ Rome Statute of the International Criminal Court art. 24 (1), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998).

⁵⁷⁸ William A. Schabas, *An Introduction to the International Criminal Court* 70 (Cambridge University Press 2004).

⁵⁷⁹ This argument is based upon the fact that establishing an international criminal court is a task which cannot be accomplished within a short period of time. In addition, trying war criminals by this court shortly after war, even if the court were composed of neutral judges, would not be considered an impartial trial since in most cases there would be few neutral or even nominally neutral states left. H. Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT’L L. 58, 81 (1944).

⁵⁸⁰ States party to the International Criminal Court Statute are available at <http://www.icc-cpi.int/asp/statesparties.html> (last visited July 19, 2007).

3. Ad Hoc Tribunals' Jurisdiction

The practice of using military tribunals to prosecute individuals accused of war crimes was established after World War II.⁵⁸¹ After World War II, a number of significant war crimes cases also were pursued in domestic courts, with varying degrees of success.⁵⁸² One of the most important developments since then has been the creation of specialized international tribunals to pursue those individuals accused of war crimes.

The first specialized tribunal, established by the United Nations Security Council resolution 827 of May 25, 1993, was the “International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.”⁵⁸³ The establishment of this tribunal was challenged before the tribunal itself,⁵⁸⁴ which held that it had the authority to review the legality of its establishment to the extent necessary to determine its primary jurisdiction.⁵⁸⁵

⁵⁸¹ A.P.V. Rogers, *War Crimes Trials under the Royal Warrant: British Practice 1945-1946*, 39 INT'L & COMP. L. Q. 780 (1990).

⁵⁸² Christopher Amerasinghe, *The Canadian Experience in International Criminal Law*, Vol. III, 243 (M. Cherif Bassiouni ed., Transnational Publishers, Inc. 2ed 1999); Leile Sadat Wexler, *The French Experience in International Criminal Law*, Vol. III, 273 (M. Cherif Bassiouni ed., Transnational Publishers, Inc. 2ed 1999); Graham T. Belwitt, *The Australian Experience in International Criminal Law*, Vol. III, 301 (M. Cherif Bassiouni ed., Transnational Publishers, Inc. 2ed 1999); Jane Garwood-Cutler, *The English Experience in International Criminal Law*, Vol. III, 325 (M. Cherif Bassiouni ed., Transnational Publishers, Inc. 2ed 1999). For head of state cases, M. Cherif Bassiouni, *Introduction to International Criminal Law* 76-80 (Transnational Publishers 2003).

⁵⁸³ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. SCOR, Sess. 48th, 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993); generally see O'Brian, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639 (1993).

⁵⁸⁴ *Prosecutor v. Tadic*, Case No. IT-94-1, Appeal Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (October 2 1995). For a critical commentary, see Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031 (1999).

⁵⁸⁵ *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (October 2, 1995) ¶ 21.

The personal jurisdiction of the tribunal encompasses prosecuting “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991....”⁵⁸⁶ The subject matter jurisdiction of the tribunal, the “serious violations,” encompasses grave breaches of the Geneva conventions of 1949, violations of the laws and customs of war, genocide, and crimes against humanity.⁵⁸⁷ The Tribunal’s jurisdiction is concurrent with national courts, but can assume primacy over national investigations and prosecutions.⁵⁸⁸ Despite the fact that the tribunal was slow to start,⁵⁸⁹ it has made considerable progress in its investigations and prosecutions. Tribunal indictments range from low-level soldiers and camp guards to senior military and government officials.⁵⁹⁰

The Tribunal commented that “[I]nternational prosecution should be directed to leaders...more than minor actors.”⁵⁹¹ The Tribunal’s new policy focuses international prosecutions on persons in the position of some military or political authority. To implement this policy, the prosecutor and the Trial Chamber reviewing the decision to prosecute take into account the status of the accused at the time of the commission of the

⁵⁸⁶ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 1, S.C. Res. 827, U.N. SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993).

⁵⁸⁷ See arts. 2-4 of the ICTY statute. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 arts. 2-4, S.C. Res. 827, U.N. SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993).

⁵⁸⁸ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 11, SC res. 827, U.N. SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993).

⁵⁸⁹ Hafida Lahiouel, *The Right of the Accused to an Expeditious Trial in Essays on ICTY Procedure and Evidence* 197 (Richard May ET Al., Kluwer Law International 2001).

⁵⁹⁰ These senior military and government officials include former Yugoslavia President Slobodan Milosevic; Radovan Karadzic, Former President of the Bosnian Serb Republic; and General Rudislav Krstic, Former Deputy Commander of the Drina Corps in the Army of the Republika Srpska.

⁵⁹¹ S.C. Res. 1329, U.N. SCOR 55th Sess., 4240th mtg. (2000).

crime.⁵⁹² As for the prosecution of non-leadership figures, the Tribunal has ruled that “named accused [non-leadership figures] could appropriately be tried in another forum, such as a State forum.”⁵⁹³

Only a year and a half after the establishment of the ICTY, the United Nations Security Council, relying on its powers under Chapter VII of the U.N. Charter, passed resolution 955 by which an international tribunal was created “for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between January 1, 1994 and December 31, 1994.”⁵⁹⁴ The Tribunal or ICTR also has jurisdiction over Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states.⁵⁹⁵

The ICTR differs from the ICTY in terms of jurisdiction in two aspects. First, its jurisdiction is personal and territorial. Second, it has jurisdiction over genocide and crimes against humanity, but only in view of the “internal” character of the events in Rwanda. It covers only violations of common Article 3 of the Geneva conventions of 1949 and crimes listed in additional Protocol II. Thus, neither grave breaches of the Geneva conventions nor violations of the laws and customs of war are included in the

⁵⁹² International Criminal Tribunal for the former Yugoslavia Rules of Procedure and Evidence arts. 9-10, U.N. Doc. IT/32/Rev.37 (2006).

⁵⁹³ Prosecutor v. Dusko Sikirica ET AL., Case No. IT-95-8, Order Granting Leave for Withdrawal of Charges (May 5, 1998). Moreover, ICTY Rules of Procedure and Evidence article 11 (C) *bis* provides “ In determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council resolution 1534 (2004) , consider the gravity of the crimes charged and the level of responsibility of the accused.” Rules of Procedure and Evidence art. 11 (C) *bis*, UN Doc. IT/32/Rev.37 (2006).

⁵⁹⁴ S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994).

⁵⁹⁵ Article 1 of the ICTR statute. S.C. Res. 955, UN SCOR, 49th Sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994).

tribunal's statute. Like the ICTY, the ICTR indicted and convicted senior governmental officials as well.⁵⁹⁶ After reviewing the jurisdiction of the two tribunals, ICTY and ICTR, one can conclude that neither tribunal could have tried those crimes against the environment committed during the Gulf War of 1991. Both tribunals have limitations in exercising their jurisdiction and these limitations are based on subject matter, territorial, temporal, and personal grounds.⁵⁹⁷

Nevertheless, the U.N. Security Council's precedent in creating ad hoc tribunals might have paved the way to create an ad hoc tribunal to try Saddam Hussein and other members of the Iraqi regime for all international offenses, including the environmental offenses. The Security Council would create such a tribunal, however, only in response to demands by interested states, especially both regional states such as Kuwait, Iran, Saudi Arabia and the new Iraqi regime and Security Council member states.

⁵⁹⁶ Jean Kambanda, the Former Prime Minister of Rwanda and the first head of government to be convicted of genocide, and Jean-Paul Akayesu, a former mayor, were convicted of genocide. See Prosecutor v. Kambanda, Case No. ICTR-97-23-S, 4 September 1998; see also Prosecutor v. Kambanda, Case No. ICTR-23-A, Appeal Judgment (October 19, 2000). For the appeal decision discussion see 95 AM. J. INT'L L. 656 (2001); For Akayesu case, see Prosecutor v. Akayesu, Case No. ICTR-96-4-T (September 2, 1998); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Appeal Judgment (June 1, 2001).

⁵⁹⁷ Although the ICTY has jurisdiction over crimes against property and may have jurisdiction over environmental war crimes, this jurisdiction is limited to crimes committed in the territory of the former Yugoslavia. The ICTY statute does not explicitly include environmental crimes or violations of the Protocol I within its text; however, the Tribunal has convicted based upon violations of the Protocol I. These violations were legally justified based upon Articles 1 and 3 of the Statute. Article 1 extends ICTY jurisdiction to "serious violations of international humanitarian law." Article 3 stipulates "The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, *but not be limited to:*" (emphasis added). See Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (October 2, 1995) ¶ 87, 91. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 arts. 1, 3, S.C. Res. 827, U.N. SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993). In regard to ICTR, it has territorial, personal and temporal limitations. Article 1 of the ICTR statute confers upon the Tribunal jurisdiction over "serious violations of international humanitarian law committed in *the territory of Rwanda and Rwandan Citizens responsible for such violations committed in the territory of neighbouring States, between January 1994 and 31 December*" (Emphasis added). Statute of the International Criminal Tribunal for Rwanda art. 1, S.C. Res. 955, U.N. SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994).

Several factors suggest why this kind of court was not created. One of the difficulties relates to the origin of the process which led to the Iraqi leader's capture. This capture was the result of internationally unauthorized interference⁵⁹⁸ in Iraqi internal affairs by the United States which invaded Iraq without an express decision from the U.N. Security Council. This unauthorized interference raised the possibility that one or more of the Security Council's permanent member states could have used its veto against any decision proposing the creation of an ad hoc tribunal.

In addition, both ad hoc tribunals faced financial hardships.⁵⁹⁹ U.N. financial involvement in the budget for an ad hoc Iraq tribunal probably would not have been accepted globally, requiring contributions to the budget from those regional states most interested in the creation of the tribunal.

Finally, Saddam Hussein's case was greatly complicated by the tremendously serious offenses attributed to him, especially those offenses committed against the Iraqi people. Consequently, it is logical that the Iraqi Provisional Authority rejected the idea of creating an international ad hoc tribunal to try Saddam Hussein.⁶⁰⁰ As an alternative, the new Iraqi regime welcomed the idea that all criminal allegations against Saddam Hussein, including his crimes against Kuwait and Iran, be tried either before Iraqi national courts or before modified national courts without external intrusion.

⁵⁹⁸ Michael Mandel, *How America Gets Away with Murders: Illegal Wars, Collateral Damage and Crimes against Humanity* 3 (Pluto Press 2004). For a contrary view, see Jason Pedigo, *Rogue States, Weapons of Mass Destruction, And Terrorism: Was Security Council Approval Necessary for the Invasion of Iraq?* 32 *GA. J. INT'L & COMP. L.* 199 (2004).

⁵⁹⁹ See William A. Schabas, *The U.N. International Criminal Tribunals: former Yugoslavia, Rwanda and Sierra Leone* 622-23 (Cambridge University Press 2006).

⁶⁰⁰ Mark R. Shulman, *Preface to Recommendations Related to the Trial of Saddam Hussein in The Imperial Presidency and the Consequences of 9/11*, Vol. I, 173-74 (James R. Silkenat & Mark R. Shulman eds., Praeger Security International 2007).

III. The Immunity Issue

As a general matter, immunity from jurisdiction means that a court cannot entertain a suit, not that a defendant is immune from criminal responsibility. In other words, immunity is a procedural obstacle but not a substantive one.⁶⁰¹ Immunity can be granted at both the national and international levels. At the national level, legislators, prosecutors, and judges can be immune.⁶⁰² Under international law, there are two types of immunity. First, immunity is related to the status of persons, which is called *ratione personae* or personal immunity. Second is subject-matter immunity or so-called *ratione materiae* which is attached to official acts.

The difference between the two immunities is that “Immunity *ratione personae* prevents domestic authorities, be they judicial or not, from enforcing local laws, either criminal or civil, on internationally protected individuals. Immunity *ratione materiae* prevents local judicial authorities from adjudicating cases based on the nonjusticeability of the internationally sensitive subject matter.”⁶⁰³

Rationae materiae immunity applies when the head of state leaves office. It is deemed a limited immunity because it attaches only to official acts regardless of who committed the act. Thus, immunity *ratione materiae* offers two-pronged protection:

⁶⁰¹ Both the International Court of Justice and the Special Court of Serra Leone reached this conclusion. See Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (2002) ICJ Reports, 14 April 2002. ¶ 60; Prosecutor v. Charles Taylor, Case No. SCSL-2003-01-I, Appeal Decision on Immunity from Jurisdiction (May 31, 2004) ¶ 27.

⁶⁰² For an official’s immunity under the U.S. legal system, see Donald L. Doernberg, *Sovereign Immunity or The Rule of Law- The New Federalism’s Choice* 119-24 (Carolina Academic Press 2005).

⁶⁰³ Yitiha Simbeye, *Immunity and International Criminal Law* 110 (Ashgate Publishing Company 2004).

personal immunity for the person committing the act, and non-justiceability for the act itself under the “act of state” doctrine.⁶⁰⁴

Rationae Personae immunity applies to heads of state, diplomats and officials on state missions.⁶⁰⁵ It covers all of a person's actions, whether they were done in official or in private capacity. This immunity is temporary because it lasts only until the individual leaves office.⁶⁰⁶

Although the inviolability of the head of a state or government is considered *erga omnes*,⁶⁰⁷ the view that international criminals cannot claim immunity began to emerge after the first attempt to prosecute a head of state after World War I through the Treaty of Versailles. Later on, the World War II trials made this view the reality.⁶⁰⁸ Within the

⁶⁰⁴ The traditional view is that, “Head of state immunity can be looked at as an aspect of state immunity.” As a result, his or her act constitutes the act of the state. “Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another within its territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers themselves.” Yitiha Simbeye, *Immunity and International Criminal Law* 93 n.15, 123, 252 (Ashgate Publishing Company 2004). The aim of immunity is to protect state acts from review by foreign courts based on the claim that the act was done by the individual not the state.

⁶⁰⁵ United Nations Convention on Special Missions art. 21, 29, 31, 34, 42, Dec. 16, 1969, 1400 U.N.T.S. 231 (entered into force June 21, 1985); Vienna Convention on the Law of Diplomatic Immunity, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, Apr. 24, 1963, 12 U.S.T. 77, 596 U.N.T.S. 261; Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (2002) ICJ Reports, 14 April 2002.

⁶⁰⁶ The purpose of this immunity is to enable people to do their jobs without fear of being prosecuted due to political conflict. Yitiha Simbeye, *Immunity and International Criminal Law* 110, 113-14 (Ashgate Publishing Company 2004).

⁶⁰⁷ *Erga omnes* are obligations that all states are held to have a legal interest in protecting. See *Barcelona, Traction, Light and Power Co. Case, (Belgium v. Spain)* (1970) ICJ Reports, 3.

⁶⁰⁸ For instance, the International Military at Nuremberg prosecuted both Admiral Erich Raeder, who was appointed as head of state by Adolph Hitler, and Vice President and Foreign Minister Fritz von Pappen. Although the Far East tribunal did not prosecute Japan's head of state, Emperor Hirohito, it prosecuted a former head of government, cabinet officers and diplomats. See M. Cherif Bassiouni, *Introduction to International Criminal Law* 73 (Transnational Publishers, Inc 2003); in fact, the Nuremberg Charter, and other international legal instruments, rejected official status as a defense. Charter of the International Military Tribunal art. 7, 82 UNTS 279; 59 Stat. 1544; 3 Bevans 1238; 39 AJILs 258 (1945); Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity* art. 11(4)(a), 3 Official Gazette Control Council for Germany 50-55 (1946); Convention on the Prevention and Punishment of the Crime of Genocide art. 4, 78 U.N.T.S. 277 (1948); International

context of the ad hoc international criminal tribunals, the notion of non-recognition of immunity in international crimes became well recognized.⁶⁰⁹

The current development of most sovereign immunity for international crimes has occurred before two courts. The first court is a domestic court, the House of Lords in England, the highest English Court, while the second is the International Court of Justice. The *Pinochet* case,⁶¹⁰ dealing with the former Chilean president, concerns the domestic prosecution of international crimes. Therefore, the case will be discussed in the next chapter, which deals with domestic trials.

In 2002, the ICJ issued a decision regarding the immunity issue.⁶¹¹ The parties to the case were Congo and Belgium. The case was raised when the latter issued a warrant to arrest the Foreign Minister of Congo for grave breaches of the Geneva conventions of 1949 and other crimes against humanity committed before he assumed that position. By the time the case was decided, he was no longer Foreign Minister. The essential argument of Congo was that the Belgian action interfered with Congo's sovereignty and was

Convention on the Suppression and Punishment of the Crime of Apartheid art. 3 *reprinted in* International Criminal Law: A Collection of International and European Instruments 37 (Christine Van den Wyngaert & Guy Stessens eds., Kluwer Law International 1996).

⁶⁰⁹ As a result of the fact that the jurisdiction of the International Criminal tribunals depends on their constitutive instruments, the tribunals are not bound by the rules controlling immunity and privileges that bind national jurisdictions. As recent examples, ICTY and ICTR prosecuted both Jean Kambanda, the former Prime Minister of the Government of Republic Rwanda, and Slobodan Milosevic, the former head of the Republic of Yugoslavia, before he died. See Ilias Bantekas & Susan Nash, International Criminal Law 176 (Cavendish Publishing 2003); see also Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 6 (2), S.C. Res. 827, U.N. SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993); Statute of the International Criminal Tribunal for Rwanda art. 7 (2), S.C. Res. 955, U.N. SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994); Prosecutor v. Kambanda Case No. ICTR-97-23; For Milosevic cases see IT-99-93-I (May 24, 1999) (Kosovo); IT-01-50-I (Oct. 8, 2001)(Croatia); and IT-01-51- I (Nov. 22, 2001)(Bosnia).

⁶¹⁰ R. v. Bow Street Stipendiary Magistrate and others, [1999] 2 UKHL 97.

⁶¹¹ Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (2002) ICJ Reports, 14 April 2002.

contrary to international law. As a result of this violation, Congo sought an injunction for relief and compensation.

The ICJ equated the immunity of the Foreign Minister to the immunity of a head of state.⁶¹² The Court distinguished between immunity in prosecutions before international courts and before national courts. It ruled that international criminal tribunals have priority in exercising their jurisdiction according to the Universal Jurisdiction over national domestic courts.⁶¹³ It has been argued that the Court failed to recognize the Universal Jurisdiction doctrine for national prosecutions.⁶¹⁴

The Court affirmed that immunity is a procedural issue. Thus, it is a judicial bar to trying the case. Granting immunity does not mean granting impunity. Therefore, criminal responsibility as a substantive question is not affected by the question of immunity.⁶¹⁵ The Court, in its decision, did not make any distinction among international crimes such as war crimes, crimes against humanity, and crimes against peace. Presumably, the decision is applicable to all international crimes. The Court agreed with the view that “There is no way to compromise between human rights law and the law of jurisdictional immunities”⁶¹⁶ and also agreed that the denial of immunity should be

⁶¹² Although the Court limited its decision to the Foreign Affairs Minister, its decision is presumably applicable to heads of state since the Court used a justification which is applicable equally to the Foreign Affairs Minister and the Head of State. The Court considered both of them as representative of the state. Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (2002) ICJ Reports, 14 April 2002. ¶ 53.

⁶¹³ Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (2002) ICJ Reports, 14 April 2002. ¶ 61.

⁶¹⁴ Antonio Cassese, When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, 13 EJIL 853-875 (2002).

⁶¹⁵ Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (2002) ICJ Reports, 14 April 2002. ¶ 60.

⁶¹⁶ Andrea Bianchi, Immunity Versus Human Rights: The Pinochet Case, 10 EJIL 237, 277 (1999).

extended not only to the former head of state, but to the incumbent head of state as well.⁶¹⁷

Therefore, unlike domestic prosecution of international crimes, the Court denied immunity to both incumbent and former Foreign Affairs Ministers before the international tribunals. At the international level, the Court did not recognize the fact that “Political necessity and state sovereignty appear to be entrenched factors in the battle between more traditional principles of absolute immunity and the new norms of international law.”⁶¹⁸

However, the Court decision to equalize the ad hoc tribunals and the International Criminal Court is troublesome.⁶¹⁹ The ICJ decision raised tension between Articles 27(1) and 98 of the Rome statute concerning extradition.⁶²⁰ It has been argued that although the ICC statute is not yet part of international customary law, it will be so after it has been

⁶¹⁷ Andrea Bianchi, *Immunity Versus Human Rights: The Pinochet Case*, 10 EJIL 237, 261 (1999).

⁶¹⁸ Kerry Creque O’Neill, *A New Customary Law of Head of State Immunity: Hirohito and Pinochet*, 38 STAN. J. INT’L L. 289, 318 (2002).

⁶¹⁹ Such a view was criticized on the basis of the difference between ad hoc tribunals and the International Criminal Court in light of their constitutive instruments. The point, here, is that the ad hoc tribunals were established by U.N. Security Council decisions that are obligatory to all United Nations members. Per contra, International Criminal Court was established through a treaty which is not obligatory except for those states that ratified it. Michael J. Kelly, *No Where to Hide, Defeat of the Sovereignty Immunity Defense for Crimes of Genocide and the Trials of Slobodan Milosevic and Saddam Hussein* 79 (Peter Lang Publisher 2005).

⁶²⁰ Concerning immunity before ICC, there is tension between art. 27(1) and 98. It has been argued that Article 27 (1) deals with immunity as a substantive defense for criminal responsibility and rejects official status as a defense. Meanwhile, article 27(2) asserts that immunity should not constitute a bar to the Court’s exercise of its jurisdiction. Article 98 of the ICC statute imposes an obligation on state parties to extradite any individual who is accused of committing any of the statute offenses. There is no dilemma regarding the state party nationals. Per contra, the problem concerns those non- party state nationals who are entitled to immunity and who are located within the state party territory. Is the state party obligated to extradite them to the ICC when a request is made? See Dapo Akande, *International Immunities and the International Criminal Court*, 98 AM. J. INT’L L. 407, 419 (2004) (arguing that the state is not obligated since such extradition action will impose upon the state international responsibility).

ratified by two-thirds of the U.N. members.⁶²¹ At that point, the International Criminal Court statute will remove the immunity issue completely from the international law dictionary.

Based upon the ICJ decision, the Special Court for Sierra Leone rejected Charles Taylor's argument that he was the head of the State of Liberia when he was indicted. Thus, he argued, immunity prevented the court from exercising its jurisdiction.⁶²² The rejection was based on the fact that the Special Court of Sierra Leone is an international criminal tribunal, not bound by immunity rules according to the ICJ decision.⁶²³ In Saddam Hussein case, according to the ICJ decision, he could have claimed neither *ratione personae* nor *ratione materiae* immunities concerning his actions against the environment if the trial had been held before an ad hoc international criminal tribunal.

IV. The Statute of Limitations Issue

The Saddam Hussein case is unique because a long period of time, about thirteen years, had passed between the time of the commission of the crime and the time of his capture. Therefore, the statute of limitations on either prosecution or execution might have been raised as an objection to such a trial. The statute of limitations means "A statute establishing a time limit for prosecuting a crime, based on the date when the offense occurred."⁶²⁴ The statute of limitations serves several purposes.⁶²⁵

⁶²¹ M. Cherif Bassiouni, *Introduction to International Criminal Law* 81 n.102 (Transnational Publishers, Inc 2003).

⁶²² *Prosecutor v. Charles Taylor*, Case No. SCSL-2003-01-I, Appeal Decision on Immunity from Jurisdiction (May 31, 2004) ¶ 53.

⁶²³ *Prosecutor v. Charles Taylor*, Case No. SCSL-2003-01-I, Appeal Decision on Immunity from Jurisdiction (May 31, 2004) ¶ 38, 41.

⁶²⁴ *Black's Law Dictionary* 1422 (7th ed. 1999).

International Criminal Law does not recognize a statute of limitations. For instance, the Fourth Geneva Convention and the Genocide Convention⁶²⁶ did not include a statute of limitations. The reason is that World War II criminals were brought to justice within a short time. Another reason is that in most common-law jurisdictions the statute of limitations does not exist for murder and other serious crimes.⁶²⁷

A 1966 U.N. study reached the following conclusion: “International crimes are fundamentally different from ordinary domestic crimes and the reasons normally invoked in favor of statutory limitation for crimes under municipal law do not apply to them.”⁶²⁸ In 1968, the U.N. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity⁶²⁹ opened for signature. The U.N. Convention entered into force on November 11, 1970. Iraq is not a party, but Kuwait has been a party since 1995.⁶³⁰ This Convention is not part of customary international Law.⁶³¹ No

⁶²⁵ The U.S. Supreme Court stipulated that “The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature had decided to punish by criminal sanction. Such a limitation is designated to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activities.” *Toussie v. United States*, 397 U.S. 112, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970). There are other objectives that can be sought from the limitations such as preventing prosecution of those who obeyed the law for some years, avoiding prosecution when the community’s retributive impulse has ceased, and lessening the possibilities of blackmail. Wayne R. LaFave ET AL., *Criminal Procedure* 875 (West Publishing Co. 2004).

⁶²⁶ Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948).

⁶²⁷ *Criminal Procedure Systems in the European Community* (Christine Van Den Wyngaert et. Al. eds., 1993) cited in *International Criminal Law*, Vol. III, 233 n. 38 (M. Cherif Bassiouni eds., Transnational Publishers, Inc. 1999).

⁶²⁸ Report on the 1953 Committee on International Criminal Jurisdiction, U.N. GAOR, 9th Sess., Supp. No.12, at 20, U.N. Doc. A/2645 (1953) quoted in Scott R. Morris, *Killing Egyptian Prisoners of War: Does the Phrase “Lests We Forget” Apply to Israel War Criminals?*, 29 VAND. J. TRANSNAT’L L. 903, 931 (1996).

⁶²⁹ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968); 754 U.N.T.S. 73; 18 ILM 68 (1979).

⁶³⁰ States party to the Convention are available at <http://www.ohchr.org/english/countries/ratification/6.htm> (last visited July 19, 2007)

international instrument contains a statute of limitations for any international crime.⁶³²

Therefore, it is logical to assume that the U.N. Convention is meant to apply only to domestic laws, for they are the only sources of law containing a statute of limitations.

It is argued, however, that the Convention violates the principles of legality⁶³³ because the Convention violates principles of non-retroactivity, adopted by several international human rights instruments.⁶³⁴ This is not the case, however, because the statute of limitations controls the temporal jurisdiction of the court, while the principles of legality have to do with creating a new crime that did not exist when the action was committed. In other words, the statute of limitations relates to procedural rules, while the principle of legality relates to substantive law rules.

A statute of limitations was included in the International Law Commission's 1991 draft Code of Crimes against the Peace and Security of Mankind (1991).⁶³⁵ However, this provision was deleted in the 1996 draft.⁶³⁶ The ICC statute rejects the application of the

⁶³¹ Nicole Barrett, *Holding Individual Leaders Responsible for Violations of International Customary Law: The U.S. Bombardment of Cambodia and Laos*, 32 COLUM. HUM. RTS. L. REV. 429, 468 (2001)

⁶³² Scott R. Morris, *Killing Egyptian Prisoners of War: Does the Phrase "Lest We Forget" Apply to Israeli War Criminals?*, 29 VAND. J. TRANSNAT'L L. 903, 930 (1996).

⁶³³ Art. 1 of the Convention laid down "No statutory limitations shall apply to the following crimes [war crimes and crimes against humanity], *irrespective of the date of their commission...*" (Emphasis added). see *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968).

⁶³⁴ *International Covenant on Civil and Political Rights* art. 15, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966); 999 U.N.T.S. 171; 6 ILM 368 (1967); *European Convention for the Protection of Human Rights and Fundamental Freedoms* art. 7, E.T.S. 5; 213 U.N.T.S. 221 (1950). This violation led the European Community, in 1974, to sign its own convention in this matter stipulating that the convention will not be applicable to those offenses committed before its entry into force. *European Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* art. 2, Jan. 25, 1974, E.T.S. No. 82, *reprinted in* 13 I.L.M. 540 (1974).

⁶³⁵ *Draft Code of Crimes against the Peace and Security of Mankind* art. 7, A/CN.4/L.459 [and corr.1] and Add.1 (1991).

⁶³⁶ *Draft Code of Crimes against the Peace and Security of Mankind*, 51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532, corr.1, corr.3 (1996).

statute of limitations to its crimes.⁶³⁷ The ICTY adopts the view that crimes against humanity may not be covered by a statute of limitations.⁶³⁸

Based upon the fact that international crimes are not covered by a statute of limitations, Saddam Hussein could not have claimed before an international criminal tribunal that his crimes against the environment or property were covered by a statute of limitations.

V. The Right to Be Tried Without Undue Delay

In the context of international criminal law, there are several defendants' rights which are not recognized in some national legal systems, including the Kuwaiti and Iraqi legal systems.⁶³⁹ The right to be tried without undue delay is one of these fundamental rights.⁶⁴⁰ Consequently, international criminal trials might have this advantage over some national trials in the context of human rights protection. The right to "be tried without undue delay" differs somewhat in wording in international and regional instruments.⁶⁴¹

⁶³⁷ Article 29 of the ICC statute provides "Crimes within the jurisdiction of the Court shall not be subject to any statute of limitations." Rome Statute of the International Criminal Court art. 29, U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998).

⁶³⁸ Prosecutor v. Furundizja, Case No. IT-95-17/1-T (December 10, 1998) ¶ 157.

⁶³⁹ Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 17 of 1960 (Kuwait). Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 23 of 1971 (Iraq).

⁶⁴⁰ Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 17 of 1960, arts. 102-104 (Kuwait). Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 23 of 1971, arts. 130-136 (Iraq).

⁶⁴¹ Under the following instruments, the term is "the right to be tried within reasonable time." European Convention on Human Rights art. 6 (1), E.T.S. 5; 213 U.N.T.S. 221(1950); art. 14 (3) International Covenant of Civil and Political Rights art. 14 (3), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); 999 U.N.T.S. 171; 6 ILM 368 (1967); African Charter art. 7 (1), O.A.U. Doc. CAB/LEG/67/3 Rev. 5; 1520 U.N.T.S. 217; 21 ILM 58 (1982); American Convention on Human Rights art. 8 (1), O.A.S. Treaty Series No. 36; 1144 U.N.T.S. 123; 9 ILM 99 (1969). In addition, under the U.S. legal system, the right is called "the right to speedy trial." The Sixth Amendment of the U. S. Constitution provides "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...." U.S. Const. amendment VI. The right to "be tried within a reasonable time," which exists in the European human rights convention, was distinguished from the right "to be tried without undue delay," on

The fair trial standards, including the right to be tried without undue delay, are problematic before international courts, including the ICC, due to the lack of international law sources to which a judge may resort to interpret and define fair trial standards.⁶⁴² Because of the lack of international law on the topic, national and regional cases regarding the right, such as the U.S. and the European Court for Human Rights cases, have been used in international criminal tribunals.⁶⁴³ Therefore, this part of the research will examine the right to be tried without undue delay before the ICTY and national or regional cases when necessity requires it.

By and large, the right to be tried without undue delay is meant to protect the defendant because commencing trial after a long time has passed may affect the defendant's ability to prepare his defense.⁶⁴⁴ It has been ruled that the delay's effect on the trial can be anticipated "(1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct."⁶⁴⁵ Although the right to be tried without undue delay is

the basis, that the former is meant to be applied to those defendants who are in detention while the latter applies to all defendants regardless of the detention issue. Christoph J. M. Safferling, *Towards an International Criminal Procedure* 251 (Oxford University Press 2001).

⁶⁴² Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 *YALE J. INT'L L.* 111, 117 (2002).

⁶⁴³ *Prosecutor v. Barayagwize*, Case No. ICTR-97-19, Appeal Decision (November 3, 1999) ¶ 96.

⁶⁴⁴ The Secretary-General's Report provided that "the Tribunal [Tribunal for the former Yugoslavia] must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings." Report of the Secretary-General pursuant to paragraph 2 of the Security Council Resolution 808, U.N. Doc. S/25704 (1993) ¶ 106. In the same context, it is ruled that the accused may not waive his or her right to be tried without undue delay because this right is an essential element of the right to a fair trial. *Prosecutor v. Kovac and others*, Decision on Interlocutory Appeal by the Accused Zoran Zigic against the Decision of Trial Chamber I Dated 5 December 2000, 25 May 2001 *cited in* John R. W.D. Jones & Steven Powles, *International Criminal Practice* 586 (3^d ed. 2003).

⁶⁴⁵ *Prosecutor v. Barayagwize*, Case No. ICTR-97-19, Appeal Decision (November 3, 1999) ¶ 71.

mainly meant to benefit the accused, it accomplishes other goals such as gaining the public's confidence in the proceedings and their credibility.⁶⁴⁶

In the context of international criminal tribunals, "The influence of the international community over the practice of the Tribunal [ICTY] is, therefore, not only important with regard to its noted preference for more expeditious proceedings, but also for its potential indifference to the fair trial rights of the accused."⁶⁴⁷ Thus, exaggerated protection of this right might prejudice the defendant's interests on some occasions.

Since the right to be tried without undue delay does not attach until the arrest takes place, it may be seen from different angles. The first situation is when the defendant is in custody and the trial does not begin until a long period of time has passed. The second situation is when the defendant's trial has already begun, but the proceeding consumes a long time.⁶⁴⁸

Internationally, the right to be tried without undue delay has been provided by all international criminal tribunals, from Nuremberg to the ICC.⁶⁴⁹ Guarantees to preserve

⁶⁴⁶ Megan A. Fairlie, *Due Process Erosion: The Diminution of Live Testimony at the ICTY*, 34 CAL. W. INT'L L. J. 47, 63 (2003). Under the U.S. legal system, it is ruled that the right to speedy trial protects "at least three basic demands of Criminal Justice in the Anglo-American system: '[1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public accusation and [3] to limit the possibilities that long delay will impair the ability of an accused to defend himself.'" *Smith v. Hooey*, 393 U.S. 374, 89 S. Ct. 575, 21 L. Ed. 2d 607 (1969).

⁶⁴⁷ Megan A. Fairlie, *Due Process Erosion: The Diminution of Live Testimony at the ICTY*, 34 CAL. W. INT'L L. J. 47, 62 (2003).

⁶⁴⁸ The European Court of Human Rights rules that the right to be tried within a reasonable time lasts at least until acquittal or conviction, even if this decision is reached on appeal. *Wemhoff v. Germany*, App. No. 2122/64, ¶ 18 (June 27, 1968).

⁶⁴⁹ Charter of the International Military Tribunal art. 16, 82 U.N.T.S. 279; 59 Stat. 1544; 3 Bevans 1238; 39 AJILs 258 (1945); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 21(2), S.C. Res. 827, U.N. SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993); Security Council Resolution 955 art. 20(2), S.C. Res. 955, U.N. SCOR 49th sess., 3453rd

this right have been provided by customary international law as well.⁶⁵⁰ Within the framework of the ICTY statute, article 20 provides, “The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”⁶⁵¹

Meanwhile article 21 (4) (c) of the same statute provides, “In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:.... to be tried without undue delay.”⁶⁵² The difference between article 20 and article 21(4)(c) is that the former governs the stage after commencing the trial while the latter controls the stage both before and after commencement.⁶⁵³

Regarding reasons that might lead to infringement of the right, Cassese attributed the delay in ICTY trials to “Adoption of the adversarial system, which requires that all the evidence be scrutinized orally through examination and cross-examination.”⁶⁵⁴ Moreover, the causes of the delay cannot be attributed to one single source. The delay

mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994); Rome Statute of the International Criminal Court art. 67 (1), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998).

⁶⁵⁰ Geneva Convention III relative to the Treatment of Prisoners of War arts. 99-108, 75 U.N.T.S. 135 (1949).

⁶⁵¹ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 20, S.C. Res. 827, U.N. SCOR 48th sess., 3217th mtg. at 1-2 (1993).

⁶⁵² Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 21 (4)(c), S.C. Res. 827, U.N. SCOR 48th sess., 3217th mtg. at 1-2 (1993).

⁶⁵³ This conclusion can be derived from the title of each article. The title of article 20 is “Commencement and Conduct of Trial Proceedings” while article 21 is titled “The Rights of the Accused.” Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. SCOR 48th sess., 3217th mtg. at 1-2 (1993).

⁶⁵⁴ Antonio Cassese, *International Criminal Law* 442 (2003).

might occur because of difficulties in obtaining evidence, hurdles to securing defendants, language difficulties, proof of “predicate conditions” to establish the court’s jurisdiction, and the rare use of the guilty plea.⁶⁵⁵ The fact that international courts depend upon other entities, such as states and relevant international and regional organizations, in their operations should be considered when the court is determining whether the defendant’s right to be tried without undue delay has been violated or not.⁶⁵⁶ To solve part of this dilemma, the ICTY amended its Rules of Procedure and Evidence at the expense of live testimony.⁶⁵⁷ In addition, judges have adopted several measures to respect this right.⁶⁵⁸

Also, one of the stages which contribute to delay in starting the trial is the screening of evidence by the pre-trial judge. However, this stage has its own importance. It assists the court in avoiding those cases which lack sufficient evidence and in avoiding the problem of overcrowding the courts.⁶⁵⁹

European case law identifies causes of delay in criminal proceedings held nationally. These are the complexity of the case,⁶⁶⁰ the conduct of the accused,⁶⁶¹ and the

⁶⁵⁵ Megan A. Fairlie, *Due Process Erosion: The Diminution of Live Testimony at the ICTY*, 34 CAL. W. INT’L L. J. 47, 63-64 (2003).

⁶⁵⁶ Several issues such as money, access to evidence, defendants, witnesses, witness protection, court personnel, prison facilities, and the enforcement of the court’s orders and judgments may contribute to delaying the commencement or to the length of the judicial proceedings. In sum, states’ cooperation with international judicial organs is a significant factor in obtaining a speedy trial.

⁶⁵⁷ Megan A. Fairlie, *Due Process Erosion: The Diminution of Live Testimony at the ICTY*, 34 CAL. W. INT’L L. J. 47, 64-66 (2003).

⁶⁵⁸ For instance, the tribunals prefer that motions be made in writing and disposed of in writing, without an oral hearing. The justification for this practice is “the need to ensure a fair and expeditious trial.” Even if the defense counsel requested an oral hearing, it does not mean he will be granted that request. The chambers define the issue in dispute before them by means of pre-trial briefs. The use of a pre-trial judge is another means to assist in expeditious trials. The right to be tried without undue delay leads the chambers to limit the amount of time allocated to each party to present the evidence.

⁶⁵⁹ Christoph J. M. Safferling, *Towards an International Criminal Procedure* 184 (Oxford University Press 2001).

⁶⁶⁰ The complexity of the case may be due to the seriousness of the offense, the number of acts constituting a pattern of criminal behavior, and the distance in both time and location between the commission of the offense and the investigations. *Pelissier and Sassi v. France*, App. No. 25444/94, ¶ 67 (March 25, 1999).

conduct of the relevant authorities.⁶⁶² The reasonableness of the length of the judicial proceeding should be assessed in light of these criteria.⁶⁶³

In regard to a remedy to be taken in case of a violation of this right, international courts, like national courts, have discretion in determining whether exercising further jurisdiction in the case of a serious violation of the defendant's rights will affect the fairness and integrity of the process.

In spite of the fact that the court might find that there is a violation of the right to be tried without undue delay, the ICTY statute does not explicitly provide for a sanction for the violation of this right. In addition, it has been noted that the Rules of Procedure and Evidence of the ICTY have failed to ensure compliance with the right to be tried without undue delay by establishing a time limit such as is done in some military

Regarding the complexity of the case, the need for parties to prepare their cases should be taken into account in determining whether the right to an expeditious trial has been violated. The European Court of Human Rights ruled that a period of delay of five years, due to the complexity of the case and the defendant's requests, is not unreasonable. *Ringeisen v. Austria*, App. No. 13/71, ¶ 110 (July 16, 1971).

⁶⁶¹ The behavior of the accused might also play a role in the delay of the proceedings. This behavior can be anticipated either because of the defendant's overuse of his available means or his failure to co-operate. In the same context, the European Court of Human Rights ruled that "Article 6 [European Convention on Human Rights] does not require accused persons actively to co-operate with the judicial authorities. Neither can any reproach be levelled against them for making full use of the remedies available under domestic law." *Ledonne (No 1) v. Italy*, App. No. 35742/97, ¶ 21 (May 12, 1999).

⁶⁶² Regarding a delay attributed to the behavior of the prosecution, it has been noted that, due to the complexity of the ICTY statute defining the crimes, the prosecution took the position of transferring as many appearances and as much evidence as possible in order to establish the defendant's guilt beyond a reasonable doubt. This practice contributes to prolonging the pre-trial and trial proceedings. In addition, motions to amend and joint indictments and their responses from the defense council are other sources of delay. In addition, this right may affect part of the international prosecutor's prescribed power. In ICTY practice, it has been held that "The prosecutor's right to submit a request for leave to amend the indictmentmust not be exercised to the prejudice of the defendant's right to be tried without undue delay." *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14-2, Decision on the Prosecutor's Motion to Hold Pre-trial Motions in abeyance (January 28, 1998).

⁶⁶³ *Ledonne (No. 1) v. Italy*, App. No.35742/97, ¶ 25 (May 12, 1999).

courts.⁶⁶⁴ Disregarding this time limit can be permitted in some circumstances with advance judicial approval. As a result, it has been suggested that dismissing the relevant charges should be the remedy if the time limit requirement has been ignored.⁶⁶⁵ Unfortunately, this suggestion has not been adopted by international criminal tribunals.

The ICTY judges are in favor of granting provisional release if there is excessively long detention with no prospect of coming to trial.⁶⁶⁶ Analogizing to the remedy for the violation of the right to be informed promptly of charges against the defendant, it has been argued that the remedy for the violation of the right to be tried without undue delay should be discontinuance.⁶⁶⁷ Unless some national modifications were adopted in the case of Saddam Hussein, the right to be tried without undue delay would have provided an argument supporting holding the trial internationally.

VI. The Issue of the Transfer of Defendants to International Tribunals

This part of the paper will not include the question whether an international obligation exists to surrender persons accused of international crimes to international criminal tribunals. Rather, the discussion assumes the existence of such an obligation, and examines developments before international criminal tribunals regarding obtaining

⁶⁶⁴ Joseph L. Falvey, *United Nations Justice or Military Justice: Which is the Oxymoron? An Analysis of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 19 *FORDHAM INT'L L. J.* 475, 504-05 (1995).

⁶⁶⁵ Joseph L. Falvey, *United Nations Justice or Military Justice: Which is the Oxymoron? An Analysis of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 19 *FORDHAM INT'L L. J.* 475, 504-05 (1995).

⁶⁶⁶ *Prosecutor v. Simic ET Al.*, Case No. IT-95-9-PT, Decision on Milan Simic's Application for Provisional Release (May 19, 2001).

⁶⁶⁷ Hafida Lahiouel, *The Right of the Accused to an Expeditious Trial in Essays on ICTY Procedure and Evidence* 197 (Richard May ET Al., Kluwer Law International 2001); For the case deciding on discontinuance for violation of the defendant's right to be informed promptly of charges against him, see *Prosecutor v. Barayagwize*, Case No. ICTR-97-19, Appeal Decision (November 3, 1999) ¶ 71. (ruling that the right to be informed promptly concerning the charges had been violated by the 96 day interval between the transfer of the accused and his initial appearance before a trial court).

custody of the defendant and its relationship to extradition principles under international law.

Since an ad hoc international criminal tribunal for the Iraqi invasion was the only international judicial body that might have been expected to try Saddam Hussein's case, the discussion will focus on the practice of ad hoc international criminal tribunals, mainly the ICTY, in dealing with the issue of obtaining custody of the defendant. Since Saddam Hussein was in custody at the time these lines were written, this review concentrates on the surrender issue rather than the arrest issue.

The establishment of international criminal tribunals is one of those exceptional departures from Article 2 (7) of the U.N. Charter authorizing the Security Council acting under chapter VII to interfere in the internal affairs of States.⁶⁶⁸ The necessity to bring those persons responsible for international crimes to justice justifies this interference.⁶⁶⁹ However, since international criminal tribunals do not have their own police or military forces, they cannot fulfill their functions and duties without the cooperation of the governments of states. Such cooperation is not perfect all the time.⁶⁷⁰

Contemplating the necessity of States' cooperation, the Security Council, in its decision establishing the ICTY, emphasized that ".....[A]ll states shall cooperate fully

⁶⁶⁸ Prosecutor v. Blaskic, Case No. IT-95-14, Appeals Chamber, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (October 29, 1997) ¶ 64.

⁶⁶⁹ Kenneth S. Gallant, Securing the Presence of Defendants before the International Tribunal for Former Yugoslavia: Breaking with Extradition, 5 CRIM. L.F. 557, 562 (1994).

⁶⁷⁰ It is said that "[T]he experience of the Yugoslavia Tribunal demonstrates that state co-operation and Security Council support are inextricably linked issues, and are themselves dependent on the court's image as a powerful institution." Ilias Bantekas & Susan Nash, International Criminal Law 393 (Cavendish Publishing 2003).

with the International Tribunal and its organs.....”⁶⁷¹ Such cooperation encompasses “all stages of the proceedings.”⁶⁷² This cooperation, as prescribed by Article 29 of the ICTY statute, includes, but is not limited to, both the investigation and the prosecution stages concerning “(a) the identification and location of persons;(b) the taking of testimony and the production of evidence;(c) the service of documents;(d) the arrest and detention of persons; and (e) the surrender or the transfer of the accused to the International Tribunal.”⁶⁷³ Moreover, this cooperation is not limited to orders issued by the trial Chambers, but extends to include the assistance of the prosecutors.⁶⁷⁴ The Security Council’s request to cooperate led some states to enact new legislation to avoid conflict between their national legal systems and the obligations established by the Security Council.⁶⁷⁵ Other states, such as the Republic of Croatia and the former Republic of

⁶⁷¹ Security Council Resolution 827, S.C. Res. 827, U.N. SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993).

⁶⁷² Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704& add. 1 (1993), ¶ 125.

⁶⁷³ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993). A comparison of the ICC statute and the ICTY statute on this issue shows that the state’s obligation to transfer defendants to the ICC is narrower than the obligation prescribed by the ICTY statute since, unlike the ICTY obligation which extends to all states that are members of the U.N. Organization, the ICC obligation is limited to those states which are parties to the ICC statute. Rome Statute of the International Criminal Court arts. 86, 87(5), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998).

⁶⁷⁴ ICTY’s Rules of Procedure and Evidence art. 39 (iii), U.N. Doc. IT/32/Rev.37 (2006). In the same context, between the ICTY and the ICTR, there is disagreement regarding whether the obligation to cooperate includes international organizations. For instance, the ICTY Trial Chamber held that the obligation prescribed by Art. 29 does not apply to international organizations. Prosecutor v. Simic and others, Case No. IT-95-9, Decision on the Prosecution Motion under r 73 for a Ruling Concerning the Testimony of a Witness (July 27, 1999) ¶ 78. On the contrary, the ICTR Trial Chamber recognized the Registrar’s right to seek assistance from the United Nations High Commissioner for Refugees. Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Decision on the Motion for the Protection of Defence Witnesses (October 6, 1997) Sec. D (ii).

⁶⁷⁵ England is one of these states. Concerning the new English legislation implementing the Security Council’s decision, see Colin Warbrick, Co-operation with the International Criminal Tribunal for Yugoslavia, 45 INT’L & COMP. L. Q. 947 (1996).

Yugoslavia, failed to enact such legislation and this failure was judicially considered a violation of their international obligations.⁶⁷⁶

While a state cannot be ordered to act by another state or international organization, it is the obligation of states to cooperate and to provide judicial assistance to an international tribunal as an *orga omnes* obligation which every member of the U.N. must fulfill.⁶⁷⁷ In addition, orders issued by the international trial Chambers, including transfer orders, are considered “the application of an enforcement measure under Chapter VII of the Charter of the United Nations.”⁶⁷⁸ As a result, these orders are binding on all members of the U.N. organization.⁶⁷⁹

⁶⁷⁶ Prosecutor v. Blaskic, Case No. IT-95-14-, Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence (April 3, 1996) ¶ 9. However, the primacy of international criminal tribunals is limited to specific issues: jurisdiction, investigation, transfer of defendants and punishment. To ensure primacy in the matter of the transfer of defendants, article 58 of the ICTY Rules of Procedure and Evidence provides that “The obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned. Rules of Procedure and Evidence art. 56, U.N. Doc. IT/32/Rev.37 (2006). Within the ICC statute, article 102 distinguishes clearly between extradition and surrender to the international tribunals. This distinction is based upon the authority which makes the request to surrender. If such a request is made by the International Criminal Court, it is considered a request for surrender. However, if a state makes a request to another state, then this request is deemed extradition. Rome Statute of the International Criminal Court art. 102, U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998). For reasons behind the ICC statute distinction between extradition and surrender, see Claus Kreb, Penalties, Enforcement and Cooperation in the International Criminal Court Statute (Parts VII, IX, X), 6 EUR. J. CRIME CRIM. L. & CRIM JUST. 126, 135 (1998); Prosecutor v. Blaskic, Case No. IT-95-14, Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence (April 3, 1996) ¶ 7; Prosecutor v. Slavko Dokmanovic, Case No. IT-95-13a, Decision on the Motion of the Release by the Accused Slavko Dokmanovic (October 22, 1997) ¶ 38. In the *Dokmanovic* case, the Federal Republic of Yugoslavia (Serbia and Montenegro) has argued that its constitution forbids the extradition of its nationals.

⁶⁷⁷ Prosecutor v. Blaskic, Case No. IT-95-14, Appeals Chamber, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (October 29, 1997) ¶ 25. The Trial Chamber’s order requested the Republic of Croatia to submit documents which were considered, by Croatia, to be documents which would jeopardize its national security.

⁶⁷⁸ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704& add. 1 (1993) ¶ 126.

⁶⁷⁹ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704& add. 1 (1993) ¶ 125-26.

In the milieu of ad hoc international criminal tribunals, the states' obligation to surrender and transfer accused persons found on their territories to international tribunals is not extradition, a cooperative tool between states in criminal matters. As a result, extradition principles between states under international law are not applicable before international criminal tribunals as long as they are not expressly included within the tribunals' statutes or within the meaning of customary international law principles.⁶⁸⁰

The reason behind the trend of not recognizing extradition principles in the context of international criminal tribunals is the fear that a state's prosecution of its own nationals will not be conducted in good faith. Therefore, "The formula *aut dedere aut judicare* is replaced by a mandatory requirement of transfer to the Tribunal at its order."⁶⁸¹

The process of transferring defendants begins with an order issued by the judge of the trial Chamber after confirmation of the indictment and the prosecutor's request.⁶⁸² The order to arrest and transfer can be internationally addressed to all states.⁶⁸³ Upon the issue of an international warrant for arrest and transfer, all states shall "act promptly and with all due diligence to ensure proper and effective execution thereof, in accordance

⁶⁸⁰ Geoff Gillbert, *Responding to International Crime* 45 (Martinus Nijhoff Publishers 2006).

⁶⁸¹ Kenneth S. Gallant, *Securing the Presence of Defendants before the International Tribunal for Former Yugoslavia: Breaking with Extradition*, 5 CRIM. L.F. 557, 569 (1994).

⁶⁸² Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 19 (2), S.C. Res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993).

⁶⁸³ Rules of Procedure and Evidence art. 55 *bis*, U.N. Doc. ITR/3/REV.1 (1995). Within the ICTY framework, a specified article for international warrants for arrest and transfer does not exist. Other administrative procedures relating to execution of the transfer order, procedures after arrest and transmission of transfer orders are prescribed by articles 55, 57 and 59 *bis* of ICTY Rules of Procedure and Evidence. The ICTY Rules of Procedure and Evidence art. 56, U.N. Doc. IT/32/Rev.37 (2006).

with Article 29 of the Statute.”⁶⁸⁴ The state to which a transfer order is transmitted cannot review the sufficiency of the evidence supporting the order and it cannot either appeal or challenge the transfer order. It is argued that the Rules of Procedure and Evidence must be amended in order to avoid any human rights violations in the transfer of defendants by allowing such challenges.⁶⁸⁵

The remaining question is, what remedy is available when a state fails to execute, or purposely refrains from executing, the surrender and transfer order? International criminal tribunals do not have the power to impose financial fines on those states.⁶⁸⁶ However, the tribunals’ statutes contemplated the occurrence of this issue and provided procedures to be followed when it occurred. Article 59 of the ICTY Rules of Procedure and Evidence furnishes the tribunal with the power to notify the Security Council when, in a reasonable time after transmission of a surrender and transfer order, the state does not report its inability to execute the orders and the reasons for this inability.⁶⁸⁷

⁶⁸⁴ The ICTY Rules of Procedure and Evidence art. 56, U.N. Doc. IT/32/Rev.37 (2006).

⁶⁸⁵ Kenneth S. Gallant, *Securing the Presence of Defendants before the International Tribunal for Former Yugoslavia: Breaking with Extradition*, 5 CRIM. L.F. 557, 587 (1994). Unlike the ICTY statute, the ICC statute provides a person sought for surrender with a challenge (*ne bis in idem*). Rome Statute of the International Criminal Court art. 89 (2), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998).

⁶⁸⁶ The ICTY Rules of Procedure and Evidence art. 59, U.N. Doc. IT/32/Rev.37 (2006).

⁶⁸⁷ The ICTY Rules of Procedure and Evidence art. 56, U.N. Doc. IT/32/Rev.37 (2006); *Prosecutor v. Blaskic*, Case No. IT-95-14-IT, Appeals Chamber, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (October 29, 1997) ¶ 33. Within the ICC statute, article 87 (7) provides “Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.” Rome Statute of the International Criminal Court art. 87 (7), U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998).

From ICTY experience, it seems that this tool, the notification of the Security Council, was not effective.⁶⁸⁸ As a result, it is suggested that the Security Council should have imposed sanctions against the governments of those states.⁶⁸⁹ One commentator has proposed a set of procedures to enhance and strengthen compliance with the requests and orders of an international criminal tribunal to gain custody of defendants.⁶⁹⁰ Notwithstanding these difficulties, an overall assessment of ICTY accomplishments in obtaining the custody of defendants shows great success. Among 161 defendants indicted by the ICTY, only 6 defendants are at large.⁶⁹¹

In the case of Saddam Hussein, if an ad hoc international criminal tribunal had been established, it is more likely that the custodial state, the United States, would have welcomed his transmission to the tribunal. Otherwise, the United States would have added to its violation of international obligations one more violation. In sum, within the framework of ad hoc international criminal tribunals, the first so-called problem, namely, obtaining custody of the defendant, which can block international justice, does not exist.

⁶⁸⁸ Regretting the fact that, in the ICTY experience, political pressures were not effective in making states comply with the surrender and transfer of defendants, in her final reports to the Security Council Concerning Outstanding Issues of State Non-Compliance, Judge McDonald, the President of the ICTY, stated that “On the verge of the twenty-first century, it is simply unacceptable that territories have become safe-havens for individuals indicted for most serious offenses against humanity. It must be made absolutely clear to such states that this behavior is legally- as well as morally- wrong.For the benefit of all peoples of the former Yugoslavia, I urge you to act.” Letter from President McDonald to the President of the Security Council Concerning Outstanding Issues of State Non-Compliance, 2 November 1999, U.N. Doc.S/1999/1117. Judge McDonald’s reflections resulted from the fact that the Security Council did not adequately respond to the Court’s reports concerning a state’s non-compliance with ICTY surrender and transfer orders. The strongest response to non-compliance reports was the Security Council’s resolution 1207 which condemns the failure of the former Republic of Yugoslavia to arrest and surrender the Vukovar Three. See Resolution 1207 (17 November 1998) U.N. Doc. S/Res/1207 (1998).

⁶⁸⁹ Lyal S. Sunga, *The Emerging System of International Criminal Law* 301 (Kluwer Law International 1997); Geoff Gillbert, *Responding to International Crime* 49 (Martinus Nijhoff Publishers 2006).

⁶⁹⁰ Lyal S. Sunga, *The Emerging System of International Criminal Law* 303-06 (Kluwer Law International 1997).

⁶⁹¹ See ICTY website. <http://www.un.org/icty/glance-e/index.htm> (last visited July 27, 2007).

Otherwise, this quandary would have been bucked by the international community with several options.

Conclusion and Observations

Generally, the principle of legality or *nullum crimen poena legali* is not applicable in the field of international law in the same strict sense as in national legal systems, particularly with regard to jurisdiction. Having reached the conclusion that the existing judicial bodies did not have jurisdiction to try Saddam Hussein, the only means of trying such a case internationally would have been the establishment of an ad hoc international criminal tribunal.

The trial of Saddam Hussein by an ad hoc tribunal would not have been in contradiction to head of state immunity, since that immunity is a procedural issue which bars only national foreign judicial authorities and not international foreign judicial authorities from judging the immune individual case for a limited time. In short, there is no immunity before international criminal tribunals regardless of its type as long as the actions in question are considered international crimes.

Moreover, international crimes are not subject to, nor governed by, a statute of limitations, which exists only in national legal systems. However, international law protects human rights to some extent, even more than some national legal systems, since the former recognizes some defendant's rights which are unfamiliar to the latter, such as the right to be tried without undue delay.

Ad hoc criminal tribunals should not confront a traditional problem facing international or foreign courts regarding obtaining custody of the defendant. The international law process of surrender and transfer of defendants to an international tribunal does not amount to an extradition process. The surrender and transfer of defendants is usually accomplished under the Security Council's supervision. This supervision can lead to stronger tools or remedies when needed.

In the end, the political will did not exist to create an ad hoc international tribunal for the Iraqi invasion. Consequently, national prosecution was the only way to try Saddam Hussein for environmental crimes.

Chapter V

War Crimes against the Environment and a National Criminal Remedy

Introduction

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Chapter V

War Crimes against the Environment and a National Criminal Remedy

Introduction

Since courts of the state where the crimes were committed, Kuwait, or courts of the nationality state, Iraq, would have been interested in holding Saddam Hussein's trial concerning crimes against the environment committed during the Gulf War of 1990-1991;⁶⁹² the focus in this chapter will be on the Kuwaiti and the Iraqi legal systems.

Since these two legal systems operate under the civil-law regime, there is much in common between the two systems. There are also differences with respect to Saddam Hussein's case. This chapter examines common aspects in Part I while Part II deals with the Kuwaiti trial and its difficulties. Part III reviews the basis of Iraqi jurisdiction and the flaws found in the Statute of the Supreme Iraqi Criminal Tribunal established after the collapse of Saddam Hussein's regime. The Iraqi part intends to review the ad hoc statute and the statute in force when the crimes were committed to evaluate advantages and disadvantages of both statutes.

I. Common Issues

This part of the chapter reviews how the Kuwaiti and Iraqi legal systems take common approaches to the status of international law, the availability of national legislation, immunity, the death penalty, and issues of evidence and defendant's rights.

⁶⁹² This conclusion arises from the fact that the most common bases for jurisdiction claimed by states are the territorial principle (the location of the crime state) and the active personality principle (the nationality of the accused state.) Lyal S. Sunga, *The Emerging System of International Criminal Law* 252 (Kluwer Law International 1997).

1. International Law as a Source of Law within the Kuwaiti and the Iraqi Legal Systems

The relationship between international law and national legal systems is governed by two schools of thought. Adopting either of these approaches is a matter which is left to the state itself based upon the nature of its own legal system. The two approaches are the monist and the dualist approaches.⁶⁹³

The first approach, the monist approach, considers the two systems, international law and domestic law, as parts of a single legal system. As a result, no express municipal adoption of international law principles is required. The United States is one of those states which have adopted the monist view.⁶⁹⁴

The second approach, the dualist approach, views international law and the internal law of a state as totally separate legal systems. Based upon this distinction, international law would not form part of the internal law of a state. Consequently, the principles of international law apply within the internal system only when they are expressly adopted as part of the internal law of the state.⁶⁹⁵ This approach avoids the question as to the supremacy of one system over the other since there is no common sphere of application of the two systems. Both Kuwait and Iraq follow this approach.⁶⁹⁶

The Kuwaiti Constitution explicitly refers to international conventions but does not mention other sources of international law. Article 70 of the Kuwaiti Constitution states “The Emir [the ruler] shall conclude treaties by decree and shall transmit them immediately to the National Assembly [the Congress] with the appropriate statement. A

⁶⁹³ Sir Robert Jennings & Sir Arthur Watts eds., *Oppenheim’s International Law* 53 (LongMan 1992).

⁶⁹⁴ Sir Robert Jennings & Sir Arthur Watts eds., *Oppenheim’s International Law* 54 (LongMan 1992).

⁶⁹⁵ Sir Robert Jennings & Sir Arthur Watts eds., *Oppenheim’s International Law* 53 (LongMan 1992).

⁶⁹⁶ M. Cherif Bassiouni, *Introduction to International Criminal Law* 217 (Transnational Publishers 2003); Dr. Fayez Al-Zafeery & Dr. Mohammed Abu-Zoubar, *Al-Wajeez Fee Shrah Al-Qwa’ed Al-Amaa* [The Handbook of Explaining General Rules] 109 (2003).

treaty shall have the force of law after it is signed, ratified and published in the official Gazette.”⁶⁹⁷ This reference, however, does not preclude Kuwaiti recognition of other sources of international law; all international law sources are valid as long as they are adopted by national legislation.⁶⁹⁸

Without mentioning the status of international agreements within the national legal system, Article 43 (d) of the Interim Iraqi Constitution of 1990 provides that “The Revolutionary Command Council exercises the following competencies by the majority of its members:Ratifying treaties and international agreements.”⁶⁹⁹ In addition, the same Constitution confers upon the Iraqi president the power to conduct negotiations and to conclude agreements and international treaties.⁷⁰⁰

Both the Kuwaiti and the Iraqi legal systems grant adopted treaties the force of national law. These treaties are then controlled by the constitutional principles of the adopting state and cannot contradict them. Having acknowledged the position of both systems concerning international conventions as a source of national law, the focus of this paper now will move toward those rules governing international conventions as a source of the definition of criminality within the two systems.

Crimes and their sanctions are controlled by the fundamental principle of “legality.” This principle is expressly recognized as a constitutional principle in both

⁶⁹⁷ Dostor Dwllat Al-Kuwiet [The Constitution of the State of Kuwait] 70 (1962).

⁶⁹⁸ Article 2 of the Constitution stipulates that “The religion of the State is Islam, and the Islamic Sharia shall be a main source of legislation.” This article is interpreted as other sources are available to be sources of legislation. Dostor Dwllat Al-Kuwiet [The Constitution of the State of Kuwait] 2 (1962); Al’Mothkrah Al’Tfseer’iah L Dostor Dwllat Al-Kuwiet [The Explanatory Memorandum of the Constitution of the State of Kuwait].

⁶⁹⁹ AL-Dostor Al-Moakaat Lljomhoriah Al-Iraqiah [The Interim Constitution of the Republic of Iraq] 43 (d)(1990).

⁷⁰⁰ AL-Dostor Al-Moakaat Lljomhoriah Al-Iraqiah [The Interim Constitution of the Republic of Iraq] 57 (j)(1990).

legal systems.⁷⁰¹ Because international conventions have the status of the national legislation adopting them as the source of the definition of criminality, they are bound by the principle of legality in terms of meaning and extent. In terms of meaning the process of defining criminality must be done through legislation.⁷⁰² Criminality cannot be defined by a decree or a rule issued by the executive power.

The principle of legality is especially important in the Kuwaiti legal system⁷⁰³ because the definition of criminality in Saddam Hussein's case is the Fourth Geneva Convention, which was negotiated and adopted by the executive branch (the Emir) without any participation by the legislative branch. In the Kuwaiti legal system, the Emir and the National Assembly share legislative power.⁷⁰⁴ Consequently, the process of enacting law requires a proposal from the National Assembly and approval of the Emir. If

⁷⁰¹ Article 32 of the Kuwaiti Constitution provides "No crime and no penalty may be established except by virtue of law, and no penalty may be imposed except for offenses committed after the relevant law has come into force." Dostor Dwllat Al-Kuwiet [The Constitution of the State of Kuwait] 32 (1962). Article 21 (b) of the Interim Iraqi Constitution states "There can be no crime, nor punishment, except in conformity with the law. No penalty shall be imposed, for acts punishable by the law, while they are committed. A severer penalty than that prescribed by the law, when the act was committed, cannot be inflicted." AL-Dostor Al-Moakaat Lljomhoriah Al-Iraqiah [The Interim Constitution of the Republic of Iraq] 21 (b)(1990).

⁷⁰² Dr. Fayeze Al-Zafeery & Dr. Mohammed Abu-Zoubar, *Al-Wajeez Fee Shrah Al-Qwa'ed Al-Amaa* [The Handbook of Explaining General Rules] 95 (2003).

⁷⁰³ In the Iraqi system, the Constitution does not explicitly deal with the way by which international conventions may be incorporated within the legal system. However, some assumptions can be made based on those constitutional articles dealing with both international agreements and the principle of legality. Article 38 (a) of the Iraqi Constitution provides that "The Command Revolutionary Council exercises the following competencies by two-thirds of its members: Electing a President from its members, called President of the Revolutionary Council, who is President of the Republic." Article 42 of the Iraqi Constitution stipulates that "The Revolutionary Command Council exercises the following competencies: (a) Issuing laws and decrees having the force of the law." Article 43 (d) lays down that "The Revolutionary Command Council exercises the following competencies by the majority its members: ratifying treaties and international agreements." Finally, article 57 (j) confers upon the President of Iraq the authority to negotiate and conclude international treaties. In the Iraqi legal system, although it was theoretically foreseeable that conflict between Saddam Hussein and other members of the Iraqi Revolutionary Command Council might have occurred regarding enactment of a law implementing an international convention, as a practical matter, in a dictatorship system, this conflict might not have been contemplated. AL-Dostor Al-Moakaat Lljomhoriah Al-Iraqiah [The Interim Constitution of the Republic of Iraq] 38, 42 (a), 43 (d), 57 (j) (1990).

⁷⁰⁴ Article 51 of the Kuwaiti Constitution provides "Legislative power shall be vested in the Emir and the National Assembly in accordance with the Constitution." Dostor Dwllat Al-Kuwiet [The Constitution of the State of Kuwait] 51 (1962).

the Emir disapproves of a legislative action, however, and the National Assembly repasses it with a two thirds vote, approval of the Emir becomes mandatory.⁷⁰⁵ This raises the question of whether the Emir can conclude international conventions criminalizing actions without legislative approval, when the principle of legality requires legislative action to criminalize them. Answering this question requires a review of the position of the Kuwaiti Constitution concerning compromise between the Emir's power to conclude a treaty criminalizing certain acts and the National Assembly's power to do so.

By and large, national constitutions differ in their treatment of the process of ratification of international conventions. Some constitutions leave the task of negotiation and conclusion exclusively to the executive power without the need for approval by the legislative power.⁷⁰⁶ A second group of constitutions requires that all international conventions be ratified by the legislature.⁷⁰⁷ Others follow this general rule but require legislative approval of international agreements in some exceptions.⁷⁰⁸

Compromising between the Emir's power to ratify a treaty and the National Assembly's power to criminalize, the Kuwaiti Constitution embraces the approach of the last group. Article 70 of the Kuwaiti Constitution provides that "The Emir [the ruler] shall conclude treaties by decree and shall transmit them immediately to the National

⁷⁰⁵ Article 66 of the Kuwaiti Constitution stipulates that "Reference [from the Emir to the National Assembly] of a bill for reconsideration shall be by a decree stating the grounds therefore. If the National Assembly confirms the bill by a two-thirds majority vote of its members, the Emir shall sanction and promulgate the bill within thirty days from its submission [from the National Assembly] to him." Dostor Dwlal Al-Kuwiet [The Constitution of the State of Kuwait] 66 (1962).

⁷⁰⁶ Examples of these constitutions are the French Constitution of 1814 and the German Constitution of 1871. See Adel Al-Tabtbaee, Al-Netham Al-Dostorey Fee Al-Kuweit [The Constitutional System in Kuwait] 555 (2001).

⁷⁰⁷ This happened in the Swiss experience. Dr. Othman Abdul'Malik Al-Saleh, Al-Netham Al-Dostorey Wa Al-Moa's'saat Al-Dostoriah Fe Al-Kuweit [The Constitutional System and Political Institutions in Kuwait] 439 (2003).

⁷⁰⁸ See Adel Al-Tabtbaee, Al-Netham Al-Dostorey Fee Al-Kuweit [The Constitutional System in Kuwait] 556 (2001).

Assembly [the Congress] with the appropriate statement. A treaty shall have the force of law after it is signed, ratified and published in the official Gazette. However, treaties of peace and alliance; treaties concerning the territory of the state, its natural resources or sovereign rights, or public or private rights of citizens; treaties of commerce, navigation and residence; and treaties which entail additional expenditure not provided for in the budget, or which involve amendment of the laws of Kuwait; shall come into force only when made by a law.”⁷⁰⁹

In any event, the Emir has the power to ratify an international treaty. Under the international law system, Kuwait, by the Emir’s ratification, will be bound by the treaty’s obligations. However, implementing and incorporating the ratified treaty’s rules into the Kuwaiti legal system in some issues requires legislative action. In other words, based on the above constitutional article, the general rule is that a decree issued by the Emir is sufficient to incorporate international principles within the framework of the national legal system as enforceable principles. Some exceptional treaties require legislative approval in order to be part of Kuwaiti law.

International conventions criminalizing actions fall within the purview of these exceptional treaties requiring legislative action for several reasons. First, since criminal law represents one aspect of “sovereign rights,” conventions criminalizing certain actions concern sovereign rights. Second, such conventions also touch the “public rights of citizens.” The principle of legality is provided in Part III of the Kuwaiti Constitution,

⁷⁰⁹ Dostor Dwwlat Al-Kuwiet [The Constitution of the State of Kuwait] 70 (1962). It should be clear that in international law, the general rule is that a state is not bound by a treaty unless it ratified it. Signing or initialing a treaty is not sufficient to consider a state as being bound by the treaty unless a treaty decides otherwise. Jan Klabbbers, *The Concept of Treaty in International Law* 74-75 (Kluwer Law International 1996). Both the fourth Geneva Convention of 1949 and its first additional Protocol adopts a rule requiring ratification. Geneva Convention relative to the Protection of Civilian Persons in Time of War art. 153, 75 UNTS 287 (1949); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 95 (2), 1125 UNTS 3 (1977).

“Public Rights and Duties.”⁷¹⁰ Third, international conventions adding new crimes introduce amendment of the laws of Kuwait. The Fourth Geneva Convention and its first additional Protocol are international conventions requiring legislative approval because they fall within those categories of treaties for which article 70 of the Kuwaiti Constitution requires legislative action. Although Kuwait is a party to both the Fourth Geneva Convention and its first Protocol, it signed these treaties pursuant to the Emir’s decree without legislative approval.⁷¹¹ While the failure of the Kuwaiti legislature to enact war crimes legislation might violate Kuwait’s international obligations,⁷¹² it would have undercut any attempt to prosecute Saddam Hussein in a Kuwaiti court for environmental war crimes under those international conventions.

2. The Availability of National Criminal Legislation

The lack of national war crimes legislation is a disadvantage of prosecuting war crimes nationally because enactment of new national legislation on war crimes could violate the principle of legality operating at the national level. National legal systems that

⁷¹⁰ Dostor Dwlal Al-Kuwiet [The Constitution of the State of Kuwait] 27-49 (1962).

⁷¹¹ Those two decrees were issued without a comprehensive framework concerning the convention violations and their punishments. Marsoom Be Qanon Be’sh’an Al-Mowaafqah Ala Enzmaam Al-Kweit Ala Etifaqiaat Genv [A Decree of Law concerning Approval of Joining the Geneva Conventions of Aug. 12, 1949] Aug. 8, 1967; Marsoom Be Qanon Be’sh’an Al-Mowaafqah Ala Enzmaam Al-Kweit Ala Al-Brotokolien [A Decree of Law concerning Approval of Joining the two Protocols Additional to Geneva Conventions] Dec. 3, 1984.

⁷¹² International law requires that states fulfill their obligation to pursue persons accused of international crimes. In holding a state responsible, it is a well-established rule of international law that a state cannot justify its failure to fulfill an international obligation based upon the argument that its failure is due to defective internal law or to an internal law that contradicts international law. The same rule applies to a state’s failure to secure the changes in its law necessary to meet its international obligations. Based on this international rule, the Kuwaiti approach might be criticized. This criticism would be based upon the argument that a policy disagreement between the Emir and the National Assembly concerning whether an international convention falls within the category of exceptional treaties or not might result in the international responsibility of Kuwait. Sir Robert Jennings & Sir Arthur Watts eds., *Oppenheim’s International Law* 84-85 (LongMan 1992); Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations art. 46(1), 25 ILM 543 (1986).

had no war crimes legislation when these crimes were committed would violate the principle of legality.⁷¹³

Even though Iraq is a party to the Fourth Geneva Convention, it did not enact any national legislation concerning war crimes.⁷¹⁴ As mentioned above, although Kuwait is a party to both the Fourth Geneva Convention and its first Protocol, it also failed to enact national legislation implementing the obligations of those conventions and criminalizing their violations.

The problem of a state's failure to enact domestic criminal legislation implementing and fulfilling its international obligations is not new in international law. When states lacking national war crimes legislation are called to prosecute war criminals, they adopt contradictory approaches. The first approach ignores the principle of legality by prosecuting under national criminal legislation enacted after the complained actions. This occurred in national trials after World War II. The second approach respects the principle of legality by prosecuting under limited legislation already in force when the complained action was committed. An example is the trials held before Rwanda's national courts.⁷¹⁵ Violations of rules applicable before commission of the action are the only basis for national trials complying with the principle of legality.

In the case of Saddam Hussein, Kuwait or Iraq could have avoided international responsibility for violation of their obligations to enact legislation enabling them to prosecute international war criminals, or for violation of their international obligation to

⁷¹³ Violation of the principle of legality occurs when national authorities enact new war crimes legislation to conduct trials when their international obligation to prosecute suspected war criminals found in their territories arises.

⁷¹⁴ M. Cherif Bassiouni, *Introduction to International Criminal Law* 217 (Transnational Publishers 2003).

⁷¹⁵ See William A. Schabas, *Preserve Effects of the Nullu Poena Principle: National Practice and the Ad Hoc Tribunals*, EJIL Vol. 11 No.3 521, 26 (2000).

protect human rights (the principle of legality,) only by prosecuting Saddam Hussein for violating criminal legislation in force when the offense was committed.

In addition, to ensure the fairness of the proceedings, some domestic modifications, procedural and substantive, are necessary. Some of these modifications will be clarified in this chapter. In the Kuwaiti and Iraqi criminal justice systems, the core legislation controlling criminal trials is the Penal Code.⁷¹⁶ This legislation deals with the substantive aspect of criminal proceedings. In the procedural part of criminal proceedings, the Criminal Procedure Code controls the action from the original complaint to the execution of the sentence.

In both Kuwaiti and Iraqi core legislation, the principle of legality is reaffirmed.⁷¹⁷ It is the standard by which a distinction between a State where “law” is arbitrary and a State which abides by the rule of law is made. Unlike the requirement for the principle on the international plane, any crime and its punishment must be prescribed in advance by written law. This written law must be issued by the legislature and published in the official Gazette. Despite the fact that this principle has been criticized, it still benefits defendants to some extent.⁷¹⁸ Pre-existing national criminal legislation could have been used as a basis for prosecuting Saddam Hussein criminally for his actions against the environment and could have been found in the Penal Code. These laws, however, do not refer to war crimes.⁷¹⁹ Avoiding failure to fulfill the state’s international obligation to prosecute for international war crimes justifies interpreting these pre-

⁷¹⁶ The substantive part grapples with principles of the application of the Code, with the elements of the crime, defenses, excuses, and crimes and their sanctions.

⁷¹⁷ Kanon Al-Jazaa [The Sanction Law], Law No. 16 of 1960, art.1-14 (Kuwait). Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 1 (Iraq).

⁷¹⁸ Dr. Fayeze Al-Zafeery & Dr. Mohammed Abu-Zoubar, *Al-Wajeez Fee Shrah Al-Qwa’ed Al-Amaa* [The Handbook of Explaining General Rules] 98 (2003).

⁷¹⁹ Dr. Fayeze Al-Zafeery & Dr. Mohammed Abu-Zoubar, *Al-Wajeez Fee Shrah Al-Qwa’ed Al-Amaa* [The Handbook of Explaining General Rules] 162 (2003).

existing laws to apply during both peace and war. At the same time, the texts of these laws do not indicate that they apply only during peace time.

Even though there is a lack of national legislation criminalizing environmental war crimes, national prosecutors have several tools with which to prosecute the accused for underlying actions. Specifically, in the matter of Saddam Hussein's actions against the environment, the prosecutor may consider those actions to be crimes against property, arson, harming animals or offenses against the public health.

Under the Kuwaiti criminal justice system, a proceeding could have been commenced based upon the charge that Saddam Hussein's actions are considered crimes against property. Article (250) of the Kuwaiti Penal Code provides that "Any person who willfully destroys a public installation or a resource of national wealth, causing the closure of the installation or a reduction in its utility or damage to that resource entirely or partly, is punishable by life imprisonment."⁷²⁰

This provision differs in two aspects from Article 53 of the Geneva Convention IV⁷²¹ which criminalizes destruction of property during war. First, it does not require that the proscribed action be conducted during international armed conflict, nor does it require a connection between the action and the event (warfare.) Secondly, this provision does not furnish the accused with the defense of military necessity. Consequently, it would have been easier to use national legislation to prosecute the defendant since it does not require the prosecutor to prove these additional elements, the lack of military necessity, the existence of armed conflict and a nexus between this conflict and the committed crime. On the other hand, the lack of the defense of military necessity constitutes a

⁷²⁰ Kanon Al-Jazaa [The Sanction Law], Law No. 16 of 1960, art.250 (Kuwait).

⁷²¹ Geneva Convention relative to the Protection of Civilian Persons in Time of War art. 53, 75 UNTS 287 (1949).

disadvantage of the national trial approach since this provides less human rights protection. Under both systems, it could have been argued that the necessity defense is generally available for all offenses.⁷²²

In addition to crimes against property, a Kuwaiti prosecutor could have prosecuted for violation of the provisions criminalizing arson. Article (243) of the Kuwaiti Penal Code provides that “Any person who willfully sets on fire an oil well and causes damage to others is punishable by a term of imprisonment not exceeding 10 years and a fine not exceeding 10,000 dinars [30,000 dollars] or any of these penalties.”⁷²³ The punishment is increased if explosives are used in carrying out the crime.⁷²⁴

Corresponding provisions are included in the Iraqi Penal Code. The Iraqi Penal Code is more specific concerning the place where the fire was set or where the destruction occurred. Article 353(1) stipulates, “Any person who...destroys or causes other damage to an oil installation is punishable by a term of imprisonment not exceeding seven years or by detention if such damage could lead to the closure of that installation. The penalty will be a term of imprisonment not exceeding ten years of detention if the crime actually causes the closure of such installations.”⁷²⁵

⁷²² Kanon Al-Jazaa [The Sanction Law], Law No. 16 of 1960, art.25 (Kuwait). Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 63 (Iraq). It is questionable whether military necessity is included with the general necessity defense since there is no war crimes statute or case law within the two systems. However, a Kuwaiti or Iraqi court might interpret the defense of necessity broadly to include military necessity. This interpretation is acceptable because of a well-known rule allowing broad interpretation of criminal statutes as long as they relate to defenses. Dr. Fayez Al-Zafeery & Dr. Mohammed Abu-Zoubar, *Al-Wajeez Fee Shrah Al-Qwa’ed Al-Amaa* [The Handbook of Explaining General Rules] 124 (2003).

⁷²³ Kanon Al-Jazaa [The Sanction Law], Law No. 16 of 1960, art.243 (Kuwait).

⁷²⁴ The punishment is life imprisonment in this case. Kanon Al-Jazaa [The Sanction Law], Law No. 16 of 1960, art.247 (Kuwait).

⁷²⁵ Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 353 (1) (Iraq).

If the defendant destroys or damages an oil installation by arson, he may be punished by life imprisonment.⁷²⁶ Life imprisonment is mandatory if the arson was carried out by means of explosives and serious damage resulted.⁷²⁷

Neither the Kuwaiti nor the Iraqi Penal Codes recognize “order” or “command responsibility” as a basis for criminal responsibility. However, other theories of responsibility could have been used. For instance, principal, accessory and conspiracy provisions may make someone criminally responsible for criminal actions committed by others. Article 47 (2) of the Kuwaiti Penal Code provides, “The following are considered to be principals to an offense: Any person who participates in the commission of an offense that consists of a number of acts and who willfully carried out one of those acts during the commission of that offense.”⁷²⁸ One of those acts might be planning an offense. Articles 56 and 48 (3) provide for conspiracy and deliberate assistance as bases for holding an individual as accessory to an offense.⁷²⁹ Finally, under the Penal Codes of both countries, an accessory to the crime receives the same punishment as that of the principal.⁷³⁰ A personal defense available to one of the principals or accessories, such as obedience to a superior order, does not affect the responsibility of other principals or accessories.⁷³¹

In conclusion, although national crimes legislation upon which the prosecution of Saddam Hussein could have been based exists, the lack of national war crimes legislation constitutes a flaw that could have been attributed to the national trials approach. More

⁷²⁶ Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 342 (2) (Iraq).

⁷²⁷ Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 346 (Iraq).

⁷²⁸ Kanon Al-Jazaa [The Sanction Law], Law No. 16 of 1960, art.47 (2) (Kuwait).

⁷²⁹ Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 47-48 (2)(3) (Iraq).

⁷³⁰ Kanon Al-Jazaa [The Sanction Law], Law No. 16 of 1960, art.52 (Kuwait); Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 50 (Iraq).

⁷³¹ Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 40 (2), 50 (1) (Iraq). Kanon Al-Jazaa [The Sanction Law], Law No. 16 of 1960, art.37, 50, 52 (Kuwait).

specifically, holding Saddam Hussein's trial based upon national crimes legislation would raise doubt about some issues. Immunity is one of these issues.⁷³²

3. Saddam Hussein's Immunity before National Courts

Assuming that Kuwait or Iraq had enacted ad hoc legislation regarding war crimes to try Saddam Hussein for his actions against the environment, one might have asked to what extent he could successfully have claimed immunity before Kuwaiti or Iraqi courts. To answer this question, it is essential to review the international rules governing the immunity of a head of state before national courts. This issue is important because, if the immunity claim could have succeeded, then immunity must be considered a disadvantage in national trials for war crimes.

Saddam Hussein's argument for immunity is a losing argument in the Iraqi legal system in light of the ICJ's decision. The ICJ held that "such persons [An incumbent or former Minister of Foreign Affairs] enjoy no criminal immunity under international law in their own countries and may thus be tried by these' countries' courts in accordance with the relevant rules of domestic law."⁷³³

On the other side, a review of the Kuwaiti legal system shows that there is no national legislation controlling the immunity of a head of state except those provisions contained in the Kuwaiti Constitution.⁷³⁴ In any case, this legislative vacuum does not

⁷³² International law rules governing immunity are meant to be applied to individuals accused of international crimes, but not national crimes. For instance, although the ICJ's decision regarding immunity is deemed to be the final word concerning the current international rules regarding immunity, it is applicable only to individuals accused of international crimes. *Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (2002) ICJ Reports, 14 April 2002.

⁷³³ *Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (2002) ICJ Reports, 14 April 2002. ¶ 61.

⁷³⁴ Article 54 provides the Emir with absolute immunity and Article 110 grants the National Assembly members immunity concerning those statements and actions attributed to them while they are in sessions. Dostor Dwwlat Al-Kuwiet [The Constitution of the State of Kuwait] 54, 110 (1962). In fact, these provisions play a role in keeping Kuwait from joining the ICC statute. See Adel Al-Tabtabayie, Al-Netham Al-Assasee

provide Kuwait with an excuse to violate its obligation to respect the sovereignty of the state regarding immunity, laid down by international customary law.

Recently, the issue of conflict between the rules of immunity and the rules governing individual criminal responsibility in international crimes has been raised. This issue has been reviewed before national courts in England, in the House of Lords;⁷³⁵ in France, in the *Cour de Cassation*;⁷³⁶ and in the ICJ.⁷³⁷ The ICJ decision will be reviewed in depth because it is the most comprehensive decision of the three and the most recent.

The first national case was tried in the House of Lords and concerned a former head of state.⁷³⁸ On December 24, 1999, a panel of seven members of the House of Lords ruled that the defendant was not immune to a charge of torture. The decision is important because the Court did not consider international crimes to be official acts or acts of state covered by the immunity doctrine of *ratione materiae*. This type of immunity begins when an official leaves office. Consequently, it would not have been available for Saddam Hussein with regard to those actions committed against the environment that are considered international crimes.

The second national case was tried before the *Cour de Cassation* of Paris against Mouammar Ghaddafi, Leader of the Socialist People's Libyan Arab Jamahiriya.⁷³⁹ Ghaddafi was charged with murder for complicity in a terrorist action. On March 13,

Ll'mah'kamah Al-Jenaieh Wa Madaa Taarozoh Maa Al-Dostor Al-Kuwieti [Contradiction between the Statute of the ICC and Rules of the Constitution of Kuwait] 37-56 (Kuwait University 2003).

⁷³⁵ R. v. Bow Street Stipendiary Magistrate and others, [1999] 2 UKHL 97.

⁷³⁶ Cass. Crim. March 13, 2001, Bull. Crim., No. 1414.

⁷³⁷ Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (2002) ICJ Reports, 14 April 2002.

⁷³⁸ The case concerned the former head of state of Chile, General Augusto Pinochet Duarte. After the defendant entered England in September 1997, he was arrested on the basis of provisional arrest warrants issued by UK magistrates, at the request of Spanish courts. General Pinochet was accused of involvement in torture actions while he was in office. For analysis of this decision, see Andrea Bianchi, Immunity Versus Human Rights: The Pinochet Case, 10 EJIL 237 (1999).

⁷³⁹ Cass. Crim. March 13, 2001, Bull. Crim., No. 1414.

2001, the Court accepted the Prosecutor's plea of immunity and declined jurisdiction over the case. This decision was criticized.⁷⁴⁰ It coincided with the conclusion of the House of Lords concerning the absolute immunity of an incumbent head of state from foreign criminal jurisdiction regardless of the gravity of offenses attributed to him.

In the case before the ICJ,⁷⁴¹ the Court implicitly recognized the immunity of heads of state under international law.⁷⁴² Although the decision was limited to the immunity of a Minister of Foreign Affairs, its reasoning applies to heads of state.⁷⁴³

To resolve the conflict between a state's international obligation to search out and to prosecute individuals responsible for international crimes and the obligation to respect the sovereignty of the state, the Court stated that, "[A]lthough various international conventions on the prevention and punishment of certain serious crimes impose on the state obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such an extension of jurisdiction in no way affects immunities under customary international law."⁷⁴⁴

In admitting that immunity does not amount to impunity, the Court ruled that "[T]he immunities enjoyed under international law by an incumbent or former Minister of Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances. First, such persons enjoy no criminal immunity under international law in their own countries.... Secondly, they will cease to enjoy immunity from foreign jurisdiction if the

⁷⁴⁰ Salvatore Zappala, Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French *Cour De Cassation*, 12 EJIL 595 (2001).

⁷⁴¹ For the case facts, see *supra*. Ch. IV Sec. III.

⁷⁴² Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (2002) ICJ Reports, 14 April 2002. ¶ 51.

⁷⁴³ The Court considered both the Minister of Foreign Affairs and the head of state "as representative of the state solely by virtue of his or her office." Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (2002) ICJ Reports, 14 April 2002. ¶ 53.

⁷⁴⁴ Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (2002) ICJ Reports, 14 April 2002. ¶ 59.

state which they represent or they have represented decides to waive this immunity. Thirdly, after a person ceases to hold the office of Minister of Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other states. Provided that it has jurisdiction under international law, a court of one state may try a former Minister of Foreign Affairs of another state for acts committed prior to or subsequent to his or her period of office, as well as for acts committed during that period of office in a private capacity.”⁷⁴⁵

Finally, in its response to Belgium’s argument that exceptions to an incumbent official’s immunity can be inferred from the Pinochet and Ghaddafi cases, the Court stated that, “[I]t [the Court] has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.”⁷⁴⁶

Two comments may be made about the ICJ decision. First, the Court did not set a bright-line rule concerning when the action is considered to have been committed in a private capacity. The Court did not expressly rule that international crimes are committed in a private capacity. Secondly, the decision removed immunity from any official who leaves office, without considering the reason for his leaving the office. Consequently, the decision did not address a situation in which a defendant has been forced to leave office as a result of an internationally illegal act.

⁷⁴⁵ Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (2002) ICJ Reports, 14 April 2002, ¶ 61.

⁷⁴⁶ Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (2002) ICJ Reports, 14 April 2002, ¶ 58.

In the case of Saddam Hussein, assuming that the action of the United States in invading Iraq was contrary to international law, does the illegality of this action have an impact on Saddam Hussein's immunity *ratione personae*? In other words, could Saddam Hussein successfully have claimed that he was still the *de jure* President of Iraq and that the illegal action of the United States did not affect his position? If so, he would have been immune from Kuwaiti criminal jurisdiction.

The answer to this question depends on the issue of government recognition. It is well established under international law that an unrecognized government will usually be denied immunity as one of the consequences of its lack of recognition.⁷⁴⁷ Consequently, no immunity exists for an individual, including a head of state, who comes from a country whose government is not recognized by the state conferring immunity. Whether Saddam Hussein could successfully have claimed immunity before Kuwaiti courts would have depended on whether Kuwait recognized Saddam Hussein as the legitimate president of Iraq. The answer to this question should be evaluated based on the practice of the state of Kuwait in light of those international rules controlling the issue of government recognition.

By and large, recognition of governments is subject to the discretion of a state and is deduced from the circumstances of each case. Some countries, such as England, adopt criteria by which to recognize governments.⁷⁴⁸ Other countries, such as the United States and Kuwait, leave the task of recognition to the executive power.⁷⁴⁹ Government

⁷⁴⁷ Yitiha Simbeye, *Immunity and International Criminal Law* 113-14 (Ashgate Publishing Company 2004).

⁷⁴⁸ Sir Robert Jennings & Sir Arthur Watts eds., *Oppenheim's International Law* 150 (LongMan 1992).

⁷⁴⁹ *Lafontant v. Aristide*, 844 F. Supp. 128 (1994). Kuwait does not have case law or national legislation that clearly prescribes this issue. However, the recognition power can be inferred from article 74 of the Kuwaiti Constitution which dictates that "He [the Emir] shall also accept credentials of representatives of foreign countries." *Dostor Dwllat Al-Kuwiet [The Constitution of the State of Kuwait]* 74 (1962).

recognition can be exercised expressly or implicitly. An implied recognition takes place when the acts of a state, such as the formal initiation of diplomatic relations or the conclusion of bilateral treaties, leave no doubt as to the intention to grant recognition.⁷⁵⁰

Until 1990, Kuwait had formal diplomatic relations and had concluded several bilateral treaties with Iraq. Consequently, Kuwait had recognized the Iraqi government headed by Saddam Hussein. After the Gulf War of 1991, diplomatic relations between the two countries were severed. This severance per se did not result in the withdrawal of recognition of Saddam Hussein's government as long as a formal notification by the Kuwaiti government announcing the withdrawal of recognition was not issued.⁷⁵¹

Alternatively, withdrawal may take place by the recognition *de jure* of a rival government.⁷⁵² In reviewing the practice of Kuwait, it appears that Kuwait did recognize the new Iraqi government. Although no express notification was issued, the practice of Kuwait proved its recognition of the new government.⁷⁵³ As a result of this recognition, it was very likely that Saddam Hussein's claim of immunity *ratione personae* would not have succeeded in a Kuwaiti court if his trial had been commenced.

The matter would have been different if, after the liberation of Kuwait, had Saddam Hussein admitted his mistakes, voluntarily agreed to pay compensation, and resumed diplomatic relations with Kuwait. It is likely that such a position, taken by Saddam Hussein, would have affected the Kuwaiti position on the invasion of Iraq by the United States. If after invading Iraq, Saddam Hussein had fled to Kuwait and the latter

⁷⁵⁰ Sir Robert Jennings & Sir Arthur Watts eds., *Oppenheim's International Law* 169 (LongMan 1992).

⁷⁵¹ Sir Robert Jennings & Sir Arthur Watts eds., *Oppenheim's International Law* 176 (LongMan 1992).

⁷⁵² Sir Robert Jennings & Sir Arthur Watts eds., *Oppenheim's International Law* 177 (LongMan 1992).

⁷⁵³ Kuwait allowed the United States to use its territory to remove Saddam Hussein from power. On several occasions the State of Kuwait announced its support of the new Iraqi government. The State of Kuwait announced its intention to resume diplomatic relations with the new Iraqi government as soon as safety was guaranteed in Iraq.

had been asked to extradite or prosecute him, his claim of immunity might have succeeded before the Kuwaiti courts.

In conclusion, in some cases other than that of Saddam Hussein, immunity could be a disadvantage of national trials for war crimes since it might bar the commencement of criminal proceedings against a head of state who is recognized as the legitimate president of his country by the state where he is located and where the criminal complaint is filed. But this is not the case with Saddam Hussein.

4. The Death Penalty Issue

Although the death penalty may be considered legitimate by some national legal systems, it is considered a violation of human rights by the international legal system.⁷⁵⁴ Therefore, the availability of the death penalty in a national system disfavors use of that system to prosecute international crimes.

If international judicial action had been taken in the case of Saddam Hussein's actions against the environment, given the current trend of the international community, it is more likely that the death penalty would have been unacceptable as an appropriate punishment for war crimes.

In this part of the paper, several questions will be reviewed: whether the Kuwaiti and Iraqi legal systems recognize the death penalty, what factors justify infliction of this punishment by Kuwaiti and Iraqi courts, and the likelihood that this punishment could have been imposed in Saddam Hussein's case.

⁷⁵⁴ William A. Schabas, *The Abolition of the Death Penalty in International Law* 211 (Cambridge University Press 2002).

Both the Kuwaiti and the Iraqi legal systems formally accept the death penalty as one of the primary punishments for national crimes.⁷⁵⁵ At the sentencing stage, unlike international criminal practice and the legal system of the United States, neither the Kuwaiti nor the Iraqi legal systems furnish their courts with sentencing guidelines ensuring the uniformity of the application of the punishments.

In addition, within both systems, the death penalty might not be prescribed by the text criminalizing the committed action itself. However, aggravating circumstances can play a role in having this punishment for the committed action as an option in some cases but as mandatory in others. For instance, the punishment can be aggravated to reach death penalty level if the offense was committed during time of war.⁷⁵⁶ The relationship between the perpetrator and the victim restricts the judge's ability to impose only the death penalty, requiring him to choose among several punishments. For instance, under the Iraqi Penal Code, in murder cases, the punishment is aggravated from life imprisonment to the death penalty if the victim is a parent of the offender.⁷⁵⁷ Finally, the circumstances of the case relating to the means of its commission, premeditation and the purpose for which the offense was committed, can be aggravating circumstances as well.⁷⁵⁸

⁷⁵⁵ Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 85 (1) (Iraq). Kanon Al-Jazaa [The Sanction Law], Law No. 16 of 1960, art.57 (1) (Kuwait).

⁷⁵⁶ Article 8 of Law No. 31/1970 amending the Kuwait Penal Code stipulates "The following persons are punishable by life imprisonment or imprisonment for a term of years: Any person who willfully destroys an oil pipeline or installation used by the armed forces. The penalty will be death if the offense occurs during time of war." Kanon Besh'an Tadeel Kanon Al-Jazaa [The Law concerning Amendments to The Sanction Law], Law No. 31 of 1970, arts. 8 (Kuwait). Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 163 (1) (Iraq).

⁷⁵⁷ Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 406 (1)(d) (Iraq).

⁷⁵⁸ Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 406 (1)(a) (Iraq). Kanon Al-Jazaa [The Sanction Law], Law No. 16 of 1960, arts. 149, 150, 180 (Kuwait).

In the case of arson and offenses involving the destruction of property, the punishment may reach the level of life imprisonment in some cases. For example, article 342 (2) (b) of the Iraqi Penal Code states, “Any person who willfully sets on fire moveable or immovable property...(2) The penalty will be life imprisonment if the following places are set on fire...(b) An oil rig or well.”⁷⁵⁹ Concerning offenses against property, article 346 of the same Code stipulates, “Any person who willfully uses or attempts to use explosives, thereby endangering the property of others, is punishable by a term of imprisonment not exceeding ten years. The penalty will be life imprisonment if the explosion causes serious damage to such property.”⁷⁶⁰

In addition to these specific aggravating circumstances, the Iraqi Penal Code recognizes general aggravating circumstances. Holding public office or public authority is one of those circumstances. These circumstances may raise the level of punishment in some cases to the death penalty.⁷⁶¹ Applying general aggravating circumstances such as those mentioned above to the crimes of arson and property destruction allows a sentencing court to inflict the death penalty upon those individuals condemned for these offenses, such as Saddam Hussein.⁷⁶² In short, the imposition of the death penalty under national legal systems, especially the Iraqi legal system, was probable. The same could have been said regarding the Kuwaiti legal system, but with a different legal context.

⁷⁵⁹ Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 342 (2)(b) (Iraq).

⁷⁶⁰ Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 346 (Iraq).

⁷⁶¹ Article 135 (4) of the Iraqi Penal Code provides “Without prejudice to the special conditions prescribed by law for an increase in the penalty; the following are considered to be aggravating circumstances:the use by the offender in the commission of an offense of his position of employment or the abuse of any authority or influence deriving from such position.” If any of these aggravating circumstances exist in the commission of an offense, the court may impose the death penalty if the penalty prescribed for the offense is life imprisonment. Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 135 (4) (Iraq).

⁷⁶² Article 136 (1) of the Iraqi Penal Code provides that, “If there exist any aggravating circumstances in the commission of an offense, the court may rule as follows: (1) If the penalty prescribed for the offense is life imprisonment, the death penalty may be imposed...” Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 136 (1) (Iraq).

Even though imposing the death penalty in the case of Saddam Hussein might have been considered legal in light of the principle of legality, there was a high possibility that this penalty would have been imposed arbitrarily due to the lack of sentencing guidelines within the national legal systems. Without question, the possibility of imposing this punishment arbitrarily constitutes a flaw which might have been addressed by national war crimes trials.

5. The Issues of Evidence and of Defendant's Rights

The existence of flaws in procedural protection within national legal systems constitutes a problem for national war crimes trials. Examples of these flaws are the lack of rules governing evidence, especially documentary evidence,⁷⁶³ and the lack of some of the defendant's rights, such as the right to be tried without undue delay. These flaws suggest that war crimes trials be held internationally. To examine these flaws, the Kuwaiti and the Iraqi legal systems will be reviewed with regard to these issues.

There is no independent legislation in the Kuwaiti and Iraqi legal systems addressing the rules of evidence in criminal proceedings. Generally, evidence is controlled by provisions included in the Penal Procedure Code. Unlike provisions made in international criminal instruments, national provisions regarding evidence do not make a distinction between the stage at which evidence is admitted and the ruling.⁷⁶⁴ These provisions govern evidence which is legally recognized as the basis for conviction.

⁷⁶³ If the trial of Saddam Hussein concerning his actions against the environment had been held, it would have depended mainly on documentary evidence. Therefore, this part of the paper will focus on documentary evidence.

⁷⁶⁴ Although it is a fact that the above distinction has no value in the light of the end of the proceedings, admission of almost all evidence presented might consume time. This affects a defendant's rights to prepare a defense and his right to be tried without undue delay.

In light of the evidentiary aspect, a comparison between the two systems on one hand and the international system on the other hand shows that they have both common⁷⁶⁵ and different features.⁷⁶⁶ Even within the common sphere, the extent of evidentiary principles is inconsistent.⁷⁶⁷ This comparison is conducted in light of these evidentiary principles and their relationship to the protection of human rights, more specifically protection of the defendant's rights.

Although neither national system explicitly contains a rule requiring evidence to be relevant and have probative value, it is a judicial practice to enforce this principle during the stage when evidence is weighed. Finally, the Iraqi Penal Procedure Code has

⁷⁶⁵ Both national and international legislative systems have common principles governing some procedural issues such as the admission of written statements in lieu of oral testimony, a written defense in lieu of oral argument and the rejection of evidence which is not subject to parties' argument.

⁷⁶⁶ At the level of international criminal law, there are some rules which do not exist in either of the two national systems. For instance, evidence of a consistent pattern of conduct, judicial notice and lawyer-client privilege are not recognized by either national system. However, despite the fact that these principles are not recognized, it does not follow that national judges cannot apply them. The principles can be applied in the mental evaluation of the evidence by judges. It is more likely however, that judges will be reluctant to rely on them because they are not recognized by the legislature. ICTY Rules of Procedure and Evidence arts. 93, 94, 97, U.N. Doc. IT/32/Rev.37 (2006).

⁷⁶⁷ Common principles exist within the two compared systems to a different extent in some cases. For example, international criminal instruments adopt the corroboration rule regarding a child's testimony. Within the Iraqi Penal Procedure Code, Article 213 (B), generalizing the rule to all testimonies, stipulates, "One testimony is not sufficient for a ruling if it is not corroborated by other convincing evidence or a confession from the accused. The exception to this rule is if the law specifies a particular way of proving a case, which must be followed." An example of this exception is provided by Article 181 (D) of the same Code. Article 181 (D) states, "If the defendant confesses to the charge against him and the court is satisfied of the truth of his confession and that he understands its implication, then it listens to his defense and issues a judgment in the case without any requirement for further evidence." In addition, in international criminal law, a court may exclude any evidence "if its probative value is substantially outweighed by the need to ensure a fair trial" or "if [evidence is] obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings." On the contrary, this principle, in both national systems, is limited to those confessions which are given "as a result of coercion, whether it is physical or moral, a promise or a threat." Both national systems recognize the testimony of experts as evidence. Unlike the international system, they do not confer upon a defendant the right to challenge the qualifications of the testifying experts. As an alternative, a defendant may present a contradictory expert's testimony or report. ICTY Rules of Procedure and Evidence arts. 89 (D), 90 (B), 95, UN Doc. IT/32/Rev.37 (2006); Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 17 of 1960, arts. 159, 170 (Kuwait). Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 23 of 1971, arts. 181 (D), 213 (B), 218 (Iraq).

its own advantage over both the international and Kuwaiti systems by not permitting hearsay as evidence.⁷⁶⁸

With regard to documentary evidence, both national systems assign this type of evidence to a principle which controls all types of evidence. This principle provides that a court, in its verdict, may resort to any evidence presented during any stage of the inquiry or the hearing.⁷⁶⁹ This evidence may consist of witnesses' statements, written records of an interrogation, other official discoveries, or reports of experts and technicians. Based upon this principle, documentary evidence will be evaluated just as any other evidence is evaluated. The Iraqi Penal Procedure Code does not impose upon the court an obligation to examine the authenticity of the document.⁷⁷⁰ The Kuwaiti Penal Procedure contains no provisions dealing exclusively with documentary evidence.

Unlike international criminal instruments, the Kuwaiti and Iraqi systems do not explicitly refer to certain defendant's rights such as the right to a fair trial, the right to a speedy trial, the right to cross-examine witnesses and the defendant's right not to be compelled to testify against himself or to confess guilt. In spite of this fact, some rights can be implied from the rules mentioned above. However, some national evidentiary and procedural principles may raise doubt concerning their violation of the defendant's rights mentioned above. For instance, Article 179 of the Iraqi Penal Procedure Code states that "The Court may ask the defendant any questions considered appropriate to establish the

⁷⁶⁸ Article 169 of the Iraqi Penal Procedure Code states "The testimony should be based upon the facts which the witness is able to recall through one of his senses." Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 23 of 1971, art. 169 (Iraq). For the hearsay rule before the Yugoslavia Tribunal, see Almino Rodrigues & Cecile Tournaye, Hearsay Evidence *in* Essays on ICTY Procedure and Evidence 291 (Richard May eds. 2001) (Examining the rule before the Tribunal and proposing guidelines to admit hearsay statements).

⁷⁶⁹ Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 17 of 1960, art. 151 (Kuwait). Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 23 of 1971, art. 213 (Iraq).

⁷⁷⁰ Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 23 of 1971, art. 221 (Iraq).

truth before or after issuing a charge against him. *A refusal to answer will be considered as evidence against him*”(emphasis added).⁷⁷¹ This provision clearly infringes upon the defendant’s right not to be compelled to testify against himself. Such a principle is not found in the Kuwaiti Penal Procedure Code.

The lack of rules of documentary evidence and of the defendant’s right to be tried without undue delay within the two national legal systems constitute a flaw which could have been addressed had Saddam Hussein’s war crimes trials been held nationally. Unless national modifications, including procedural protection, documentary evidence rules and the defendant’s right to be tried without undue delay, were made, these flaws were reasons to hold war crimes trials internationally. Otherwise, arbitrary conviction would have been highly expected in the case of Saddam Hussein.

II. The Kuwaiti Trial

A review of the Kuwaiti legal system in light of the Saddam Hussein case raises several questions relating to the basis for jurisdiction, obtaining custody of the defendant, trying the defendant in absentia, and execution of the Kuwaiti sentence in Iraqi territory.

1. The Basis for Jurisdiction

Jurisdiction is necessary to make laws functional. More importantly, establishing jurisdiction is a prerequisite to any extradition process. Jurisdictional power encompasses the functions of the three powers, legislative, executive, and judicial, in every nation. This power grants a state the authority to prescribe, adjudicate and enforce those laws and judgments that concern conduct occurring within the territory of that state. The adjudication power is discussed here.

⁷⁷¹ Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 23 of 1971, art. 179 (Iraq).

Under international law, a state may claim jurisdiction using one of several principles. These principles are the territorial principle, the active personality principle, the passive personality principle, the protective principle, and the universality principle.⁷⁷² As the territorial and active personality principles are the most common jurisdictional principles used or claimed by the majority of states and are most clearly related to Saddam Hussein's case,⁷⁷³ the paper will focus on them. This part of the paper will discuss the territorial principle. The subsequent section on Iraqi jurisdiction will address the active personality principle.

Before examining the territorial principle, it should be made clear that, unless an international convention establishes priority among the above principles, there is no international customary rule governing the hierarchy of these principles if a dispute concerning jurisdiction between states is raised. Concerning national crimes, the territorial principle is considered the primary basis for criminal jurisdiction.⁷⁷⁴ According to this principle, a state is competent to prosecute all offenses committed, in whole or in part, within its territory. A territorial nexus is a basic requirement for this principle. This principle rests upon the doctrine of sovereignty by which every state has the authority to assume power over its own territory.⁷⁷⁵ Without the territorial principle, statehood does not exist in international law.⁷⁷⁶

⁷⁷² Ilias Bantekas & Susan Nash, *International Criminal Law* 143-60 (Cavendish Publishing 2003).

⁷⁷³ Lyal S. Sunga, *The Emerging System of International Criminal Law* 252 (Kluwer Law International 1997).

⁷⁷⁴ Christopher L. Blakesley, *Extraterritorial Jurisdiction in International Criminal Law*, Vol. II, 33,43 (M. Cherif Bassiouni ed., Transnational Publishers, Inc. 2ed 1999).

⁷⁷⁵ Antonio Cassese, *International Criminal Law* 278 (Oxford University Press 2003).

⁷⁷⁶ Christopher L. Blakesley, *Extraterritorial Jurisdiction in International Criminal Law*, Vol. II, 33,44 (M. Cherif Bassiouni ed., Transnational Publishers, Inc. 2ed 1999).

The arguments for the territorial principle are that it serves justice by allowing immediate access to evidence as well as minimizing expenses and judicial time.⁷⁷⁷ In the context of national prosecutions, under the territorial principle, Professor Cassese also argues that, “[I]t is more likely for the cathartic process of criminal trials to have effect: the victims and their families relive their tragedies; the whole society becomes aware of what has happened and is thus put in a position of better coming to terms with, hence of psychologically overcoming, past crimes.”⁷⁷⁸

At the international level, the territorial principle is expressly adopted in the context of genocide.⁷⁷⁹ Based upon this principle, national prosecutions for the crime of genocide were conducted in Rwanda for the first time in the history of the Genocide Convention.

Unlike international law, most often national criminal justice systems set a comprehensive framework governing the jurisdiction issue. Within this framework, the territorial principle is always prescribed as the primary rule controlling the application of the national criminal law. For instance, the Kuwaiti Penal Code provides, “The provisions of this legislation [the Kuwaiti Penal Code] apply to every individual in the territory of Kuwait committing an offense as prescribed by this legislation.”⁷⁸⁰

The territorial principle applies in two forms. Subjective territoriality requires that at least one of the offense’s elements be committed within the territory of the asserting state. Objective territoriality requires that the impact of the offense occur in the territory

⁷⁷⁷ Antonio Cassese, *International Criminal Law* 278 (Oxford University Press 2003).

⁷⁷⁸ Antonio Cassese, *International Criminal Law* 279 (Oxford University Press 2003)

⁷⁷⁹ Convention on the Prevention and Punishment of the Crime of Genocide art.VI, 78 U.N.T.S. 277 (1948).

⁷⁸⁰ Kanon Al-Jazaa [The Sanction Law], Law No. 16 of 1960, art. 11 (Kuwait).

of the asserting state.⁷⁸¹ The Kuwaiti provision above deals with the subjective form. As regards the objective form,⁷⁸² the Kuwaiti legislation, unlike the Iraqi Penal Code, does not set a general rule regarding offenses which are committed abroad but impact Kuwaiti territory. However, the Kuwaiti system recognizes the objective form in a limited number of offenses, not including arson and destruction of property.⁷⁸³

Unlike normal arson and destruction of property offenses, the objective form may present some difficulties in crimes against the environment because they may be committed within one territorial jurisdiction, but impact the environment in the other territorial jurisdiction.

Because Saddam Hussein's order for action was given in Iraq, an argument might have been raised that Kuwait lacked jurisdiction (the objective form.) However, Article 11 of the Kuwaiti Penal Code states that, "This legislation applies to all parties to the offense of which all or part occurs in Kuwait even though any of those parties may be abroad at the time of commission and regardless of whether any of those parties is a principal or accessory to the offense."⁷⁸⁴ In any case, even though the territorial principle may be a basis for jurisdiction, it is not enforceable without obtaining custody of the defendant.

2. Obtaining Custody of the Defendant

At the international level, obtaining custody of the defendant is called extradition. Extradition is defined as, "The official surrender of an alleged criminal by one state or

⁷⁸¹ Christopher L. Blakesley, *Extraterritorial Jurisdiction in International Criminal Law*, Vol. II, 33,47 (M. Cherif Bassiouni ed., Transnational Publishers, Inc. 2ed 1999).

⁷⁸² Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 2 (1) (Iraq).

⁷⁸³ Kanon Besh'an Tadeel Kanon Al-Jazaa [The Law concerning Amendments to The Sanction Law], Law No. 31 of 1970, art. 15 (Kuwait).

⁷⁸⁴ Kanon Al-Jazaa [The Sanction Law], Law No. 16 of 1960, art. 11 (Kuwait).

nation to another having jurisdiction over the criminal charged.”⁷⁸⁵ Extradition represents an effective tool between states in criminal matters. Some believe that the obligation to extradite suspected war criminals exists without the requirement of a treaty while others believe that a treaty, whether bilateral or multilateral, is necessary to claim the existence of this obligation.⁷⁸⁶ As contemporary practice in international law supports and confirms the second view, this paper will assume that this view prevails.⁷⁸⁷ Based upon this assumption, the possibility of being unable to obtain custody of the defendant represents a difficulty in holding war crimes trials nationally. This requires a review of the possibility of obtaining custody of Saddam Hussein by Kuwait.

At the international level, the basis for extradition between states can be found based upon reciprocity, comity and an international convention. Between Kuwait and Iraq, reciprocity and comity as bases for extradition would not be appropriate methods to secure custody of Saddam Hussein because of the tremendous crimes Saddam Hussein committed against the Iraqi people. As a result, an existing treaty would have been the only path through which both states could have been satisfied. A review of the history of the relationship between the two states shows that there is no bilateral treaty in existence regarding this issue. However, within the Arab League Organization, there is a multilateral extradition treaty which both Kuwait and Iraq ratified. This treaty is the Extradition of Criminals Agreement between Arab Countries [hereinafter the Convention.]⁷⁸⁸

⁷⁸⁵ BLACK'S LAW DICTIONARY 605 (7th ed. 1999).

⁷⁸⁶ M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 5-6 (Oceana Publications Inc. 1996).

⁷⁸⁷ M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 5-6 (Oceana Publications Inc. 1996).

⁷⁸⁸ *The Extradition of Criminals between Arab Countries*, Sep. 14, 1952 (on file with author).

According to the Convention, each State Party is bound to deliver up a criminal sought by another State Party according to conditions and circumstances prescribed by the Convention.⁷⁸⁹ This obligation includes everything found in the possession of the fugitive criminal at the time of his arrest, whether the proceeds of the crime, or materials that will serve as evidence to prove the crime.⁷⁹⁰

Extradition becomes obligatory when the offense prescribed by the Convention as an extraditable offense is committed in the territory of the state which seeks the surrender of the fugitive criminal (hereinafter the requesting state).⁷⁹¹ The Convention recognizes the territorial principle as a basis for both jurisdiction and requests for extradition. Therefore, since crimes against the environment were committed in the territory of Kuwait, Kuwait could have been a requesting state under the Convention.

The request to extradite can be made for the purpose of either prosecution or execution. If the request concerns prosecution, the Convention requires that the crime charged be punishable by imprisonment of a year or more according to the laws of both requesting and requested states.⁷⁹² In applying this provision to arson and offenses involving destruction of property, both acts are considered criminal and are punishable according to the Iraqi and Kuwaiti Penal Codes.⁷⁹³ As a result, these offenses meet the requirement of this provision.

⁷⁸⁹ The Extradition of Criminals between Arab Countries art. 1, Sep. 14, 1952 (on file with author).

⁷⁹⁰ The Extradition of Criminals between Arab Countries art. 12, Sep. 14, 1952 (on file with author).

⁷⁹¹ The Extradition of Criminals between Arab Countries art.2, Sep. 14, 1952 (on file with author).

⁷⁹² The Extradition of Criminals between Arab Countries art.3, Sep. 14, 1952 (on file with author).

⁷⁹³ Kanon Al-Jazaa [The Sanction Law], Law No. 16 of 1960, art.25 (Kuwait). Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, arts. 342 (2), 353 (Iraq). Kanon Al-Jazaa [The Sanction Law], Law No. 16 of 1960, arts. 243, 250 (Kuwait).

If the request is made to execute a sentence issued against a fugitive criminal, the punishment prescribed by the sentence must be at least two months' imprisonment.⁷⁹⁴ Because the Kuwaiti criminal system permits criminal trials in absentia, it is possible that a sentence might have been issued with the punishment mentioned above.

Despite the fact that the Convention imposes upon state parties an obligation to extradite, it allows these states to reject the request for extradition based upon several theories. These theories pertain to the nature of the offense, the protection of human rights and the nationality of the fugitive criminal.

In terms of the nature of the offense, the Convention does not permit a claim of extradition for crimes of a political character nor for acts connected with such crimes.⁷⁹⁵ The Convention also removes certain offenses, not including arson and destruction of property, from the definition of political offenses.⁷⁹⁶ The Iraqi Penal Code makes a distinction between ordinary and political offenses. Defining political offenses, Article 21 stipulates, "A political offense is one which is committed with a political motive or which violates the political rights either of the public or of the individual. All other offenses are considered to be ordinary."⁷⁹⁷ Based upon this standard, it seems that neither arson nor destruction of property meet the requirement of the standard of political offenses.

A statute of limitations argument is another basis upon which to refuse the surrender of the fugitive criminal. Article 6 of the Convention states, "A fugitive criminal shall not be surrendered under the provisions of this treaty, when from lapse of time, according to the laws of the place within the jurisdiction of which the crime was

⁷⁹⁴ The Extradition of Criminals between Arab Countries art.3, Sep. 14, 1952 (on file with author).

⁷⁹⁵ The Extradition of Criminals between Arab Countries art.4, Sep. 14, 1952 (on file with author).

⁷⁹⁶ The Extradition of Criminals between Arab Countries art.4, Sep. 14, 1952 (on file with author).

⁷⁹⁷ Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 21 (1) (Iraq).

committed, the criminal is exempt from prosecution and punishment for the crime for which the surrender is asked.”⁷⁹⁸ Unlike the Iraqi criminal justice system, the Kuwaiti system recognizes the statute of limitations in both prosecution and punishment.

In felony cases, such as arson and destruction of property, Article (4) of the Kuwaiti Penal Code states, “A prosecution for a felony must be commenced within ten years after the commission thereof.”⁷⁹⁹ Applying this principle to the time when Saddam Hussein became available for surrender, 2003, Iraq could have claimed that the time limit of ten years since the commission of the crime in 1990 had passed. However, the Kuwaiti Authorities might have responded that the Kuwaiti Penal Code provides that the statute of limitations stops running when an investigative step is taken.⁸⁰⁰ Therefore, since on November 9, 1992, Kuwait established a special division within the public prosecutor’s office to investigate⁸⁰¹ those offenses committed during the Iraqi invasion, the statute of limitations for all those offenses stopped running from that date.

In addition to the statute of limitations, a double jeopardy argument might be raised according to the Convention. According to Article 5, a surrender shall not be granted when a fugitive criminal whose surrender is sought was previously convicted, acquitted or is actually under prosecution for the same offense for which the surrender request is made.⁸⁰² Based on this provision, Iraq could have claimed that those offenses committed against the environment were currently under investigation or prosecution

⁷⁹⁸ The Extradition of Criminals between Arab Countries art.6, Sep. 14, 1952 (on file with author) .

⁷⁹⁹ Kanon Al-Jazaa [The Sanction Law], Law No. 16 of 1960, art. 4 (Kuwait).

⁸⁰⁰ Kanon Al-Jazaa [The Sanction Law], Law No. 16 of 1960, art. 8 (Kuwait).

⁸⁰¹ Kuwait Seeks UN Help to Indict Saddam Aides for War Crimes, *Agence France-Presse*, October 28, 2003, <http://www.globalpolicy.org/intljustice/tribunals/2003/1028kuwait.htm> (last visited July 12, 2007).

⁸⁰² The Extradition of Criminals between Arab Countries art.5, Sep. 14, 1952 (on file with author).

before the New Iraqi Special Tribunal. This is a valid basis upon which Iraq could have made a successful claim.⁸⁰³

The nationality of the fugitive criminal is recognized as one of the valid bases upon which to reject the surrender request, according to the Convention. Article 7 provides that, “Under the stipulations of this treaty, none of the High Contracting Parties shall be bound to deliver up its own nationals providing the rejecting state conducts the trial before its own courts.”⁸⁰⁴ The importance of this provision is dual. First, it confirms an internationally recognized justification for refusing extradition of the state’s own nationals. Secondly, it balances the requirement to seek justice and the sovereignty rights of the state by imposing upon the requested state the obligation to prosecute the fugitive criminal. By this provision, the Convention cedes priority of the territorial principle to the active personality principle.

In the same context, Professor Mohammed Cherif Bassiouni argues that a state’s obligation “to extradite or to prosecute” is not alternative, but coexistent.⁸⁰⁵ It was more likely that Iraq, in the case of Kuwait’s request to surrender Saddam Hussein, would have resorted to the defendant’s nationality provision of the Convention to reject the request since the criminal had committed tremendous offenses against the Iraqi people. This provision could have been used in all crimes attributed to the defendant as long as Iraq was willing to prosecute the defendant for the crimes upon which the request was based.

⁸⁰³ Telephone Interview with Dr. Mohammed Aby-Zabour, Member, the Kuwaiti Committee concerning prosecution of Saddam Hussein, in Kuwait (Mar. 3, 2005)(Confirming that the Iraqi Prosecution Office was reviewing and investigating the Kuwaiti file regarding Saddam Hussein’s crimes committed during the Gulf armed conflict of 1990-1991, including crimes against the environment).

⁸⁰⁴ The Extradition of Criminals between Arab Countries, art.7, Sep. 14, 1952 (on file with author).

⁸⁰⁵ M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 10 (Oceana Publications Inc. 1996); generally see M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff Publishers 1995).

These bases for rejecting a surrender or extradition request, as noted above, are clearly provided by the Iraqi Penal Procedures Code. However, the same legislation eliminates any possibility of extraditing an alleged criminal found in the territory of Iraq. Article 358 (2) stipulates that, “Extradition is not permitted in the following circumstances: If the offense *could be* tried before the Iraqi courts in spite of occurring abroad”⁸⁰⁶(emphasis added). Based upon this provision and the fact that the Iraqi Penal Code adopts the notion of universal jurisdiction, it is clear that in almost all cases, extradition is not permitted.⁸⁰⁷

The Iraqi legal provision above does not conflict with the Convention since the Convention confers upon Iraq the discretion to choose between extradition and prosecution. Consequently, if Iraq chose, by adopting the universal jurisdiction doctrine to enforce its jurisdiction, to prosecute all cases which fell within its jurisdiction, there is no violation of the Convention as long as Iraq implemented its conventional obligations by prosecuting suspected criminals for the crimes for which the extradition request is made.

Finally, unlike the Iraqi Criminal Procedures Code,⁸⁰⁸ both the Convention and the Kuwaiti Criminal Procedures Code contain a flaw in that they do not provide for national judicial supervision ensuring the proper application of their provisions or requirements. The lack of such provisions is probably due to the fact that an extradition decision is considered an act of sovereignty which is a nonjusticiable act according to

⁸⁰⁶ Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 23 of 1971, art. 358 (2) (Iraq).

⁸⁰⁷ Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 13-15 (Iraq)

⁸⁰⁸ Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 23 of 1971, arts. 357-68 (Iraq)

Kuwaiti Law.⁸⁰⁹ Finally, in other cases, the difficulty of obtaining custody of the defendant might support holding war crimes trials internationally.⁸¹⁰

3. Trial in Absentia or Transferring the Whole Judicial Proceeding

Holding war crimes trials in absentia represents a regressive step in the context of human rights protection. Therefore, such trials should be considered a disadvantage of the national trial approach and a reason to conduct them internationally. Given the difficulty of securing custody of the defendant, the Kuwaiti Government would have had to choose between two options, either trying Saddam Hussein in absentia or transferring the whole judicial proceeding to Iraq.

If the former were the first Kuwaiti choice, then provisions for both legal notices and execution of foreign sentences must have been respected. Generally, the Kuwaiti Penal Procedure Code permits trials in absentia as long as provisions for legal notices are respected. Before going to trial, the investigating authorities have the right to seek Iraqi judicial assistance. The source of this right is based upon a multilateral agreement to which both Iraq and Kuwait are parties, The Letters of Request & Legal Notices Agreement between Arab Countries (hereinafter the Agreement).⁸¹¹

The Agreement recognizes the right of each state party to request [hereinafter the requesting state] from another party (hereinafter the requested party) to conduct any

⁸⁰⁹ Marsoom B'Qanon Be'Sh'an Tnzeem Al-Qdaa [A Decree of Law Concerning The Judicial Power] Law No. 23 of 1990, art.2 (Kuwait).

⁸¹⁰ In the case of Saddam Hussein, this might have occurred if Saddam Hussein had given up office voluntarily with an offer of immunity and Iraq had accepted its international responsibility for failure to prosecute him for his crimes against the environment. The same scenario might have happened in the case of the former Chilean President, General Augusto Pinochet Duarte, who was given immunity by Chilean law if he had not traveled to England and gotten caught. See M. Cherif Bassiouni, *Introduction to International Criminal Law* 76-77 (Transnational Publishers 2003).

⁸¹¹ The Letters of Request & Legal Notices Agreement Between Arab Countries, Sep. 14, 1952 (on file with author).

judicial procedure concerning a case pending in the requesting party's judicial system.⁸¹²

This request is conditional upon the notion that the requested procedure does not contradict the public system of the requested state. There is no doubt that the term "public system" is a broad term which can be the basis for the rejection of any request. In any case, based on the above provision, Kuwait may request from Iraq that it be allowed to conduct any investigative procedure such as questioning witnesses or interrogating defendants.

If the procedure is conducted according to this Agreement, it is conducted as it would be in the territory of the requesting state.⁸¹³ In addition to conducting judicial procedures, the Agreement allows that legal notices of judicial documents, such as notices of the court's sessions and sentences, be issued in the same manner as the judicial procedure mentioned above.⁸¹⁴ In this context, the legal notices are viewed as they would be if issued within the territory of the requesting state.⁸¹⁵ This is important in light of Kuwaiti provisions governing a trial in absentia.

Neither the Agreement nor the Kuwaiti Penal Procedures Code account for a situation in which the defendant is in the custody of another country while a trial against him is conducted, making it impossible for him to attend the trial. So, even though there is an obstruction preventing the defendant from attending, a trial can be conducted as long as the defendant is given legal notice, probably violating his human rights.

⁸¹² The Letters of Request & Legal Notices Agreement Between Arab Countries art. 6, Sep. 14, 1952 (on file with author).

⁸¹³ The Letters of Request & Legal Notices Agreement between Arab Countries art. 8, Sep. 14, 1952 (on file with author).

⁸¹⁴ The Letters of Request & Legal Notices Agreement between Arab Countries art. 2, Sep. 14, 1952 (on file with author).

⁸¹⁵ The Letters of Request & Legal Notices Agreement between Arab Countries art. 5, Sep. 14, 1952 (on file with author).

While allowing a sentence to be issued in absentia, the Kuwaiti Penal Procedures Code limits the right of the convicted person to object to the sentence issued only⁸¹⁶ within a week either of the arrest or of the legal notice given to the defendant.⁸¹⁷ As a result, an authorized attorney may not submit an objection request on behalf of the defendant thereafter. If the time limit has passed without submission of the request, then the defendant has only the right to appeal the sentence before a higher court, the High Appeal Court.⁸¹⁸

When a sentence in absentia becomes a decision to which no objection can be made, it may be appealed within the twenty days.⁸¹⁹ When this time limit has passed without submission of an appeal request, the sentence becomes final and may be executed,⁸²⁰ unless the defendant appeals the sentence to the Supreme Court. This course of action is based exclusively upon the discretion of the defendant. Finally, the Kuwaiti Penal Procedures Code terminates a case if the defendant dies during any stage of an investigation or a trial.⁸²¹ Based on both the Agreement and the provisions of Kuwaiti Criminal Procedure Code, a sentence in the case of Saddam Hussein could have been issued in absentia.

In terms of sentence execution, neither the Kuwaiti nor the Iraqi Codes contain provisions regarding the execution of foreign sentences. However, there is a provision included within the Extradition of Criminals Agreement between Arab Countries. Article 17 of that Agreement stipulates that, "It is permissible to execute custodial sentences

⁸¹⁶ Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 17 of 1960, art. 187 (Kuwait).

⁸¹⁷ Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 17 of 1960, art. 188 (Kuwait).

⁸¹⁸ Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 17 of 1960, art. 201 (Kuwait).

⁸¹⁹ Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 17 of 1960, art. 214 (Kuwait).

⁸²⁰ Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 17 of 1960, art. 214 (Kuwait).

⁸²¹ Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 17 of 1960, art. 191, 205 (Kuwait).

between party states providing a request is submitted by the sentencing state and the state where the sentence is to be executed approves.”⁸²²

Since the authority of Iraq to execute a Kuwaiti sentence is discretionary only, it is highly likely that Iraq would have rejected this request. The rejection might have been based on the argument that Iraq had priority in exercising jurisdiction over the case according to the same agreement. The only advantage to trying Saddam Hussein in absentia in Kuwait would have been the possibility of using this case as a precedent for future national prosecutions of crimes against the environment throughout the world.

This advantage may not be available in the Iraqi criminal justice system because it does not recognize other trials as a basis for postponing execution of the death penalty issued against the defendant. This occurred since the crimes against the environment committed in Kuwait were not covered by the trial of Saddam Hussein first conducted by the Supreme Iraqi Criminal Court. In any event, if Iraq had accepted execution of a Kuwaiti sentence, a trial in absentia would have reduced human rights protection, making this a disfavored option.

The second option which the Kuwaiti Government could have followed was to transfer the whole judicial proceeding to the Iraqi authorities. Although there is no existing agreement recognizing this option, i.e., transfer of the proceedings, Iraq was bound to try Saddam Hussein’s crimes against the environment according to the Extradition Agreement mentioned above as an alternative to Iraq’s rejection of the

⁸²² The Extradition of Criminals between Arab Countries art.17, Sep. 14, 1952 (on file with author).

extradition of Saddam Hussein. Probably, Kuwait chose this approach because of the difficulties of extraditing Saddam Hussein.⁸²³

III. The Iraqi Trial

In addition to common issues already reviewed, an examination of the Iraqi legal system raises new issues relating to the basis for Iraqi jurisdiction and flaws in the Statute of the Iraqi Supreme Criminal Tribunal established after the collapse of Saddam Hussein's regime.

1. The Basis for Jurisdiction

Although Iraq has adopted the principle of universal jurisdiction for the same purpose, it could not have asserted that jurisdiction over crimes against the environment by Saddam Hussein during the Iraqi invasion of Kuwait because the Iraqi Penal Code limits the Universal principle to, "Destroying or causing damage to international means of communications or trading in women, children, slaves or drugs."⁸²⁴ This provision omits many acts, including crimes against property, deemed criminal by international conventions to which Iraq is a party.

As an alternative, Iraq could have asserted its jurisdiction based upon the active personality principle. According to this principle, a state can prosecute all offenses committed by its nationals abroad. Although this principle is deemed to be extraterritorial jurisdiction, it is generally accepted in international law. In fact, it has been adopted by

⁸²³ Kuwait Presses for Active Role in Trying Saddam Hussein, *Agence France-Presse*, December 18, 2003, <http://www.globalpolicy.org/intljustice/general/2003/1218active.htm> (last visited July 12, 2007).

⁸²⁴ Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 13 (Iraq).

several international criminal conventions.⁸²⁵ It is argued that this principle should be applied internationally equally with the territorial principle.⁸²⁶

The active personality principle has been adopted mainly by civil law states.⁸²⁷ This principle is based upon the allegiance a citizen owes to his country. The root of the principle is the French view that it is essential to protect the reputation of the state before the whole world. In other words, the function of this principle is to compromise between two values, the inability to extradite nationals and the duty to prevent culprits from escaping punishment.⁸²⁸

States differ in implementing this principle. Some states do not adhere to the double criminality doctrine requiring that the act in question be criminalized according to the laws of both the nationality state and the *locus delicti* state.⁸²⁹ Other states, such as Iraq and Kuwait, adopt the double criminality doctrine.⁸³⁰

Even among states requiring double criminality, the extent of the principle differs. For instance, unlike the Kuwaiti Code, the Iraqi Penal Code does not require application of the principle that the accused must escape a foreign trial for the same act. Also, unlike the United Kingdom,⁸³¹ Iraq applies the principle broadly. It does not limit its application to certain offenses.⁸³²

⁸²⁵ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation art. 6 (1)(c), 1678 U.N.T.S. 221; 27 ILM 668 (1988); Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment art. 5 (1)(b) *reprinted in* John P. Grant & J. Graig Barker, *International Criminal Law Deskbook* 44 (Cavendish Publishing 2006).

⁸²⁶ P. Arnell, *The Case for Nationality Based Jurisdiction*, 50 INT'L & COMP. L. Q. 955 (2001).

⁸²⁷ Geoff Gilbert, *Aspects of Extradition Law* 43 (Martinus Nijhoff Publishers 1991).

⁸²⁸ Christopher L. Blakesley, *Extraterritorial Jurisdiction in International Criminal Law*, Vol. II, 33,63 (M. Cherif Bassiouni ed., Transnational Publishers, Inc. 2ed 1999).

⁸²⁹ One of these countries is the United Kingdom. See Ilias Bantekas & Susan Nash, *International Criminal Law* 152 n. 69 (Cavendish Publishing 2003).

⁸³⁰ Kanon Al-Jazaa [The Sanction Law], Law No. 16 of 1960, art.10 (Kuwait). Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 12 (Iraq).

⁸³¹ See Ilias Bantekas & Susan Nash, *International Criminal Law* 151 (Cavendish Publishing 2003).

⁸³² Kanon Al-Oqobaat [The Punishments Law], Law No. 111 of 1969, art. 12 (Iraq).

2. Comments on the Statute of the Supreme Iraqi Criminal Tribunal

Although establishment of a tribunal to try individuals responsible for international crimes is a positive step toward achievement of post-conflict justice, this approach will not satisfy all interested parties. When the Iraqi Special Tribunal or IST was established,⁸³³ this approach of the trial was unacceptable to some.⁸³⁴

Some feared that the IST would not achieve justice nor enhance the foundations of current international criminal law.⁸³⁵ This fear was attributed to the complexity of the prosecution of international crimes, the nature of Iraqi society, the Iraqi judicial system's lack of experience and impartiality, and the probability of the government's interference in the tribunal's work.⁸³⁶ This fear arose from the fact that the Statute of the IST was the product of a decree by an occupying power. On December 9, 2003, this statute was drafted and approved by both the Governing Council (GC) and the Coalition Provisional Authority (CPA), two authorities established by an occupying power, the United States. A day later, CPA administrator Paul Bremer signed the Statute order and published it in the CPA's official Gazette.⁸³⁷

⁸³³ An ad hoc international tribunal was not an available option because it was considered costly and time-consuming. Establishing an ad hoc national tribunal "(1) would allow the people of Iraq to assume responsibility for trying high-ranking Iraqi Ba'ath officials for past political violence; (2) such a tribunal would provide a strong foundation for a system of government based on the rule of law; and (3) a tribunal is likely to deliver a message regarding impunity." M. Cherif Bassouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraqi Special Tribunal*, 38 INT'L L. J. 327, 344 (2005).

⁸³⁴ Others believe that the tribunal would constitute a form of victor's justice. Some believe that one reason for not trying Saddam Hussein before the ICC is the fear of the United States that its soldiers in Iraq would be subject to prosecution before the ICC. Olaoluwa Olusanya, *The Statute of the Iraqi Special Tribunal for Crimes against Humanity- Progressive or Regressive?* 5 GERMAN LAW JOURNAL No. 7, ¶ 18, 21 (2004), <http://www.germanlawjournal.com/article.php?id=462> (last visited June 27, 2007).

⁸³⁵ Olaoluwa Olusanya, *The Statute of the Iraqi Special Tribunal for Crimes against Humanity- Progressive or Regressive?* 5 GERMAN LAW JOURNAL No. 7, ¶ 4 (2004), <http://www.germanlawjournal.com/article.php?id=462> (last visited June 27, 2007).

⁸³⁶ *The Statute of the Supreme Iraqi Criminal Tribunal*, arts. 7 (C), 8 (C), 9 (C), http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf. (last visited June 27, 2007).

⁸³⁷ M. Cherif Bassouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraqi Special Tribunal*, 38 INT'L L. J. 327, 358 (2005).

After much criticism,⁸³⁸ in early August 2005, the IST's Statute was revoked and was replaced by a statute establishing the Supreme Iraqi Criminal Tribunal (SICT), formerly known as the Iraqi Special Tribunal.⁸³⁹ The new Statute had been passed by the Transnational National Assembly, an elected legislature, and ratified by the Presidency Council. The new statute preserves almost all of the substantive provisions of the IST's Statute with increased use of the Iraqi Criminal Procedure Code.

Before reviewing the provisions of the Statute, it should be clear that there are several events that played a role in drafting the Statute. These events are: (1) the Iran-Iraq war, (2) the persecution of sections of the Iraqi population by Saddam Hussein, (3) the Iraq-Kuwait conflict, and (4) the terrorist attack against the United States on September 11, 2001. Most of the provisions of the Statute were derived from the ICC Statute with a few exceptions relating to jurisdiction, the death penalty, and violations of Iraqi law.

Evaluating provisions of the Statute will be limited to the principles of legality, jurisdiction, immunity, evidence, and the defendant's right to be tried without undue delay. The Statute violates the principle of legality in different ways. In terms of offenses, the principle of legality is infringed by borrowing the definition of war crimes from the ICC statute. There are many offenses contained in the ICC statute that, when committed, do not acquire the status of international customary law.

⁸³⁸ The IST statute was criticized based on two arguments. First, that it was issued by an unelected legislature and without consultation with the international community. Second, that no international precedent existed to allow an occupying power to establish an exceptional tribunal. This action violates article 14 of International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).

⁸³⁹ The Statute of the Supreme Iraqi Criminal Tribunal, http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf. (last visited June 27, 2007).

For instance, Article 13 of the ISCT's Statute dictates that, "For the purpose of this law, "War Crimes" means:...Other serious violations of the laws and customs applicable in international armed conflicts, within the established framework of international law, namely, any of the following acts:...(E) Intentionally launching an attack in [with] the knowledge that such [an] attack will cause widespread, long-term, and severe damage to the natural environment, which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."⁸⁴⁰

Based upon this provision, with respect to his crimes against the environment, Saddam Hussein could have been held criminally responsible even though Iraq is not party to Protocol I of the Geneva Conventions of 1949. He could have been criminally responsible even though those provisions regarding protection of the environment contained in the Protocol were not considered international customary law crimes when they were committed. This would have violated the principle of legality.

Another violation of the principle of legality relates to provisions establishing an individual's criminal responsibility based upon orders and superiority.⁸⁴¹ By including these provisions in the Statute, Iraq violated a fundamental principle of criminal law by establishing a basis for criminal liability that did not exist in the Iraqi legal system at the time the criminal acts were committed. Consequently, this will not enhance the rule of law in Iraq.

⁸⁴⁰ The Statute of the Supreme Iraqi Criminal Tribunal, art. 13 (2)(E), http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf. (last visited June 27, 2007).

⁸⁴¹ The Statute of the Supreme Iraqi Criminal Tribunal, art. 15 (2)(B), (4), http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf. (last visited June 27, 2007). Unless these two bases exist within the Iraqi Military Criminal Law, the Statute clearly violates the principle of legality. The text of the Iraqi Military Criminal Law was not available to the author.

Finally, Article 17 of the Statute confirms the rule that those offenses prescribed are not subject to the statute of limitations.⁸⁴² This provision was viewed as a violation of the principles of legality.⁸⁴³ It was unlikely that an argument that the principle of legality was applicable to the statute of limitations issue would have been accepted in the case of Saddam Hussein because neither the Iraqi Penal Code nor the Penal Procedure Code prescribe the statute of limitations.

However, assuming that a conviction based on the above provision had been secured, the Statute puts the tribunal in a dilemma by stipulating that, “The penalty for any crimes under Articles 11, 12, 13 [war crimes] which do not have a counterpart under Iraqi law shall be determined by the court taking into account..., guided by *judicial precedents and relevant sentences issued by the international criminal courts*”(emphasis added).⁸⁴⁴

This article violates the principle of legality because it does not prescribe in advance an appropriate punishment and it leaves determination of the punishment to the court’s discretion. In some cases, this authority might lead to infliction of an arbitrary punishment, especially considering the fact that the statute allows imposition of the death penalty, a central issue in choosing the domestic approach.⁸⁴⁵ Moreover, no international

⁸⁴² The Statute of the Supreme Iraqi Criminal Tribunal, art. 17, http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf. (last visited June 27, 2007).

⁸⁴³ M. Cherif Bassouni, Post-Conflict Justice in Iraq: An Appraisal of the Iraqi Special Tribunal, 38 INT’L L. J. 327, 379-80 (2005).

⁸⁴⁴ The Statute of the Supreme Iraqi Criminal Tribunal, art. 24 (5), http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf. (last visited June 27, 2007).

⁸⁴⁵ Article 24 (1) of ISCT. The Statute of the Supreme Iraqi Criminal Tribunal, art. 24 (1), http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf. (last visited June 27, 2007).

precedent exists concerning crimes against the environment upon which the Court may rely.

This punishment violates the International Covenant of Civil and Political Rights or the ICCPR because the Statute does not allow for pardons or for mitigating any punishment handed down by the tribunal.⁸⁴⁶ In the context of enforcement of sentences, the Statute refers to the Iraqi legal system as the controlling instrument in the execution of sentences.⁸⁴⁷

The Statute emphasizes that, “The punishment must be executed [carried out] within thirty days of the date when the judgment becomes final and non-appealable.”⁸⁴⁸ Without doubt, this provision deprives victims, witnesses, and whole interested societies of the opportunity to establish conclusively which individuals were legally responsible for crimes where the defendant is charged in several cases. This is the result of the rule under the Iraqi Criminal Procedure Code that a criminal case concludes upon the death of the accused.⁸⁴⁹

This is a smart strategy to end many of the cases before the tribunal. Unfortunately, one of those cases was that of Saddam Hussein against the environment.

⁸⁴⁶The Statute of the Supreme Iraqi Criminal Tribunal, arts. 15 (6), 27 (2), http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf. (last visited June 27, 2007). Article 6 (4) of the ICCPR to which both Iraq and the United States are parties provides that, “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.” International Covenant on Civil and Political Rights art. 6 (4), G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).

⁸⁴⁷The Statute of the Supreme Iraqi Criminal Tribunal, art. 27 (1), http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf. (last visited June 27, 2007).

⁸⁴⁸The Statute of the Supreme Iraqi Criminal Tribunal, art. 27 (2), http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf. (last visited June 27, 2007).

⁸⁴⁹Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 23 of 1971, art. 300 (Iraq).

This case was concluded when Saddam Hussein was executed based upon the sentence of his first trial before the tribunal.⁸⁵⁰

Enforcing Iraq's international obligation to prosecute Saddam Hussein for crimes against both Kuwait and Iran, the ISCT Statute extends its jurisdiction to include "every natural person, whether Iraqi or non-Iraqi, resident in Iraq and accused of one of the crimes listed in Article 11 to 14 below, committed during the period from July 17, 1968 until May 1, 2003 in the Republic of Iraq or *elsewhere*, including the following crimes:... (C) War Crimes"(emphasis added).⁸⁵¹

The ISCT Statute removed all types of immunity, including the immunity of the head of state conferred by the Interim Iraqi Constitution of 1990.⁸⁵² This provision in the Iraqi Constitution regarding immunity is contrary to international law.⁸⁵³ However, removing immunity by the Statute concerning national crimes appears to be unconstitutional.

On the other hand, credit should be given to the ISCT Statute for protecting defendant's rights and for some procedural guarantees. For instance, although giving the tribunal the authority to adopt a set of evidence rules was viewed as a clear violation of

⁸⁵⁰ The first trial before the ISCT concerned the aftermath of an assassination attempt on Saddam Hussein in the town of al-Dujail in 1982. It was alleged that reprisals for the assassination attempt led to the extrajudicial execution and disappearance of over one hundred and forty individuals at the hands of government security forces, and the widespread destruction of property. Saddam Hussein was convicted in this trial and sentenced to death. After becoming final, the sentence was executed on December 30, 2006.

⁸⁵¹ The Statute of the Supreme Iraqi Criminal Tribunal, art. 1 (2), http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf. (last visited June 27, 2007).

⁸⁵² AL-Dostor Al-Moakaat Lljomhoriah Al-Iraqiah [The Interim Constitution of the Republic of Iraq] 40 [1990]. The Statute of the Supreme Iraqi Criminal Tribunal, art. 15 (C), http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf. (last visited June 27, 2007).

⁸⁵³ Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (2002) ICJ Reports, 14 April 2002. Para. 61.

the notion of separation of powers set forth in the Iraqi Constitution,⁸⁵⁴ this authority permits the tribunal to establish safeguards protecting the defendants. Based on this authority, many evidentiary rules relating to expert witnesses were adopted and general rules ensuring credible evidence in the trial were established.⁸⁵⁵

Some of these rules have flaws. For instance, neither the Iraqi Criminal Procedure Code nor the ISCT's Rules of Procedure and Evidence permit the investigative judges to rely on the evidence gathered by foreign authorities, either Kuwaiti or Iranian. To solve this problem, a judicial cooperation treaty between Iraq and these states was required.⁸⁵⁶

In Saddam Hussein's case, although there might have been reasons supporting a speedy trial or a slow trial,⁸⁵⁷ the Statute provides the right to be tried without undue delay.⁸⁵⁸ Although the Statute does not set a time limit with respect to this right and does not clearly provide a remedy for its violation, the Rules of Procedure and Evidence furnish the tribunal with the authority to determine an appropriate remedy to be taken when the provision is violated.⁸⁵⁹

Finally, unlike the ICTY Rules of Procedure and Evidence,⁸⁶⁰ the Tribunal's Rules do not directly mention the impact of the failure to execute arrest warrants on the

⁸⁵⁴ M. Cherif Bassouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraqi Special Tribunal*, 38 INT'L L. J. 327, 348 (2005).

⁸⁵⁵ The Supreme Iraqi Criminal Tribunal's Rules of Procedure and Evidence, arts. 59-63, http://www.law.case.edu/saddamtrial/documents/IST_rules_procedure_evidence.pdf (last visited June 27, 2007).

⁸⁵⁶ M. Cherif Bassouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraqi Special Tribunal*, 38 INT'L L. J. 327, 383-84 (2005).

⁸⁵⁷ The fact that a fair rendition of Saddam Hussein's crimes might undercut the insurgency provides a reason to more quickly. On the contrary, giving the people the opportunity to confront and understand the tragedy of the past decades is a reason to more slowly.

⁸⁵⁸ The Statute of the Supreme Iraqi Criminal Tribunal, art. 19 (4)(C), http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf (last visited June 27, 2007).

⁸⁵⁹ The Supreme Iraqi Criminal Tribunal's Rules of Procedure and Evidence, art. 3 (2), http://www.law.case.edu/saddamtrial/documents/IST_rules_procedure_evidence.pdf (last visited June 27, 2007).

⁸⁶⁰ ICTY Rules of Procedure and Evidence art. 61 (C), U.N. Doc. IT/32/Rev.37 (2006).

commencement of the trial.⁸⁶¹ However, Article 45 of the Rules stipulates that, “Trial proceedings should comply with the provisions set forth in the Iraqi Criminal Procedure Code No. 23 of 1971.”⁸⁶² Since the Iraqi Criminal Procedure Code permits a trial to be conducted in absentia,⁸⁶³ the above provision contradicts Article 19 (4)(D) of the tribunal’s Statute ensuring the defendant’s right to be present when his trial is conducted.⁸⁶⁴

Conclusion and Observations

National legal systems located in the same region share common characteristics and differ in others. The differences are due to several factors including the nature of the society and the legislative history.

There are common legal provisions in both the Kuwaiti and the Iraqi legal systems. An example is the status of international law within both systems. Adopting the dualist approach, neither system considers international law as a source of legality and criminality, except with legislative approval.

As a result of the absence of legislative approval in the context of war crimes, both systems place their courts in a dilemma when the time comes to fulfill their international obligations either to extradite or to prosecute. Both states may refrain from fulfilling their obligations to extradite due to national impediments (asylum or non-

⁸⁶¹ The Supreme Iraqi Criminal Tribunal’s Rules of Procedure and Evidence art. 36, http://www.law.case.edu/saddamtrial/documents/IST_rules_procedure_evidence.pdf (last visited June 27, 2007).

⁸⁶² The Supreme Iraqi Criminal Tribunal’s Rules of Procedure and Evidence art. 45, http://www.law.case.edu/saddamtrial/documents/IST_rules_procedure_evidence.pdf (last visited June 27, 2007).

⁸⁶³ Kanon Al-Ejraat Al-Jazaeih [The Criminal Procedure Law], Law No. 23 of 1971, art. 147(D)(Iraq).

⁸⁶⁴ The Statute of the Supreme Iraqi Criminal Tribunal, art. 19 (4)(D), http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf. (last visited June 27, 2007).

extradition of nationals) and to prosecute due to national guarantees as well (the principle of legality).

Alternatively, in order to compromise on the obligation to prosecute and the obligation to respect human rights, both national courts must resort to available national provisions which to some extent are similar to these international criminal provisions. Moreover, even though trials based upon national legislation were conducted, they must address some difficulties relating to evidence and to defendants' rights. These difficulties render conviction and the severe punishment of the death penalty highly likely.

On the Kuwaiti side, although the state has an internationally recognized basis for jurisdiction in the territorial principle, a trial might not have been at hand because, according to conventional international law, this jurisdictional basis has no priority. Alternatively, trial in absentia was another option that could have been pursued, but again, the execution of a Kuwaiti sentence in Iraqi territory would have subject to the discretion of Iraqi authorities.

Finally, since the success of the immunity claim depends mainly on the government-recognition issue, Saddam Hussein's claim concerning immunity was more likely to be rejected by Kuwaiti courts if extradition had been granted by the United States before handing Saddam Hussein over to Iraqi authorities.

On the Iraqi side, it is internationally accepted that a state has the authority to try its own nationals for their acts committed abroad. However, the Iraqi experience shows that modification of international law rules (the ICC statute) for the sake of harmony and to meet the needs of a national legal system and its society results in serious flaws. This

modification proves that changing legal provisions does not result in changing the enforcement of these modified provisions.

Moreover, the modification process infringed upon the principle of legality which in turn undermines the credibility of the whole proceeding. Unfortunately, the modification process did not include those rules governing the execution of sentences under the Iraqi legal system which rendered trying Saddam Hussein for his crimes against the environment practically, although not theoretically, impossible.

Conclusion

Individual accountability for international environmental crimes is necessary at the current stage of international law. However, the manner by which this accountability is enforced must be carefully balanced with human rights values. Balancing those two values, the need for accountability and the need to protect human rights, requires a balance between the prosecutor's interests and the defendant's interests. In the milieu of pursuing international environmental crimes, there are often advantages and disadvantages for each side, the prosecutor's side and the defendant's side. Evaluating those features, whether they are advantages or disadvantages, depends on the interests represented.

The prosecutor's advantages are the defendant's disadvantages and the contrary is true. A review of Saddam Hussein's case shows that whether his trial had been held internationally or nationally there were advantages and disadvantages serving the prosecutor's side, the need for accountability, and the defendant's side, the need to protect human rights.

If the trial had been held internationally, the prosecutor would have benefited from some advantages such as the lack of acceptance of the claim of immunity, a statute of limitations or the flexibility of the principle of legality. In addition, it was more likely that the prosecutor would have had no problem obtaining custody of the defendant. On the defendant's side, the existence of human rights guarantees such as evidence rules, defendant's rights, and sentencing guidelines would have made it difficult for the prosecutor's side. In addition to those guarantees, political will, the main factor in most cases, plays a role in enhancing the defendant's side.

If the trial had been held nationally, the balance between the prosecutor's side and the defendant's side would have depended on the location of the trial. If the trial had been held before Kuwaiti courts, although the prosecutor would have had advantages relating to the lack of evidence rules, the defendant's rights, and sentencing guidelines, and the availability of a trial in absentia, disadvantages would have been expected as well. Those disadvantages would be related to extradition, the principle of legality and execution of an issued sentence. In other cases, immunity may be considered a disadvantage on the part of the prosecutor.

The trial held in Iraq and its statutory basis proved that the national trial approach would heavily favor the prosecutor's side. The trial caused the loss of a unique opportunity to establish environmental justice. This opportunity may not be available in the near future. In short, following the international trial approach would have served the question of the truth rather than the question of revenge. A review of international, Iraqi and Kuwaiti legal systems shows the need to follow some modifications which may assist in achieving uniformity.

- On the international law side:
 - Adopting clear prosecutorial guidelines to ensure uniformity of application of the law.
 - Including environmental offenses committed accidentally and during peace time in the International Criminal Court Statute.
 - Enhancing the role of non-government organizations in the International Criminal Court Statute.

- On the Kuwaiti and Iraqi side:
 - Enacting war crimes legislation including environmental crimes.
 - Enacting evidence legislation ensuring the establishment of guilt with international standards.
 - Eliminating trial in absentia or at least limiting this style of trial to exceptional occasions.
 - Enacting immunity legislation.
 - Reaching an international agreement concerning transfer of judicial proceedings and execution of criminal sentences.
 - Enacting sentencing guidelines ensuring uniformity of punishments.
 - Adopting the defendant's rights stipulated in article 14 of the Covenant Civil and Political Rights including the right to be tried without undue delay.
- On the Kuwaiti side:
 - Adopting the Universal Jurisdiction doctrine within its Penal Code.
 - Adopting judicial supervision of the extradition process.

Appendix 1

Historical Problem

Generally, borders between states do not have very important values until natural sources such as ground-water, oil, and coal are discovered. This is the whole story between the State of Kuwait and the Republic of Iraq. The historical rights that Iraq's governments claimed did not begin publicly until 1933.⁸⁶⁵ Therefore, it would be reasonable to examine those claims-their basis-their justifications to comprehend whether those damages that resulted from the Gulf armed conflict of 1990-1991 were justified under international law.

The Iraqi allegations began in 1933 when King Gaze established his own radio station which he used as a tool to promote the idea that Kuwait was part of his region, Iraq.⁸⁶⁶ From that time on, the subordination idea was warmly adopted by consecutive Iraqi administrations. The basis for King Gaze's claim was that Kuwait was part of the Basra region, the southern region of Iraq, which was subordinated to the Ottoman Turkey Empire. After World War I, the Ottoman Empire, as a deafted party, was divided into several states. One of these was Iraq. It was argued that, since Basra is part of Iraq, Kuwait should follow its origin (Basra).

As evidence that the international community has reached the correct conclusion in considering the State of Kuwait an independent state, and Iraq's annexation of Kuwait as null and void⁸⁶⁷ it is necessary to review briefly some important events that happened during the last decades. These events prove the authenticity of the conclusion. They

⁸⁶⁵ 19-year old King Gaze undertook the power in Iraq, as a successor of his father King Fisal.

⁸⁶⁶ Dr. Mimona Al-Sabah, Tareek Al-Atmaa Al-Iraqia Fee Al-Kwiet [The history of Iraq's greed concerning Kuwait], 74 Journal of The Gulf and Arabian Peninsula Studies 79, 142 (1994) (Arabic).

⁸⁶⁷ See S.C. Res. 662, U.N. SCOR, 45th Sess., 2934st mtg, P.1, U.N. Doc. S/RES/662 (1990).

began in 1899 when Kuwait entered into a protection agreement with England against the Ottoman Turkey Empire's control over the Gulf region.⁸⁶⁸ The agreement showed that England regarded Kuwait as an independent part of the Empire. Thirteen years later, England signed an agreement with the Ottoman Turkey Empire whereby the Empire acknowledged that Kuwait was an independent area, but the agreement did not become a reality because of the beginning of the War World I.⁸⁶⁹

Until War World I ended, there was no state called Iraq. In 1922, an agreement was signed whereby Turkey, "a successor of the Ottoman Turkey Empire," waived all its claims toward the Arabic territories including Iraq.⁸⁷⁰ Iraq, as an independent region, was held under the British mandate which continued until 1932. Kuwait was not considered part of Iraq at that time according to the agreement. In 1932, in order for Iraq to become a member of the League of Nations, it was required to determine its official borders. Consequently, Iraq sent a request along with its proposed borders between Iraq and Kuwait to the English delegate⁸⁷¹ in the Gulf. This request was forwarded to the Kuwaiti Emir, the ruler, who accepted the proposed borders later.

Some argued that this process constituted an international agreement.⁸⁷² In 1933, King Gaze took power in Iraq and for the first time, the allegation that Kuwait was a part

⁸⁶⁸ Dr. Rasheed Al-Enizee, Mowqef Al-Qanoon Al-Dwlee mn Al-Edaa'at Al-Iraqia thd Dwlat Al-Kweit [The International Law's position from Iraq's allegations against the State of Kuwait], 72 Journal of The Gulf and Arabian Peninsula Studies 73, 78 (1994) (Arabic).

⁸⁶⁹ Dr. Rasheed Al-Enizee, Mowqef Al-Qanoon Al-Dwlee mn Al-Edaa'at Al-Iraqia thd Dwlat Al-Kweit [The International Law's position from Iraq's allegations against the State of Kuwait], 72 Journal of The Gulf and Arabian Peninsula Studies 73, 79 (1994) (Arabic).

⁸⁷⁰ Dr. Rasheed Al-Enizee, Mowqef Al-Qanoon Al-Dwlee mn Al-Edaa'at Al-Iraqia thd Dwlat Al-Kweit [The International Law's position from Iraq's allegations against the State of Kuwait], 72 Journal of The Gulf and Arabian Peninsula Studies 73, 85-89 (1994) (Arabic).

⁸⁷¹ At that time, England was in charge of deciding external affairs regarding Kuwait according, to the 1899 agreement between Kuwait and England.

⁸⁷² Dr. Rasheed Al-Enizee, Mowqef Al-Qanoon Al-Dwlee mn Al-Edaa'at Al-Iraqia thd Dwlat Al-Kweit [The International Law's position from Iraq's allegations against the State of Kuwait], 72 Journal of The Gulf and Arabian Peninsula Studies 73, 91 (1994) (Arabic).

of Iraq began publicly. This was the seed for continuous allegations toward Kuwait over 57 years.

Some believed that the roots of these allegations lay in the following reasons: 1) Iraqi intentions to steal properties of the Kuwaiti people in the Iraq region; 2) in 1938, the Burgan oil well, “the second biggest oil well in the world,” was discovered in Kuwait; 3) Iraq’s failure to control the Kuwaiti economic system which in turn affected the Iraqi economic system; 4) Germany’s stimulation of Iraq in order to prevent England from controlling the region; 5) Iraq’s desire to stretch its marine shore through the Arabian Gulf;⁸⁷³ 6) political and economic problems Iraq faced at that time, resulting in a strategy to attract the Iraqi people to what could be gained by annexing Kuwait; 7) Iraq’s desire to lead the Arab World; 8) a wicked plot which the Iraqi government had at that time.⁸⁷⁴

Iraq’s endeavors to annex Kuwait continued in divising ways such as asking Kuwait to rent some Kuwaiti isles or by providing Kuwait with unsalted water,⁸⁷⁵ but the Kuwait government was wary of these attempts. Consequently, the Kuwaiti government stymied these attempts smartly. In 1958, the Kingdom lapsed in Iraq and the Republic of Iraq was established. Three years later, Kuwait sought its freedom from England and it succeeded. But Kuwaitis independence angered the Iraqi government which threatened to

⁸⁷³ Iraq lost part of its marine shore in an agreement signed with Iran in 1937. Dr. Mimona Al-Sabah, Tareek Al-Atmaa Al-Iraqia Fee Al-Kwiet [The history of Iraq’s greed concerning Kuwait], 74 Journal of The Gulf and Arabian Peninsula Studies 79, 88 (1994) (Arabic).

⁸⁷⁴ Dr. Mimona Al-Sabah, Tareek Al-Atmaa Al-Iraqia Fee Al-Kwiet [The history of Iraq’s greed concerning Kuwait], 74 Journal of The Gulf and Arabian Peninsula Studies 79, 85-87 (1994) (Arabic).

⁸⁷⁵ At that time, the region was dearth and the main source of unsalted water was the Shut Al-Arab area located in Iraq. Later, desalination plants were built around the Gulf region from south to north. See Dr. Rasheed Al-Enizee, Mowqef Al-Qanoon Al-Dwlee mn Al-Edaa’at Al-Iraqia thd Dwlat Al-Kweit [The International Law’s position from Iraq’s allegations against the State of Kuwait], 72 Journal of The Gulf and Arabian Peninsula Studies 73, 94 (1994) (Arabic).

use force to join Kuwait. This motivated the Soviet Union ⁸⁷⁶ to use its veto against Kuwaiti requests to join the United Nations organization.⁸⁷⁷ On July 20, 1961 Kuwait joined the League of Arabic States with the official acknowledgment of all Arabic States members except Iraq. On May14, 1963, Kuwait became the one hundred eleventh member of the United Nations Organization.

⁸⁷⁶ Dr. Mimona Al-Sabah, Tareek Al-Atmaa Al-Iraqia Fee Al-Kwiet [The history of Iraq's greed concerning Kuwait], 74 Journal of The Gulf and Arabian Peninsula Studies 79, 182 (1994) (Arabic).

⁸⁷⁷ Dr. Mimona Al-Sabah, Tareek Al-Atmaa Al-Iraqia Fee Al-Kwiet [The history of Iraq's greed concerning Kuwait], 74 Journal of The Gulf and Arabian Peninsula Studies 79, 182 (1994) (Arabic).

Appendix 2

The Environmental Impact on the Arabian Gulf Region

Environmental impacts will be reviewed according to the affected element of the environment: hydrosphere, lithosphere, atmosphere, and public health. The review will not be limited to oil well fires, but extended to all other sources of pollution so that all environmental consequences resulting from the Gulf armed conflict of 1990-1991 may be comprehended.

1. Hydrosphere Pollution:

Hydrosphere pollution will be examined through two stages. In the first part of this section, the focus will be on those sources that caused the pollution while the second part of this section is concerned with the effects resulting from the pollution.

a. The Sources of Hydrosphere Pollution:

i. Oil Spill:

On January 25, 1991, the U.S. administration announced that Iraq had deliberately discharged crude oil from the Kuwaiti oil facilities into the Gulf.⁸⁷⁸ These discharges and the following incidents occurred from different sources. The first incident occurred on January 19, 1991, when Iraqi armed forces began discharging oil from five tankers anchored in the Kuwaiti port of Al-Ahmadi.⁸⁷⁹

⁸⁷⁸ Bush Access Saddam of “sick” Move in Gulf Oil Flood, Reuters, Jan. 25, 1991, available at LEXIS NEXIS Library, Reuters File.

⁸⁷⁹ Dr. Lolya Nasser ET AL., Al-Talweth Al-Naftee Fee Al-Bea Al-Bahrya Bdwlal Al-Kwiet [Oil Pollution in Kuwaiti Marine Environment] 107 (Center For Research and Studies on Kuwait, ed 2001)(Arabic).

The oil discharged in this incident was estimated at 500,000,000 tons.⁸⁸⁰ The oil flow continued until January 30, 1991, and resulted in a massive oil slick, 75 by 35 kilometers in dimension, which stretched out to cover both the southern Kuwaiti and the northern Saudi coastlines.⁸⁸¹

The second oil spill happened on January 20, 1991, when Iraqi armed forces opened the pipeline connecting the mainland oil refineries at Al-Ahmadi port with the sea island terminal, located five miles off the Kuwaiti coast.⁸⁸² This incident lasted until January 26, 1991, and the estimated amount of oil released was 1,100,000 tons.⁸⁸³

The third incident occurred on January 30, 1991, when an oil spill took place in Mina Al-Bakr.⁸⁸⁴ There were no data regarding the amount of released oil.⁸⁸⁵ A series of oil spills that polluted the waters and Gulf shores occurred later when Iraqi missiles hit the Al-Khafj⁸⁸⁶ oil storage. This incident formed a massive oil slick 6-8 kilometers long.⁸⁸⁷ The total amount of oil released into the Gulf was 4-7 millions barrels. It

⁸⁸⁰ Dr. Rafat Misaak ET AL., *Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlal Al-Kuwiet [Natural Resources and Environmental Features of the State of Kuwait]* 198 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

⁸⁸¹ Dr. Rafat Misaak ET AL., *Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlal Al-Kuwiet [Natural Resources and Environmental Features of the State of Kuwait]* 198 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

⁸⁸² Richard Lacayo, *A War against the Earth; Torching Oil Wells and Disgorging into the Gulf, Saddam Makes the Plants his Latest Victim*, TIME, Feb.4, 1991, at 32.

⁸⁸³ See Dr. Lolya Nasser ET AL., *Al-Talweth Al-Naftee Fee Al-Bea Al-Bahrya Bdwlal Al-Kwiet [Oil Pollution in Kuwaiti Marine Environment]* 199 (Center For Research and Studies on Kuwait, ed 2001)(Arabic).

⁸⁸⁴ Richard Lacayo, *A War against the Earth; Torching Oil Wells and Disgorging into the Gulf, Saddam Makes the Plants his Latest Victim*, TIME, Feb.4, 1991, at 32.

⁸⁸⁵ See Dr. Lolya Nasser ET AL., *Al-Talweth Al-Naftee Fee Al-Bea Al-Bahrya Bdwlal Al-Kwiet [Oil Pollution in Kuwaiti Marine Environment]* 199 (Center For Research and Studies on Kuwait, ed 2001)(Arabic).

⁸⁸⁶ Al-Khafj is a coastal area located in the Saudi Arabia's territory and contains petroleum facilities.

⁸⁸⁷ See Dr. Lolya Nasser ET AL., *Al-Talweth Al-Naftee Fee Al-Bea Al-Bahrya Bdwlal Al-Kwiet [Oil Pollution in Kuwaiti Marine Environment]* 199 (Center For Research and Studies on Kuwait, ed 2001)(Arabic).

generated an oil slick 130 kilometers in length and 25 kilometers in width.⁸⁸⁸ It was recorded that the amount of oil released into the Gulf was two or three times bigger than any previous oil spill.⁸⁸⁹

ii. Sewage

Another source contributing to pollution of the Gulf as a result of the Iraqi invasion was sewage and the absence of technical staff.⁸⁹⁰ Before the invasion happened, there were four sewage treatment plants in Kuwait.⁸⁹¹ The Iraqi armed forces destroyed all the sewage plants; as a result, the Kuwaiti government was forced to discharge untreated sewage directly into the Gulf. This process lasted about ten months after the liberation of Kuwait.⁸⁹²

No doubt, the sewage discharge caused pollution to the marine environment and the beaches. Released sewage generated an increasingly injurious bacteria level containing Coli form Faecal Coli form.⁸⁹³ The resultant viruses made the Gulf a dangerous body of water to swim in. In addition, these viruses affected the quality of the fish whose bodies might contain toxic substances.⁸⁹⁴

Also, the sewage played a role in decreasing the level of dissolved Oxygen in the water body. This process was a result of organic substances the sewage may contain.

⁸⁸⁸ See Dr. Sulman Al-Matar ET AL., *Al-Bea Al-Bahrya Fee Dwlal Al-Kwiet* [The Marine Environment of the State of Kuwait] 148 (Center for Research and Studies on Kuwait, ed. 2003)(Arabic).

⁸⁸⁹ William M. Akrin, *The Environmental Threat of Military Operations*, 69 *Protection the Environment during Armed Conflict* 116 (Richard J. Grunawalt ed. 1996).

⁸⁹⁰ Dr. Yosef Al-Ebraheem ET AL., *Al-eqtesadyaat Alarbia Wa Al-Kazoo al-Iraqi to Kowiet* [Arabic Economies and Iraqi Invasion to the State of Kuwait] 31 (Arabic Planning Institution, ed. Dec. 1992)(Arabic).

⁸⁹¹ Al-Regea, Filka, Al-Rega, Al-Ardia, and Shewiq plants.

⁸⁹² Dr. Abdullah Al-Gneem ET AL., *Tadmeer Abar Alnfet fee alwthaeq Aliraqya* [Destruction Oil Wells in Iraqi Documents] 247 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

⁸⁹³ Dr. Abdullah Al-Gneem ET AL., *Tadmeer Abar Alnfet fee alwthaeq Aliraqya* [Destruction Oil Wells in Iraqi Documents] 247 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

⁸⁹⁴ Dr. Abdullah Al-Gneem ET AL., *Tadmeer Abar Alnfet fee alwthaeq Aliraqya* [Destruction Oil Wells in Iraqi Documents] 247 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

Thus, the fishy opulence of the Gulf affected and air pollution resulted of bad smell release.⁸⁹⁵

iii. Fallen Substances

The marine environment was not polluted only through the release of oil and sewage directly into the Gulf by Iraqi armed forces. It was polluted from another source, the air pollution caused by the oil-well fires.⁸⁹⁶ It is reasonable to assume such a connection causing pollution from one component of the environment, air, to another, water.

This pollution occurred through twofold sources, either through acid rain or through fallen substances such as soot particles.⁸⁹⁷ The oil-well fires lasted about seven months until the last oil well was extinguished on November 11, 1991.⁸⁹⁸ The fires used up approximately 4,600,000 barrels of oil daily and discharged about 1,900,000 metric tons of carbon dioxide, 20,000 metric tons of sulfur dioxide, and 12,000 metric tons of soot particles daily into the air.⁸⁹⁹

iv. Military Operations:

Military operations associated with the Gulf armed conflict constituted another pollution source of the marine environment. These operations caused both instant and long-term environmental damages. For instance, thousands of marine mines planted by

⁸⁹⁵ Dr. Abdullah Al-Gneem ET AL., *Tadmeer Abar Alnfet fee alwthaeq Aliraqya* [Destruction Oil Wells in Iraqi Documents] 247 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

⁸⁹⁶ Air Pollution caused by oil-well fires will be discussed later in this chapter.

⁸⁹⁷ See Dr. Sulman Al-Matar ET AL., *Al-Bea Al-Bahrya Fee Dwlat Al-Kwiet* [The Marine Environment of the State of Kuwait] (Center for Research and Studies on Kuwait, ed. 2003)(Arabic).

⁸⁹⁸ See Dr. Sulman Al-Matar ET AL., *Al-Bea Al-Bahrya Fee Dwlat Al-Kwiet* [The Marine Environment of the State of Kuwait] (Center for Research and Studies on Kuwait, ed. 2003)(Arabic).

⁸⁹⁹ Sylvia A. Earle, *Persian Gulf Pollution: Assessing the Damage One Year Later*, *Nat'L Geographic*, Feb. 1992, at 130.

Iraqi troops to prevent Coalition forces' marine assaults severely affected the ecological system in the Gulf.⁹⁰⁰

The estimated number of mines, including marine mines, was 1,250,000.⁹⁰¹ Also, vessels sunk in the Gulf as a result of military conflict were another source of pollution to marine life. There were about 82 of these vessels.⁹⁰² During the conflict, these vessels were oil-supply tools for Iraqi troops. The amount of oil that escaped from these vessels was 1,500,000 barrels.⁹⁰³ These vessels were recognized as sources of other pollutants such as lead and heavy metals.⁹⁰⁴ Recently, there was a regional conference was held in Kuwait regarding these vessels and how to deal with them.⁹⁰⁵

b. Hydrosphere Pollution Effects:

Apprehending the environmental impacts that struck the region requires an understanding of the nature of the marine environment and its features. Thus, the region's features will be explored first, then how the environment was affected negatively.

i. The Gulf and its Ecosystem Features:

The Gulf is a partially closed sea of salty water with an average depth of 35 meters.⁹⁰⁶ The length of the Gulf is about 1000 kilometers and its width about 300

⁹⁰⁰ See Dr. Sulman Al-Matar ET AL., *Al-Bea Al-Bahrya Fee Dwlal Al-Kwiet* [The Marine Environment of the State of Kuwait] 148 (Center for Research and Studies on Kuwait, ed. 2003)(Arabic).

⁹⁰¹ *Al-Watan- Kuwaiti Newspaper*, Feb.8, 1992, at 3.

⁹⁰² See Dr. Sulman Al-Matar ET AL., *Al-Bea Al-Bahrya Fee Dwlal Al-Kwiet* [The Marine Environment of the State of Kuwait] at 148 (Center for Research and Studies on Kuwait, ed. 2003)(Arabic).

⁹⁰³ See Dr. Sulman Al-Matar ET AL., *Al-Bea Al-Bahrya Fee Dwlal Al-Kwiet* [The Marine Environment of the State of Kuwait] (Center for Research and Studies on Kuwait, ed. 2003)(Arabic).

⁹⁰⁴ See Dr. Sulman Al-Matar ET AL., *Al-Bea Al-Bahrya Fee Dwlal Al-Kwiet* [The Marine Environment of the State of Kuwait] (Center for Research and Studies on Kuwait, ed. 2003)(Arabic).

⁹⁰⁵ Regional Organization for The Protection of The Marine Environment (ROPME), 62 *Nashrat Al-Bea Al-Bahriya* [The Marine Environment Bulletin] 4 (2004).

⁹⁰⁶ Dr. Lolya Nasser ET AL., *Al-Talweth Al-Naftee Fee Al-Bea Al-Bahrya Bdwlal Al-Kwiet* [Oil Pollution in Kuwaiti Marine Environment] 20 (Center For Research and Studies on Kuwait, ed 2001)(Arabic).

kilometers.⁹⁰⁷ One of the Gulf's disadvantages is having a weak exchange of water with other water bodies.⁹⁰⁸ It joins free international waters through the Strait of Hormuz. One of the factors threatening the Gulf environment is the higher rate of water evaporation in the Gulf than fresh water can replace. The annual water evaporation rate in the Gulf ranges from 150-400 cm.⁹⁰⁹

Fresh water is supplied mainly by rivers in the northwest, but the amount is insufficient and does not compensate for the evaporation. One of the most vital factors in maintaining the ecological balance in this waterway is the circulation of water. This process is relative and takes place every three to five years.⁹¹⁰ The United Nations Environment Programme (UNEP) declared that the Gulf is considered one of the more sensitive marine ecosystems a special area. UNEP promulgated specific regulations for its preservation.⁹¹¹

Another characteristic of the Gulf marine environment is the presence of coral reef colonies and plant species that thrive in areas which mark tidal movements. The mangrove forest in the Gulf, which is a continuation of the forest in Southeast Asia and the Indian Ocean, is also very important from the ecological viewpoint.⁹¹²

⁹⁰⁷ Dr. Rafat Misaak ET AL., *Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlal Al-Kuwiet [Natural Resources and Environmental Features of the State of Kuwait]* 199 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

⁹⁰⁸ Dr. Rafat Misaak ET AL., *Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlal Al-Kuwiet [Natural Resources and Environmental Features of the State of Kuwait]* 199 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

⁹⁰⁹ Dr. Lolya Nasser ET AL., *Al-Talweth Al-Naftee Fee Al-Bea Al-Bahrya Bdwlal Al-Kwiet [Oil Pollution in Kuwaiti Marine Environment]* 16 (Center For Research and Studies on Kuwait, ed 2001)(Arabic).

⁹¹⁰ Dr. Abdullah Al-Gneem ET AL., *Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents]* 253 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

⁹¹¹ Kuwait Case Study: The Economic and Environmental Impact of the Gulf War on Kuwait and the Persian Gulf, <http://gurukul.ucc.american.edu/ted/KUWAIT.HTM> (last visited July 6, 2006).

⁹¹² Dr. Abdullah Al-Gneem ET AL., *Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents]* 253 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

Coral reefs are crucial in controlling water flow and they harbor various kinds of fish, especially smaller species. Mangrove and Avicenna marine plants, which are particular to the Gulf and to the Gulf of Oman, are among the sea resources that provide ideal living environments for crustaceans such as shrimp and other marine life.⁹¹³

Coral reefs and mangroves, together with an array of other plant colonies, are among the marine life forms that are threatened by petroleum hydrocarbon pollutants. The total areas covered by Mangroves in the Gulf and the Gulf of Oman exceed more than 20,000 square meters.⁹¹⁴

Equally significant are colonies of shrimp living in the sea bed near the shore, which also play a significant role in the areas' marine life cycles. The vegetation that results is the major food source that sustains many sea species thriving in the region.

The Gulf, a feeding and spawning ground for fish and other marine life, supports 180 species of mollusks, 106 species of fish, three types of whales, five species of dolphin, scores of different types of seabirds, and 450 species of animals which live in its coral reefs.⁹¹⁵

The Gulf is considered an important natural resource for the Gulf States (Kuwait, Qatar, Bahrain, Oman, Saudi Arabia, and United Arab Emirates) because it represents the main source of unsalted water in the region which lacks other water-supply resources such as rivers and rain. By 1990, there were 37 desalination plants in the Gulf. Kuwait,

⁹¹³ Regional Organization for The Protection of The Marine Environment (ROPME), 63 Nashrat Al-Bea Al-Bahriya [The Marine Environment Bulletin] 20 (2005).

⁹¹⁴ Regional Organization for The Protection of The Marine Environment (ROPME), 63 Nashrat Al-Bea Al-Bahriya [The Marine Environment Bulletin] 20 (2005).

⁹¹⁵ Eric Schmitt, *After the War: The Environment; Fouled Region is Casualty of War*, N.Y. TIMES, March 3, 1991, at A19.

for instance, gets 90% of its water from the Gulf.⁹¹⁶ Finally, the Gulf plays a cardinal role in furnishing the population with plenty of fishy species such as shrimp. In addition, the Gulf is deemed the primary resort for recreational purposes.

ii. Hydrosphere pollution effects on the Gulf:

Oil has a dangerous impact on any marine environment. Oil pollution may destroy marine life in various ways. Some of these impacts are due to the characteristics of oil. For example, oil is less heavy than water and that allows oil to float and spread over the water surface. Thus, oil will be dissolved because of sunlight exposure. This dissolution may generate several toxic petroleum materials which harm the marine environment.⁹¹⁷ By being floated over the water the oil may prevent sunlight from penetrating to the sea beds and, as a result, the photosynthesis process of plankton, which is deemed the main source of nutrition for other marine species (fish and shrimp), will be affected.⁹¹⁸

Oil, no doubt, plays a role in reducing the amount of dissolved oxygen in the body of water. Oxygen reduction is due to the active bacteria that oil usually contains.⁹¹⁹ The final result of such reduction is that fish perish because of Oxygen decrement. Oil may produce negative effects on species directly.

Seabirds were the first victims of the environmental damages caused by the Gulf armed conflict. Before the war, there were various seabirds living in the Gulf region and the number of these birds was about 260,000,000. After the war, the previous number was reduced to 100,000,000 birds. Around 100,000,000 to 150,000,000 were found dead

⁹¹⁶ Dr. Abdullah Al-Gneem ET AL., *Tadmeer Abar Alnfet fee alwthaeq Aliraqya* [Destruction Oil Wells in Iraqi Documents] 253 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

⁹¹⁷ See Dr. Sulman Al-Matar ET AL., *Al-Bea Al-Bahrya Fee Dwlat Al-Kwiet* [The Marine Environment of the State of Kuwait] 149 (Center for Research and Studies on Kuwait, ed. 2003)(Arabic).

⁹¹⁸ See Dr. Sulman Al-Matar ET AL., *Al-Bea Al-Bahrya Fee Dwlat Al-Kwiet* [The Marine Environment of the State of Kuwait] 150 (Center for Research and Studies on Kuwait, ed. 2003)(Arabic).

⁹¹⁹ See Dr. Sulman Al-Matar ET AL., *Al-Bea Al-Bahrya Fee Dwlat Al-Kwiet* [The Marine Environment of the State of Kuwait] 150 (Center for Research and Studies on Kuwait, ed. 2003)(Arabic).

on the Saudi Arabia coastlines.⁹²⁰ Death caused by oil slicks resulted from the oil which had been deliberately released into the Gulf by Iraqi troops. Thinking that oil slicks are water bodies, birds land on them. When landing is completed, the birds lose their capability to fly again. Thus, birds will perish either because of sinking or hunger.⁹²¹

Sea turtles, green turtles living in the Gulf, are wounded by oil slicks. Several green turtles were found wounded on Garoh Island.⁹²² Also, turtles nest areas located in the Kuwaiti islands were contaminated by petroleum.⁹²³ Green turtles are considered an endangered species.⁹²⁴ Ninety three dolphins were found dead during the period of between February-April 1991 in the region.⁹²⁵ These deaths were attributed to toxic substances penetrating these mammals' bodies.⁹²⁶

Even fish eggs and larva were affected by air pollution. One of the studies reported that some dangerous petroleum materials were found in high concentration on

⁹²⁰ See Philip Elmer, Environmental Damage, A Man-Made Hell on Earth, *TIMES*, March 18, 1991, at 36; See also Dr. Lolya Nasser ET AL., *Al-Talweth Al-Naftee Fee Al-Bea Al-Bahrya Bdwlal Al-Kwiet [Oil Pollution in Kuwaiti Marine Environment]* 122 (Center For Research and Studies on Kuwait, ed 2001)(Arabic).

⁹²¹ See Dr. Sulman Al-Matar ET AL., *Al-Bea Al-Bahrya Fee Dwlal Al-Kwiet [The Marine Environment of the State of Kuwait]* 151 (Center for Research and Studies on Kuwait, ed. 2003)(Arabic).

⁹²² Dr. Lolya Nasser ET AL., *Al-Talweth Al-Naftee Fee Al-Bea Al-Bahrya Bdwlal Al-Kwiet [Oil Pollution in Kuwaiti Marine Environment]* 122 (Center For Research and Studies on Kuwait, ed 2001)(Arabic).

⁹²³ Dr. Lolya Nasser ET AL., *Al-Talweth Al-Naftee Fee Al-Bea Al-Bahrya Bdwlal Al-Kwiet [Oil Pollution in Kuwaiti Marine Environment]* 122 (Center For Research and Studies on Kuwait, ed 2001)(Arabic); See Micheal D. Lemonick, *Dead Sea in the Making: A Fragile Ecosystem Brimming with Life is Headed for Destruction*, *TIME*, Feb.11, 1991, at 40.

⁹²⁴ Philip Shenon, *U.S. Bombs Kuwait Oil Station, Seeking to Cut Flow into Gulf, More Iraqi Planes Fly to Iran*, *N.Y. TIMES*, January 28, 1991, at 1.

⁹²⁵ Dr. Lolya Nasser ET AL., *Al-Talweth Al-Naftee Fee Al-Bea Al-Bahrya Bdwlal Al-Kwiet [Oil Pollution in Kuwaiti Marine Environment]* 124 (Center For Research and Studies on Kuwait, ed 2001)(Arabic).

⁹²⁶ See Dr. Sulman Al-Matar ET AL., *Al-Bea Al-Bahrya Fee Dwlal Al-Kwiet [The Marine Environment of the State of Kuwait]* 149 (Center for Research and Studies on Kuwait, ed. 2003)(Arabic).

the water surface.⁹²⁷ It is well established that these materials cause harm to fish eggs and larva.⁹²⁸ Oil may cover and block the gills of fish which causes extinction.⁹²⁹

Water pollution caused harm to shrimp. The shrimp fishing rate was brought down in the 1992 season due to the Gulf pollution.⁹³⁰ Coral reefs were partially damaged because of oil pollution⁹³¹ and their color became white, a well known sign that they will vanish. It was reported that 50% of the coral reefs were destroyed in the Gulf after the war.⁹³² Coral reefs have a primary role in the absorption of carbon dioxide.⁹³³

The heavy oil spill in early 1991 might have reduced the survival rate of Pearl Oyster larva. The great amount of fallout and heavier petroleum that sank into the bottom of the Gulf might cover the settlement of substrate for Pearl Oyster larva.⁹³⁴ It is mentioned that the low temperature due to air pollution would retard the growth of larvae and increase larval mortality, further affecting recruitment.⁹³⁵

⁹²⁷ Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 249 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

⁹²⁸ Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 249 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

⁹²⁹ Dr. Lolya Nasser ET AL., Al-Talweth Al-Naftee Fee Al-Bea Al-Bahrya Bdwlal Al-Kwiet [Oil Pollution in Kuwaiti Marine Environment] 47 (Center For Research and Studies on Kuwait, ed 2001)(Arabic).

⁹³⁰ Dr. Lolya Nasser ET AL., Al-Talweth Al-Naftee Fee Al-Bea Al-Bahrya Bdwlal Al-Kwiet [Oil Pollution in Kuwaiti Marine Environment] 131 (Center For Research and Studies on Kuwait, ed 2001)(Arabic).

⁹³¹ Tomas P. Lippman, Gulf War Leaves Environment Severely Wounded, WASH. POST, March 2, 1991, at A1, Col. 1.

⁹³² See Dr. Lolya Nasser ET AL., Al-Talweth Al-Naftee Fee Al-Bea Al-Bahrya Bdwlal Al-Kwiet [Oil Pollution in Kuwaiti Marine Environment] 125 (Center For Research and Studies on Kuwait, ed 2001)(Arabic).

⁹³³ Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 251 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

⁹³⁴ Dr. Sulaiman Al-Matar ET AL., Possible Effects of the Gulf War on the Pearl Oyster Stocks in Kuwait Waters, A paper presented to the International Conference on the Effects of the Iraqi Aggression on the State of Kuwait held April 2-6 1994 Kuwait, 103 (Center of the Gulf and Arabian Peninsula Studies, ed. 1996).

⁹³⁵ Dr. Sulaiman Al-Matar ET AL., Possible Effects of the Gulf War on the Pearl Oyster Stocks in Kuwait Waters, A paper presented to the International Conference on the Effects of the Iraqi Aggression on the State of Kuwait held April 2-6 1994 Kuwait, 111 (Center of the Gulf and Arabian Peninsula Studies, ed. 1996).

Mangrove forests are so important in maintaining balance for marine beaches and for feeding marine animals.⁹³⁶ It was reported that 400 kilometers of Saudi coastlines were heavily contaminated with oil. This contamination caused harm for both mangrove forests and salted marshes.⁹³⁷ Sediments, also, were harmed due to Iraqi troop operations such as land mines and defense walls built to prevent marine assaults.⁹³⁸

Oil pollution affected the process of water desalination. For instance, when oil oxidation occurs, toxic substances are the result. These toxic substances may harm human beings because of their capability to dissolve in salt water (sea). Another result might be anticipated as a result of the interaction between some petroleum materials, such as hydrocarbon, and the chlorine usually added in the water desalination process to sterilize water.⁹³⁹ It has been expected that the Gulf's ecological damages will last for the next twenty years.⁹⁴⁰

2. Lithosphere Pollution:

The marine environment was not the only field affected negatively by the Iraqi invasion of the State of Kuwait. Soil has been victimized through several activities attributed to Iraqi armed forces. These activities, depending on their environmental damages, can be classified into three groups: oil lakes, military activities, and ground mines.

⁹³⁶ Thomas Y. Carby, *After the Storm*, NAT' L GEOGRAPHIC, August 1991, at 25.

⁹³⁷ John H. Gushman, *Claims for Damages Iraq Go Begging for Data*, NAT' L GEOGRAPHIC, Nov. 12 1991, at C4.

⁹³⁸ Dr. M. Al-Sarawi ET AL., *A Preliminary Assessment of the Impact of Iraqi Invasion on Filka Island, Kuwait*, A paper presented to the International Conference on the Effects of the Iraqi Aggression on the State of Kuwait held April 2-6 1994 Kuwait, 368 (Center of the Gulf and Arabian Peninsula Studies, ed. 1996).

⁹³⁹ Dr. Abdullah Al-Gneem ET AL., *Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents]* 253 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

⁹⁴⁰ Bruce Nichols, *Horrors Plague Wanton Mideast*, NEW ORLEANS TIMES PICAYUNE, Dec.8, 1991, at A36 (1st edition). See also Sharon Regley, *Saddam's Ecoterror- The Iraq Oil FloodCreates Environmental Hazards and Military Obstacles*, NEWSWEEK, Feb.4, 1991, at 38.

a. The Sources of Lithosphere Pollution:

i. Oil Lakes:

Oil lakes were formed by gushed oil wells. There were 77 gushed oil wells in the northern and southern oil fields.⁹⁴¹ These wells were blown up, but they did not catch fire. Thus, oil was flowing through these wells into the desert in both northern and southern portions of the country.⁹⁴²

The flow was estimated at 60 million barrels.⁹⁴³ Others reckoned it at 24 million.⁹⁴⁴ The oil flow formed approximately 570 oil lakes around the country.⁹⁴⁵ Some of these lakes are 5 kilometers in length and 500 meters in width.⁹⁴⁶ These lakes cover a space of 49 Km/square.⁹⁴⁷ The depth of these lakes ranged from 60 to 120 Cm.⁹⁴⁸ The estimated depth to which oil might reach beneath the soil is controversial. Some believe

⁹⁴¹ Dr. Zain Al-Dean Gneemee, Al-Athar Al-Beayia LL Gazoo Al-Iraqi Ldwlat Al-Kowiet [Environmental Impacts of Iraqi Aggression for the State of Kuwait], 17 Center of the Gulf and Arabian Peninsula Studies Journal 20, 24 (1992)(Arabic).

⁹⁴² Dr. Zain Al-Dean Gneemee, Al-Athar Al-Beayia LL Gazoo Al-Iraqi Ldwlat Al-Kowiet [Environmental Impacts of Iraqi Aggression for the State of Kuwait], 17 Center of the Gulf and Arabian Peninsula Studies Journal 20, 25 (1992)(Arabic).

⁹⁴³ Dr. Abdullah Al-Kandari, Environment and Development 266 (Kuwait University, 1992).

⁹⁴⁴ Dr. Rafat Misaak ET AL., Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlat Al-Kuwiet [Natural Resources and Environmental Features of the State of Kuwait] 192 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

⁹⁴⁵ Dr. Rafat Misaak ET AL., Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlat Al-Kuwiet [Natural Resources and Environmental Features of the State of Kuwait] 192 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

⁹⁴⁶ Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 258 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

⁹⁴⁷ Dr. Rafat Misaak ET AL., Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlat Al-Kuwiet [Natural Resources and Environmental Features of the State of Kuwait] 192 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

⁹⁴⁸ Dr. Abdullah Al-Kandari, Environment and Development 266 (Kuwait University, 1992).

that the depth was between a few centimeters and a meter,⁹⁴⁹ while others think that the oil might reach a deeper area, 3,7 meters.⁹⁵⁰

Polluted soil can be classified in three groups depending on how much pollution presents in the soil. The first group was severely-polluted soil which caused death to all its biological capabilities.⁹⁵¹ The second group is mid-polluted soils that affected about 25-100% of the soil's biota,⁹⁵² while the third group is slight-polluted soil covered by soot which had fallen from oil smoke caused by oil-well fires.⁹⁵³

ii. Military Operations:

No doubt, Iraqi troops' military operations affected the soil. These military operations, such as off-road vehicle traffic, bunkers, and ditches lasted about seven months, enough to guarantee any soil changes. The movement of heavy military artilleries would destroy the soil surface. Building defense lines which consist of bunkers and ditches was another activity that might be counted as an anti-environment activity.

The Iraqi armed forces, following a scorched earth strategy, created a new path to revenge from the earth in the so called "oil ditches." These are ditches made above the

⁹⁴⁹ Dr. Abdullah Al-Gneem ET AL., *Tadmeer Abar Alnfet fee alwthaeq Aliraqya* [Destruction Oil Wells in Iraqi Documents] 258 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

⁹⁵⁰ Dr. Rafat Misaak ET AL., *Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlat Al-Kuwiet* [Natural Resources and Environmental Features of the State of Kuwait] 194 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

⁹⁵¹ Dr. Rafat Misaak ET AL., *Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlat Al-Kuwiet* [Natural Resources and Environmental Features of the State of Kuwait] 192 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

⁹⁵² Dr. Rafat Misaak ET AL., *Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlat Al-Kuwiet* [Natural Resources and Environmental Features of the State of Kuwait] 192 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

⁹⁵³ Dr. Rafat Misaak ET AL., *Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlat Al-Kuwiet* [Natural Resources and Environmental Features of the State of Kuwait] 192 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

soil surface and filled with oil in order to prevent any ground assaults.⁹⁵⁴ Soil ditches extended about 200 kilometers along the southern border line of Kuwait facing the Saudi borders.⁹⁵⁵ There were 120 ditches,⁹⁵⁶ each one of them about 2.5-3 meters in width and 1.5-2 meters in depth.⁹⁵⁷

These ditches were filled with crude oil estimated at about 3.5 million barrels.⁹⁵⁸ It took about five months from August to January 1991 to build these ditches.⁹⁵⁹ This process caused the movement of a tremendous amount of dust and turned over much soil.

iii. Land Mines

Although land mines can be considered a result of military operations, they have been classified as an independent source of environmental damages inflicted on the soil. Mines may affect soil in a variety of ways.⁹⁶⁰ Without involving details, the number of land mines discovered in Kuwait by 1997 was about 1,464,514 land mines.⁹⁶¹ 1,078,829

⁹⁵⁴ Dr. Dari Al-Ajmi ET AL., Kanadeq Al-Nafet Wa Tadmmer AlBea Al-Kwioetia [Oil Trenches and Kuwait Environmental Destruction as One of Iraqi Invasion Crimes] 25 (Center of Research and Studies on Kuwait, 2004)(Arabic).

⁹⁵⁵ Dr. Dari Al-Ajmi ET AL., Kanadeq Al-Nafet Wa Tadmmer AlBea Al-Kwioetia [Oil Trenches and Kuwait Environmental Destruction as One of Iraqi Invasion Crimes] 25 (Center of Research and Studies on Kuwait, 2004)(Arabic).

⁹⁵⁶ Dr. Dari Al-Ajmi ET AL., Kanadeq Al-Nafet Wa Tadmmer AlBea Al-Kwioetia [Oil Trenches and Kuwait Environmental Destruction as One of Iraqi Invasion Crimes] 37 (Center of Research and Studies on Kuwait, 2004)(Arabic).

⁹⁵⁷ Dr. Dari Al-Ajmi ET AL., Kanadeq Al-Nafet Wa Tadmmer AlBea Al-Kwioetia [Oil Trenches and Kuwait Environmental Destruction as One of Iraqi Invasion Crimes] 31 (Center of Research and Studies on Kuwait, 2004)(Arabic).

⁹⁵⁸ Dr. Dari Al-Ajmi ET AL., Kanadeq Al-Nafet Wa Tadmmer AlBea Al-Kwioetia [Oil Trenches and Kuwait Environmental Destruction as One of Iraqi Invasion Crimes] 86 (Center of Research and Studies on Kuwait, 2004)(Arabic).

⁹⁵⁹ Dr. Dari Al-Ajmi ET AL., Kanadeq Al-Nafet Wa Tadmmer AlBea Al-Kwioetia [Oil Trenches and Kuwait Environmental Destruction as One of Iraqi Invasion Crimes] 61 (Center of Research and Studies on Kuwait, 2004)(Arabic).

⁹⁶⁰ Jennifer Leaning, Environment and Health: Impact of War, 1159 (Canadian Medical Association Journal, Oct.31, 2000).

⁹⁶¹ Center of Research and Studies on Kuwait, Al-Algam Al-Ardia Wa Tadmeer Al-Bea Al-Koiwetia [Ground Mines and Destruction of Kuwaiti Environment as One of Iraqi Aggression Crimes] 27 (1998)(Arabic).

anti-individual mines were planted in the southern and northern portions of Kuwait while 567,685 anti-tank mines were scattered around the country.⁹⁶²

b. Lithosphere Pollution Effects:

Soil was affected greatly by the Iraqi invasion of the State of Kuwait. The soil in areas of war activities was exposed to various impacts which left their mark in the form of changed soil conditions. The soil surface was pulverized by exposure to off-road vehicle traffic. Soil was displaced, loosened, and shattered. The digging of bunkers, ditches, and embankments distributed soil and exposed the hardpan present under the root zone in most parts of the country.⁹⁶³

The distributed soil was exposed to water and wind erosion and its productivity was adversely affected. All plants and animals in the affected areas were killed or very adversely affected. Acid rain, which fell in large areas, created a dark grey crust on the soil surface, which modified its physical and chemical features.⁹⁶⁴ Environmental damages inflicted on the soil were varied. These damages will be examined according to their causes.

Military operations affected soils in different ways. For example, the very low numbers of both annuals and perennials was due to the use of plants to hide military equipment; burial of plants during construction of bunkers, trenches, and embankments;

⁹⁶² Center of Research and Studies on Kuwait, *Al-Algam Al-Ardia Wa Tadmeer Al-Bea Al-Koiwetia* [Ground Mines and Destruction of Kuwaiti Environment as One of Iraqi Aggression Crimes] 27 (1998)(Arabic).

⁹⁶³ A Rapid Assessment of the Impacts of the Iraq-Kuwait conflict on Terrestrial Ecosystems, A Report prepared for the United Nations Environment Program (UNEP) by Gaafar Karrar ET AL., at 56-59, (UNEP,Regional Office for West Asia, Sep. 1991).

⁹⁶⁴ A Rapid Assessment of the Impacts of the Iraq-Kuwait conflict on Terrestrial Ecosystems, A Report prepared for the United Nations Environment Program (UNEP) by Gaafar Karrar ET AL., at 56-59, (UNEP,Regional Office for West Asia, Sep. 1991).

and destruction of plants due to the movements of heavy military vehicles,⁹⁶⁵ In some cases, the digging of bunkers harmed the soil by exposing the hardpan and parent rocks.

The destruction of sediments was cited as one of the negative effects of the military operations.⁹⁶⁶ Iraqi troop centralization above the soil caused soil compression. This compression brought about the blockage of soil pores, soil dryness, and an increase in water flow (rain).⁹⁶⁷

Bunkers created by the Iraqi armed forces had direct and indirect impact upon the soil. Direct impacts are those damages caused by the soil digging process.⁹⁶⁸ An example of direct impacts would be the crumbling of upper parts of the soil, destruction of vegetable cover, loss of rain and flood water due to water gathering inside bunkers created by the invader. Gathering water inside bunkers accelerates the water evaporation process.⁹⁶⁹ In addition, bunkers caused indirect impacts on soil.⁹⁷⁰

Land mines have their own effects on soil. These damages created both instant and long-term effects. Instant impacts are those damages which resulted after the implantation process occurred, changing the chemical conditions of the soil, destroying

⁹⁶⁵ M. El-Din ET AL., Environmental Impacts of Burned Oil Wells and Military Operations on some Desert Plants and Soils of Kuwait, A paper presented to the International Conference on the Effects of the Iraqi Aggression on the State of Kuwait held April 2-6 1994 Kuwait, 167 (Center of the Gulf and Arabian Peninsula Studies, ed. 1996).

⁹⁶⁶ Ali Al-Dousari ET AL., Impact of the Iraqi War Machinery and Ground Fortifications on the Surface Sediments and Aeolian Process in Kuwait, A paper presented to the International Conference on the Effects of the Iraqi Aggression on the State of Kuwait held April 2-6 1994 Kuwait, 229 (Center of the Gulf and Arabian Peninsula Studies, ed. 1996).

⁹⁶⁷ Dr. Rafat Misak ET AL., Al-Bea Al-Sahrawiya Be Dawllat Al-Kowiet [Desert Environment of the State of Kuwait] 91 (Center of Research and Studies on Kuwait, ed. 2003)(Arabic).

⁹⁶⁸ Dr. Dari Al-Ajmi ET AL., Kanadeq Al-Nafet Wa Tadmmer AlBea Al-Kwioetia [Oil Trenches and Kuwait Environmental Destruction as One of Iraqi Invasion Crimes] 87 (Center of Research and Studies on Kuwait, 2004)(Arabic).

⁹⁶⁹ Dr. Dari Al-Ajmi ET AL., Kanadeq Al-Nafet Wa Tadmmer AlBea Al-Kwioetia [Oil Trenches and Kuwait Environmental Destruction as One of Iraqi Invasion Crimes] 78 (Center of Research and Studies on Kuwait, 2004)(Arabic).

⁹⁷⁰ Dr. Dari Al-Ajmi ET AL., Kanadeq Al-Nafet Wa Tadmmer AlBea Al-Kwioetia [Oil Trenches and Kuwait Environmental Destruction as One of Iraqi Invasion Crimes] 98 (Center of Research and Studies on Kuwait, 2004)(Arabic).

the coral reefs around the islands, crumbling upper parts of the soil, and destroying desert plants.⁹⁷¹

Long-term impacts are those which resulted after a period of time had passed such as losing surface water, waste of soil humidity, and annihilation of desert fauna and flora.⁹⁷² It was reported that soil suitability for land use was affected by land mines.⁹⁷³

Oil lakes played a role in affecting soil adversely. Some toxic substances resulting from the oil lakes may accumulate in plant tissue and constitute carcinogens which cause death to any animal eating such plants.⁹⁷⁴ Areas within the boundaries of the oil lakes were considered biologically dead.⁹⁷⁵ After drying, oil tar or sludge remains, causing severe disturbances in the physical, chemical, and biological properties of the soil environment.⁹⁷⁶

The dark coloration of the soil surface leads to greater heat absorbance, increased soil temperature, and hence increased water loss by evaporation.⁹⁷⁷ A study

⁹⁷¹ Dr. Rafat Misak ET AL., *Al-Bea Al-Sahrawiya Be Dawllat Al-Kowiet* [Desert Environment of the State of Kuwait] 164 (Center of Research and Studies on Kuwait, ed. 2003)(Arabic).

⁹⁷² Dr. Rafat Misak ET AL., *Al-Bea Al-Sahrawiya Be Dawllat Al-Kowiet* [Desert Environment of the State of Kuwait] 164-168 (Center of Research and Studies on Kuwait, ed. 2003)(Arabic).

⁹⁷³ Reem Al-Nifaisi, *Environmental Impact Assessment of the Iraqi Strategic Mine Fields in the Southern portion of Kuwait*, A paper presented to the International Conference on the Effects of the Iraqi Aggression on the State of Kuwait held April 2-6 1994 Kuwait, 249 (Center of the Gulf and Arabian Peninsula Studies, ed. 1996).

⁹⁷⁴ Dr. Rafat Misaak ET AL., *Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlat Al-Kuwiet* [Natural Resources and Environmental Features of the State of Kuwait] 198 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

⁹⁷⁵ M. El-Din ET AL., *Environmental Impacts of Burned Oil Wells and Military Operations on some Desert Plants and Soils of Kuwait*, A paper presented to the International Conference on the Effects of the Iraqi Aggression on the State of Kuwait held April 2-6 1994 Kuwait, 175 (Center of the Gulf and Arabian Peninsula Studies, ed. 1996).

⁹⁷⁶ M. El-Din ET AL., *Environmental Impacts of Burned Oil Wells and Military Operations on some Desert Plants and Soils of Kuwait*, A paper presented to the International Conference on the Effects of the Iraqi Aggression on the State of Kuwait held April 2-6 1994 Kuwait, 175 (Center of the Gulf and Arabian Peninsula Studies, ed. 1996).

⁹⁷⁷ M. El-Din ET AL., *Environmental Impacts of Burned Oil Wells and Military Operations on some Desert Plants and Soils of Kuwait*, A paper presented to the International Conference on the Effects of the Iraqi Aggression on the State of Kuwait held April 2-6 1994 Kuwait, 175 (Center of the Gulf and Arabian Peninsula Studies, ed. 1996).

acknowledged that damages to the natural vegetation were caused by the increased the temperature in atmosphere and soil, decreased photosynthetic activities, and the burning of many oil lakes.⁹⁷⁸ Finally, oil lakes affected the ground water aquifer.⁹⁷⁹ Sea water used to extinguish the oil-well fires is another factor contributing to loss of soil productivity.⁹⁸⁰

3. Atmospheric Pollution:

Understanding atmospheric pollution requires apprehending both the sources of such pollution and its effects.

a. The Sources of Atmospheric Pollution:

i. Oil Fire:

The crime against the environment was not limited to life marine and soil, but was extended to the atmosphere. Burning oil wells were the stone which hit two birds or targets, wealth and environment. Although it is a small territory, the State of Kuwait contains an amount of oil estimated at about 12,960 million tons.⁹⁸¹ Kuwaiti oil is

⁹⁷⁸ M. El-Din ET AL., Environmental Impacts of Burned Oil Wells and Military Operations on some Desert Plants and Soils of Kuwait, A paper presented to the International Conference on the Effects of the Iraqi Aggression on the State of Kuwait held April 2-6 1994 Kuwait, 174 (Center of the Gulf and Arabian Peninsula Studies, ed. 1996).

⁹⁷⁹ See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 271, 296 (Center for Research and Studies on Kuwait ed. 2004)(Arabic); See also Dr. Rafat Misaak ET AL., Al-Mawareed Al-Tabeyya Wa Al-Semaat Al-Beaya Fee Dwlal Al-Kuwiet [Natural Resources and Environmental Features of the State of Kuwait] 202 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

⁹⁸⁰ The estimated amount of sea water used to extinguish the oil-well fires was about 1,5 billion gallons (25,000 gallons daily) Due to the temperature increase, water is evaporated and salt will remain in soils which prevents plant growth. The amount of salt added to the soil due to the use of sea water was about 76,500 tons of salt. It can not be washed by a little rain water (100-150 millimeters annually). See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 261, 266 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

⁹⁸¹ Muhadee Al-Ajmi, Al-Awamel Al-Bashriya Wa Athroha on Al-Bea Al-Tbeeyia Fee Al-Kowiet [Human Factors and their Effects on Natural Environment in the State of Kuwait] 69 (Kuwait Foundation For the Advancement Science, ed. 1996)(Arabic).

divided among eight major fields (Burgan, Manakeesh, Um-Qudair, Wafra, Mutreba, Rawdatain, Sabryia, and Bahra). These oil fields contain 1555 oil wells.⁹⁸²

The northern oil fields group (Rawdatain, Sabryia, Bahra, and Mutreba) contains 287 oil wells.⁹⁸³ These oil wells were affected severely by the wicked Iraqi plan; 108 oil wells were on fire, nine oil wells were gushing, fourteen oil wells were severely damaged, and sixteen oil wells were intact.⁹⁸⁴

The southern oil fields group (Burgan, Manakeesh, Um-Qudair, and Wafra) contains 1268 oil wells.⁹⁸⁵ Their statistics were 510 oil wells on fire, 68 oil wells gushing, 448 oil wells severely damaged, and 140 wells intact.⁹⁸⁶

The amount of oil burned was estimated at from 2.5 to 6 millions barrels daily.⁹⁸⁷ Assuming that 2.5 million barrels daily were burned, the resulting substances were: 20-40 thousands tons of black smoke, 250 tons of carbon monoxide, 20 thousands tons of sulfur dioxide, 1500 tons of toxic substances, and 500 tons of nitric oxide.⁹⁸⁸

⁹⁸² Dr. Zain Al-Dean Gneemee, Al-Athar Al-Beayia LL Gazoo Al-Iraqi Ldwlat Al-Kowiet [Environmental Impacts of Iraqi Aggression for the State of Kuwait], 17 Center of the Gulf and Arabian Peninsula Studies Journal 20, 23 (1992)(Arabic).

⁹⁸³ Dr. Zain Al-Dean Gneemee, Al-Athar Al-Beayia LL Gazoo Al-Iraqi Ldwlat Al-Kowiet [Environmental Impacts of Iraqi Aggression for the State of Kuwait], 17 Center of the Gulf and Arabian Peninsula Studies Journal 20, 23 (1992)(Arabic).

⁹⁸⁴ Dr. Zain Al-Dean Gneemee, Al-Athar Al-Beayia LL Gazoo Al-Iraqi Ldwlat Al-Kowiet [Environmental Impacts of Iraqi Aggression for the State of Kuwait], 17 Center of the Gulf and Arabian Peninsula Studies Journal 20, 23 (1992)(Arabic).

⁹⁸⁵ Dr. Zain Al-Dean Gneemee, Al-Athar Al-Beayia LL Gazoo Al-Iraqi Ldwlat Al-Kowiet [Environmental Impacts of Iraqi Aggression for the State of Kuwait], 17 Center of the Gulf and Arabian Peninsula Studies Journal 20, 23 (1992)(Arabic).

⁹⁸⁶ Dr. Zain Al-Dean Gneemee, Al-Athar Al-Beayia LL Gazoo Al-Iraqi Ldwlat Al-Kowiet [Environmental Impacts of Iraqi Aggression for the State of Kuwait], 17 Center of the Gulf and Arabian Peninsula Studies Journal 20, 23 (1992)(Arabic).

⁹⁸⁷ Dr. Mustafa Al-Desouky, Impact of Oil Well Fires on the Air Quality in Kuwait, a paper presented to Proceedings of an International Symposium held at the University of Birmingham 17th October 1991, at 18.

⁹⁸⁸ Dr. Zain Al-Dean Gneemee, Al-Athar Al-Beayia LL Gazoo Al-Iraqi Ldwlat Al-Kowiet [Environmental Impacts of Iraqi Aggression for the State of Kuwait], 17 Center of the Gulf and Arabian Peninsula Studies Journal 20, 23 (1992)(Arabic).

Soot and oil mist were noticed on the soil as a result of the burning oil.⁹⁸⁹ Types of oil smoke formed were: black smoke, white smoke, and a clean flame without smoke.⁹⁹⁰ It was reported that the smoke reached places far away from the region including some areas of the former Soviet Union and the United States of America.⁹⁹¹

ii. Oil Lakes:

Although oil lakes formed above the soil, they have negative impacts on air. Oil lakes might be a source of toxic substances such as methane, butane, and hydrocarbons.⁹⁹² These oil lakes were formed by oil escaping from oil wells. Either their damaged oil well-heads were not on fire or their oil well-heads were on fire, but gushing crude oil simultaneously.⁹⁹³ Oil lakes were different in shape, location, size, characteristics of oil, and depth.⁹⁹⁴ Some of these oil lakes caught fire from the oil wells on fire.⁹⁹⁵

b. Atmospheric Pollution Effects:

Oil-well fires greatly affected the environment. Environmental impacts occurred in different ways. Burned oil caused harm to the atmosphere, and to animals, plants, soil, and construction. In light of atmospheric impacts, a high concentration of toxic and

⁹⁸⁹ A Rapid Assessment of the Impacts of the Iraq-Kuwait conflict on Terrestrial Ecosystems, A Report prepared for the United Nations Environment Program (UNEP) by Gaafar Karrar ET AL., at 30, (UNEP,Regional Office for West Asia, Sep. 1991).

⁹⁹⁰ Jassem Al-Besharah, The Kuwaiti Oil Fires and Oil Lakes: Facts and Numbers, a paper presented to Proceedings of an International Symposium held at the University of Birmingham 17th October 1991, at 14; Dr. Abdullah Al-Kandari, Environment and Development 266 (Kuwait University, 1992).

⁹⁹¹ Dr. Abdullah Al-Kandari, Environment and Development 261 (Kuwait University, 1992).

⁹⁹² Dr. Abdulrahman Al-Awdee, Al-Mushklaat Al-Beayia Fee Al-Watan Al-Arabee Bad Tahreer Al-Kowiet [Environmental Problems in Arabic World after Kuwait Liberation] 18 (Arab Planning Institute, ed. 1992)(Arabic).

⁹⁹³ Jassem Al-Besharah, The Kuwaiti Oil Fires and Oil Lakes: Facts and Numbers, a paper presented to Proceedings of an International Symposium held at the University of Birmingham 17th October 1991, 15

⁹⁹⁴ Dr. Zain Al-Dean Gneemee, Al-Athar Al-Beayia LL Gazoo Al-Iraqi Ldwlat Al-Kowiet [Environmental Impacts of Iraqi Aggression for the State of Kuwait], 17 Center of the Gulf and Arabian Peninsula Studies Journal 20, 25 (1992)(Arabic).

⁹⁹⁵ Jassem Al-Besharah, The Kuwaiti Oil Fires and Oil Lakes: Facts and Numbers, a paper presented to Proceedings of an International Symposium held at the University of Birmingham 17th October 1991, 15.

harmful substances was recorded.⁹⁹⁶ After the liberation of Kuwait, a couple of monitoring stations (Al-Rega and Al-Mansooriya) were set up in order to record and observe any air pollution that might result from oil-well fires. These stations' records revealed a high concentration of nitric oxide.⁹⁹⁷

The sulfur dioxide concentration level exceeded the safe levels recommended by the World Health Organization (WHO).⁹⁹⁸ Also, hydrocarbons were found in a high concentration in some areas of Kuwait.⁹⁹⁹ One of the effects from the smoke of the fires was decreasing the regional temperature.¹⁰⁰⁰ This decrease is due to increasing of pollutants concentration in atmosphere which decreases the amount of sunlight stored by the soil.¹⁰⁰¹

Plants were victimized by the oil-well fires. Oil rain killed plants in the Kuwaiti territory.¹⁰⁰² The increased of temperature of the areas surrounding the oil wells was another source of fatal impact on vegetation.¹⁰⁰³ Soot caused by oil-well fires hindered

⁹⁹⁶ Ahmad Issa, Impact of Past Oil Fires on Atmospheric Respirable Particulates in Kuwait, A paper presented to the International Conference on the Effects of the Iraqi Aggression on the State of Kuwait held April 2-6 1994 Kuwait, 35 (Center of the Gulf and Arabian Peninsula Studies, ed. 1996).

⁹⁹⁷ Dr. Abdullah Al-Kandari, Environment and Development 263 (Kuwait University, 1992).

⁹⁹⁸ Dr. Zain Al-Dean Gneemee, Al-Athar Al-Beayia LL Gazoo Al-Iraqi Ldwlat Al-Kowiet [Environmental Impacts of Iraqi Aggression for the State of Kuwait], 17 Center of the Gulf and Arabian Peninsula Studies Journal 20, 31 (1992)(Arabic).

⁹⁹⁹ Dr. Zain Al-Dean Gneemee, Al-Athar Al-Beayia LL Gazoo Al-Iraqi Ldwlat Al-Kowiet [Environmental Impacts of Iraqi Aggression for the State of Kuwait], 17 Center of the Gulf and Arabian Peninsula Studies Journal 20, 32 (1992)(Arabic).

¹⁰⁰⁰ Dr. Yosef Al-Ebraheem ET AL., Al-eqtesadyaat Alarbia Wa Al-Kazoo al-Iraqi to Kowiet [Arabic Economies and Iraqi Invasion to the State of Kuwait] 29 (Arabic Planning Institution, ed. Dec. 1992)(Arabic).

¹⁰⁰¹ Dr. Yosef Al-Ebraheem ET AL., Al-eqtesadyaat Alarbia Wa Al-Kazoo al-Iraqi to Kowiet [Arabic Economies and Iraqi Invasion to the State of Kuwait] 29 (Arabic Planning Institution, ed. Dec. 1992)(Arabic).

¹⁰⁰² A Rapid Assessment of the Impacts of the Iraq-Kuwait conflict on Terrestrial Ecosystems, A Report prepared for the United Nations Environment Program (UNEP) by Gaafar Karrar ET AL., at 37, (UNEP,Regional Office for West Asia, Sep. 1991).

¹⁰⁰³ A Rapid Assessment of the Impacts of the Iraq-Kuwait conflict on Terrestrial Ecosystems, A Report prepared for the United Nations Environment Program (UNEP) by Gaafar Karrar ET AL., at 41, (UNEP,Regional Office for West Asia, Sep. 1991).

the growth of plants.¹⁰⁰⁴ The lack of oxygen due to heat is an additional source which assisted in the destruction of the vegetation.¹⁰⁰⁵

Fauna were severely affected by the oil-well fires. Soot hindered animals' movements and flight.¹⁰⁰⁶ Ulcers in camels were reported as a result of soot fallen from the smoke.¹⁰⁰⁷ Soot may smother animals.¹⁰⁰⁸ It was noticed that animal's wool became dark due to soot.¹⁰⁰⁹ Animal's lungs were a full of soot.¹⁰¹⁰ Oil-well fires and their smoke did not tolerate buildings.¹⁰¹¹ Finally, it has been concluded that the flood that struck Bangladesh in 1991 was due to the oil-well fires.¹⁰¹²

4. Pollution Effects on Public Health

Air pollution was the most dangerous pollution that occurred since both marine and soil pollution can be controlled authorities by taking some precautionary steps such as warning signs or fences to prevent public contact with these polluted areas. But air may invade any place without permission.

¹⁰⁰⁴ A Rapid Assessment of the Impacts of the Iraq-Kuwait conflict on Terrestrial Ecosystems, A Report prepared for the United Nations Environment Program (UNEP) by Gaafar Karrar ET AL., at 41, (UNEP,Regional Office for West Asia, Sep. 1991).

¹⁰⁰⁵ Dr. Zain Al-Dean Gneemee, Al-Athar Al-Beayia LL Gazoo Al-Iraqi Ldwlat Al-Kowiet [Environmental Impacts of Iraqi Aggression for the State of Kuwait], 17 Center of the Gulf and Arabian Peninsula Studies Journal 20, 34 (1992)(Arabic).

¹⁰⁰⁶ A Rapid Assessment of the Impacts of the Iraq-Kuwait conflict on Terrestrial Ecosystems, A Report prepared for the United Nations Environment Program (UNEP) by Gaafar Karrar ET AL., at 43, (UNEP,Regional Office for West Asia, Sep. 1991).

¹⁰⁰⁷ A Rapid Assessment of the Impacts of the Iraq-Kuwait conflict on Terrestrial Ecosystems, A Report prepared for the United Nations Environment Program (UNEP) by Gaafar Karrar ET AL., at 43, (UNEP,Regional Office for West Asia, Sep. 1991).

¹⁰⁰⁸ A Rapid Assessment of the Impacts of the Iraq-Kuwait conflict on Terrestrial Ecosystems, A Report prepared for the United Nations Environment Program (UNEP) by Gaafar Karrar ET AL., at 43, (UNEP,Regional Office for West Asia, Sep. 1991).

¹⁰⁰⁹ A Rapid Assessment of the Impacts of the Iraq-Kuwait conflict on Terrestrial Ecosystems, A Report prepared for the United Nations Environment Program (UNEP) by Gaafar Karrar ET AL., at 41, (UNEP,Regional Office for West Asia, Sep. 1991).

¹⁰¹⁰ Dr. Zain Al-Dean Gneemee, Al-Athar Al-Beayia LL Gazoo Al-Iraqi Ldwlat Al-Kowiet [Environmental Impacts of Iraqi Aggression for the State of Kuwait], 17 Center of the Gulf and Arabian Peninsula Studies Journal 20, 22 (1992)(Arabic).

¹⁰¹¹ Hayfa Mudhaf, The Effect of Oil Pollution on Building Facades in Kuwait, A paper presented to the International Conference on the Effects of the Iraqi Aggression on the State of Kuwait held April 2-6 1994 Kuwait, 15 (Center of the Gulf and Arabian Peninsula Studies, ed. 1996).

¹⁰¹² Dr. Abdullah Al-Kandari, Environment and Development 262 (Kuwait University, 1992).

Toxic substances such as sulfur dioxide may cause negative effects on health. By exposure to some level of sulfur dioxide, a human being may become susceptible to asthma, dyspnea, emphysema, skin and eyes irritation, or lung diseases.¹⁰¹³ Sulfur dioxide is in a high concentration in Kuwaiti crude oil.¹⁰¹⁴

Carbon monoxide may cause headache, eyesight weakness, general exhaustion, and death if exposure to such toxicity reaches a high level.¹⁰¹⁵ Nitric oxide also may do harm to the respiratory system.¹⁰¹⁶ Children who are ages 2-3 years are the most sensitive to such diseases.¹⁰¹⁷ Smog resulting from burned oil might generate cancerous diseases.¹⁰¹⁸ Lead, nickel, and vanadium are well-known sources of other unhealthy effects.¹⁰¹⁹ They may hinder childrens' growth, or cause barrenness, liver disease, and brain damage.¹⁰²⁰

It has been found that nickel may cause lung cancer and skin scorch.¹⁰²¹ Vanadium may cause poliomyelitis and anemia.¹⁰²² Acid rain contributes to the

¹⁰¹³ See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 223 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

¹⁰¹⁴ Jassem Al-Besharah, The Kuwaiti Oil Fires and Oil Lakes: Facts and Numbers, a paper presented to Proceedings of an International Symposium held at the University of Birmingham 17th October 1991, at 13.

¹⁰¹⁵ See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 224 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

¹⁰¹⁶ See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 224 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

¹⁰¹⁷ See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 225 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

¹⁰¹⁸ See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 225 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

¹⁰¹⁹ See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 227 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

¹⁰²⁰ See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 227 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

¹⁰²¹ See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 228 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

¹⁰²² See Dr. Abdullah Al-Gneem ET AL., Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents] 228 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

settlement of toxic substances such as lead and mercury.¹⁰²³ These substances may penetrate into plant tissue and cause cancer to whoever eats these plants.¹⁰²⁴

After the liberation of Kuwait, a tremendous task awaited for the Kuwaiti government to fulfill. One of the top priorities the Kuwaiti government adopted was to protect public health. Steps were taken either by establishing an emergency plan or by planning to extinguish oil-well fires as soon as possible. However, impediments were there to face the government.

One of major impediments was the lack of the capability to deal with such an environmental catastrophe. The destruction and plundering of equipment used to monitor pollution before the invasion occurred contributed to the failure to conduct many scientific studies regarding this incomparable disaster. However, some studies were conducted regarding pollution's instant effects. Some of these studies discovered the fact that asthma and respiratory system problems increased after the pollution occurred.¹⁰²⁵ These studies concluded that children were more vulnerable to this kind of disease than adults.¹⁰²⁶ Also, an increase in eye, skin, and nose allergies was noticed during 1991.¹⁰²⁷

A decrease in natural childbirth and an increase of short-weight children were recorded.¹⁰²⁸ One of the studies includes air pollution as one of the causes for increased

¹⁰²³ Dr. Rafat Misaak ET AL., *Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlal Al-Kuwiet [Natural Resources and Environmental Features of the State of Kuwait]* 198 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

¹⁰²⁴ Dr. Rafat Misaak ET AL., *Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlal Al-Kuwiet [Natural Resources and Environmental Features of the State of Kuwait]* 198 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

¹⁰²⁵ See Dr. Abdullah Al-Gneem ET AL., *Tadmeeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents]* 231 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

¹⁰²⁶ See Dr. Abdullah Al-Gneem ET AL., *Tadmeeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents]* 232 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

¹⁰²⁷ See Dr. Abdullah Al-Gneem ET AL., *Tadmeeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents]* 234 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

¹⁰²⁸ See Dr. Abdullah Al-Gneem ET AL., *Tadmeeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents]* 234 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

spontaneous abortions, and congenital deformity.¹⁰²⁹ These are some of the diseases reported after the invasion occurred. Now, there is a long-term study being conducted on 400 families in Kuwait to examine the long-term effects of air pollution. This study is expected to last from 15 to 25 years.¹⁰³⁰

The fact that most of the studies have agreed upon is that instant and long-term effects on public health cannot be determined fully. As a matter of fact, it is necessary to point out that there were some unexpected circumstances, unrelated to the role Iraqi troops played, that mitigated negative health impacts on public. These circumstances were the high temperature,¹⁰³¹ the wind direction,¹⁰³² rain,¹⁰³³ thermal inversion,¹⁰³⁴ and the emergency plan.¹⁰³⁵ In addition, the Kuwaiti territory is flat which allows pollutants to move fast by winds.¹⁰³⁶ No doubt that the period of time (240 days) consumed in extinguishing the oil-well fires assisted in reduction of the effects.¹⁰³⁷

¹⁰²⁹ M. Maqseed, *The Effects of the Aggressive Iraqi Invasion on the Obstetric Practice in Maternity Hospital of Kuwait*, 47 (Kuwait Foundation For the Advancement Science, ed. 1995).

¹⁰³⁰ Dr. Mustafa Al-Desouky, *Impact of Oil Well Fires on the Air Quality in Kuwait*, a paper presented to Proceedings of an International Symposium held at the University of Birmingham 17th October 1991, 26.

¹⁰³¹ Dr. Dari Al-Ajmi ET AL., *Kanadeq Al-Nafet Wa Tadmmar AlBea Al-Kwioetia [Oil Trenches and Kuwait Environmental Destruction as One of Iraqi Invasion Crimes]* 87 (Center of Research and Studies on Kuwait, 2004)(Arabic).

¹⁰³² Dr. Zain Al-Dean Gneemee, *Al-Athar Al-Beayia LL Gazoo Al-Iraqi Ldwlat Al-Kowiet [Environmental Impacts of Iraqi Aggression for the State of Kuwait]*, 17 *Center of the Gulf and Arabian Peninsula Studies Journal* 20, 29 (1992)(Arabic).

¹⁰³³ Dr. Rafat Misaak ET AL., *Al-Mawareed Al-Tabeya Wa Al-Semaat Al-Beaya Fee Dwlat Al-Kuwiet [Natural Resources and Environmental Features of the State of Kuwait]* 321 (Kuwait Institute for Scientific Researches, ed. 2000)(Arabic).

¹⁰³⁴ Dr. Abdullah Al-Gneem ET AL., *Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents]* 215 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

¹⁰³⁵ Dr. M. Daoud, *Ahmadi City Under the Smoke*, a paper presented to Proceedings of an International Symposium held at the University of Birmingham 17th October 1991, 27.

¹⁰³⁶ Dr. Abdullah Al-Gneem ET AL., *Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents]* 225 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

¹⁰³⁷ Dr. Abdullah Al-Gneem ET AL., *Tadmeer Abar Alnfet fee alwthaeq Aliraqya [Destruction Oil Wells in Iraqi Documents]* 35 (Center for Research and Studies on Kuwait ed. 2004)(Arabic).

Appendix 3

Document 2

This document indicates the Iraqi regime's desire to safeguard Kuwait's oil wells in the hope of occupying Kuwait for good.

Top Secret

HQ
First Regiment
47th Mechanized Infantry Brigade Battle Group
No. 686
Date : 28/10/1990

To : All Companies
Subject: Infringements

Top secret memo of Army Chief of Staff HQ no. 245 of 19/10/1990 communicated to us by top secret memo of 47 Mechanized Infantry Brigade Battle Group no. 408 of 25/10/1990.

1. It has been noticed that the personnel of some of the units deployed near the oil installations and utilities infringe on these establishments and fire shots at the oil pipes and tamper with some of their parts. This may cause the flow of oil and gas that may constitute grave danger to their security and the security of the nearby units . To prevent this phenomenon, the Army Chief of Staff has ordered the following:

- a. Circulate to your units down to the level of unit commanders to stay away from the oil installations within your area and to refrain from tampering with them in order to safeguard their security and the security of the sectors near them.
- b. The unit commander will be held responsible for any infringements against the installations within the sector of his jurisdiction.

Please take all required measures.

Captain Thu'ban Khalil Hussain
Commander
First Regiment
47th Infantry Brigade Battle Group

cc: Movements: 47th Infantry Brigade Battle Group/ your memo above.

Document 3

**This document also shows that the Iraqi regime is desperate to preserve
Kuwait's oil wells hoping it will occupy Kuwait permanently.**

In the Name of God, Most Gracious, Most Merciful

Martyrs shall remain the best of us.

Secret

Third Regiment Command
Chief of Staff
(Movements)
No. 2/10/5524
Date : 15 September 1990

To: 1st Mechanized Division Command
3rd Armored Division Command
7th Infantry Division Command
8th Infantry Division Command
11th Infantry Division Command
14th Infantry Division Command
15th Infantry Division Command
18th Infantry Division Command
29th Infantry Division Command

Subject: Damage to Gas Pipe and Infringements

Enclosed is a photocopy of the secret and urgent memo of the Ministry of Petroleum no. 4332 of 4 September 1990, communicated by Army Chief of Staff HQ's secret memo number 4023 on 14 September 1990, regarding damage to the gas installations and infringements on materials that belong to the said ministry in the southern sector.

Please be informed and stop all infringements and conduct continuous surveillance to safeguard these installations.

Encls.: 1 above
Major General (Staff)
Ali Mohammed al-Shallal
for/ Third Regiment Commander

15 September 1990

1/1 Secret

Document 4

Devastating oil wells and other vital Kuwaiti installations was the
final goal of the Iraqi aggression on Kuwait

HQ
11 Division Commando Battle
Group
No'2/122
Date: 25/1/1991

To: All Companies
Subject: Directives

Army Chief of Staff HQ's top secret and personal memo no. 490 of 16 January 1991, communicated by Third Regiment Command top secret and personal memo no. 776 of 17 January 1991, communicated to us by 42nd Division top secret and personal memo 206 on 22 January 1991.

In the meeting of the Armed Forces General Command on 13 January 1991, our leader the President (may God keep him) ordered the following:

1. Oil installations prepared for destruction are to be blown up when the situation is too dangerous in order not to leave them intact to the enemy, they should be completely devastated. Commanders present in the sectors of their responsibility should check the decision of the implementation of destruction with the division headquarters. In case communications are disrupted and contact is impossible, commanders in charge of destruction should take decisions of implementation in light of the situation.
2. Kuwait Governorate is handled like any other. We defend it the way we defend other governorates, and we should not foresake territory except at the right moment.
3. Use intensive fire while in defensive positions and do not move from them into combat except under well-calculated circumstances.
4. Americans may transmit on Iraqi TV materials that are contrary to fact. Caution is required, and anything contrary to our aims should not be believed, notwithstanding the enemy's attempts.

Captain Amir Sityat Mutlak
pp. Commado Battle Group
42nd Division

Document 5

The Republican Guard was responsible for implementing the Deferred Destruction Plan.

In the Name of God, Most Gracious, Most Merciful

Top Secret and Personal

Command
Nabu-Khath Nasr Forces, Republican
Guard
Chief of Staff
(Movements)
No. 2/2
Date: 12 August 1990
12 Muharram 1411

To: 19th Infantry Brigade, Republican Guard
20th Infantry Republican Guard
22nd Infantry Republican Guard
23rd Infantry Republican Guard
Command, Artillery, Nabu-Khath Nasr Forces HQ,
Republican Guard
Command, Air Defence, Nabu-Khath Nasr Forces HQ,
Republican Guard
Armored Battalion, Nabu-Khath Nasr Forces, Nabu-Khath Nasr Forces HQ,
Republican Guard

Subject: Directives

Reference to the top secret and personal memo of Republican Guard Forces Command no. 730 dated 12 August 1990 about the directives of the Minister of Industry and Military Industrialization of 12 August 1990.

1. All units should actively control all sectors they occupy. Areas in front of defense positions are prohibited zones; no one is allowed in them or near them from the direction of the Saudi borders. Full control must be imposed. Mechanized and reconnaissance patrols should be dispatched to secure complete control.
2. Appoint sabotage squads to mine the oil wells and power and electricity stations that have been prepared for deferred destruction, and prepare and finalize all the requirements for their destruction, so that every group is stationed in its designated place in order to blow up these targets as soon as orders are issued. Groups that fail to blow up their assigned targets will be severely penalized.

3. Select accurate positions for stationing artillery, which should be within the range and protection of our air defence units.
4. In the event of any enemy air strike, all tanks should use smoke; mortar and artillery should fire smoke bombs. This will interfere with the enemy's use of laser and electronic weapons and reduce their chance of hitting their targets accurately. In addition to that, all formations should request and secure enough smoke barrels ASAP to be spread in the defense positions and the areas of tanks, APCs, artillery, and machinery. They should be immediately ignited in the event of enemy air raids.
5. All jamming equipment dispensed to you should be used. They should be immediately installed on tanks; inoperative ones should be repaired. Check their suitability and practise on them. Also immediately list your needs thereof to secure them for the tanks that have not received them in order to request them for you so that they are procured and installed as soon as possible.
6. Move and spread as many as possible of the broken and damaged vehicles now scattered all over Kuwait to the defence positions of your formations. They should be copiously dispersed among tanks, APCs, and artillery positions. Trenches should be dug for them in a way that makes it difficult to identify them. They are to be placed at a level higher than the armored vehicles and light artillery to warrant their strike by the missiles and bombs fired by the enemy aircraft. They have to look as real as possible. This requires the launching of a wide campaign drawing on all the resources available to you to move those inoperative and damaged vehicles. Utmost attention should be given to this in order to secure all needs ASAP.
7. Instruct, enlighten, and urge all commanders of all sections, platoons, companies, units, and detachments to intensely use smoke to counter enemy electronic and laser equipment.
8. Attention should be paid to supply areas with due emphasis to digging, deployment, camouflage, hiding and continuous and regular relocation to avoid their detection by enemy air force.
9. Commanders at all levels from section commander to formation commander should be made to understand how to manage any forthcoming battle without telecommunications or even telephones. The duties of each one should be made clear. Due emphasis should be placed on their understanding and practice of duties to secure the implementation of those assigned to you in case of any enemy ground, air, or sea attack accompanied by complete jamming of our communication. Emphasis should be placed on the use of substitute means of communication such as liaison personnel, office boys, flags, light signals, megaphones and helicopters. From now on, all orders for countering all possibilities and emergency situations should be clear.

Please take required measures and inform us.

Colonel (Staff)
Ghalib Abdulla Ahmed
pp. Commander
Nabu-Khath Nasr Forces, Republican Guard

12 August 1990

- cc: - Nabu-Khaz Nasr Command HQ, Republican Guard, to take measures required for no. 8 above
- NKNC, Chief of Staff HQ, RG: to take measures required for no. 5 above
 - Al-Hussain Tanks Battalion: please take required measures.
 - Field Engineering Battalion, NKNC, RG: please take measures required for no. 2 above, send a list of the names in the sabotage squad and inform us.

Document 6

**This document reveals that the head of the Iraqi regime is the mastermind
of the crime of destroying and igniting the oil wells.**

In the Name of God, Most Gracious, Most Merciful

Top Secret and Personal

Ninth Tanks Battalion

No. 2/2/28

Date: 18 January 1991

Subject: Directives

Reference to Army Chief of Staffs top secret and personal memo 490 of 16 January 1991, communicated by Third Regiment Command's top secret and personal memo 726 of 17 January 1991, communicated to us by 7th Division Command top secret and personal memo 52 on 17 January 1991. In this meeting of the Armed Forces General Command on 13 January 1991, our leader the President (may God keep him) gave the following orders:

1. Oil installations prepared for destruction should be blown up when the situation becomes dangerous, so that they are left to the enemy destroyed, not intact. Commanders of regiments where there are oil installations within their positions of responsibility should check the decision of implementing the destruction with the General Command.

In case communications are disrupted and contact is impossible, regiment commanders should take decisions of implementation in light of the situation.

2. Care should be observed when using the Counter-Attack Armored Force.

3. We must monitor enemy manoeuvres to shift our concentration. However, we must keep our sectors as they are.

4. The coast road 'Aradat-Hafr al-Batin-Qaysuma - should be targeted by helicopters to prevent the enemy from advancing.

5. Coordinate the operations of Squadron BC 9 aircraft in fighting the enemy helicopters.

6. We handle Kuwait Governorate like any other governorate. We defend it the way we defended other governorates, and we do not forsake territory except at the right moment.

7. Use intensive fire while in defence positions and do not move from them into combat except under well-calculated circumstances.

8. Americans may transmit on Iraqi TV materials that are contrary to fact. Caution is required, and anything contrary to our aims should not be believed, notwithstanding the enemy's attempts.

Please take required measures and act accordingly. The Commander-in-Chief has ordered the following:

- a. Communicate the above directives to all fighters and ensure that all understand them well.
- b. Ensure that the oil wells are prepared for destruction. This should not be carried out except in the most dangerous situation. They are not to be left intact to the enemy, whatever the cost may be.
- c. Sections should inform us about measures for communicating this.
- d. The commander of the regiment should be personally informed.

Please take all required measures. It is imperative to inform all ranks today.

Lt. Colonel (Armor)
Zaydan Khalaf Abdulla
Commanding Officer, Ninth Tank Battalion
18 January 1991

(Signatures)

Top Secret and Personal

Document 9

Document 9 reveals the detonation plan concentrated mainly on the producing wells, not the closed or abandoned ones, and their ignition to realize the plan's aim of destroying the Kuwaiti economy.

In the Name of God, Most Gracious, Most Merciful

Top Secret, Personal and Urgent

Command
Third Regiment
General Staff (Movements)
No. G2/10/10364
Date 23 December 1990

To: Command, Third Armored Division
Subject: Exercise Report

[Reference to] Army Chief of Staff top secret personal and urgent memo no. 7394 of 21 December 1990. It is possible that the oil gushing out of the wells may not combust due to the shock that occurs during closure. In view of this, the following measures should be taken regarding the oil installations and oil wells in your sectors prepared for the deferred destruction and ignition plan.

1. Cooperating with Kuwait Oil Company (only through its Iraqi personnel) to identify the abandoned wells, those fitted with underground safety valves, and those producing ones which will be selected for detonation.
2. As the producing wells may not ignite after the explosion, gunpowder fillings should be placed with the explosive charges to guarantee the burning of gas and oil after detonation.
3. Guard and detonation personnel should withdraw to a distance of not less than 300 meters prior to the explosion.
4. Monitor the oil well after its ignition to ensure that the fire does not extinguish, and take measures required to rekindle it, by using cannons and munition. This should be regarded as priority since the non-burning of the oil well will cause dangerous lethal gases to amass in minutes for a distance between 2.5 - 3 km from the well head.

The degree of effect is lower for longer distances.

Please take all required measures and inform us.

Brigadier Staff

Salah Mahdi

Document 10

Its subject is Committee Resolution. It shows that the destructive filling charges were placed in the oil wells by representatives of the Ministry of Petroleum and Military Engineering. It also reveals the targets prepared for destruction by each of the three regiments and their responsibilities.

Secret and Personal

Army Staff HQ
Office of Army Chief of Staff
No. /6066
Date: 11 November 1990

To: Command, Third Regiment
Command, Fourth Regiment
Command, Sixth Regiment

Subject: Committee Resolution

1. Enclosed is a copy of the resolution of the committee that visited your sectors in the period 27 October 1990 to 4 November 1990 and which coordinated with you regarding the recommendations of deferred destruction and ensuring that it is practical and implementable.
2. The Army Chief of Staff has approved its content.

Please take all the required measures, each in his own sector. The Committee will visit your sectors in the future to follow up on implementation.

Encl.: Committee Resolution

Major General Staff
Sa'di Ahmed Saleh
Secretary, Field Forces, Army Chief of Staff

- cc: • Operations Dept.: Your top secret and personal memo no. 1243 of Nov. 1990. For your information and please provide us with a report on the upcoming visit.
- Training Dept. : Please provide the above regiments with fuses.

Secret and Personal

Committee Resolution

The Committee formed in accordance with the Operations Department's secret and personal memo no. 706 O.D. of 17 November 1990, visited the sectors of the Third, Fourth, and Sixth Regiments in the period 27 Nov. 1990 - 4 Dec. 1990 and coordinated with them regarding the recommendations of deferred destruction plan and ensuring that it is practical, sound and implementable, and that their measures will achieve the [required] objectives.

1. Third Regiment Sector:

a. Targets: The regiment has prepared the targets listed below which are within its domain of responsibility for deferred destruction.

No.	Target	Area	Brigade Sector	Division Sector
1	Assembly no. 16 (31 oil wells)	al-Manaqeesh	39	Inf. 7
2	Assembly no. 2 (40 oil wells)	Burgan	19	" "
3	Abdaliyya Water Station	Abdaliyya	19	" "
4	450 oil wells	al-Wafra	12	Inf. 8
5	Saddam's Grand Water Project	Abdulla Terminal	12	" "
6	Water Water Project	al-Wafra	12	" "
7	Assembly no. 20 (49 oil wells)	al-Magwa'	45	Inf. 11
8	Assembly no. 9 (58 oil wells)	"	45	viol
9	Az-Zoor Power and Water Desalination Station	Ras az-Zoor	426	Inf. 14
10	Oil Storehouse at az-Zoor Oil Terminal	Ras az-Zoor	426	Inf. 14
11	Gas Storehouse at az-Zoor Oil Terminal	" "	18	" "
12	Az-Zoor Water Pumping Station	" "	426	" "
13	Az-Zoor Electricity Station	" "	18	" "
14	Doha and Eastern Doha Power and Water Desalination Station	Doha	436	15

15	Al-Rasheed Power and Water Desalination Station	Al-Rasheed (Shuwaikh)	76	15
16	Al-Raghwa Water Project	al-Raghwa	95	Inf. 18
17	Assembly no. 17-27 oil wells)	Um Qadeer	84	Inf. 29

18	Assembly no. 18 (14 oil wells)	fill	84	" "
19	Assembly points (1,3,4,5,6,7,8,10,11,12,13,14,19,21,22). They form 505 oil wells	Burgan	451	Inf. 42
20	Petro-Chemical Compound	al-Nida'	45	" "
21	Osmosis Station	Port al-Nida'		" "
22	Northern & Southern Shuaiba Power and Water Desalination Station	Shuaiba		" "

b. Procedures and Remarks:

First: The regiment headquarters prepared recommendations for the deferred destruction of the targets listed above, and informed the divisions of them by its secret and personal memo no. 3798 of 29 Nov. 1990.

Second: All targets have been prepared for deferred destruction in two ways (electric deferred destruction circuit and ordinary deferred destruction circuit), except for 30% of the targeted oil wells which were fitted only in one way, i.e. the ordinary way, due to the current lack of electric fuses. Work is currently undertaken by the Regiment Operations Dept. to fit them in both ways.

Third: All targets prepared for deferred destruction are in the secure position.

Fourth: Targets of serial nos. 9, 10, 11, 14, 15 and 20 mentioned in a) above have been prepared for destruction by tanks and artillery because it is hazardous to place the charges in these targets, due to their high temperature when burning.

Fifth: The filling charges have been placed in the suitable places of oil wells and installations by the representatives of the Ministry of Petroleum according to Army Chief of Staff secret, personal and urgent memo no. 5798 dated 4 November 1990, except for some of them which were put in the designated place. The Regiment Operations Corps have been informed. An actual destruction plan was conducted on a vertical well group in the sector of the Sixth Division by using 20 pounds of T.N.T. with good results.

Sixth: Form 822 of the orders to the commander of the burning destruction group and Form 823 of the order to the detonation destruction group were not efficiently used. They were also not used in some of the division sectors.

Seventh: The guards assigned to the targets are insufficient in number and unfamiliar with the details of their obligations as shown in the form.

Eighth: There is no coordination whatsoever between the guard groups and the destruction implementation groups in all sectors.

Ninth: The implementation groups are not clear about the context of delegating authority for destruction.

Tenth: There is no efficient system that secures delivering regiment orders to all targets as required.

Eleventh: Due to the vast number of oil wells, their spacing and their location mostly in sandy areas, and because of the few number of engineering elements assigned to destruction and the few wheels [available], the destruction operation is not completely guaranteed at the fixed time.

Twelfth: There is approximately a 30% shortage of fuses.

Thirteenth: The repeated replacement of the engineering units responsible for destruction affects their readiness to implement this task in an accurate manner.

Fourteenth: There is a possibility that the equipment prepared for destruction purposes may be stolen by some elements to be used for different purposes, especially in targets located inside cities and wells close to general utilities.

Fifteenth: The awareness of the guard and destruction units is not concurrent with the hazardous duties for which they are commissioned.

Sixteenth: The explosive materials are not secured due to stuffing the filling charges in a portion of the targets.

Seventeenth: There are five oil wells in the sector of the 7th Infantry Division that have not been prepared for destruction because they are located in a mine field.

Suggestions:

First: Destruction recommendations should be issued by the headquarters of the divisions to guarantee that the implementing elements are completely familiar with them.

Second: Fit all targets prepared for in two ways: an electric deferred destruction circuit and an ordinary one.

Third: Prepare the plan to be used by the tanks and artillery to guarantee the destruction of the targets listed in Fourth above; assign the detonation units for these tasks and do not replace them or commission them for any duty other than their responsibility.

Fourth: Representatives of the Ministry of Oil and Military Engineering should place the filling charges in the designated places in the oil wells.

Fifth: Forms 822 and 823 should be used by everyone up to the level of the commander of the destruction plan and the commander of the ignition plan.

Sixth: Assign a destruction group that is sufficient [in number] and armed, besides the ones shown in the above forms.

Seventh: Establish a central-superintendent body for the deferred destruction in the headquarters of the divisions to guarantee coordination between the Destruction Guard Groups and the Destruction and Ignition Groups and the delegation of authority.

Eighth: Secure an effective and efficient system that guarantees communicating impromptu orders to the implementing elements, by using wire or wireless means or persons, as the situation may develop.

Ninth: Allow sufficient time to increase preparedness from security to destruction and ignition when orders are given, by preparing additional engineering units and enough vehicles and motor-cycles to secure the quick movement of the implementors.

Tenth: Secure the fuses still needed. (The regiment has already submitted a request form).

Eleventh: It is preferred that the engineering units responsible for destruction as well as the guard units are not replaced except under dire conditions to ensure ease of implementation.

Twelfth: Alert the different ranks of the Destruction Guard and the Destruction Units of the importance and danger of the duty they are assigned to shoulder through briefings and meetings.

Thirteenth: Secure the materials for placing the filling charges for the targets which have not been supplied up to now.

Targets:

First: The regiment has submitted a list of 34 targets for calculating the materials required for deferred destruction, as per its top secret and personal memo no. 1155 of 13 Nov. 1990.

Second: The above list includes the targets that have been approved for preparation for destruction except for Martyr Adnan's Air Base as it is considered a substitute for Kuwait's civil airport.

Third: The Regiment HQ has reconsidered the number of targets and deleted 26 of them. The number of targets prepared for deferred destruction in the regiment's sector stands now at eight. They are as follows:

No.	Target	Area	Brigade Sector	Division Sector
1	Pumps and docks	Mitla'	2	Inf. 2
2	Broadcasting and TV Station	"	4	" "
3	Telecommunications Station		58	" "
4	Jahra-Mitla', Road		4	" "
5	Satellite Station	Urn al-'Aysh	2	" "
6	Oil wells	Atra	.	Rec. 1
7	Water Tanks	"	.	" "

8	Salmi-Jahra Road	Salmi	108	Inf. 16
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Procedures and Remarks:

First: Approval was obtained as per the Army Chief of Staff's top secret memo no. 5477 of 25 Nov. 1990 to dispense the materials needed for destruction as requested by the regiment HQ and as shown in item First 2a above. The official was sent to receive the dispensed materials.

Second: The regiment has destroyed target no. 8 listed above, i.e. Salmi-Jahra Road, by using engineering materials only. Other targets will be prepared for deferred destruction when the materials are received.

Suggestions:

First: Expedite the receiving of the destruction materials dispensed to start preparing the other targets for deferred destruction.

Second: Observe what is stated in Third 1 c above when work starts, and also during the visit to the regiment sector to ensure that the plan is applicable when the work is finished and that we are informed by the regiment HQ.

Sixth Regiment Sector

Targets: The regiment has prepared the following targets within its sector of responsibility for deferred destruction:

No.	Target	Area	Brigade Sector	Division Sector
1	Assembly no. 23 (11 oil wells)	al-Sabriyya	78	Inf. 28
2	Assembly no. 24 (31 oil wells)			" "
3	Assembly no. 15 (31 oil wells)	al-Rawdatain		" "
4	Assembly no. 25 (17 oil wells)			" "
5	Assembly no. 32 (17 oil wells)	al-Ritqa		" "
6	Assembly no. 12 (26 oil wells)			" "
7	Bubiyah Bridge	Khawr al-Sabbiyya	90	Inf. 34

Procedures and Remarks:

First: Forms 822 and 823 have been filled out by the regiment commander only.

Second: A committee has been formed in the regiment HQ to follow up the destructions.

Third: Only 39 oil wells have not been finally prepared for deferred destruction because materials have not been received.

Fourth: Destruction guards have not been assigned to all targets across the Bubiyan Bridge; instead the regiment personnel have been depended on [for that purpose].

Fifth: The oil wells have been fitted with one destruction method, either ordinary or electric, because of the current lack of wires.

Sixth: Insufficient engineering personnel have been assigned to the targets.

Suggestions: Same as 1 c of the Third Regiment above except for "third" because of the absence of electricity and water desalination stations in the regiment's sector.

Recommendations:

1) Inform the Regiments (3,4 and 6) of the suggestions stated in the Committee resolution.

2) Appoint another time for the committee to visit the sectors of the above regiments to immediately check all the shortcomings mentioned above.

Resolution issued on 6 November 1990

Signed by

Lt. Col. Staff (Infantry)
Ali Sulaiman Khalaf
Representative of Military
Operations Dept.

Col. (Eng. Oper.)
Muwaffaq Bashir Abdul-Rahman
Representative of Military
Operations Dept.

Col. Staff (Armor)
Mohammed Abd Aziz
Representative of Military
Operations Dept.

Document 11

Document 11's subject is a "request for an Iraqi engineer specialized in petroleum affairs" to identify the important positions in the targets designated for preparation for destruction.

In the Name of God, Most Gracious, Most Merciful

HQ
29th Infantry Division
Administration and Supplies
No. M15/1104
Date 5 Nov., 1990.

To: Command, Third Regiment (Supplies)
Subject: Request for an Iraqi engineer specialized in petroleum affairs.

Please acquire the approval of the concerned authorities to dispatch an Iraqi engineer specialized in petroleum affairs to identify the important places and equipment in the targets prepared for destruction so as to determine point of depth and priority when requesting the implementation of the upcoming detonation operations. Please inform us.

Colonel (Armor)
Riad Hassan Kazem
Per/Commander
29th Infantry Division

cc: 29th Inf. Div.: Movements Dept.
29th Inf. Div.: Intelligence Dept.
29th Inf. Div.: Security Dept.

Third Regiment: Field Eng. Battalion: Your
memo no. 6464 of 3/11/1990

Documents Archives (A/B)

Document 13

Document 13 with the subject "Information" identifies the position of filling bursting charges at the heads of the wells and the types of explosives used.

In the Name of God, Most Gracious, Most Merciful

137/27/12/80
Top Secret

HQ

18 Field Engineering Battalion Movements
No. M/6/366
Date: 26 December 1990

To: 2nd Field Engineering Division
18th Field Engineering Battalion
Subject: Information

[Reference to] top secret memo no. 3769 of 22 December 1990 of 18th Division Command (Movements). Please provide us with the following and inform us through a messenger:

1. Number and type of explosives prepared for blowing up each installation, and the reserve thereof available
2. A detailed plan of the destruction operation
3. Provide us with a detailed report about the positive and negative aspects of the detonation process as regards the operation of destroying the installations.

Captain Nabhan Fa'iq Hasan
pp. Commander, 18th Field Engineering Battalion
26/12/1990

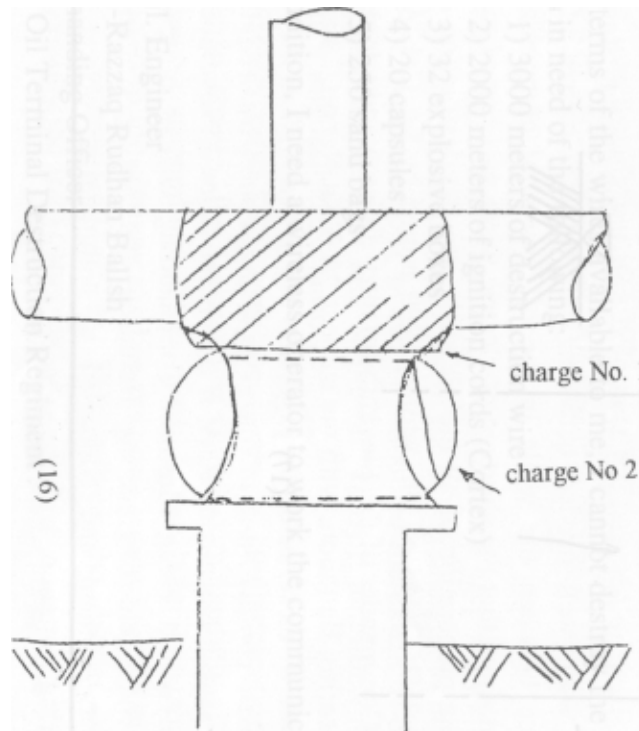
In the Name of God, Most Gracious, Most Merciful

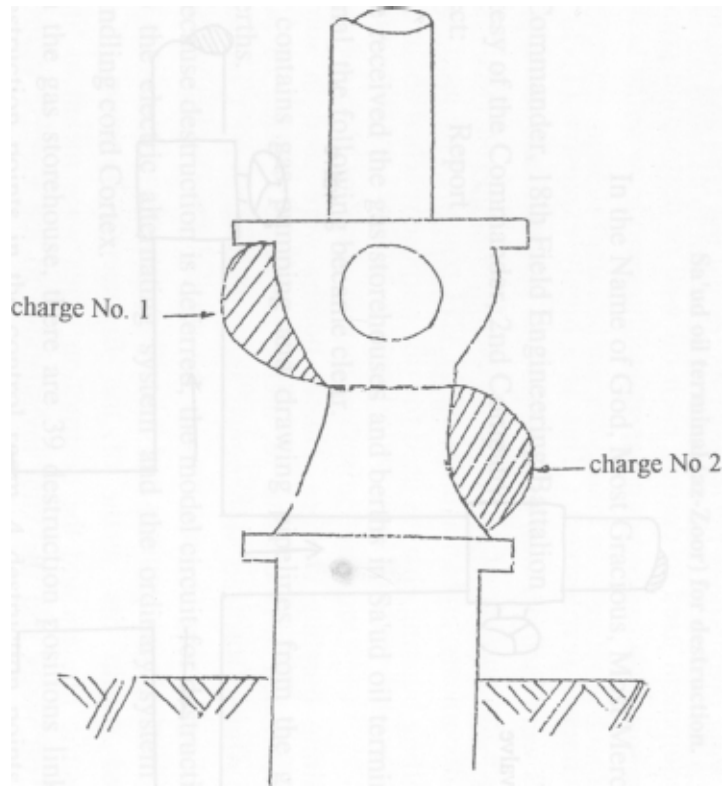
A list of explosives received by 2nd Field Engineering Company and 18th Field Engineering Battalion:

No.	Material Type	Total	Used	Reserve	Remarks
1	Explosive boxes	573	331	242	
2	Fuses	13.2 km	13.20 km	-	

3	Ignition cord	15.7 km	15.7 km	-	
4	Electric igniters	530	230	300	
5	Ordinary igniters	102	--	102	
6	Capsules	330	--	330	
7	Safety cords	50 meters	--	50 meters	
8	Electric safety cord Kindler	15	--	15	

Document 13 - continued





Document 21

**This document shows that the officer who received the explosives
conducted a drill to ensure that they were faultless.**

Brother Lt. Abdul-Wahed

I carried out an experiment on the ignition cord I received from you but it did not
kindle. My regards for the commanding officer and all the officers.

2nd Lt.
Abdul-Razzaq Rawdan

Appendix 4

International Environmental Law:

First of all, it is important to face the issue of whether a war has any effect on treaty obligations. It has been said that, in case of war, a distinction should be observed between the subject matter of the treaty. Therefore, if the treaty to which belligerents are parties concerns the war issue, the treaty obligations will continue binding on both sides.

However, other treaties dealing with other issues, either bilateral or multilateral, will be suspended in case of the existence of war.¹⁰³⁸ The suspension is only between the belligerents. The Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations rejects the notion that war may affect the parties' obligations.¹⁰³⁹

Discussion of the international environmental system requires dividing the discussion into two sections. The first section concerns the so-called soft environmental laws or instruments while the second section focuses on hard environmental laws. The differences between the two types of laws will be clarified through examining both types in terms of their definitions and examples.

¹⁰³⁸ Rashid Al-Enezee, *Al-Qanoon Al-Dwalee Al-Aam* [International Public Law] 369 (Kuwait University 1997) (Arabic).

¹⁰³⁹ Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations art. 73, 25 ILM 543 (1986).

I. Soft Law

Soft Law is “Guidelines, policy declarations, or codes of conduct that set standards of conduct but are not legally binding.”¹⁰⁴⁰ Soft Law arises from those rules that are neither strictly binding nor completely lacking in legal significance.¹⁰⁴¹ The distinction between soft and hard law is not a precise matter because in some cases it is possible to find soft obligations in hard law such as a framework treaty.¹⁰⁴²

Soft law might “...come in a richly kaleidoscopic variety of forms. Yet at their centre stand two primary instruments. The first instrument is the voluntary standards that serve as equivalent to formally legislated and ratified governmental law and regulation. The second instrument consists of the informal institutions at the international, transnational, and national levels that depend on the voluntarily applied participation, resources, and consensual actions of their members, rather than on the formally mandated participation and regularly assessed obligatory contributions, organization, resources, and sanctions of the institutions itself.”¹⁰⁴³

Soft law can be created by non-governmental organizations (NGOs). As a result, soft laws may pave the way to create hard laws in the future.¹⁰⁴⁴ Soft laws can be categorized or found within three groups of instruments, “(1) so called ‘non-binding’ agreements, such as the Helsinki records, (2) ‘voluntary’ codes of conduct for

¹⁰⁴⁰ Black’s Law Dictionary Special Abridged Eighth Edition Created in Honor of the 100 the Anniversary of AALL. 1159.

¹⁰⁴¹ David Hunter ET AL., *International Environmental Law and Policy* 250 (Foundation 1998).

¹⁰⁴² David Hunter ET AL., *International Environmental Law and Policy* 944 (Foundation 1998).

¹⁰⁴³ John J. Kirton & Michael J. Triebilcock eds., *Hard Choices and Soft Law in Sustainable Global Governance* 4 (Ashgate Publishing Company 2004).

¹⁰⁴⁴ Nada Al-Duaij, *Environmental Law of Armed Conflict* 182 (Transnational Publishers, Inc. 2003); Pierre-Marie Dapuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT’L L. 420, 432 (1991).

transnational corporations, and (3) resolutions of international organizations, of which General Assembly resolutions are the leading examples.”¹⁰⁴⁵

The distinction between principles based on their legal status is criticized.¹⁰⁴⁶ Thus, it has been argued that the debate over the legal status of any environmental norms is misplaced by claiming that these norms, regardless of their legal status, “can play a significant role by setting the terms of the debate, providing evaluative standards, serving as a basis to criticize other states’ actions, and establishing a framework of principles within which negotiation may take place to develop more specific norms, usually in treaties.”¹⁰⁴⁷ There are social reasons that lead to the creation of soft law phenomena.¹⁰⁴⁸ Soft law form exists at both international and national levels.¹⁰⁴⁹ Moreover, soft laws might have their impact on national legislation.¹⁰⁵⁰ Examples of soft laws on international environmental issues are the Stockholm Declaration, the World Charter of Nature and the Rio Declaration.

¹⁰⁴⁵ *Quoted in* Nada Al-Duaij, *Environmental Law of Armed Conflict* 183 (Transnational Publishers, Inc. 2003).

¹⁰⁴⁶ Daniel Bodarsky, Customary (and Not So Customary) International Environmental Law, 3 *Ind. J. Global Legal Stud.* 105, 119 (1995).

¹⁰⁴⁷ Daniel Bodarsky, Customary (and Not So Customary) International Environmental Law, 3 *IND. J. GLOBAL LEGAL STUD.* 105, 119 (1995); Pierre-Marie Dapuy, Soft Law and the International Law of the Environment, 12 *MICH. J. INT’L L.* 420, 434 (1991).

¹⁰⁴⁸ Pierre-Marie Dapuy, Soft Law and the International Law of the Environment, 12 *MICH. J. INT’L L.* 420, 420-22 (1991).

¹⁰⁴⁹ Pierre-Marie Dapuy, Soft Law and the International Law of the Environment, 12 *MICH. J. INT’L L.* 420, 422 (1991).

¹⁰⁵⁰ Pierre-Marie Dapuy, Soft Law and the International Law of the Environment, 12 *MICH. J. INT’L L.* 420, 434 (1991).

a. The Stockholm Declaration¹⁰⁵¹

The Stockholm Declaration was the fruit of the United Nations Conference on the Human Environment in 1972. This Declaration indirectly approached the protection of the environment during armed conflict. It is not clear whether the Declaration was meant to be applicable in the time of armed conflict. However, the principles set by the Declaration do not come into conflict with the existence of armed conflict. Thus, there is nothing in the Declaration that prevents its principles from applying in the time of armed conflict.

The fundamental principle in the Declaration pertinent to the destruction of the environment is principle 21. This principle mandates states to “ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”¹⁰⁵² There is no doubt that Kuwait, during the Iraqi invasion, can be considered as an occupied territory, within or under Iraq’s control.

Also, principle 7 requires states to “take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.”¹⁰⁵³ Moreover, principle 26 protects the environment through restricting the

¹⁰⁵¹ Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972).

¹⁰⁵² Declaration of the United Nations Conference on the Human Environment art. 21, U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972).

¹⁰⁵³ Declaration of the United Nations Conference on the Human Environment art. 7, U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972).

use of weapons, such as nuclear weapons and weapons of mass destruction, which negatively affect the environment.¹⁰⁵⁴

Although both Kuwait and Iraq participated in the Stockholm Conference and approved its Declaration, the Declaration is not an effective tool for criminal trial on several grounds. First, it is not a binding instrument.¹⁰⁵⁵ Second, principle 22 recommends only that the potential remedy for those activities which caused harm is civil in nature.¹⁰⁵⁶ Third, the Declaration imposes obligations on states, not individuals. In sum, the Declaration might be considered an important factor to hold Iraq, as a state, civilly liable but not its citizens.

b. The World Charter of Nature¹⁰⁵⁷

The World Charter of Nature is another soft law instrument which was adopted by the United Nations General Assembly in 1982. This instrument sets general principles governing activities harmful to the environment either in peace or time of armed conflict. Principle 5 deals explicitly with warfare activities by stating, “Nature shall be secured against degradation caused by warfare or other hostile activities.”¹⁰⁵⁸ In addition,

¹⁰⁵⁴ Declaration of the United Nations Conference on the Human Environment art. 26, U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972).

¹⁰⁵⁵ See Shilpi Gupta, Iraq’s Environmental Warfare in the Persian Gulf, 6 GEO. INT’L ENVTL. L. REV. 251, 264 (1993).

¹⁰⁵⁶ Article 22 provides “States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.” Declaration of the United Nations Conference on the Human Environment art. 22, U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972).

¹⁰⁵⁷ World Charter for Nature, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51 (1982); 22 ILM 455 (1983).

¹⁰⁵⁸ World Charter for Nature princ. 5, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51 (1982); 22 ILM 455 (1983).

principle 20 requires states' avoidance of those "Military activities damaging to nature."¹⁰⁵⁹

Again, the internationally customary principle which prohibits causing harm to another state's territorial environment was included in the Charter. In the debate concerning the legal status of the Charter, some have argued that the Charter is considered binding because it was adopted by 111 states.¹⁰⁶⁰ Regardless of the legal status of the Charter, the principles provided by the Charter cannot be a basis for prosecution of the crimes against the environment committed during the Gulf war for the same reasons mentioned above in regard to the Stockholm declaration.

c. The Rio Declaration¹⁰⁶¹

The Rio Declaration was adopted at the "Earth Summit" in Rio de Janeiro in 1992. This Declaration did not advance the rules regarding protecting the environment. There is no doubt that the failure to provide more protection was motivated by the desire to reach universal agreement regarding the protection of the environment. The focus in this Declaration was to solve the two combating interests, economic development and the preservation of the environment. Thus, the effort was directed toward creating a mechanism in order to compromise on the interests in conflict.

¹⁰⁵⁹ World Charter for Nature princ. 20, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51 (1982); 22 ILM 455 (1983).

¹⁰⁶⁰ Resorting to "general principles recognized by civilized nations" as a source of international law, it has been said that such a number of adopting states (111 states) renders the Charter a binding instrument. See Stephanie Simonds, *Conventional Warfare and Environmental Protection: A Proposal for International Legal Reform*, 29 STAN. J. INT'L L. 165 (1992) *cited in* Nada Al-Duaij, *Environmental Law of Armed Conflict* 187 n.268 (Transnational Publishers, Inc. 2003).

¹⁰⁶¹ Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

However, the Declaration continues the affirmation of principles covering activities harming the environment, whether these activities were military or non-military. For instance, principle 24, acknowledging the destruction of the environment during the Gulf War, provides, “Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.”¹⁰⁶²

Principle 13 of the Declaration repeats the same remedy which should be expected in case of harm caused by one state to another.¹⁰⁶³ After reviewing the principles of the Declaration, no one can reach the conclusion that the Declaration has any plain rule regarding criminal responsibility, the individual’s obligations, or the legal status which makes the Declaration binding for Iraq and its nationals, especially since Iraq did not participate in the Conference.

II. Hard Law

Hard laws under the international law regime represent basically the primary sources for international law. Sources mainly are international customs and international conventions. Since international environmental law has been recently developed, custom has not played a significant role yet. Consequently, the focus will be on international

¹⁰⁶² Rio Declaration on Environment and Development princ. 24, U.N. Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

¹⁰⁶³ Principle 13 provides, “States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.” Rio Declaration on Environment and Development princ. 13, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

conventional law. The review will focus on major environmental problems facing the international community.

a. Land-Based Pollution

It has been reported that 80% of all marine pollution comes from sources that are located on land.¹⁰⁶⁴ Pollutants generated on land travel in many ways through the atmosphere, rivers, canals, underground watercourses, and outfalls. Moreover, urban expansion into coastal areas has exacerbated the problem of land-based marine pollution. In sum, the problem of land-based pollution has loomed as more problematic due to urban and economic growth.

Oil is one of eight groups of pollutants that are deposited into the sea and the ocean.¹⁰⁶⁵ The sources of these pollutants are various. For instance, nutrients are introduced into the marine environment through runoff from agricultural lands, discharge of domestic sewage, industrial effluents, and atmospheric emissions.¹⁰⁶⁶ Increased amounts of nutrients in the sea leads to phytoplankton growth which causes decomposition of organic materials. This process ends up with depletion of oxygen causing the death of fish and other marine life.

The control of land-based pollution is one of the hardest tasks on several grounds. First, it requires controlling domestic pollution which leads to control of the sovereign

¹⁰⁶⁴ Agenda 21, June 13, 1992, U.N. Doc. A/CONF. 151/26, Ch.17.

¹⁰⁶⁵ Other chemicals are chemical nutrients, sewage and bacterial agents, organic chemicals, metals, sediments and litter, radioactive substances, and heat.” IMO/FAO/UN.ESCO-ICO/WMO/WHO/IAEA/UN/UNEP: Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection, Protecting the Ocean from Land-Based Activities, 2.2.1 (June 2001).

¹⁰⁶⁶ IMO/FAO/UN.ESCO-ICO/WMO/WHO/IAEA/UN/UNEP: Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection, Protecting the Ocean from Land-Based Activities, 2.2.3 (June 2001).

rights of states to pollute their own territory states rarely accept that. Secondly, the scientific difficulties of demonstrating pathways and sources are immense. Thirdly, controlling land-based pollution demands generally expensive measures which sacrifice states' economy. The international community's legal response to such a problem was through the United Nations Convention on the Law of the Sea and the Montreal Guidelines.

i. The United Nations Convention on the Law of the Sea¹⁰⁶⁷

Article 207 (1) of the Convention requires states to adopt measures “to prevent, reduce and control...” land-based pollution, “taking into account internationally agreed rules, standards and recommended practices and procedures.”¹⁰⁶⁸ However, no formal standards even exist at the global level for land-based pollution. Article 122-123 controls enclosed and semi-enclosed seas, like the Gulf.

Looking for standards regarding land-based pollution, states resort to the Montreal Guidelines.¹⁰⁶⁹ The Montreal Guidelines are a set of recommendations compiled by a Working Group of Experts under UNEP auspices. It suggested that states adopt national legislation, regional agreements or any future global agreements on land-based pollution.

¹⁰⁶⁷ United Nations Convention on the Law of the Sea, 1833 UNTS 3; 21 ILM 1261 (1982) (entered into force Nov. 16, 1994).

¹⁰⁶⁸ United Nations Convention on the Law of the Sea art. 207 (1), 1833 UNTS 3; 21 ILM 1261 (1982) (entered into force Nov. 16, 1994).

¹⁰⁶⁹ Montreal Guidelines for the Protection Marine Environment against Pollution from Land-Based Pollution, UNEP/GC.13/9/add.3, UNEP/GC/DEC/13/1811., UNEP ELPG No.7 (1985).

Neither the Convention nor the guidelines set up any provision for criminal responsibility in case of any violation of these standards. No doubt, states can adopt legislation or regulations containing criminal remedies for a violation of land-based pollution standards. However, neither Kuwait nor Iraq has adopted these remedies upon which criminal responsibility can be based.

ii. Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution and its Protocols¹⁰⁷⁰

The only regional convention which exists, relating to the environment in the Gulf and to which both Iraq and Kuwait are parties, is the Kuwait Regional Convention for the Cooperation on the Protections of the Marine Environment from Pollution and its protocols.

The Convention is the fruit of the Kuwait Regional Conference of Plenipotentiaries held on April 23, 1978. The Convention entered into force on June 30, 1979. The parties are: Bahrain, Qatar, Iran, Iraq, Kuwait, Saudi Arabia, Oman, and the United Arab Emirates. The Convention is a comprehensive umbrella agreement for the protection of the marine environment. It identifies the pollution sources and requires controlling these sources. The sources are ships, dumping, land-based sources, exploration and exploitation of the sea bed, and other human activities.

It also identifies other environmental management issues for which co-operative efforts are to be made. The convention contains provisions dealing with technical assistance and liability. Article III of the convention provides, “The Contracting States

¹⁰⁷⁰ Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution, April 24, 1978, 1140 U.N.T.S. 133 (on file with author).

shall, individually and/or jointly, take all appropriate measures...to prevent, abate and combat pollution of the marine environment in the Sea Area....”¹⁰⁷¹ In addition, Article XIII laid down, “The Contracting States undertake to co-operate in the formulation and adoption of appropriate rules and procedures for the determination of: (a) Civil Liability and compensation for damage resulting from pollution of the marine environment, bearing in mind applicable international rules and procedures relating to those matters; and (b) liability and compensation for damage resulting from violation of obligations under the Convention and its Protocols.”¹⁰⁷²

With the Convention, the Protocol Concerning Regional Co-operation in Combating Pollution by Oil and Other Harmful Substances in case of Emergency¹⁰⁷³ was adopted. Article I (2) of the Protocol defines “Marine Emergency” as “[A]ny casualty, incident, occurrence or situation, however caused, resulting in substantial pollution or imminent threat of substantial pollution to the marine environment by oil or other harmful substances and including, *inter alia*, collisions, strandings and other incidents involving ships, includes tankers, blow-outs arising from petroleum drilling and production activities, and the presence of oil or other harmful substances arising from the failure of industrial installations.”¹⁰⁷⁴ The Protocol aims for cooperation in case the occurrence of a marine emergency. Parties to the Convention are parties to the Protocol.

¹⁰⁷¹ Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution art. III, April 24, 1978, 1140 U.N.T.S. 133 (on file with author).

¹⁰⁷² Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution art. XIII, April 24, 1978, 1140 U.N.T.S. 133 (on file with author).

¹⁰⁷³ Protocol Concerning Regional Co-operation in Combating Pollution by Oil and other Harmful Substances in Case of Emergency, April 24, 1978 (on file with author).

¹⁰⁷⁴ Protocol Concerning Regional Co-operation in Combating Pollution by Oil and Other Harmful Substances in Case of Emergency art. I (2), April 24, 1978 (on file with author).

Neither the Convention nor the Protocol contains any indication of an individual criminal responsibility in case of a violation. Obligations under the instruments are imposed on states, but not individuals. In other words, they rely on states to cooperate in formulating the rules to determine liability. Such a lack of an effective mechanism has rendered the Convention and the Protocol unsuitable as a substantive basis for criminal responsibility. Although it might be considered that Iraq violated the Convention, this violation does not raise the criminal responsibility of the Contracting states' citizens.

b. Biodiversity

Biodiversity means “the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.”¹⁰⁷⁵ The problem of biodiversity exists because species are driven to extinction by predators that over hunt them; by competitors that co-opt their habitat, or food sources; by disease; and by natural disasters, and this mass extinction is not natural. The extinction rate is very high, estimated at a thousand times the natural rate. The value of biodiversity is very important.¹⁰⁷⁶ The causes of biodiversity loss are various.¹⁰⁷⁷

In brief, human activities cause species loss either directly by consumption (food, clothing, ornament, pets, and raw materials) or indirectly by destroying their habitats (logging, slash and burn agriculture, damming rivers, draining wetlands, and contaminating the air and the water).

¹⁰⁷⁵ Convention on Biological Diversity art. 2, June 5, 1992, 31 I.L.M. 818 (entered into force Dec. 29, 1993).

¹⁰⁷⁶ David Hunter ET AL., International Environmental Law and Policy 939 (Foundation 1998).

¹⁰⁷⁷ David Hunter ET AL., International Environmental Law and Policy 944 (Foundation 1998).

In addition, climate change and ozone depletion contribute as well to biodiversity loss. The consequences of biodiversity loss are based on the fact that all life on the earth depends for its existence on the ecosystem services such as the cycling of oxygen, carbon and nitrogen, maintenance of soil fertility, recycling of nutrients, decomposition of waste, stabilization of climate and water purification. In sum, biodiversity is essential to human survival and prosperity.

The international effort to solve this problem resulted in the Convention on Biological Diversity (CBD).¹⁰⁷⁸ The objectives of this Convention are “the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.”¹⁰⁷⁹

Article 3 of the Convention provides that “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”¹⁰⁸⁰ Since this rule is part of international customary law, it is applicable in both peace and armed conflict times.

However, this Convention cannot be a basis for individual criminal responsibility in case of violation of its terms. First, the Convention does not provide a criminal remedy

¹⁰⁷⁸ Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (entered into force Dec. 29, 1993).

¹⁰⁷⁹ Convention on Biological Diversity art. 1, June 5, 1992, 31 I.L.M. 818 (entered into force Dec. 29, 1993).

¹⁰⁸⁰ The Convention on Biological Diversity art. 3, June 5, 1992, 31 I.L.M. 818 (entered into force Dec. 29, 1993).

in case of the violation. Second, the Convention entered into force on December 29, 1993. Therefore, assuming it has criminal provisions, adopting this Convention as a basis for criminal prosecution will clearly violate the basic criminal rule prohibiting retroactive application of the criminal law. Third, Iraq is not party to the Convention and Kuwait became a party on August 2, 2002. The same thing can be said regarding the Cartagena Protocol on Biosafety¹⁰⁸¹ which is considered the supplementary agreement for CBD.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)¹⁰⁸² attempts to protect endangered species through restrictions on international trade. Its aim is to ensure that international trade in specimens of wild animals and plants does not threaten their survival. It imposes on state parties an obligation to penalize the trade or possess the endangered species.¹⁰⁸³ The subject matter of the convention does not relate to environmental destruction during armed conflict. However, this does not mean that the convention does not apply in the time of armed conflict. Such a trade can be anticipated in both peace and armed conflict times.

Moreover, the Convention Concerning the Protection of the World Culture and Natural Heritage is also an international endeavor to protect another aspect of the environment.¹⁰⁸⁴ It protects the sites which are considered both “cultural heritage” and “natural heritage.”¹⁰⁸⁵ The Convention prohibits each state party from taking any

¹⁰⁸¹ Cartagena Protocol on Biosafety, January 29, 2000, 39 I.L.M. 1027.

¹⁰⁸² Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 UST 1087; TIAS 8249; 993 UNTS 243 (1973) (entered into force July 1, 1975).

¹⁰⁸³ Convention on International Trade in Endangered Species of Wild Fauna and Flora art. VIII (1), 27 UST 1087; TIAS 8249; 993 UNTS 243 (1973) (entered into force July 1, 1975).

¹⁰⁸⁴ Convention Concerning the Protection of the World Culture and Natural Heritage, Nov. 16, 1972, 1073 U.N.T.S. 151.

¹⁰⁸⁵ Article 1 of the Convention defines “cultural heritage” as “monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave

measure which directly or indirectly causes the destruction of the protected sites which are located in another state party's territory.¹⁰⁸⁶ The Convention recognizes and protects examples of natural and cultural sites. Most of the listed sites are national parks. In addition, Article 11(4) of the Convention contains a "list of World Heritage in danger."¹⁰⁸⁷

The Convention does not provide a criminal remedy for its violation. As a matter of fact, the nature of the adopted remedy to fulfill the Convention obligations is a national policy issue. Iraq accepted the Convention in March 3, 1974 and Kuwait ratified it on June 6, 2002. In addition, after reviewing the "World Heritage List," Kuwait had no properties which were included in that list.¹⁰⁸⁸

To protect the wetlands, the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention) was adopted.¹⁰⁸⁹ Article 4 (1) provides that, "Each Contracting Party shall promote the conservation of wetlands and

dwelling and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view." While article 2 defines the "natural heritage" as "natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty." Convention Concerning the Protection of the World Culture and Natural Heritage, Nov. 16, 1972, 1073 U.N.T.S. 151.

¹⁰⁸⁶ Article 6 (3) of the convention provides "Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention." Convention Concerning the Protection of the World Culture and Natural Heritage, Nov. 16, 1972, 1073 U.N.T.S. 151.

¹⁰⁸⁷ Convention Concerning the Protection of the World Culture and Natural Heritage art. 11 (4), Nov. 16, 1972, 1073 U.N.T.S. 151.

¹⁰⁸⁸ For the list of these sites, visit <http://whc.unesco.org/en/list/> (last visited Aug. 21, 2006).

¹⁰⁸⁹ Convention on Wetlands of International Importance especially as Waterfowl Habitat, 996 UNTS 245; TIAS 11084; 11 ILM 963 (1972) (entered into force Dec. 21, 1975).

waterfowl by establishing nature reserves on wetlands, whether they are included in the List or not, and provide adequately for their wardening.”¹⁰⁹⁰ The violation of this Convention might raise without doubt the international responsibility of the state which violated the Convention’s provisions. However, individual criminal responsibility requires a clear and precise expression concerning the parties’ intention.

Finally, the Convention on Conservation of Migratory Species of Wild Animals or the Bonn Convention¹⁰⁹¹ was adopted to protect the entire spectrum of animal species including birds, mammals, reptiles, and fish. Article III (4) (a) laid down:

Parties that are Range States of a migratory species listed in Appendix I shall endeavour: a) to conserve and, where feasible and appropriate, restore those habitats of the species which are of importance in removing the species from danger of extinction; b) to prevent, remove, compensate for or minimize, as appropriate, the adverse effects of activities or obstacles that seriously impede or prevent the migration of the species; and c) to the extent feasible and appropriate, to prevent, reduce or control factors that are endangering or are likely to further endanger the species, including strictly controlling the introduction of, or controlling or eliminating, already introduced exotic species.¹⁰⁹²

Although some of the animals affected during the Gulf armed conflict of 1990 are listed as endangered species, such as the Green Turtle, neither Kuwait nor Iraq are parties to this Convention. In sum, the Convention, as previously cited international legal instruments in this field, cannot be used to try its violators criminally.

¹⁰⁹⁰ Convention on Wetlands of International Importance especially as Waterfowl Habitat art. 4 (1), 996 UNTS 245; TIAS 11084; 11 ILM 963 (1972) (entered into force Dec. 21, 1975).

¹⁰⁹¹ Convention on Conservation of Migratory Species of Wild Animals, 19 ILM 15 (1980); ATS 1991/32; BTS 87 (1990), Cm. 1332. (entered into force Nov. 1, 1983).

¹⁰⁹² Convention on Conservation of Migratory Species of Wild Animals art. III (4)(a), 19 ILM 15 (1980); ATS 1991/32; BTS 87 (1990), Cm. 1332 (entered into force Nov. 1, 1983).

c. Global Climate Change

Human activities are changing the global climate which causes unpredictable consequences for global weather patterns, ecosystems and human health. Human activities have resulted in increased concentration of gases in the atmosphere, causing increased global temperature. Increased temperature leads to an increase in the number of extreme weather events such as floods, hurricanes, and tornadoes. In addition, the increase of temperature might cause biodiversity loss through affected forests and habitats. Moreover, increasing the temperature may spread those species carrying fatal diseases such as malaria and typhus.¹⁰⁹³

An international effort to deal with this problem has been made through the United Nations Framework Convention on Climate Change (UNFCCC).¹⁰⁹⁴ All parties have a duty to “promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all greenhouse gases.”¹⁰⁹⁵ In sum, all governments under the Convention are obligated to gather and share information on greenhouse gas emissions, national policies and best practices and to launch national strategies for addressing greenhouse gas emissions and adapting to expected impacts, including the provision of financial and technological support to developing countries, and to cooperate in preparing for adaptation to the impacts of climate change.

¹⁰⁹³ David Hunter ET Al., *International Environmental Law and Policy* 2-3 (Foundation 1998).

¹⁰⁹⁴ United Nations Framework Convention on Climate Change, 1771 U.N.T.S. 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992) (entered into force Mar. 21, 1994).

¹⁰⁹⁵ United Nations Framework Convention on Climate Change art. 4 (1)(d), 1771 U.N.T.S. 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849, (1992) (entered into force Mar. 21, 1994).

Each party must take climate change considerations into account in domestic policies and actions.¹⁰⁹⁶ Article 3 (3) adopts the Precautionary Approach. It states “the parties shall take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.”¹⁰⁹⁷ Such an article applies equally to both military and non-military actions. However, this Convention does not include a direct rule which criminalizes the action of creating emissions. In addition, Kuwait became a party to the treaty in 1994 while Iraq is not a party. Moreover, the Convention entered into force on March 21, 1994. The Kyoto Protocol to the United Nations Framework Convention on Climate Change¹⁰⁹⁸ does not provide any provision in criminal matters as well.

d. Ozone Depletion

The ozone layer shields the Earth from high-energy ultra-violet radiation (UV-B) from the sun. UV-B is extremely harmful to human health and the environment. Synthetic chemicals such as chlorofluorocarbons (CFC) destroy the ozone layer more quickly than it can be replenished. The increased amount of UV-B radiation striking the earth’s surface may increase the rates of skin cancer, suppress the body’s immune response system, inhibit the growth of many plants such as cotton, soybeans, and certain trees, alter the biodiversity terrestrial ecosystems, and cause developmental abnormalities in fish and other species.

¹⁰⁹⁶ United Nations Framework Convention on Climate Change art. 4 (1)(f), 1771 U.N.T.S. 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849, (1992) (entered into force Mar. 21, 1994).

¹⁰⁹⁷ United Nations Framework Convention on Climate Change art. 3 (3), 1771 U.N.T.S. 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849, (1992) (entered into force Mar. 21, 1994).

¹⁰⁹⁸ Kyoto Protocol to the United Nations Framework Convention on Climate Change, U.N. Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22 (1998) (entered into force Feb. 16, 2005).

Through the Convention for the Protection of the Ozone Layer (Vienna Convention)¹⁰⁹⁹ the international community effort began to reduce the global production and consumption of ozone layer depleting substances. Article 2 (1) of the Convention asserts that nations agree to take “appropriate measures to protect human health and the environment against adverse effects resulting from human activities which modify or are more likely to modify the ozone layer.”¹¹⁰⁰ Neither specified measures nor substances harmful to the ozone layer are mentioned by the Convention. Thus, the Montreal Protocol on Substances that Deplete the Ozone Layer was adopted.¹¹⁰¹

Its goal is to eliminate the ozone-depleting substances. (Preamble) It has been amended five times: London (1990), Copenhagen (1992), Vienna (1995), Montreal (1997) and Beijing (1999). The military use of chlorofluorocarbons is deemed a breach of both the Vienna Convention¹¹⁰² and the Montreal Protocol and London Adjustments.¹¹⁰³ Neither the Convention nor its Protocols provide a basis for individual criminal responsibility.

¹⁰⁹⁹ Convention for the Protection of the Ozone Layer, TIAS No. 11,097; 1513 U.N.T.S. 323; 26 ILM 1529 (1987) (entered into force Sep. 22, 1988).

¹¹⁰⁰ Convention for the Protection of the Ozone Layer art. 2 (1), TIAS No. 11,097; 1513 U.N.T.S. 323; 26 ILM 1529 (1987) (entered into force Sep. 22, 1988).

¹¹⁰¹ Montreal Protocol on Substances that Deplete the Ozone Layer, S. Treaty Doc. No. 10, 100th Cong., 1st Sess. 1; 26 ILM 1550 (1987) (entered into force Jan. 1, 1989).

¹¹⁰² John S. Hannah, Chlorofluorocarbon: A Scientific Environmental, and Regulatory Assessment, 31 A.F.L. REV. 85, 92 (1989) *cited in* Nada Al-Duaij, Environmental Law of Armed Conflict 157 n. 74 (Transnational Publishers, Inc. 2003).

¹¹⁰³ David D. Caron, Protection of the Stratospheric Ozone Layer and the Structure of International Environmental Law Lawmaking, 14 HOUS. INT’L COMP. L. REV. 755, 760 (1991) *cited in* Nada Al-Duaij, Environmental Law of Armed Conflict 157 n. 75 (Transnational Publishers, Inc. 2003).

e. Toxic and Hazardous Substances

Despite the fact that toxic and hazardous substances are responsible for air and water pollution, unlike in some national legal systems,¹¹⁰⁴ there is no universally adopted or accepted definition of hazardous substances. However, a toxic substance can be identified by a number of factors including the length of time it will persist in the environment, how it tends to build up in the tissue of lower species, the extent to which it reacts with other substances to form a more harmful contaminant, and whether it produces effects in humans.¹¹⁰⁵

The international legal response to this problem was the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.¹¹⁰⁶ The Convention aims to control the movement, by either importing or exporting, of hazardous waste between the state parties. The Convention considers the movement criminal.¹¹⁰⁷

The Convention defines hazardous waste as those substances which are explosive, flammable, oxidizing, poisonous, infectious, corrosive, toxic, or any substances capable of forming other materials which possess any of the previous characteristics after

¹¹⁰⁴ In national legal systems, like that of the United States, toxic and chemical substances have been identified differently for each class of pollutant and for differing regulatory schemes. Hazardous waste, defined under the Resource Conservation and Recovery Act, is any solid waste which because of its concentration, quantity, or physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in mortality or to irreversible illness. See Resource Conservation and Recovery Act, 42 U.S.C.A. §6903; Hazardous air pollutants, under the Clean Air Act, are those substances which may be carcinogenic, mutagenic, teratogenic, neurotoxin, or those that cause adverse environmental effects through bioaccumulation. See the Clean Air Act, 42 U.S.C.A. § 4712 (b)(2)(B). For the hazardous waste definition in the hazardous waste statute, see Jeffrey G. Miller ET AL, *The Law of Hazardous Waste Disposal and Remediation, Cases-Legislation-Regulations-Policies* 131-191 (West Publishing Co. 1996).

¹¹⁰⁵ G. Tyler Miller, *Living In the Environment* 397-402 (12th ed. 2002).

¹¹⁰⁶ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1673 U.N.T.S. 126; 28 ILM 657 (1989) (entered into force May. 5, 1992).

¹¹⁰⁷ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal art. 4 (3), 1673 U.N.T.S. 126; 28 ILM 657 (1989) (entered into force May. 5, 1992).

disposal.¹¹⁰⁸ Although oil can be considered waste under the Convention,¹¹⁰⁹ Kuwait has been a party to the Basel convention since 1993 while Iraq is not a party. There is another convention which has lists of wastes.¹¹¹⁰ However, the jurisdiction of this Convention covers only those activities which end in Africa.

f. Transboundary Air Pollution

Three specific problems can be singled out: (1) Particulate matter (airborne dust and smoke), (2) Lead which is produced primarily from vehicle emissions, and (3) Indoor air pollution. The migration of air pollutants has created major global problems such as climate change, ozone layer depletion, and nuclear fallout. Examples of air pollutants are sulphur dioxide and nitrous oxides. Pollutants emitted into the atmosphere from industrial and commercial sources and automobile exhausts can form gases or become dissolved in cloud vapor and raindrops. Those pollutants may produce new toxic chemicals that can be transported many hundreds miles by winds, deposited on the soil or in the water or returned to the earth by rainfall. Acid rain represents a classic example of the global transportation of pollutants.

The prevailing rule in this issue is that one country may not cause significant transboundary environmental harm to another.¹¹¹¹ Although there is no global international treaty dealing with air pollution, the international community's legal

¹¹⁰⁸ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1673 U.N.T.S. 126; 28 ILM 657 (1989) (entered into force May. 5, 1992) Annex III.

¹¹⁰⁹ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1673 U.N.T.S. 126; 28 ILM 657 (1989) (entered into force May. 5, 1992) Annex I.

¹¹¹⁰ Bamako Convention on the Ban of Import into Africa and the Control of Trans-boundary Movement and Management of Hazardous Waste within Africa art. 2, ann. I, Jan. 29, 1991, 30 I.L.M. 775.

¹¹¹¹ Thomas W. Merrill, Golden Rules for Transboundary Pollution, 46 DUKE L. J. 931, 951 n. 106-07 (1997).

response to this problem is the Convention on Long-Range Transboundary Air Pollution.¹¹¹² The Convention was created under the auspices of the U.N. Economic Commission for Europe in 1979 and counts most countries in the Northern Hemisphere as parties, including the United States, Canada, and Russia. The Convention embraces a duty not to cause transboundary harm.¹¹¹³ It focuses generally on combating acid rain.

Long-Range air pollution is air pollution “which has adverse effects in the area under the jurisdiction of another state at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources.”¹¹¹⁴ Article 2 of the Convention mandates that states endeavor to limit, reduce, and prevent air pollution.¹¹¹⁵

Eight protocols have been added to the Convention. These protocols require specific emission limitations for sulphur dioxide (1985, 1994), nitrogen oxide (1988), and volatile organic pollutants (1998), and include a protocol which set 2010 emissions ceilings for four pollutants: sulphur, NO_x, VOCs and ammonia. Neither Kuwait nor Iraq are parties to this convention. This Convention and its protocols do not adopt individual criminal responsibility in case of their violation.

¹¹¹² Convention on Long-Range Transboundary Air Pollution, TIAS 10541; 1302 U.N.T.S. 217; 18 ILM 1442 (1979) (entered into force Mar. 16, 1983).

¹¹¹³ Convention on Long-Range Transboundary Air Pollution preamble ¶ 5, TIAS 10541; 1302 UNTS 217; 18 ILM 1442 (1979) (entered into force Mar. 16, 1983).

¹¹¹⁴ Convention on Long-Range Transboundary Air Pollution art. 1 (b), TIAS 10541; 1302 U.N.T.S. 217; 18 ILM 1442 (1979) (entered into force Mar. 16, 1983).

¹¹¹⁵ Convention on Long-Range Transboundary Air Pollution art. 2, TIAS 10541; 1302 U.N.T.S. 217; 18 ILM 1442 (1979) (entered into force Mar. 16, 1983).

Appendix 5

Documentary Evidence

Nationally and internationally, criminal conviction can be secured by proving beyond reasonable doubt that an accused committed the criminal action with which he is charged. This conviction can be obtained by different types of evidence, either oral or written evidence. The evidence has to be admitted by a court after being the subject of arguments by parties.¹¹¹⁶ In international criminal law, evidence rules are set by those international instruments constituting criminal proceedings. For instance, article (89) of ICTY's Rules of Evidence and Procedure sets the general principles concerning evidentiary issues.¹¹¹⁷

By and large, international judges, unlike national judges, are not bound by these national technical and strict rules governing evidence.¹¹¹⁸ Therefore, in case of the absence of evidence rules in an international instrument creating an international criminal tribunal, a chamber "[S]hall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute [ICTY statute] and the general principles of law."¹¹¹⁹

¹¹¹⁶ Antonio Cassese, *International Criminal Law* 421 (Oxford University Press 2003).

¹¹¹⁷ Article 89 of ICTY Rules of Procedure and Evidence provides "(A) A Chamber shall apply the rules of evidence set forth in this section, and shall not be bound by national rules of evidence. (B) In cases not otherwise provided for in this section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law. (C) A Chamber may admit any relevant evidence which it deems to have probative value. (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. (E) A Chamber may request verification of the authenticity of evidence obtained out of court. (F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form." Rules of Procedure and Evidence art. 89, U.N. Doc. IT/32/Rev.37 (2006).

¹¹¹⁸ See generally Gideon Boas, *Admissibility of Evidence under the Rules of Procedure and Evidence of the ICTY: Development of the 'Flexibility Principle'* in *Essays on ICTY Procedure and Evidence* 263 (Richard May et. al. eds., 2001).

¹¹¹⁹ See Rules of Procedure and Evidence art. 89 (A)(B), U.N. Doc. IT/32/Rev.37 (2006).

As a result of this flexibility, international criminal tribunals or courts may create some evidence rules to preserve other provisions of their legislation. For example, a court may take a judicial notice concerning facts of common knowledge.¹¹²⁰ In Saddam Hussein's case, an ad hoc international criminal tribunal might have taken a judicial notice, from U.N. records, regarding issues relating to the nature of the armed conflict and the damage that resulted. No doubt this tool, judicial notice, contributes to expediting the judicial proceedings, preserving the defendant's right to be tried without undue delay.

In terms of evidence, there are several types of evidence, oral and written or documentary evidence. Documentary evidence is mainly reviewed in the following part as this type of evidence is at hand at the current time in the case of Saddam Hussein.¹¹²¹ Documentary evidence includes both written statements offered in lieu of oral evidence and "anything on which information is recorded."¹¹²² Thus, documentary evidence encompasses photographs, video-tapes, audio-tapes, digital records, sketches, maps, other written documents containing military orders and reports, letters, diaries, books, journals, newspapers and dossiers.

In one aspect, documentary evidence might be better than oral evidence (witnesses' testimony). This is true when a trial is held years after the alleged events and witnesses have difficulties remembering details of the events. Moreover, it is said that, "A challenge for the prosecution therefore is to connect the accused with the crimes charged. There may be many witnesses to testify as to the occurrence of a particular atrocity, but very few to link that atrocity to a particular accused at a higher level of

¹¹²⁰ See generally Eugene O'Sullivan, *Judicial Notice in Essays on ICTY Procedure and Evidence* 263 (Richard May et. Al. eds., 2001).

¹¹²¹ See *infra* Ch.III.

¹¹²² Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 53 (January 27, 2000).

authority.”¹¹²³ On the contrary, documentary evidence, like military orders, speaks for itself. In addition, it is no surprise that international criminal practice has proved that documentary evidence is deemed to be a necessary path to expedite the trial.¹¹²⁴

In international criminal law, documentary evidence has been used to prove several issues such as ‘crime-base’ evidence, whether there were widespread and systemic attacks on the civilian population or property, issues of command structure, and crimes that occurred in the context of an international armed conflict. Plus, it is used to corroborate, support, prove or disprove case circumstances.

Within international criminal practice, distinguishing between two stages, admissibility and evidence weighing stages, should be noted. In light of the admissibility stage, documentary evidence can be admitted either before or during the trial¹¹²⁵ and its sources can be individuals, states, and non-governmental organizations.¹¹²⁶

Concerning the standard of admissibility of documentary evidence, it is ruled that, “[T]he standard of proof required for admissibility [of documentary evidence] should be lower than the standard of proof required in the final determination of the matter at hand through the weighing up of the probative value of the evidence by the Chamber: that comes later. Admission requires simply the proof that evidence has some probative

¹¹²³ Judge Richard May & Marieke Wierda, *International Criminal Evidence* 11 (Transnational Publishers 2002).

¹¹²⁴ Judge Richard May & Marieke Wierda, *International Criminal Evidence* 256 (Transnational Publishers 2002).

¹¹²⁵ M. Cherif Bassiouni, *Introduction to International Criminal Law* 657 (Transnational Publishers 2003).

¹¹²⁶ For instance, article 18 (1) of ICTY statute states “The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations.” Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 18 (1), S.C. Res. 827, U.N. SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993).

values.”¹¹²⁷ Therefore, as a general rule, evidence to be admitted needs to be relevant and have probative value.¹¹²⁸

As a result, there are three challenges or objections the defense can raise regarding documentary evidence. These challenges relate to relevance, reliability, and repetition.¹¹²⁹ The practice concerning these challenges is beyond the scope of this paper.

On the other side, weighing documentary evidence requires considering the source and the authenticity of a document. The source of the document might affect its credibility. However, it does not follow that if the source is the party which itself adduces the document, the document is considered unreliable.¹¹³⁰

By and large, the authenticity of a document is an issue a defense might raise during a trial. Moreover, if the defense did not raise this issue, the trial court “may request verification of the authenticity of the evidence obtained out of court.”¹¹³¹ In order to determine the authenticity of a document, several considerations, such as the form, content and purported use of the document, plus the position of the parties on the matter, should be taken into account.¹¹³² Moreover, it is not sufficient to rely on one of the previous considerations to prove or disprove the authenticity of the document.¹¹³³

In terms of the form of a document, several elements should be considered such as whether a document is an original copy; whether it is enrolled with institutional

¹¹²⁷ Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶56 (January 27, 2000).

¹¹²⁸ Rules of Procedure and Evidence art. 89 (C), U.N. Doc. IT/32/Rev.37 (2006).

¹¹²⁹ Judge Richard May & Marieke Wierda, *International Criminal Evidence* 239-40 (Transnational Publishers 2002).

¹¹³⁰ Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 61-63 (January 27, 2000).

¹¹³¹ Rules of Procedure and Evidence art. 89 (E), U.N. Doc. IT/32/Rev.37 (2006).

¹¹³² Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 66 (January 27, 2000).

¹¹³³ Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 72 (January 27, 2000).

authorities; whether it contains a signature; whether it is sealed, certified, or stamped; whether it is officially authorized by an authority; and whether it is duly executed.¹¹³⁴

The content of the document is another factor to be considered, especially with “its relation to oral testimony given before the Chamber pertaining to the content of the document.”¹¹³⁵ In the same context, it is ruled that the absence of a signature or a stamp from the document does not necessarily mean it lacks authenticity.¹¹³⁶

Internationally, documentary evidence does not need to be produced through a witness. However, it should be noted that, “[T]he defense’s rights include: how the evidence was obtained, the chain of custody, potential tampering, and confronting and cross-examining those who obtained the evidence and those who handled it.”¹¹³⁷

Moreover, international criminal conviction does not require a corroboration rule. Therefore, conviction can be obtained based upon, “[A] single testimony provided such testimony is, in its opinion [Chamber’s opinion], relevant and credible.”¹¹³⁸ This rule extends to all types of evidence, including documentary evidence. In short, evidence needs to be reasonable and reliable.¹¹³⁹

¹¹³⁴ Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 67 (January 27, 2000).

¹¹³⁵ Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 70 (January 27, 2000).

¹¹³⁶ Prosecutor v. Brdanin and Talic, Case No. IT-99-36-1, Admission of Evidence Order, ¶ 20 (February 15, 2002).

¹¹³⁷ M. Cherif Bassiouni, *Introduction to International Criminal Law* 657 (Transnational Publishers 2003); Judge Richard May & Marieke Wierda, *International Criminal Evidence* 245 (Transnational Publishers 2002).

¹¹³⁸ Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment (2 September 2, 1998) ¶ 135; Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgment and Sentence (January 27, 2000) ¶ 43; Prosecutor v. Rutaganda, Case No. ICTR-96-3, Judgment and Sentence (December 6, 1999) ¶ 18.

¹¹³⁹ Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-A, Appeals Chamber Judgment (June 1, 2001) ¶ 320-22.

Documents containing military orders, reports, maps and photographs are admitted before international criminal tribunals.¹¹⁴⁰ In addition to paper documents, video-tapes, audio-tapes, and digital records are included within this accepted evidence.

Real evidence is another source for obtaining criminal conviction. This evidence “consists of any object presented to the court as evidence”¹¹⁴¹ and can be gathered by visiting the locus of the crime. Even though, in the case of those trials held years after the events, it might be thought that real evidence will not play a critical role, this is not true. Depending on the ability of the prosecution, the real evidence might be admitted if the prosecution can demonstrate that this evidence has probative value, a strong chain of custody, and there is no possibility of evidence tampering.

Finally, in the near future, pursuing crimes against the environment before the International Criminal Court will depend extensively upon expert witnesses. This type of evidence is necessary to determine environmental impacts and their causes.

¹¹⁴⁰ Judge Richard May & Marieke Wierda, *International Criminal Evidence* 246-52 (Transnational Publishers 2002).

¹¹⁴¹ Judge Richard May & Marieke Wierda, *International Criminal Evidence* 256 (Transnational Publishers 2002).

Appendix 6

International Armed Conflict Instruments that are inapplicable to Saddam Hussein's Case

As a matter of fact, the laws of armed conflict have a long history¹¹⁴² and, during that history, they have expanded from the protection of objects to the protection of people and the environment. In the context of environmental protection, the protection was indirect at the beginning. Later on, explicit protection became clear.¹¹⁴³ In the light of indirect protection of the environment, this protection can be accomplished by other conventions controlling the means of warfare. For example, the protection of the environment can be achieved through other conventions which limit the right of belligerents to use certain weapons.

However, this study is meant to explore the gaps in the international law regime concerning the explicit protection of the environment as an object. Such explicit protection is required and essential for closing any future debate that might be raised regarding whether laws of armed conflict adequately protect the environment. Moreover, in terms of the general principles applicable to any military action regardless of its target, people or properties including the environment, one of the main goals the laws of armed conflict have tried to accomplish is to limit the belligerent's right to apply any means of injuring the enemy's property, including the environment. In achievement of such a goal, there are four main principles that control war. Those principles are: [1]

¹¹⁴² Rerigiusz Bierzanek, War Crimes: History and Definition *in* International Criminal Law, Vol. III, 87,89 (M. Cherif Bassiouni ed., Transnational Publishers, Inc. 2ed 1999).

¹¹⁴³ David Hunter ET AL., International Environmental Law and Policy 1368 (Foundation Press 1998).

Military necessity, [2] proportionality, [3] prevention of unnecessary suffering, and [4] discrimination between civilian and military targets.¹¹⁴⁴

With regard to international environmental offenses committed during warfare, some of these principles, such as the military necessity and proportionality principles, lost their independence and distinction by inclusion within those articles or codes which protect the environment directly.¹¹⁴⁵

Therefore, the subject of this review is trying to accomplish is to address international instruments protecting the environment as objects in respect to their applicability to the deliberate destruction of the environment committed in the Gulf War of 1991. The main international conventions which will be reviewed in this part of the paper are the Protocol I Additional to the Geneva Convention of August 12, 1949 and relating to the Protection of Victims in Times of International Armed Conflict, the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques and the Convention for the Protection of Cultural Property in the Event of Armed Conflict.

¹¹⁴⁴ David Hunter ET AL., *International Environmental Law and Policy* 1368 (Foundation Press 1998).

¹¹⁴⁵ For instance, compare among article 8(2)(b)(iv) of ICC statute provides “. 2. For the purpose of this Statute, "war crimes" means:... (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:(iv) Intentionally launching an attack in the knowledge that such attack will cause..... injury to damage to.... widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.” See U.N. Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 (1998); and article 20 (g) of Draft Code of Crimes against the Peace and Security of Mankind provides “ Any of the following war crimes constitute a crime against the peace and the security of mankind when committed in a systematic manner or on a large scale: (g) in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.” Draft Code of Crimes against the Peace and Security of Mankind art. 20 (g), 1996, 51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532, corr.1, corr.3 (1996).

In addition, recommendations and directions concerning protection of the environment are not exclusive to binding instruments such as conventions and judicial decisions. They might be located in non-binding instruments or so called soft laws as well. Although soft laws are not binding instruments, they play an essential role in assisting international courts in interpreting the provisions related to these instruments. Therefore, the beginning of this review will deal with those instruments which are not deemed to be binding instruments. The non-binding instruments are the draft Code of Crimes against Peace and Security of Mankind and the International Committee of the Red Cross Manual regarding Protection of the Environment during the time of Armed Conflict.

Soft laws can be those drafts issued by the International Law Commission (ILC) concerning the laws of armed conflicts or war crimes such as the Draft Code of Crimes against Peace and Security of Mankind.¹¹⁴⁶ The Draft considers an intentional attack against the environment in international armed conflict without military necessity as a war crime.¹¹⁴⁷ The positive feature that can be attributed to the Draft is that it does not make a distinction, in light of the protection of the environment, between internal and international armed conflict. In addition, commentary paragraphs included and attached

¹¹⁴⁶ Draft Code of Crimes against the Peace and Security of Mankind, 1996, 51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532, corr.1, corr.3 (1996).

¹¹⁴⁷ Article 20 (g) provides the fruit of 24-year development regarding environmental protection during armed conflict. Article 20 (g) provides “Any of the following war crimes constitute a crime against the peace and the security of mankind when committed in a systematic manner or on a large scale: (g) in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.” Draft Code of Crimes against the Peace and Security of Mankind, 1996, 51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532, corr.1, corr.3 (1996).

with the Draft are useful tools for international judges to use to comprehend the elements and extent of the offense.

Other examples of soft laws in the field of armed conflict will be those recommendations, manuals, and guidelines issued by non-governmental organizations such as the International Committee of the Red Cross (ICRC.) For instance, in 1993, ICRC issued the "Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict."¹¹⁴⁸ The guidelines are meant "to contribute in a practical and effective way to raising awareness of a precious asset which merits respect and protection ...in time of armed conflict: the natural environment."¹¹⁴⁹ The guidelines reaffirmed those principles protecting the environment in international agreements such as distinction and proportionality.

In addition, the guidelines provide examples of international protection of the environment such as prohibition of transplanting indiscriminate landmines, attacks on historic monuments, using plants to cover military objectives, and destruction of cultural properties. Finally, the guidelines recommend that "the parties thereto are encouraged to facilitate and protect the work of impartial organizations contributing to preventing or repairing damage to the environment"¹¹⁵⁰ and disseminate the guideline rules by making them known as widely as possible.

¹¹⁴⁸ The guidelines are available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jn38?opendocument> (last visited Nov.11, 2006).

¹¹⁴⁹ Paragraph 19 of the Guidelines, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jn38?opendocument> (last visited Nov.11, 2006).

¹¹⁵⁰ Paragraph 17 of the Guidelines, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jn38?opendocument> (last visited Nov.11, 2006).

I. The Protocol I Additional to the Geneva Convention of August 12, 1949, relating to the Protection of Victims in Times of International Armed Conflict¹¹⁵¹

The Protocol I Additional to the Geneva Convention of August 12, 1949, relating to the Protection of Victims in Times of International Armed Conflict is the first international instrument that deals with or protects the environment explicitly during armed conflict time.¹¹⁵² It came into force in 1978.

The Protocol applies to international armed conflicts. Its general aim is to make warfare less brutal and inhuman. In addition, the Protocol was drafted by the International Committee of the Red Cross¹¹⁵³ in response to the large-scale use of “Agent Orange” by U.S. armed forces in the Vietnam War. The pertinent articles of the Protocol are 35 and 55. Article 35 (1) and (3) provides:

In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.....3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.¹¹⁵⁴

From the above text, it is plain that it did not address the incidental damages that occurred during armed conflict. In addition, it requires, in order for the Protocol to be violated, that three elements (widespread, long-term, and severe) be present. Long-term

¹¹⁵¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3 (1977).

¹¹⁵² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (1977).

¹¹⁵³ Aaron Schwabach, Environmental Damage Resulting from the Nato Military Action against Yugoslavia, 25 COLUM. J. ENVTL. L. 117, 126 (2000).

¹¹⁵⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 35 (1),(3), 1125 U.N.T.S. 3 (1977).

damage is understood as damage which lasts a period of years, if not decades.¹¹⁵⁵ The missing element in this text is military necessity which is a traditional justification for most military actions. The Protocol, at least in respect to the above article and the relative time of the commission of the Iraq offenses, is not considered a part of customary international law.¹¹⁵⁶

The second article is 55 which lays down:

Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population..... Attacks against the natural environment by way of reprisals are prohibited.¹¹⁵⁷

Generally, protection of the environment can be accomplished through a couple of approaches. The first protects those elements of nature which are necessary to human survival. Therefore, this link between human suffering and the environment injures the protection since it requires a higher standard of proof and injuries. The second is to extend protection to all elements of nature, regardless of their link to human life.¹¹⁵⁸

It seems that the Protocol adopts both approaches since the difference between article 55 and 35 is “Article 35... broaches the problem from the point of view of methods of warfare, Article 55 concentrates on the survival of the population, so that even though the two provisions overlap to some extent, and their tenor is similar, they do

¹¹⁵⁵ See International Committee of the Red Cross (ICRC) commentary. ¶ 1452 available at <http://www.icrc.org/ihl.nsf/COM/470-750044?OpenDocument> (Last visited Aug. 31, 2006).

¹¹⁵⁶ See Anthony Leibler, Deliberate Wartime Environmental Destruction: New Challenges for International Law, 23 CAL. W. INT’L L. J. 67, 113 (1992).

¹¹⁵⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 55, 1125 UNTS 3 (1977).

¹¹⁵⁸ Stephen C. MaCaffrey, Crimes against the Environment *in* International Criminal Law, Vol. I, 983 (M. Cherif Bassiouni ed., Transnational Publishers, Inc. 2ed 1999).

not duplicate each other. (9) It will be noted that the text begins with the words "care shall be taken in warfare to protect the natural environment."¹¹⁵⁹

In other words, article 35 concerns this environmental destruction regardless of its humanitarian effects while article 55 considers the environment as a protected object and recognizes the link between the environment and human survival. The Protocol does not consider environmental destruction as a grave breach.¹¹⁶⁰ Moreover, other protection can be derived from the Protocol. This protection is indirect through protecting other objects.¹¹⁶¹ The Protocol imposes both civil and criminal responsibility.¹¹⁶²

There is no need to examine whether the two articles, 35 and 55, are applicable to Iraqi action during the Gulf war, since Iraq is not party to the Protocol and the provisions protecting the environment were not considered part of international customary law at

¹¹⁵⁹ See International Committee of the Red Cross (ICRC) commentary, ¶ 2133 *available at* <http://www.icrc.org/ihl.nsf/COM/470-750070?OpenDocument> (Last visited Aug. 31, 2006)

¹¹⁶⁰ See article 85 (3) of the Protocol. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (1977). Article 85 (5) provides that "Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes." This provision is confusing regarding these provisions of the Protocol which are considered grave breaches; are they constituted crimes? are they only military crimes and thus left to local authorities to decide the fate of their actors? The only fact that can be inferred from the paragraph is that these are war crimes and the universal jurisdiction doctrine will not be applicable to them.

¹¹⁶¹ For instance article 54 (2) of the Protocol provides "It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive..." In addition, article 56(1) provides "Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (1977).

¹¹⁶² Article 86 of the Protocol deals with criminal responsibility and article 91 provides the basis for the civil responsibility Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (1977).

least when those actions were committed. Therefore, there was no way to implement the provisions of the Protocol in the facts of the case without violating the principle of legality.

II. ENMOD Convention¹¹⁶³

The Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, or ENMOD Convention, was adopted by a United Nations General Assembly Resolution¹¹⁶⁴ ratified by thirty six countries. Like Protocol I, the Convention is deemed to be a response to the actions of United States armed forces during the Vietnam War.¹¹⁶⁵ The Convention has not gained the status of an international customary norm yet.¹¹⁶⁶ It entered into force October 5, 1978.

Article I (1) of the Convention lays down the basic obligation on state parties. "Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party."¹¹⁶⁷

The Convention defines the damage requirements as: "widespread": encompassing an area on the scale of several hundred square kilometers; "long-lasting": lasting for a period of months, or approximately a season; and "severe": involving serious

¹¹⁶³ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 UST 333, 1108 UNTS 152.

¹¹⁶⁴ G.A. Res. 31/72, U.N. GAOR, 31st Sess., Supp. No.39, at 37, U.N. Doc. A/31/39 (1976).

¹¹⁶⁵ Peter J. Richard & Michael N. Schmitt, *Mars Meets Mother Nature: Protection the Environment during Armed Conflict*, 28 STETSON L. REV. 1047, 1063 (1999).

¹¹⁶⁶ See Anthony Leibler, *Delibrate Wartime Environmental Destruction: New Challenges for International Law*, 23 CAL. W. INT'L L. J. 67, 81 (1992).

¹¹⁶⁷ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques art. I (1), May 18, 1977, 31 UST 333, 1108 UNTS 152.

or significant disruption or harm to human life, and natural and economic resources or other assets.”¹¹⁶⁸

The Convention is broader than Protocol I in two aspects at least. First, it does not require for its violation all the three conditions or adjectives (widespread, long-lasting, *or* severe). Any of these conditions may cause the violation of the Convention if it resulted from the use of environmental modification techniques. Secondly, the Convention does not apply only in armed conflict time. It covers any military activities whether in armed conflict, international or internal, or in peace time.

The Convention defines environmental modification techniques as “any technique for changing -- through the deliberate manipulation of natural processes -- the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.”¹¹⁶⁹ The Convention does not consider military necessity, self-defense, or distress as justifications to violate its terms. However, it protects only a party state’s territory and does not provide explicitly civil or criminal responsibility as remedies for its violation.

The remedy that can be taken by the complaining state concerning a violation of the Convention against its territory is bilateral consultation and cooperation, an inquiry commission, or filing a complaint with the U.N. Security Council.¹¹⁷⁰ It seems that the Convention imposes its obligations on states, not individuals. Thus, the expected remedy

¹¹⁶⁸ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 UST 333, 1108 UNTS 152, Understandings Regarding the Convention, Understanding relating Article I.

¹¹⁶⁹ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques art. II, May 18, 1977, 31 UST 333, 1108 UNTS 152.

¹¹⁷⁰ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques art. V (2), May 18, 1977, 31 UST 333, 1108 UNTS 152.

is a remedy which can be taken against the states. Finally, Iraq just signed, but has not ratified.¹¹⁷¹ As a result, Iraq is not bound by the Convention's provisions.

III. Convention for the Protection of Cultural Property in the Event of Armed Conflict¹¹⁷²

The Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted at The Hague (Netherlands) in 1954 in the wake of massive destruction of the cultural heritage in the Second World War, is the first international treaty of a world-wide nature focusing exclusively on the protection of cultural heritage in the event of armed conflict. The Convention has two protocols.

It covers immovable and movable objects, including monuments of architecture, art or history; archaeological sites; works of art; manuscripts; books and other objects of artistic; historical or archaeological interest; as well as scientific collections of all kinds regardless of their origin or ownership.¹¹⁷³

States which are party to the Convention benefit from a network of more than a hundred States that have undertaken to lessen the consequences of armed conflict for the cultural heritage and to take preventive measures for such protection not only in time of hostility, when it is usually too late, but also in time of peace, by a variety of measures.

These measures safeguard and respect cultural property during both international and non-international armed conflicts; consider registering a limited number of refuges, monumental centers and other immovable cultural property of very great importance

¹¹⁷¹ Countries which are parties to the Convention available at http://en.wikipedia.org/wiki/Convention_on_the_Prohibition_of_Military_or_Any_Other_Hostile_Use_of_Environmental_Modification_Techniques (last visited July 10, 2007).

¹¹⁷² The Convention for the Protection of Cultural Property in the Event of armed conflict, 249 U.N.T.S. 240 (1954) (entered into force Aug.7, 1956).

¹¹⁷³ See article (1) of the Convention. The Convention for the Protection of Cultural Property in the Event of armed conflict, 249 UNTS 240(1954) (entered into force Aug.7, 1956).

listed in the International Register of Cultural Property under Special Protection and obtaining special protection for such property; consider marking certain important buildings and monuments with the special protective emblem of the Convention; and set up special units within the military forces to be responsible for the protection of the cultural heritage.

Article 18 (2), determining the scope of the application of the Convention, lays down, “The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”¹¹⁷⁴ According to article 5 of the Convention, in the case of occupation, the occupying power:

1. shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.
2. Should it prove necessary to take measures to preserve cultural property situated in occupied territory and damaged by military operations, and should the competent national authorities be unable to take such measures, the Occupying Power shall, as far as possible, and in close co-operation with such authorities, take the most necessary measures of preservation.
3. Any High Contracting Party whose government is considered their legitimate government by members of a resistance movement, shall, if possible, draw their attention to the obligation to comply with those provisions of the Conventions dealing with respect for cultural property.¹¹⁷⁵

The Convention penalizes violations of the Convention and promotes its provisions widely to the general public and to target groups such as cultural heritage professionals, the military or law-enforcement.¹¹⁷⁶

¹¹⁷⁴ The Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 18 (2), 249 U.N.T.S. 240 (1954) (entered into force Aug.7, 1956).

¹¹⁷⁵ The Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 5, 249 U.N.T.S. 240 (1954) (entered into force Aug.7, 1956).

¹¹⁷⁶ Article 28 of the Convention provides, “The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a

Both Kuwait and Iraq are parties to the Convention and Saddam Hussein could have been held responsible based upon the Convention for those actions taken against museums and centers containing a large amount of cultural property such as scientific collections and collections of books or archives. However, it is obvious that using oil is not included within the definition of cultural property proscribed by the Convention. Therefore, unless a connection or causation is established between the action of using oil and the destruction of cultural property (using oil or land mines in destroying archaeological sites), this Convention could not have been a basis for criminal conviction in the case of Saddam Hussein.

breach of the present Convention.” The Convention for the Protection of Cultural Property in the Event of armed conflict, 249 U.N.T.S. 240(1954) (entered into force Aug.7, 1956).

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