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Do any of the following acts, which occurred during Iraq's invasion and occupation of Kuwait, constitute crimes under the IHT Statute: (1) the removal of food, medical supplies, and medical equipment from Kuwait to Iraq; (2) the destruction of Kuwaiti assets and infrastructures; and (3) the destruction of Kuwaiti oil wells and oil refineries, and the deliberate release of oil into the Persian Gulf?

Andrew M. Katz

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**MEMORANDUM FOR THE OFFICE
OF THE PROSECUTOR OF THE
IRAQI HIGH TRIBUNAL**

ISSUE: Do any of the following acts, which occurred during Iraq's invasion and occupation of Kuwait, constitute crimes under the IHT Statute: (1) the removal of food, medical supplies, and medical equipment from Kuwait to Iraq; (2) the destruction of Kuwaiti assets and infrastructures; and (3) the destruction of Kuwaiti oil wells and oil refineries, and the deliberate release of oil into the Persian Gulf?

Prepared by Andrew M. Katz
Spring 2006

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issue*

During Iraq's invasion and occupation of Kuwait between August 1990 and March 1991, (1) Ali Hassan Al-Majid, acting on the orders of Saddam Hussein, ordered Iraqi troops to remove food, medical supplies, and medical equipment from Kuwait to Iraq, causing widespread hunger and disease; (2) Saddam Hussein ordered his troops to destroy anything of value in Kuwait, including oil wells, oil refineries, electric power generation facilities, water purification facilities, hospitals, and other critical infrastructures which could not be transported into Iraq; and (3) Saddam Hussein ordered the destruction of Kuwait's oil wells and the deliberate release of oil into the Persian Gulf. This memorandum examines whether any of these actions constitute a crime within the jurisdiction of the IHT.

B. Summary of Conclusions

The Iraqi High Tribunal ("IHT" or "Tribunal") has jurisdiction to hear cases involving genocide, crimes against humanity, war crimes, and violations of certain Iraqi laws listed in Article 14, which occurred from July 17, 1968 to May 1, 2003.¹ In its interpretation of Articles 11, 12, and 13 of the IHT statute, the Tribunal may resort to the relevant decisions of international criminal courts.² Accordingly, this memorandum analyzes Iraqi crimes in light of the relevant statutes and cases of the International Criminal Court (ICC), the International

* ISSUE: During Iraq's invasion and occupation of Kuwait in August of 1990 to March of 1991, several discrete possible offences occurred. In particular: (1) Ali Hassan Al-Majid (acting on the orders of Saddam Hussein) ordered Iraqi troops to remove food, medical supplies, and medical equipment from Kuwait to Iraq, causing widespread hunger and disease; and (2) Saddam Hussein ordered his troops to destroy anything of value in Kuwait (including such things as oil wells, oil refineries, electric power generation facilities, water purification facilities, hospitals, and other critical infrastructures) which could not be transported into Iraq. Do these actions constitute a crime within the jurisdiction of the IHT? When analyzing this fact pattern, pay close attention to the destruction of Kuwait's oil wells and the deliberate release of oil into the Persian Gulf. Discuss whether criminal liability may lie for the environmental damage Kuwait suffered.

¹ See Statute of the Iraqi High Tribunal at art. 2, available at http://www.cpa-iraq.org/human_rights/Statute.htm [hereinafter IHT Statute] [Reproduced in accompanying notebook at Tab 14]

² See *id.* at art. 17.

Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the International Military Tribunal (IMT).

1. Article 12 – Crimes Against Humanity for the Removal of Food, Medical Supplies and Medical Equipment

Members of the former Iraqi regime can be prosecuted for crimes against humanity for removing food, medical supplies and medical equipment from Kuwait to Iraq. Article 12 of the IHT Statute grants the Tribunal jurisdiction to hear cases involving crimes against humanity.³ To be prosecuted for a crime against humanity, five elements must be satisfied. There must be (1) an attack; (2) the acts of the perpetrator must be part of the attack; (3) the attack must be directed against any civilian population; (4) the attack must be widespread or systematic; and (5) the perpetrator must know that his acts constitute part of a pattern of widespread or systematic attacks directed against a civilian population, and must possess the requisite *mens rea* for the underlying offense.⁴

The first element is satisfied because the act of removing food, medical supplies and medical equipment from Kuwait to Iraq constituted various attacks, including extermination, torture and other inhumane acts.⁵ The second element is fulfilled because the removal of food, medical supplies and medical equipment was objectively part of the attack. But for the removal of these items, extermination, torture and other inhumane acts could not have taken place. The third and fourth elements, that the attack was directed against any civilian population and that the attack was widespread or systematic, is met because the Iraqi perpetrators committed the attacks

³ *Id.* at art. 12.

⁴ See *Prosecutor v. Kunarac et. al.*, Case No. IT-96-23/1-A, Judgment, para. 85 (ICTY Appeals Chamber June 12, 2002), at <http://www.un.org/icty/kunarac/trialc2/judgement/kun-tj010222e.pdf>. [hereinafter Kunarac Appeals Chamber][Reproduced in accompanying notebook at Tab 23]

⁵ See IHT Statute, *supra* note 1, art. 12. [Reproduced in accompanying notebook at Tab 14]

against numerous Kuwaiti civilians as part of an organized plan. The last element, which requires that the perpetrator commit the act with the *mens rea* of knowledge and intent, is satisfied. Evidence indicates that members of the former Iraqi regime knew that their acts were part of a widespread and systematic attack directed against a civilian population, and that they intended to remove food, medical supplies and medical equipment from Kuwait to Iraq.

B. Article 13 – War Crimes for the Removal of Food, Medical Supplies and Medical Equipment, the Destruction of Kuwaiti Assets and Infrastructures and the Destruction to the Environment

Members of the former Iraqi regime can be prosecuted for war crimes for (1) removing food, medical supplies and medical equipment from Kuwait to Iraq; (2) destroying Kuwaiti assets and infrastructures, such as oil wells, oil refineries, electric power generation facilities, water purification facilities, and hospitals; and (3) committing environmental atrocities by destroying and igniting Kuwaiti oil wells, demolishing oil refineries and spilling oil into the Persian Gulf. Article 13 of the IHT Statute grants the Tribunal jurisdiction over war crimes.⁶ War crimes mean (1) grave breaches of the Geneva Convention of 12 August 1949 (“Geneva Convention”);⁷ (2) other serious violations of the laws and customs applicable in international armed conflicts, within the established framework of international law (“violations of the laws and customs applicable in international armed conflict”); (3) acts committed during armed

⁶ *See id.* at art. 13

⁷ *See id.* at art. 13(a); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950) [Hereinafter Geneva Convention I] [Reproduced in accompanying notebook at Tab 6], Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950) [Hereinafter Geneva Convention II] [Reproduced in accompanying notebook at Tab 7], Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [Hereinafter Geneva Convention III] [Reproduced in accompanying notebook at Tab 8], and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [Hereinafter Geneva Convention IV] [Reproduced in accompanying notebook at Tab 9][collectively hereinafter Geneva Conventions]. The Geneva Conventions are international treaties governing the laws of war. For a brief summary of the Geneva Conventions visit, Wikipedia, *Geneva Conventions*, at http://en.wikipedia.org/wiki/Geneva_conventions (last modified 28 May 2005). [Reproduced in accompanying notebook at Tab 73]

conflicts against persons not taking an active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause (“acts against persons not taking an active part in the hostilities”); and (4) other serious violations of the laws and customs of war applicable in armed conflict not of an international character, within the established framework of international law.⁸

To be prosecuted for a war crime, five elements must be satisfied. There must be (1) an act (where “act” can be a number of deplorable offenses set forth in Article 13); (2) the act must be committed by the perpetrator against a protected person or object; (3) the act must take place in the context of and be associated with an armed conflict; (4) a nexus must exist between the act and the armed conflict;⁹ and (5) the perpetrator must know of the factual circumstances that established the protected status of the victim, must know of the factual circumstances that established the existence of the armed conflict, and must have the requisite *mens rea* for the underlying offense.¹⁰

a) There must be an Act

1) Removal of Food, Medical Supplies and Medical Equipment

The first element, the presence of an act, is satisfied. The removal of food, medical supplies and medical equipment constituted various acts including (1) willful killing, inhuman treatment, and willfully causing great suffering and serious injury to body and health, in violation

⁸ See IHT Statute, *supra* note 1, art. 13. [Reproduced in accompanying notebook at Tab 14]

⁹ *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, para. 573 (ICTY Trial Chamber May 7, 1997). [hereinafter *Tadic* Trial Chamber] [Reproduced in accompanying notebook at Tab 26]

¹⁰ See IHT Statute, *supra* note 1, art. 13 (setting forth the various attacks which constitute “war crimes”) [Reproduced in accompanying notebook at Tab 14]; See Iraqi Special Tribunal Elements of Crimes, Prepared by Regime Crimes Liaison Office, at http://lawwww.cwru.edu/grotian-moment-blog/documents/IST_Elements.pdf at art. 12(a)(2). [hereinafter Elements of Crimes] (setting forth the requirements for each type of attack). [Reproduced in accompanying notebook at Tab 72]

of the Geneva Convention;¹¹ (2) pillaging a town or place in violation of the laws and customs applicable in international armed conflict;¹² and (3) murder, cruel treatment and torture, committed against persons not taking an active part in the hostilities.¹³

2) Destruction of Kuwaiti Assets and Infrastructures

The destruction of Kuwaiti assets and infrastructures also constituted various acts under Article 13. The destruction amounted to “extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly,” in violation of the Geneva Convention.¹⁴ The destruction also violated the laws and customs applicable in international armed conflict including (1) intentionally directing attacks against civilian objects, that is, objects which are not military objectives;¹⁵ (2) intentionally launching an attack in the knowledge that such attack will cause damage to civilian objects which would be clearly excessive in relation to the concrete and direct overall military advantages anticipated;¹⁶ (3) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;¹⁷ (4) intentionally directing attacks against buildings that are dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are

¹¹ IHT Statute, *supra* note 1, art. 13. [Reproduced in accompanying notebook at Tab 14]

¹² *Id.* at art. 13.

¹³ *Id.*

¹⁴ *Id.*; *See also* Geneva Convention IV, *supra* note 7, art. 147 (“Grave breaches to which the preceding article relates shall be those involving any of the following acts...extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”). [Reproduced in accompanying notebook at Tab 9]

¹⁵ *See* IHT Statute, *supra* note 1, art. 13. [Reproduced in accompanying notebook at Tab 14]

¹⁶ *See id.* at art. 13.

¹⁷ *Id.*

not military objectives;¹⁸ and (5) destroying or seizing the property of an adverse party unless such destruction or seizure is imperatively demanded by the necessities of war.¹⁹

3) Crimes Against the Environment

Members of the former Iraqi regime can be prosecuted for violations of the laws and customs applicable in international armed conflict for destroying Kuwaiti oil wells and oil refineries, and spilling oil into the Persian Gulf. These strikes against the environment constituted “intentionally launching an attack in the knowledge that such attack would 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.”²⁰ Although Iraqi perpetrators should be held criminally liable for environmental damage, prosecutors will have difficulty proving all elements of this crime.

Prosecutors must demonstrate that the oil fires and oil spills caused long-term damage to the environment. Some commentators interpret “long-term” as lasting for months while others require the damage to last for decades. If the IHT construes this requirement as lasting for decades, prosecutors will have difficulty showing that the environment actually sustained “long-term” damage. Prosecutors will also have trouble proving that the Iraqi perpetrators possessed the requisite *mens rea* because there is no direct evidence indicating that members of the former Iraqi regime knew that the attacks would cause “widespread, long-term and severe damage to the natural environment.” Finally, the prosecution must demonstrate that the environmental damage was clearly excessive in relation to the concrete and direct overall military advantage anticipated. Defense counsel will likely argue that the environmental damage was necessary and militarily

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

justified. This argument will likely fail because despite the fact that the oil fires and oil spills provided a smoke-screen to cover the Iraqi retreat, the magnitude of the environmental damage was clearly excessive in relation to the overall military advantage.

b) The Act must be Committed Against a Protected Person or Object

The second element, that the perpetrator commits the act against a protected person or object, is met. The removal of food, medical supplies and medical equipment constituted acts perpetrated against civilian persons in time of war and against armed forces who had laid down their arms. The destruction of Kuwaiti infrastructures such as oil wells, oil refineries, electric power generation facilities, water purification facilities, and hospitals constituted attacks against objects protected by the IHT Statute and the Geneva Convention. Finally, the ignition of oil wells and the spilling of oil into the Persian Gulf constituted attacks against the environment, which is protected by the IHT Statute, the Geneva Conventions and other applicable international laws.

c) The Act must be Committed During an Armed Conflict

The third requirement, that the act takes place in the context of and is associated with an armed conflict, is satisfied. The removal of food, medical supplies and medical equipment, the destruction of Kuwaiti assets and infrastructures, the destruction of oil wells and oil refineries, and the spilling of oil into the Persian Gulf, all took place during the Iraqi invasion of Kuwait and during the Gulf War. These acts and hostilities were sufficiently intense and organized to constitute an armed conflict. Additionally, the absence of open hostilities from August 8, 1990 to January 16, 1991 and the Iraqi-declared annexation of Kuwait did not bring about the cessation of the armed conflict.

d) There must be a Nexus between the Act and the Armed Conflict

The fourth element, the nexus between the act and the armed conflict, is present. The Iraqi perpetrators removed food, medical supplies and medical equipment as part of the Iraqi invasion of Kuwait. Similarly, the destruction of Kuwaiti assets and infrastructures occurred as part of the Iraqi occupation of Kuwait. Finally, the destruction of the oil wells, oil refineries and the release of oil into the Persian Gulf, were acts aimed to combat coalition forces during the Gulf War.

e) The Perpetrator must Possess the *Mens Rea* of Knowledge and Intent

The final element, the perpetrator knows of the factual circumstances that established the protected status of the victim, knows of the factual circumstances that established the existence of an armed conflict, and has the requisite *mens rea*, is satisfied. The Iraqi perpetrators knew of the protected status of the Kuwaiti civilians, the armed forces who laid down their arms, and the protected objects. They also knew of the factual circumstances that established the existence of the armed conflict between Iraq and Kuwait, and Iraq and the coalition forces. Finally, the Iraqi perpetrators intended to remove food, medical supplies and medical equipment from Kuwait to Iraq, intended to destroy Kuwaiti assets and infrastructures, intended to destroy oil wells and oil refineries, and intended to spill oil into the Persian Gulf.

II. FACTUAL BACKGROUND

A. General Background

On August 2, 1990, Iraqi President Saddam Hussein (“Saddam”) ordered Iraq to invade Kuwait. Reasons for invading Kuwait included seizing control of its oil, generating revenue to pay off debts from the 1980-1988 war with Iran, and reclaiming Kuwaiti land, which had

historically been part of Iraq.²¹ In direct violation of UN Security Council Resolution 660,²² Iraqi troops infiltrated and captured Kuwait. Subsequently, Saddam set up a brief Iraqi puppet government before declaring the country annexed on August 8, 1990.²³

The UN Security Council responded to the Iraqi invasion with severe penalties. Resolution 661, passed on August 6, 1990, authorized the use of sanctions against the Iraqi regime, including the cessation of imports and exports into or out of Iraq and Kuwait.²⁴ By August 25, the Security Council passed Resolution 665, calling for an embargo of all “inward and outward maritime” shipping.²⁵

The embargos were effective; Iraq could not export any Iraqi-made commodities nor could it sell the newly acquired Kuwaiti assets. Ironically, Iraq controlled 25 percent of the world’s oil reserves, but it could not market any of it.²⁶ UN sanctions also restricted Iraqi imports, including supplies and food. These restrictions acted as a double-edged sword. Iraq, a country known for importing 75 percent of its food,²⁷ now had nothing to feed its 17 million residents. Moreover, Iraq had no food for the 1.5 million subjugated Kuwaitis. As Iraq ran out

²¹ See Jessica E. Seacor, *Environmental Terrorism: Lessons From the Oil Fires of Kuwait*, 10 AM. U.J. INT’L. & POL’Y 481, 484 (1994). [Hereinafter Seacor] [Reproduced in accompanying notebook at Tab 52]

²² S.C. Res. 660, U.N. SCOR, 2932nd mtg., U.N. Doc. S/RES/660 (Aug. 2, 1990) (demanding “that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990”). [Reproduced in accompanying notebook at Tab 35]

²³ See Wikipedia, *Gulf War*, at http://en.wikipedia.org/wiki/Gulf_war#Invasion_of_Kuwait (last modified 15, March 2006). [Reproduced in accompanying notebook at Tab 74]

²⁴ S.C. Res. 661, U.N. SCOR, 2933rd mtg., U.N. Doc. S/RES/661 (Aug. 6, 1990). [Reproduced in accompanying notebook at Tab 35]

²⁵ S.C. Res. 665, U.N. SCOR, 2938th mtg., U.N. Doc. S/RES/665 (Aug. 25, 1990). [Reproduced in accompanying notebook at Tab 35]

²⁶ LAWRENCE FREEDMAN & EFRAIM KARSH, *THE GULF CONFLICT 1990-1991* (Princeton University Press) (1993) at 189. [Reproduced in accompanying notebook at Tab 39]

²⁷ *Id.* at 191 (citing SUSAN B. EPSTEIN, *THE WORLD EMBARGO ON FOOD EXPORTS TO IRAQ* (Washington DC, Library of Congress, Congressional Research Service) (25 September 1990)).

of food and supplies, it looked to Kuwait to obtain the provisions it needed as well as the provisions it desired.

B. Removal of Food, Medical Supplies and Medical Equipment from Kuwait to Iraq

The Iraqi invasion and occupation of Kuwait provided Iraqi forces with the opportunity to partake in extensive plunder. Iraqi forces pillaged Kuwaiti food warehouses and supermarkets, and stole medical supplies and medical equipment. Iraqi forces raided the Kuwait Organ Transplant Center, the Kuwaiti Gastroenterology Center and Kuwaiti blood banks.²⁸ Some of the items reported stolen included plasma deposits,²⁹ technical medical equipment, dental chairs, and ambulances.³⁰ All of these items were transferred back to Iraq.

In a September 2, 1990 letter to the UN Secretary-General, the Permanent Representative of Kuwait listed some of the actions carried out by the Iraqi occupation authorities, including:

1. theft from the Kuwaiti Red Crescent Association stores of provisions, medical supplies and tents set aside for relief operations in disaster-stricken countries
2. looting of food and medical supplies from public, government and private stores, food shops and pharmacies
3. theft of all equipment from private and public hospitals, including x-ray machines, scanners and pieces of laboratory equipment
4. robbery of medicines and unused modern equipment from the warehouses of the Ministry of Public Health and the Kuwait Pharmaceutical Industries companies, all which valued at over 20 million Kuwaiti dinars.³¹

²⁸ ABDULLAH M. AL-HAMMADI, TORTURING A NATION A DOCUMENTED STUDY OF THE IRAQI AGGRESSION TOWARDS KUWAITI PEOPLE (2ND AUGUST 1990-26TH FEBRUARY 1991) (Al Wazzan International Press Co.) at 187. [hereinafter Torturing a Nation] [Reproduced in accompanying notebook at Tab 29]; See also Letter from the Permanent Representative of Kuwait to the United Nations addressed to the Secretary-General (Sept. 5, 1990), in CAMBRIDGE INTERNATIONAL DOCUMENTS SERIES, VOL. 1, THE KUWAIT CRISIS: BASIC DOCUMENTS (E. Lauterpacht CBE, QC, C.J. Greenwood, Marc Weller & Daniel Bethlehem eds., Grotius Publications Limited) (1991) at 269. [hereinafter Letter from Permanent Representative of Kuwait to the United Nations] [Reproduced in accompanying notebook at Tab 40]

²⁹ *Id.* at 269.

³⁰ See Torturing a Nation, *supra* note 28, at 187. [Reproduced in accompanying notebook at Tab 29]

³¹ Letter from the Permanent Representative of Kuwait to the United Nations, Sept 2, 1990, *supra* note 28, at 268-69. [Reproduced in accompanying notebook at Tab 40]

Three days later, the Permanent Representative from Kuwait sent a second letter to the Secretary-General describing the effects of the looting. The “delicate medical equipment used in the intensive care units of many Kuwaiti hospitals has been seized and taken to Baghdad. This has led to the death of many patients who were receiving intensive care.”³² Also, “the incubators in maternity hospitals used for children suffering from retarded growth (premature children) have been removed, causing the death of all the children who were under treatment.”³³ According to statistics, death rates escalated in patients from 0-50 years.³⁴ Additionally, cases of infections, dehydration, diabetes, and hypertension increased in previously modern, well-equipped hospitals.³⁵

Iraqi documents discovered after the Gulf War indicate that the Iraqi pillage and plunder of Kuwait was part of an official Iraqi policy. In a letter directed to Ali Hassan Al-Majeed,³⁶ Saddam’s cousin and “hatchet man,”³⁷ General Director of Health Services Dr. Abduljaba Abdulabbas requested approval to shut down Kuwaiti health care centers and take Kuwaiti devices, equipment, furniture and pharmaceuticals to Baghdad.³⁸ Similarly, an Iraqi document signed by Ahmed Hussain, the Chairman of the Iraqi Presidency Diwan, on September 15, 1990,

³² Letter from the Permanent Representative of Kuwait to the United Nations, Sept. 5, 1990, *supra* note 28 at 267. [Reproduced in accompanying notebook at Tab 40]

³³ *Id.* at 267; *See also* Torturing a Nation, *supra* note 28, at 188 (describing that the removal of the medical equipment along with the departure of Kuwaiti doctors and nurses and the subsequent deterioration in sanitary conditions all contributed to the death of infants, the aged and mentally and physically handicapped patients). [Reproduced in accompanying notebook at Tab 29] *See also* SECRETARY OF THE ARMY, REPORT ON IRAQI WAR CRIMES (DESERT SHIELD/DESERT STORM) (1992) at 9 (reporting that 120 babies were left to die after being removed from incubators that were taken to Iraq). [Reproduced in accompanying notebook at Tab 41]

³⁴ *See* Torturing a Nation, *supra* note 28, at 188. [Reproduced in accompanying notebook at Tab 29]

³⁵ *See id.* at 188.

³⁶ Also spelled Ali Hassan Al-Majid.

³⁷ Human Rights Watch, *Who Was Ali Hassan Al-Majid (“Chemical Ali”)?*, at <http://hrw.org/english/docs/2003/04/07/iraq5508.htm>. [Reproduced in accompanying notebook at Tab 71]

³⁸ *See* Torturing a Nation, *supra* note 28, at 543. [Reproduced in accompanying notebook at Tab 29]

sought to form “a central committee to take stock, appraise and transport goods from The State of Kuwait Governance.”³⁹ These letters were just a few of the many documents sent to Iraqi leaders requesting or instructing Iraqi forces to confiscate Kuwaiti medical equipment, appliances, and drugs, and to transfer them back to Iraq.⁴⁰

C. Destruction of Kuwaiti Assets and Infrastructures

During the Iraqi invasion of Kuwait, Iraqi forces destroyed Kuwaiti assets and infrastructures. Iraqi forces damaged and destroyed oil wells, oil refineries, electric power generation facilities, water purification facilities and hospitals. Additionally, Iraqi forces invaded and desecrated houses of worship, searched and ransacked homes, looted public and private facilities, such as the Central Bank, commercial banks and places of public business, cleared warehouses and co-operative societies of foodstuffs causing starvation among Kuwaiti citizens, and stole public and private vehicles to be sent to Iraq.⁴¹ Other attacks included burning and bombing civilian homes⁴² and deliberately destroying health care facilities.⁴³ This type of devastation was meant to “suppress the Kuwaiti community and to inflict massive torture on them.”⁴⁴ In a letter to the UN Secretary-General, the Permanent Representative of Kuwait wrote

³⁹ *See id.* at 315.

⁴⁰ HUSSAIN ‘ISA MAL ALLAH, *THE IRAQI WAR CRIMINALS AND THEIR CRIMES DURING THE IRAQI OCCUPATION OF KUWAIT* (Center for Research and Studies on Kuwait) (1998) at 301-310 (these documents were dated from August 24, 1990 to November 18, 1990). [Reproduced in accompanying notebook at Tab 33]

⁴¹ Letter from the Permanent Representative of Kuwait to the United Nations, Aug. 5, 1990, *supra* note 28, at 267. [Reproduced in accompanying notebook at Tab 40]

⁴² ABDULLAH M. AL-HAMMADI & ABDULATEEF A. AL-ABDALRAZAQ, *ATLAS OF IRAQI WAR CRIMES IN THE STATE OF KUWAIT* (Al Qabas Commercial Press) (1995) at 7. [hereinafter *Atlas of Iraqi War Crimes*] [Reproduced in accompanying notebook at Tab 28]

⁴³ *See Torturing a Nation, supra* note 28 at 193. [Reproduced in accompanying notebook at Tab 29]

⁴⁴ *See id.* at 313.

that the Iraqi aggressions intended to “intimidate the Kuwaiti people for the purpose of compelling [them] to co-operate with the puppet government installed by the occupation.”⁴⁵

Evidence indicates that Iraqi forces intentionally destroyed Kuwaiti assets and infrastructures. For example, Iraqi Brigadier Staff Nabeel Abdullah Shaheen and Hadi Mahmud Jasem recommended the destruction of water pumps and control rooms, radio and TV stations, wireless communications, Jahra-Safwan Road and satellite stations.⁴⁶ According to Water Kalin’s report concerning the human rights in the State of Kuwait, Iraqis engaged in deliberate sabotage of oil, electric, water, communication and drainage facilities.⁴⁷ This extensive and deliberate destruction accurately reflected the slogan of the Iraqi perpetrators: “Loot and Burn.”⁴⁸

D. Destruction of Oil Wells and Deliberate Release of Oil into the Persian Gulf

From the start, Saddam made it clear that he would not hesitate to use oil as part of his military campaigns. For example, after the UN passed Resolution 678 authorizing the Member States to “use all necessary means” to compel Iraq to withdraw from Kuwait,⁴⁹ Saddam promised that if he had to be evicted from Kuwait by force, he would burn Kuwait.⁵⁰ A month later, Saddam asserted that “if Iraqis were to use oil for self-defense, then the Iraqis [would] be

⁴⁵ Letter from the Permanent Representative of Kuwait to the United Nations, Aug. 5, 1990, *supra* note 28, at 267. [Reproduced in accompanying notebook at Tab 40]

⁴⁶ MAL ALLAH, *supra* note 40, at 253. [Reproduced in accompanying notebook at Tab 33]

⁴⁷ See *Torturing a Nation*, *supra* note 28, at 313 (noting that this report was made in accordance with the resolution of the Human Rights Committee of the United Nations 76/1991 and issued by the Social and Economic Council of the United Nations on January 16, 1992). [Reproduced in accompanying notebook at Tab 29]

⁴⁸ IRAQI AGGRESSION ON KUWAIT: A CRIME UNPARDONABLE (Center for Research and Studies on Kuwait) (1996) at 56. [Reproduced in accompanying notebook at Tab 34]

⁴⁹ S.C. Res. 678, U.N. SCOR, 2963rd mtg., U.N. Doc. S/RES/678 (Nov. 29 1990). [Reproduced in accompanying notebook at Tab 35]

⁵⁰ THE GULF WAR AFTERMATH AN ENVIRONMENTAL TRAGEDY (Muhammad Sadiq & John C. McCain eds., Kluwer Academic Publishers) (1993) at 2. [hereinafter *Gulf War Aftermath*] [Reproduced in accompanying notebook at Tab 42]

justified for taking such action.”⁵¹ Shortly after the commencement of Operation Desert Storm, Saddam acted on his threats.

On January 22, 1991, Iraqi forces intentionally released oil from two oil tankers in the Persian Gulf.⁵² A few weeks later, Iraqi forces ignited over 700 Kuwaiti oil wells.⁵³ According to the Kuwaiti Oil Company, the oil burned at a rate of 6 million barrels per day and a total of 1.12 billion barrels of oil were lost in the fires.⁵⁴ Additionally, Iraqi troops attacked the seas by pumping millions of barrels of oil into the Persian Gulf from supply lines between oil refineries and an offshore terminal.⁵⁵ Iraqi forces also dynamited Sea Island Terminal and five tankers at oil ports Mina Al Ahmadi, Abu Halifa, and Shuaiba,⁵⁶ spilling an estimated 8 million barrels of oil.⁵⁷

The oil fires and the oil spills damaged the Kuwaiti environment and devastated ecosystems across the globe. Particularly, the oil harmed terrestrial and marine wildlife, damaged soil and vegetation, contaminated water, and polluted the air.⁵⁸ Oil residue and soot killed camels, chickens, desert rodents, lizards, birds, turtles and many other species. The oil

⁵¹ KRISTINE HIRSCHMANN, *THE KUWAITI OIL FIRES* (Matt Levine ed., Facts On File, Inc.) (2005) at 12-13. [Reproduced in accompanying notebook at Tab 38]

⁵² Mark J. T. Caggiano, *The Legitimacy of Environmental Destruction in Modern Warfare: Customary Substance over Conventional Form*, 20 B.C. ENVTL. AFF. L. REV. 479 (1993). [Reproduced in accompanying notebook at Tab 59]

⁵³ HIDDEN CASUALTIES ENVIRONMENTAL, HEALTH AND POLITICAL CONSEQUENCES OF THE PERSIAN GULF WAR (Saul Bloom, John M. Miller, James Warner & Philippa Winkler eds., North Atlantic Books) (1994) at 82. [hereinafter Hidden Casualties] [Reproduced in accompanying notebook at Tab 32]

⁵⁴ See *Gulf War Aftermath*, *supra* note 50, at 60. [Reproduced in accompanying notebook at Tab 42]

⁵⁵ Seacor, *supra* note 21, at 486. [Reproduced in accompanying notebook at Tab 52]

⁵⁶ Hidden Casualties, *supra* note 53, at 46. [Reproduced in accompanying notebook at Tab 32]

⁵⁷ *Id.* at 46.

⁵⁸ JOHN KING, *DAYS THAT SHOOK THE WORLD THE INVASION OF KUWAIT* (Raintree) (2004) at 32. [Reproduced in accompanying notebook at Tab 36]

contaminated Kuwaiti freshwater supplies at Um Al-Aish and Raudhatain.⁵⁹ Satellites captured images of oil lakes, tar mats and soot covering 700 square miles of Kuwaiti desert.⁶⁰ Black rain fell in Saudi Arabia and Iran, oil-streaked snow descended on parts of Turkey, and oily smoke found its way into the tropical skies over Hawaii.⁶¹ According to Ruman Bojkov of the World Meteorological Organization, the Kuwaiti oil fires generated acid rain which damaged the plants and soil of Iran, Pakistan, Afghanistan and the southern Soviet Union.⁶²

The oil-related pollutants also caused human disease and sickness. Respiratory and cardiovascular disease rose in the wake of the oil fires.⁶³ Specifically, cases of bronchial disease, asthma and upper-throat infections increased.⁶⁴ While short-term effects to the environment and to human health manifested immediately, many of the long-term effects have yet to be realized.

III. LEGAL DISCUSSION

The IHT has jurisdiction to hear cases involving genocide, crimes against humanity, war crimes, and violations of certain Iraqi laws listed in Article 14. It is unlikely that the removal of food, medical supplies and medical equipment, the destruction of Kuwaiti assets and infrastructures, the destruction of Kuwait oil wells and oil refineries, and the release of oil into the Persian Gulf, constituted genocide or violation of certain Iraqi laws listed in Article 14. This

⁵⁹ Hirschmann, *supra* note 51 at 53. [Reproduced in accompanying notebook at Tab 38]

⁶⁰ *Id.* at 52.

⁶¹ *Id.* at 30.

⁶² *Id.* at 30-31.

⁶³ Gulf War Aftermath, *supra* note 50, at 234. [Reproduced in accompanying notebook at Tab 42]

⁶⁴ Walter G. Sharp, Sr., *The Effective Deterrence of Environmental Damage During Armed Conflict: A Case Analysis of the Persian Gulf War*, 137 MIL. L. REV. 1, 41 (1992). [Reproduced in accompanying notebook at Tab 68]

portion of the memorandum, however, analyzes whether the acts committed by the Iraqi perpetrators amounted to crimes against humanity or war crimes.

A. Article 12 – Crimes Against Humanity for the Removal of Food, Medical Supplies and Medical Equipment

Article 12 of the IHT Statute grants the Tribunal authority to hear cases involving “crimes against humanity.”⁶⁵ Crimes against humanity are defined as

any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- A. Willful Murder;
- B. Extermination;
- C. Enslavement;
- D. Deportation or forcible transfer of population;
- E. Imprisonment or other severe deprivation of physical liberty in violation of fundamental norms of international law;
- F. Torture;
- G. Rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity;
- H. Persecution against any specific party or group of the population on political, racial, national, ethnic, cultural, religious, gender or other grounds that are impermissible under international law, in connection with any act referred to as a form of sexual violence of comparable gravity;
- I. Enforced disappearance of persons;
- J. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to the mental or physical health.⁶⁶

International courts have interpreted crimes against humanity as including five elements:⁶⁷ (1) there must be an attack; (2) the acts of the perpetrator must be part of the attack; (3) the attack must be directed against any civilian population; (4) the attack must be widespread or systematic; and (5) the perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population, must know that his acts

⁶⁵ See IHT Statute, *supra* note 1, art. 12. [Reproduced in accompanying notebook at Tab 14]

⁶⁶ See *id.* at art. 12.

⁶⁷ Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 SAN DIEGO INT’L L.J. 73, 91 (2004). [hereinafter Badar] [Reproduced in accompanying notebook at Tab 62]

fit into such a pattern, and must possess the requisite *mens rea* for the underlying offense.⁶⁸ The removal of food, medical supplies and medical equipment from Kuwait to Iraq constitutes a crime against humanity – it was an act perpetrated as part of a widespread and systematic attack directed against a civilian population and committed with knowledge and intent.

1. **There must be an Attack**

The removal of food, medical supplies and medical equipment from Kuwait to Iraq constituted an attack against a civilian population. An “attack directed against a civilian population” means a “course of conduct involving the multiple panel of acts referred to” in article 12, paragraph 1 of the Statute “against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”⁶⁹ The removal of food, medical supplies and medical equipment involved several of the “multiple panel of acts” including “extermination,”⁷⁰ “torture,”⁷¹ and “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to the mental or physical health” (“other inhumane acts”).⁷²

⁶⁸ *Kunarac Appeals Chamber, supra* note 4, at para. 85. [Reproduced in accompanying notebook at Tab 23]

⁶⁹ *See* IHT Statute, *supra* note 1, art. 12. [Reproduced in accompanying notebook at Tab 14]

⁷⁰ Elements of Crimes, *supra* note 10, at art. 12(a)(2) (stating that extermination requires that (1) the perpetrator killed, either directly or indirectly, one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population including, but not limited to, the deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes; and (2) the conduct constituted, or took place as part of (including the initial conduct of), a mass killing of members of a civilian population). [Reproduced in accompanying notebook at Tab 72]

⁷¹ *Id.* at art. 12(a)(6) (stating that torture requires that (1) the perpetrator willfully inflicted severe physical or mental pain or suffering upon one or more persons; (2) such person or persons were in the custody or under the control of the perpetrator; and (3) such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions).

⁷² *Id.* at art. 12(a)(10) (stating that other inhumane acts requires that (1) the perpetrator willfully inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act; and (2) such act was of a character similar (in terms of the nature and gravity of the act) to the offences that are contained in Article 12(a) of the Statute of the Special Tribunal).

a) Extermination

The removal of food, medical supplies and medical equipment from Kuwait to Iraq constituted extermination. Extermination means “the intentional infliction of living conditions, such as the deprivation of access to food and medicine, with the intent to bring about the destruction of part of the population.”⁷³ Extermination can be considered murder on a massive scale.⁷⁴ It is a crime which requires an element of mass destruction and by its very nature is directed against a group of individuals.⁷⁵ However, courts do not require a specific number of people to die in order for the act to rise to extermination.⁷⁶ In *Akayesu*, the ICTR found defendant Akayesu guilty of exterminating sixteen people.⁷⁷

Historically, extermination was a crime of persecution, requiring an attack based on national, political, ethnic, racial or religious grounds.⁷⁸ The IHT removed this condition. It is unnecessary to prove that discrimination was the underlying force behind the attack. It is only necessary to show that the act constituted the type of deliberate deprivation of resources indispensable for survival. The removal of food, medical supplies and medical equipment

⁷³ IHT Statute, *supra* note 1, art. 12. [Reproduced in accompanying notebook at Tab 14]

⁷⁴ *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgment, para. 142 (ICTR Trial Chamber, May 21, 1999). [Reproduced in accompanying notebook at Tab 21]

⁷⁵ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, para. 591 (ICTR Trial Chamber Sept. 2, 1998). [Reproduced in accompanying notebook at Tab 16]

⁷⁶ *Kayishema*, *supra* note 74, at para. 142. [Reproduced in accompanying notebook at Tab 21]

⁷⁷ *Akayesu*, *supra* note 75, at para. 744. [Reproduced in accompanying notebook at Tab 16]

⁷⁸ David A Luban, *Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 99 (2004) (stating, “Ratner and Abrams, drawing on Nuremberg and CCL No. 10 decisions” found that extermination was a crime of persecution). [Reproduced in accompanying notebook at Tab 49]; *See also* Statute of the Int'l Criminal Trib. for Rwanda, U.N.S.C. Res. 955, U.N. SCOR, 49th Sess., 3453th mtg., at art. 3, U.N Doc. S/RES/955 (1994) at art. 3. [hereinafter ICTR Statute] [Reproduced in accompanying notebook at Tab 12]; *See also Akayesu*, *supra* note 75, at para. 592 (where the court held that the attack must be on discriminatory grounds, namely: national, political, ethnic, racial or religious grounds). [Reproduced in accompanying notebook at Tab 16]; *See also* Charter of the International Military Tribunal, August 8, 1945, 82 U.N.T.S. 284, art. 6(c), available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>. [IMT Charter] [Reproduced in accompanying notebook at Tab 1]

brought about living conditions intended to destroy part of the Kuwaiti population, particularly, the children, the elderly and the sick who were residing in Kuwaiti health care facilities.

b) Torture

The removal of food, medical supplies and medical equipment from Kuwait constituted torture. The IHT Statute does not provide a clear definition for “torture.” However, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁷⁹

While this definition provides some guidance, the IHT does not require a specific purpose for torture.⁸⁰

Under the IHT, prosecutors must show that the perpetrators willfully inflicted severe physical or mental pain or suffering upon one or more persons, the person or persons were in the custody or under control of the perpetrator, and such pain or suffering was not inherent to lawful sanctions.⁸¹ The act of removing food, medical supplies and medical equipment embraced these elements. Iraqi forces willfully inflicted severe physical and mental pain and suffering upon the Kuwaitis by removing food, medical supplies and medical equipment. This torture occurred

⁷⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GOAR, 39th Sess., Supp. No. 51 at 197 U.N. Doc. A/39/51, art. 1(1). [Reproduced in accompanying notebook at Tab 2]

⁸⁰ Elements of Crimes, *supra* note 10, art. 12(a)(6). [Reproduced in accompanying notebook at Tab 72]

⁸¹ *Id.* at art. 12(a)(6).

while the Kuwaitis were under the control of Iraq. Lastly, the attacks were not part of lawful sanctions.

c) Other Inhumane Acts

The removal of food, medical supplies and medical equipment constituted “other inhumane acts.” Other inhumane acts is a category reserved for acts committed with similar gravity and seriousness as the other enumerated crimes, and which constitute deliberate forms of infliction with comparable serious inhumane results that are intended or foreseeable and done with reckless disregard.⁸² This catchall provision is found in the IMT Charter,⁸³ the ICTY Statute,⁸⁴ the ICTR Statute,⁸⁵ the SCSL Statute,⁸⁶ the Rome Statute,⁸⁷ and the IHT Statute.⁸⁸ If the prosecution fails to prove the elements of extermination or torture, it will likely be able to prove the elements of “other inhumane acts.”

In proving other inhumane acts, courts have required the prosecution to adequately particularize the pieces of evidence in support of the other inhumane acts charges.⁸⁹ In *Kayishema*, the Trial Chamber held that the prosecution failed to prove its case for other inhumane acts because it did not identify the other inhumane acts in the indictment, and its

⁸² *Kayishema supra* note 74, at para 583. [Reproduced in accompanying notebook at Tab 21]

⁸³ IMT Charter, *supra* note 78, art 6(c). [Reproduced in accompanying notebook at Tab 1]

⁸⁴ Statute of the Int'l Criminal Trib. for the Former Yugoslavia, U.N.S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), amended by U.N.S.C. Res. 1166, U.N. SCOR, 53rd Sess., 3878th mtg., U.N. Doc. S/RES/1166 (1998), art. 5(i). [hereinafter ICTY Statute] [Reproduced in accompanying notebook at Tab 13]

⁸⁵ ICTR Statute, *supra* note 78, art. 3(i). [Reproduced in accompanying notebook at Tab 12]

⁸⁶ Statute of the Special Court for Sierra Leone, available at <http://www.sc-sl.org/scsl-statute.html>, art. 2(i). [hereinafter SCSL Statute] [Reproduced in accompanying notebook at Tab 15]

⁸⁷ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF,183/9, art. 126 at 87 (1998), art. 7(1)(k). [hereinafter Rome Statute] [Reproduced in accompanying notebook at Tab 11]

⁸⁸ IHT Statute, *supra* note 1, art. 12(j). [Reproduced in accompanying notebook at Tab 14]

⁸⁹ *Kayishema, supra* note 74, at para. 586. [Reproduced in accompanying notebook at Tab 21]

subsequent offering of evidence at the end of the trial violated the fundamental rights of the accused. A case can certainly be made that the removal of food constituted the inhumane act of starvation,⁹⁰ and that the removal of medical supplies and equipment constituted inhumane treatment. In prosecuting members of the former Iraqi regime, however, the prosecution must distinguish the other inhumane acts from other acts in the statute. Additionally, the indictments for other inhumane acts should be made at the beginning of trial, and not applied as a fallback position.

2. The Act of the Perpetrator must be Part of the Attack

The removal of food, medical supplies and medical equipment was part of the attack. A “crime against humanity” can only be satisfied by showing that the commission of the act, by its nature or consequences, was objectively part of the attack.⁹¹ The removal of food, medical supplies and medical equipment fulfills this element because the confiscation of Kuwaiti provisions led to extermination, torture and other inhumane acts such as starvation and inhumane treatment.

3. The Attack must be Directed Against any Civilian Population

The removal of food, medical supplies and medical equipment was directed against a civilian population. Courts and other authorities have interpreted the components of “directed against any civilian population” very particularly. For example, “directed against” (any civilian

⁹⁰ See Luban, *supra* note 78, at 99 (explaining that Steven R. Ratner & Jason S. Abrams’ analysis of Article 6(c) of the Nuremberg Charter interprets “other inhuman acts” as including food deprivation). [Reproduced in accompanying notebook at Tab 49]

⁹¹ *Prosecutor v. Kunarac et. al.*, Case No. IT-96-23 & Case No. IT-96-23/1-A, Judgment, para. 418 (ICTY Trial Chamber Feb. 22, 2001). [hereinafter Kunarac Trial Chamber] [Reproduced in accompanying notebook at Tab 22]

population) refers to the fact that the “civilian population is the primary object of the attack.”⁹² However, this does not require that the attack be part of the military operation.⁹³ The term “civilian,” as applied in the context of an international conflict, indicates a person who is not a member of the armed forces of any party to the conflict.⁹⁴ In addition, courts will defer towards calling an individual a civilian in cases of doubt or ambiguity.⁹⁵ The word “population” refers to a larger body of victims;⁹⁶ however, this does not have to mean an entire population of a State.⁹⁷ Finally, the attack does not have to be directed against a specific civilian population. The IHT grants wide protection over civilians by prescribing that the attack can be directed against “any” civilian population.⁹⁸ In light of these definitions, the removal of food, medical supplies and medical equipment constituted an attack “directed against any civilian population” because the attacks were directed against Kuwaiti citizens.

4. The Attack must be Widespread or Systematic

The removal of food, medical supplies and medical equipment from Kuwait to Iraq fulfills the fourth element of a crime against humanity which requires that the attack be

⁹² *Id.* at para. 421.

⁹³ See IHT Statute, *supra* note 1, art. 12. [Reproduced in accompanying notebook at Tab 14]

⁹⁴ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 4, 16 I.L.M. 1391, art. 50(1). [hereinafter Protocol I] [Reproduced in accompanying notebook at Tab 10]; See also Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT'L L. 307, 324 (2000) (defining civilians during international armed conflict, non-international armed conflict and non-armed conflict). [Reproduced in accompanying notebook at Tab 66]

⁹⁵ *Kunarac* Trial Chamber, *supra* note 91, at para. 426. [Reproduced in accompanying notebook at Tab 22]

⁹⁶ Badar, *supra* note 67, at 104. [Reproduced in accompanying notebook at Tab 62]

⁹⁷ *Tadic* Trial Chamber, *supra* note 9, at para. 644. [Reproduced in accompanying notebook at Tab 26]

⁹⁸ IHT Statute, *supra* note 1, art. 12; [Reproduced in accompanying notebook at Tab 14] See also Guenael Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 Harv. Int'l L.J. 237, 254 (2002) (stating that the term “any” has the effect of making the civilian group’s nationality, ethnicity or any other distinguishing feature legally irrelevant.) [Reproduced in accompanying notebook at Tab 50]

widespread or systematic.⁹⁹ “Widespread” refers to the number of victims and “systematic” refers to the existence of a policy or plan.¹⁰⁰ The purpose of this element is to exclude isolated or random acts.¹⁰¹ “Crimes against humanity shock the conscience of mankind and warrant intervention by the international community precisely because they are not isolated, random acts of individuals, but instead result from a deliberate attempt to target a civilian population.”¹⁰²

a) Widespread

Widespread “may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”¹⁰³ In its 1996 Draft Code of Crimes, the International Law Commission (“ILC”) required that crimes against humanity be “committed on a large scale.”¹⁰⁴ The ILC’s commentary described “large scale” as “cover[ing] various situations involving [the] multiplicity of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.”¹⁰⁵ The ILC offered the Nazi policy of terror as a prime example of crimes carried out on a vast scale.¹⁰⁶

Similarly, the attacks against the Kuwaiti citizens were widespread. Although exact numbers of victims are unknown, countless Kuwaitis died from the denial of food, medical

⁹⁹ The “widespread or systematic” requirement is stated in the alternative; therefore, the attack does not have to be both widespread and systematic.

¹⁰⁰ Chesterman, *supra* note 94, at 314-315. [Reproduced in accompanying notebook at Tab 66]

¹⁰¹ *Tadic* Trial Chamber, *supra* note 9, para. 646. [Reproduced in accompanying notebook at Tab 26]

¹⁰² Chesterman, *supra* note 94, at 316-317. [Reproduced in accompanying notebook at Tab 66]

¹⁰³ *Akayesu*, *supra* note 75, at para. 580. [Reproduced in accompanying notebook at Tab 16]

¹⁰⁴ Draft Code of Crimes Against the Peace and Security of Mankind: Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May-26 July 1996, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10/ (1996) at 48. [hereinafter Draft Code] [Reproduced in accompanying notebook at Tab 4]

¹⁰⁵ *Id.* at 48.

¹⁰⁶ *Id.*

supplies and medical equipment. The numbers are large enough to constitute a widespread attack. (See Table 1 *infra* page 49)

b) Systematic

Systematic “may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.”¹⁰⁷ A “systematic” attack requires a high degree of orchestration and methodological planning.¹⁰⁸ According to the Nuremberg Tribunal, the inhumane acts committed by the Nazis were part of a systematic policy of terror.¹⁰⁹ Likewise, the removal of food, medical supplies and medical equipment was systematic. Iraqi documents left behind in Kuwait demonstrate that Iraqi commanders ordered, requested or were instructed to partake in attacks against Kuwait and its citizens.¹¹⁰ This evidence establishes the “systematic” nature of the attacks.

5. The Perpetrator must Possess the *Mens Rea* of Knowledge and Intent

Iraqi perpetrators committed crimes against humanity with knowledge of the attendant circumstances and intent to commit the specific act. The IHT requires that the perpetrator know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern. Additionally, the perpetrator must have the requisite *mens rea* for the underlying offense. Specifically, extermination,

¹⁰⁷ *Akayesu*, *supra* note 75, at para 580. [Reproduced in accompanying notebook at Tab 16]

¹⁰⁸ Darryl Robinson, *Developments in International Criminal Law: Defining “Crimes against Humanity” at the Rome Conference*, 93 A.J.I.L. 43, 47 (1999). [Reproduced in accompanying notebook at Tab 48]

¹⁰⁹ Draft Code, *supra* 104, at 48. [Reproduced in accompanying notebook at Tab 4]

¹¹⁰ *See* Torturing a Nation, *supra* note 28. [Reproduced in accompanying notebook at Tab 29]

persecution and other inhumane acts require intent.¹¹¹ The existence of knowledge and intent can be inferred from the relevant facts and circumstances.¹¹²

a) Knowledge

Knowledge means an awareness that a circumstance exists or a consequence will occur in the ordinary course of events.¹¹³ It is likely that Iraqi perpetrators had knowledge of the attacks. (i.e. the perpetrators knew that the removal of food, medical supplies and medical equipment was a widespread or systematic attack directed against a civilian population). This requirement is consistent with the ICTY's interpretation of the *mens rea* requirement that "the perpetrator must know of the broader context in which his act occurs."¹¹⁴ Nonetheless, the IHT Statute does not require the perpetrator to have knowledge of all the circumstances of the attack or the precise details of the plan or policy under which it was executed.¹¹⁵

Evidence reveals that Iraqi forces not only knew about the removal of food, medical supplies and medical equipment but intended to engage in this particular conduct. Documents recovered after the Gulf War indicate that the removal of food, medical supplies and medical equipment was executed as part of an Iraqi policy.¹¹⁶ This type planning and execution could not have been accomplished without knowledge of the underlying circumstances.

b) Intent

Intent means the person either planned to engage in particular conduct to cause a specific consequence, or was aware that a particular consequence would occur in the ordinary course of

¹¹¹ IHT Statute, *supra* note 1, art. 12. [Reproduced in accompanying notebook at Tab 14]

¹¹² Elements of Crimes, *supra* note 10, § 1(3). [Reproduced in accompanying notebook at Tab 72]

¹¹³ *Id.* § 1(2).

¹¹⁴ *Tadic* Trial Chamber, *supra* note 9, at para. 656. [Reproduced in accompanying notebook at Tab 26]

¹¹⁵ Elements of Crimes, *supra* note 10, § 3. [Reproduced in accompanying notebook at Tab 72]

¹¹⁶ *See* Torturing a Nation, *supra* note 28. [Reproduced in accompanying notebook at Tab 29]

events. Intent can take three forms: *dolus directus*, *dolus indirectus*, and *dolus eventualis*.¹¹⁷ *Dolus directus* means intent in which the illegality and/or harmful consequences of the act are foreseen and desired by the perpetrator.¹¹⁸ *Dolus indirectus* is intent in which certain secondary consequences in addition to those desired by the perpetrator of the act were foreseen by the perpetrator as a certainty, and although the perpetrator did not desire those secondary consequences he or she nevertheless committed the act and those consequences set in.¹¹⁹ Finally, *dolus eventualis* means intent in which the perpetrator foresees consequences other than those desired as a possibility (including a likelihood of the consequences setting in) and nevertheless went ahead with the act.¹²⁰

There is disagreement over whether all three forms of intent should be applicable *mens rea*. According to the Regimes Crimes Liaison Office's *Elements of Crimes*, which guides the IHT, intent requires the perpetrator to be aware that a consequence will occur.¹²¹ Construing intent in this manner only validates *dolus directus* and *dolus indirectus*. This interpretation is consistent with that of the ICC, which requires more than mere knowledge of the possibility or likelihood that an atrocity may happen.¹²² In contrast, Professor Antonio Cassese, a leading authority in international law, interprets intent as including *dolus eventualis*.¹²³

¹¹⁷ Johan D. Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 U. MIAMI INT'L & COMP. L. REV. 57, 62 (2004). [hereinafter Van der Vyver] [Reproduced in accompanying notebook at Tab 53]

¹¹⁸ *Id.* at 63.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Elements of Crimes*, *supra* note 10, § 1(2). [Reproduced in accompanying notebook at Tab 72]

¹²² Rome Statute, *supra* note 87, art. 30(2)(b) (stating that a person has intent where the "person means to cause that consequence or is aware that it *will* occur in the ordinary course of event). [Reproduced in accompanying notebook at Tab 11]

¹²³ Van der Vyver, *supra* note 117, at 106. [Reproduced in accompanying notebook at Tab 53]

If the IHT refuses to recognize *dolus eventualis*, Iraqi perpetrators can still be convicted under the theories of *dolus directus* or *dolus indirectus*. It will be very difficult to prove *dolus directus*, however, because the removal of food, medical supplies and medical equipment aimed to garner provisions for Iraq, not to bring about extermination, torture and other inhumane acts. Nevertheless, members of the former Iraqi Regime possessed *dolus indirectus*; they could foresee with certainty that the removal of food, medical supplies and medical equipment would result in extermination, torture and other humane acts.

B. Article 13 – War Crimes for the Removal of Food, Medical Supplies and Medical Equipment, the Destruction of Kuwaiti Assets and Infrastructures, and the Destruction to the Environment

Members of the former Iraqi regime can be prosecuted for war crimes for (1) removing food, medical supplies and medical equipment from Kuwait to Iraq; (2) destroying Kuwaiti assets and infrastructures, such as oil wells, oil refineries, electric power generation facilities, water purification facilities, and hospitals; and (3) committing environmental atrocities by igniting Kuwaiti oil wells, destroying oil refineries and spilling oil into the Persian Gulf. Article 13 of the IHT Statute grants the Tribunal jurisdiction to hear cases involving “war crimes.”¹²⁴ “War crimes” mean (1) grave breaches of the Geneva Convention of 12 August 1949;¹²⁵ (2) other serious violations of the laws and customs applicable in international armed conflicts, within the established framework of international law; (3) attacks on persons not taking an active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause; and (4) other serious violations of the laws and customs of war applicable in armed conflict not of an international

¹²⁴ IHT Statute, *supra* note 1, art. 13. [Reproduced in accompanying notebook at Tab 14]

¹²⁵ *Id.* at art. 13(a); *See also* Geneva Conventions, *supra* note 7; [Reproduced in accompanying notebook at Tab 6-9] *See also* Audrey I. Benison, *War Crimes: A Human Rights Approach to a Humanitarian Law Problem at the International Criminal Court*, 88 GEO. L.J. 141, 161 (1999) (explaining that gravity refers to the fact that it is excessive given the circumstance). [Reproduced in accompanying notebook at Tab 45]

character, within the established framework of international law.¹²⁶ For the purposes of this memorandum, only the first three types of war crimes apply to the offenses committed.

To be prosecuted for a war crime, five elements must be satisfied. There must be (1) an act (where “act” can be a number of deplorable offenses set forth in Article 13); (2) the act must be committed by the perpetrator against a protected person or object; (3) the act must take place in the context of and be associated with an armed conflict; (4) a nexus must exist between the act and the armed conflict;¹²⁷ and (5) the perpetrator must know of the factual circumstances that established the protected status of the victim, must know of the factual circumstances that established the existence of the armed conflict, and must possess the requisite *mens rea* for the underlying offense.¹²⁸

1. There must be an Act

a) Removal of Food, Medical Supplies and Medical Equipment

The first element of a “war crime” is the act. The removal of food, medical supplies and medical equipment from Kuwait to Iraq constituted grave breaches of the Geneva Convention, particularly the acts of (1) willful killing; (2) inhumane treatment;¹²⁹ (3) willfully causing great suffering, or serious injury to body or health; and (4) appropriation of property.¹³⁰ The removal of food, medical supplies and medical equipment also constituted serious violations of the laws and customs applicable in international armed conflict, particularly the acts of seizing an adverse

¹²⁶ IHT Statute, *supra* note 1, art. 13. [Reproduced in accompanying notebook at Tab 14]

¹²⁷ *Tadic* Trial Chamber, *supra* note 9, at para. 573. [Reproduced in accompanying notebook at Tab 26]

¹²⁸ See IHT Statute, *supra* note 1, art. 13 (setting forth the various attacks which constitute “war crimes”) [Reproduced in accompanying notebook at Tab 14]; See Elements of Crimes, *supra* note 10, at art. 12(a)(2). [Reproduced in accompanying notebook at Tab 72]

¹²⁹ Geneva Convention IV, *supra* note 7, art. 3. [Reproduced in accompanying notebook at Tab 9]; See also IHT Statute, *supra* note 1 art. 13. [Reproduced in accompanying notebook at Tab 14]

¹³⁰ Geneva Convention IV, *supra* note 7, art. 147. [Reproduced in accompanying notebook at Tab 9]; See also Elements of Crimes, *supra* note 10, art. 13(a)(4) (requiring that the perpetrator willfully destroy *or* appropriate certain property). [Reproduced in accompanying notebook at Tab 72]

party's property,¹³¹ and pillaging.¹³² Finally, the removal of food, medical supplies and medical equipment amounted to acts of murder, cruel treatment and torture committed against persons not taking an active part in the hostilities.

Seizing an adverse party's property and pillaging are the most appropriate war crimes charges for the removal of food, medical supplies and medical equipment. These accusations are most fitting because Iraq's chief objective was to plunder Kuwaiti provisions. The elements of seizing an adverse party's property include the following: (1) the perpetrator willfully seized certain property; (2) such property was property of an adverse party; (3) such property was protected from seizure under the international law of armed conflict; and (4) the seizure was not justified by military necessity.¹³³ Similarly, elements of pillaging include the following: (1) the perpetrator appropriated or seized certain property; (2) the perpetrator intended to appropriate or seize the property for private or personal use; and (3) the appropriation or seizure was without the consent of the owner of the property.¹³⁴ According to the Trial Chamber in *Blaskic*, appropriation of public or private property "extends to both isolated acts of plunder for private interest and to the 'organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory.'"¹³⁵

The removal of food, medical supplies and medical equipment from Kuwait amounted to seizure of an adverse party's property and pillaging. Iraqi perpetrators willfully robbed these

¹³¹ IHT Statute, *supra* note 1, art. 13. [Reproduced in accompanying notebook at Tab 14]

¹³² *Id.* at art. 13.

¹³³ Elements of Crimes, *supra* note 10, art 13(b)(14). [Reproduced in accompanying notebook at Tab 72]

¹³⁴ *Id.* at art. 13(b)(17).

¹³⁵ *Prosecutor v. Blaskic*, Case No. IT-95-14, para. 184 (ICTY Trial Chamber March 3, 2000). [Reproduced in accompanying notebook at Tab 18]; *See also Prosecutor v. Jelusic*, Case No. IT-95-10, Judgment, para. 138 (ICTY Trial Chamber Dec. 14, 1999) (where defendant Jelusic was found guilty of plunder for stealing money from persons detained at Luka Camp). [Reproduced in accompanying notebook at Tab 19]

protected materials without consent of the owner. These acts violated the Geneva Convention IV, which states that “pillage is prohibited.”¹³⁶ Moreover, the theft was not justified by military necessity.

The removal of food, medical supplies and medical equipment also constituted the acts of willful killing, inhumane treatment, willfully causing great suffering or serious injury to body or health, murder, cruel treatment and torture. All of these crimes require the *mens rea* of intent. Intent will be difficult to prove with respect to these types of war crimes because the pillaging was executed primarily to acquire provisions for Iraq. Prosecutors must show that members of the former Iraqi regime possessed *dolus indirectus* or *dolus eventualis*, that is, they could foresee with certainty or as a possibility that the removal of food, medical supplies and medical equipment would result in murder, torture, cruel or inhumane treatment, and great suffering.

b) Destruction of Kuwaiti Assets and Infrastructures

The destruction of Kuwaiti assets and infrastructures constitute criminal acts under Article 13 of the IHT Statute, particularly the following: (1) extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;¹³⁷ (2) intentionally directing attacks against civilian objects, that is, objects which are not military objectives;¹³⁸ (3) intentionally launching an attack in the knowledge that such attack will cause damage to civilian objects which would be clearly excessive in relation to the concrete and direct overall military advantages anticipated;¹³⁹ (4) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military

¹³⁶ See Geneva Convention IV, *supra* note 7, art. 33. [Reproduced in accompanying notebook at Tab 9]

¹³⁷ Geneva Convention IV, *supra* note 7, art. 147. [Reproduced in accompanying notebook at Tab 9]; See also IHT Statute, *supra* note 1, art. 13A(d). [Reproduced in accompanying notebook at Tab 14]

¹³⁸ *Id.* at art. 13.

¹³⁹ *Id.*

objectives;¹⁴⁰ (5) intentionally directing attacks against buildings that are dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;¹⁴¹ and (6) destroying or seizing the property of an adverse party unless such destruction or seizure is imperatively demanded by the necessities of war.¹⁴²

The crime of “extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly”¹⁴³ is firmly established in international law.¹⁴⁴ Although this offense does not require the complete destruction of property, the destruction must be extensive.¹⁴⁵ Thus, isolated acts do not rise to the level of “extensive.”¹⁴⁶ The destruction of the objects in Kuwait was clearly excessive in relation to the

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Although the destruction of Kuwaiti assets and infrastructure constitutes any of the six crimes mentioned above, the crime of “extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly,” resembles the other crimes. Thus, for purposes of this memorandum, it will be representative of the comparable crimes of destruction.

¹⁴⁴ See Geneva Convention IV, *supra* note 7, art. 53, 146 (forbidding the destruction of hospitals). [Reproduced in accompanying notebook at Tab 9]; IMT Charter, *supra* note 78, art. 6(b) [Reproduced in accompanying notebook at Tab 1]; ICTY Statute, *supra* note 84, art. 3 [Reproduced in accompanying notebook at Tab 13]; Rome Statute, *supra* note 87, art. (8)(2)(a)(iv) [Reproduced in accompanying notebook at Tab 11]; Protocol I, *supra* note 94, art. 52 (prohibiting indiscriminate acts such as an “attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”). [Reproduced in accompanying notebook at Tab 10]; SCSL, *supra* note 86, art. 5(b) [Reproduced in accompanying notebook at Tab 15]; *See also Prosecutor v. Karadzic and Mladic*, Confirmation of Indictment Pursuant to Rule 61, Case Nos. ICTY-95-5-R61 and ICTY-95-18-R61 (ICTY Trial Chamber, July 16, 1996) (indicted for wanton destruction of private and public property). [Reproduced in accompanying notebook at Tab 20]

¹⁴⁵ Walter Gary Sharp, Sr., *The International Criminal Tribunal for the Former Yugoslavia: Defining the Offenses*, 23 MD. J. INT’L L. & TRADE 15, 44-45 (1999). [hereinafter *Defining the Offenses*] [Reproduced in accompanying notebook at Tab 69]

¹⁴⁶ Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 MICH. J. INT’L L. 783, 811 (1995) (stating that “the commentary of the Fourth Geneva Convention indicates that a bombing of a single civilian hospital would constitute a grave breach if done intentionally.”) [Reproduced in accompanying notebook at Tab 63]

concrete and direct overall military advantages anticipated.¹⁴⁷ The number of non-military objects that were destroyed and burned speaks to the wanton and unlawful nature of the attacks. In all, 123 schools, 9 hospitals, 662 houses, 1051 public and private institutions, 31 industries, 7 health facilities, 11 hotels, 11 power stations, 106 stores, and 782 oil wells were destroyed or burned.¹⁴⁸ (See Table 2 *infra* page 50-52)

The crime of extensive destruction is not justified by military necessity. Military necessity requires that there must be a reasonable connection between the destruction of property and the triumph over the enemy.¹⁴⁹ Protocol I states that “attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military actions and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”¹⁵⁰ Accordingly, if the destruction is not justified by military necessity, it is committed unlawfully. The wanton destruction of schools, hospitals, public and private institutions, industries, health care facilities, hotels, power stations, stores and oil wells did not purport to achieve a military objective. In most cases it was used to inflict punishment and harm on the Kuwaitis.

¹⁴⁷ See *Prosecutor v. Babic*, Case No. IT-03-72-S, Judgment, (ICTY Trial Chamber June 29, 2004) (where defendant Babic was found guilty of wanton destruction of villages not justified by military necessity and destruction or willful damage to institutions dedicated to education or religion, in violation of the laws or customs of war). [Reproduced in accompanying notebook at Tab 17]

¹⁴⁸ Atlas of Iraqi War Crimes, *supra* note 42, at 23, 26. [Reproduced in accompanying notebook at Tab 28]

¹⁴⁹ Defining the Offenses, *supra* note 145, at 45. [Reproduced in accompanying notebook at Tab 69]

¹⁵⁰ Protocol I, *supra* note 94, art. 52. [Reproduced in accompanying notebook at Tab 10]

c) Crimes Against the Environment

Iraqi perpetrators can be prosecuted under Article 13 for crimes against the environment for igniting oil wells and spilling oil into the Persian Gulf. The IHT statute makes it a crime to intentionally launch “an attack in the knowledge that such 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.”¹⁵¹

Environmental devastation during warfare is nothing new. During World War II, Nazis engaged in “scorched-earth-practices.”¹⁵² Similarly, American troops liberally applied Agent Orange to defoliate the jungles of Vietnam during the Vietnam War. Despite the prevalence of environmental crimes during warfare, the international community inconsistently recognizes these offenses and rarely prosecutes offenders. For example, the ICTY and the ICTR have no jurisdiction for crimes against the environment. In contrast, the Rome Statute extends liability for “severe damage to the natural environment.”¹⁵³ Similar divergences exist with regard to international conventions. For instance, countries such as the United States and Iraq do not recognize Protocol I,¹⁵⁴ which states that “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

¹⁵¹ IHT Statute, *supra* note 1, art. 13(b)(5). [Reproduced in accompanying notebook at Tab 14]

¹⁵² Carl E. Bruch, *The Environmental Law of War: All's Not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict*, 25 VT. L. REV. 695, 716 (2001). [Reproduced in accompanying notebook at Tab 47]

¹⁵³ Rome Statute, *supra* note 87, art 8(2)(b)(iv). [Reproduced in accompanying notebook at Tab 11]; *See* Peter Sharp, *Prospects for Environmental Liability in the International Criminal Court*, 18 VA. ENVTL. L.J. 217, 241 (1999) (explaining that the final language of the Rome Statute protecting the environment was the least protective of the three alternate versions which were proposed in the Draft Statute). [Reproduced in accompanying notebook at Tab 64]; *See also* Michael N. Schmitt, *Humanitarian Law and the Environment*, 28 DENV. J. INT'L L. & POL'Y 265, 271 (2000) (stating that the International Court of Justice's advisory opinion emphasized that during military operations ‘States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives’). [Reproduced in accompanying notebook at Tab 60]

¹⁵⁴ CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME II: PRACTICE PART 2 (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., International Committee of the Red Cross, Cambridge University Press) (2005) at 4166, 4169. [Reproduced in accompanying notebook at Tab 30]

the natural environment.”¹⁵⁵ However, these countries have signed the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques,¹⁵⁶ which states 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.”¹⁵⁷

Unlike the ICTY and the ICTR, the IHT has jurisdiction for crimes against the environment. In order to be convicted for this crime, six elements must be satisfied:¹⁵⁸ (1) the perpetrator must launch an attack; (2) the attack must be such that it causes incidental damage to the natural environment and the damage must be to such an extent that it is clearly excessive in relation to the concrete and direct overall military advantage anticipated; (3) the damage to the natural environment must be widespread, long-term and severe; (4) the perpetrator must know that the attack is likely to cause incidental widespread, long-term and severe damage to the natural environment and that such damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated; (5) the conduct must take place in the context of and be associated with an international armed conflict; and (6) the perpetrator must be aware of the factual circumstances that established the existence of an armed conflict. Holding Iraqi perpetrators accountable under the IHT Statute is consistent with UN

¹⁵⁵ Protocol I, *supra* note 94, at art. 35; See also *id.* art. 55 (stating that “care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage”). [Reproduced in accompanying notebook at Tab 10]

¹⁵⁶ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333, T.I.A.S. No. 9614, (entered into force Oct. 5, 1978). [hereinafter ENMOD] [Reproduced in accompanying notebook at Tab 3]; See The Sunshine Project, *Enmod Parties and Signatories*, at <http://www.sunshine-project.org/enmod/parties.html> (listing the signatories). [Reproduced in accompanying notebook at Tab 75] See also Aaron Schwabach, *Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Conflicts* 15 COLO. J INT’L ENVTL. L. & POL’Y 1, 12 (2004) (stating that Iraq is a party to fifty treaties with environmental provisions). [Reproduced in accompanying notebook at Tab 43]

¹⁵⁷ ENMOD, *supra* note 156, at art. 1. [Reproduced in accompanying notebook at Tab 3]

¹⁵⁸ Elements of Crimes, *supra* note 10, art. 13(b)(5). [Reproduced in accompanying notebook at Tab 72]

Resolution 687, which declared that Iraq would be liable for “any direct loss, damage, including environmental damage, and the depletion of natural resources” inflicted on Kuwait during the Iraqi invasion.¹⁵⁹

The first of the six elements, that the perpetrator launches an attack, is satisfied. In an unjustified attempt to deter coalition forces from attacking Iraqi forces by land, air and water, Saddam ordered his forces to bomb the Kuwaiti oil fields near the Saudi Arabian border, two major mainland refineries, an offshore loading terminal, and anchored tankers.¹⁶⁰ (See Table 3 *infra* page 52) Additionally, Iraqi forces pumped several million barrels of oil into the Persian Gulf from supplies lines connecting offshore terminals to oil refineries.¹⁶¹ Finally, as Iraqi forces retreated from Kuwait to Iraq, they ignited hundreds of Kuwaiti oil wells and blasted the wells’ safety valves necessary to turn off the oil flow.¹⁶²

The resulting damage to the environment was excessive in relation to the concrete and direct overall military advantage anticipated. Although the destruction of the environment is often an inevitable result of armed conflict, a party’s actions should adhere to the four main principles of war - humanity, necessity, discrimination and proportionality - in order to mitigate environmental damage.¹⁶³ These four doctrines respectively require that the action must attempt to avoid unnecessary suffering, the action must be required to achieve a military objective, the weaponry utilized should discriminate between lawful and unlawful targets, and the means used

¹⁵⁹ S.C. Res. 687, U.N. SCOR, 2981st mtg., U.N. Doc. S/RES/687 (Apr. 3 1990); [Reproduced in accompanying notebook at Tab 35] See also John Alan Cohan, *Modes of Warfare and Evolving Standards of Environmental Protection under the International Law of War*, 15 FLA. J. INT’L L. 481, 488-89, (2003) (stating that Resolution 687 has created legal precedent in connection with future wars). [Reproduced in accompanying notebook at Tab 54]

¹⁶⁰ Seacor, *supra* note 21, at 486. [Reproduced in accompanying notebook at Tab 52]

¹⁶¹ *Id.*

¹⁶² *Id.* at 489.

¹⁶³ Andy Rich, *The Environment: Adequacy of Protection in Times of War*, 12 PENN ST. ENVTL. L. REV. 445, 448 (2004). [Reproduced in accompanying notebook at Tab 44]

to pursue a military goal must be proportional to the magnitude of the objective.¹⁶⁴ The Iraqi bombing of the oil wells and the release of oil violated these principles. Although defense counsel might argue that the ignition of the oil wells and the spilling of oil provided a smoke-screen to facilitate the Iraqi retreat, the attacks were not proportional to the military objective. Ultimately, the attacks on the environment can be characterized as acts of desperation, spite and vengeance.

The damage to the environment must also be widespread, long-term and severe. It is to be noted that this requirement is conjunctive, requiring the damage to be “widespread” and “long-term” and “severe.”¹⁶⁵ The statute is silent on the definition of these terms. According to the Geneva Conference of the Committee of Disarmament Understanding, “widespread” means encompassing an area on the scale of several hundred square kilometers; “long-lasting” means lasting for a period of months, or approximately a season; and “severe” means involving serious or significant disruption or harm to human life, natural and economic resources.¹⁶⁶ The definitions of “widespread,” “long-term,” and “severe” have been interpreted differently by other authorities. For example, the International Committee of the Red Cross interprets “long-term” as meaning lasting for decades rather than months.¹⁶⁷ The German Military Manual interprets “widespread, long-term, and severe” damage as a major interference with human life or natural

¹⁶⁴ *Id.* at 448-49; *See also* Laurent R. Hourcle, *The Environmental Law of War: Environmental Law of War*, 25 VT. L. REV. 653, 662-70 (2001) (describing the four doctrines of war, humanity, necessity, discrimination and proportionality, in more detail). [Reproduced in accompanying notebook at Tab 55]

¹⁶⁵ Elements of Crimes, *supra* note 10, art. 13(b)(5)(c). [Reproduced in accompanying notebook at Tab 72]

¹⁶⁶ Mark A. Drumbl, *Waging War Against the World: The Need to Move From War Crimes to Environmental Crimes*, 22 FORDHAM INT’L L.J. 122, 128 (1998). [hereinafter *Waging War Against the World*] [Reproduced in accompanying notebook at Tab 58]; Mark A. Drumbl, *International Law Weekend Proceedings: International Human Rights, International Humanitarian Law, and Environmental Security: Can the International Criminal Court Bridge the Gaps?* 6 ILSA J INT’L & COMP L 305, 316 (2000) (stating that the definitions set forth by the CCD Understanding are limited to the ENMOD Convention and do not explicitly guide other internal law). [hereinafter *International Law Weekend Proceedings*] [Reproduced in accompanying notebook at Tab 57]

¹⁶⁷ *Id.* at 317; *See also* Tara Weinstein, *Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities*, 17 GEO. INT’L ENVTL. L. REV. 697, 708 (2005) (stating that “the ICTY Committee measured ‘long-term’ ‘in years rather than months’”). [Reproduced in accompanying notebook at Tab 67]

resources.¹⁶⁸ How these terms - widespread, long-term, and severe - are interpreted is very important because if the threshold is too demanding, then the statute will lose all practical application and consequent viability.¹⁶⁹

It is often difficult to establish a relationship between a given activity and its supposed harmful effects on the environment. Factors such as the distance between the origin of the pollution and the damage, time, the possibility of cumulative environmental degradation, the potential for the combination of pollutants, and the fact that pollution caused by human activity can be amplified by natural phenomena, often contribute to the difficulty of connecting the act to the damage.¹⁷⁰ Nevertheless, it is apparent that the acts committed against the environment caused widespread and severe damage. The oil fires and oil spills effected ecosystems across the globe.¹⁷¹ Additionally, there was significant disruption and harm to human life, flora and fauna, as well as natural and economic resources. It will be more difficult to prove that the oil fires and oil spills were “long-term,” especially if “long-term” is interpreted as lasting for decades. Given nature’s ability to heal itself, long-term damage will be difficult to measure in terms of longevity.¹⁷² Additionally, analyzing long-term effects would require the prosecution to delay trial. Finally, scientific methods for evaluating environmental damage, including reliability or error rate, might be attacked as faulty.

¹⁶⁸ International Law Weekend Proceedings, *supra* note 161, at 317. [Reproduced in accompanying notebook at Tab 57]

¹⁶⁹ Marcos A. Orellana, *Criminal Punishment for Environmental Damage: Individual and State Responsibility at a Crossroad*, 17 GEO. INT’L ENVTL. L. REV. 673, 694 (2005) (analyzing the Rome Statute’s environmental provision in light of the ENMOD definitions of “widespread,” “long-term” and “severe harm.”) [Reproduced in accompanying notebook at Tab 56]

¹⁷⁰ Robert McLaughlin, *Improving Compliance: Making Non-State International Actors Responsible for Environmental Crimes*, 11 COLO. J. ENVTL. L. & POL’Y 377, 396-97 (2000). [Reproduced in accompanying notebook at Tab 65]

¹⁷¹ Hirschmann, *supra* note 51 at 53. [Reproduced in accompanying notebook at Tab 38]

¹⁷² Weinstein, *supra* note 167, at 708. [Reproduced in accompanying notebook at Tab 67]

The *mens rea* of an attack against the environment requires both intent and knowledge. Article 13 requires that the perpetrator “intentionally” launch the attack with “knowledge.”¹⁷³ It is clear that Iraqi forces intentionally launched the attack against the environment, but it will be difficult to prove that Saddam and his followers knew that the attack would cause widespread, long-term and severe damage to the natural environment and that such damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated. In his analysis of Article 8(2)(b)(iv) of the Rome Statute, which is nearly identical to IHT Article 13(b)(5), Mark A. Drumbl concludes that “proof that someone did not know that the act would commit ‘widespread, long-term and severe’ damage would, under the present wording, be sufficient to absolve that individual from criminal sanction.”¹⁷⁴ Thus, proving the requisite *mens rea* will be a substantial hurdle to overcome.

The final two elements, that the attack took place in the context of and was associated with an international armed conflict, and that the perpetrator was aware of the factual circumstance that established the existence of an armed conflict were present.¹⁷⁵

2. The Act must be Committed Against A Protected Person or Object

The removal of food, medical supplies and medical equipment, the destruction of Kuwaiti assets and infrastructures, and the crimes against the environment were committed against protected persons and objects. Under Article 13, grave breaches of the Geneva Conventions must be committed against protected persons and objects.¹⁷⁶ Specifically, the Geneva

¹⁷³ IHT Statute, *supra* note 1, art. 13. [Reproduced in accompanying notebook at Tab 14]

¹⁷⁴ Waging War Against the World, *supra* note 166, at 130. [Reproduced in accompanying notebook at Tab 58]

¹⁷⁵ See *infra* section III(B)(3) and section III(B)(5).

¹⁷⁶ See Geneva Conventions, *supra* note 7 (Convention I protects the wounded and sick in Armed Forces in the field, Convention II protects the wounded, sick and shipwrecked members of armed forces at sea, Convention III protects prisoners of war, and Convention IV protects civilian persons in time of war). [Reproduced in accompanying notebook at Tab 6-9]

Conventions call for the protection of the wounded and sick in the armed forces in the field, the wounded, sick and shipwrecked members of the armed forces at sea, prisoners of war, and civilian persons in time of war.¹⁷⁷ Additionally, the Geneva Conventions protect hospitals, medical service buildings, ambulances, vehicles, medical equipment and materials, hospital ships, coastal rescue crafts, coastal medical installations, civilian hospitals and their equipment, medical transports, movable or immovable property (in occupied territories), and food and medical supplies of the population (in occupied territories).¹⁷⁸ Also under Article 13, the violations of the laws and customs applicable in international armed conflict must be committed against specific objects.¹⁷⁹ In particular, the statute prohibits attacks against civilian objects, towns, villages, dwellings, buildings (including buildings which are dedicated to religion, education, art, science or charitable purposes), historic monuments, hospitals, places where the sick and wounded reside, and the environment.¹⁸⁰ Finally, Article 13 forbids acts committed in armed conflict against persons not taking an active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause.¹⁸¹

¹⁷⁷ *Id.*

¹⁷⁸ See Geneva Convention I, *supra* note 7, chpt. III, V, VI. [Reproduced in accompanying notebook at Tab 6]; See Geneva Convention II, *supra* note 7, chpt. III, V [Reproduced in accompanying notebook at Tab 7]; See Geneva Convention IV, *supra* note 7, art. 18-22, 53, 55. [Reproduced in accompanying notebook at Tab 9]; See also Protocol I, *supra* note 94, art. 48 (stating that parties to an international conflict “shall at all times distinguish between the civilian population and combatants and between civilian objects and military objective and accordingly shall direct their operations only against military objectives”). [Reproduced in accompanying notebook at Tab 10]; See also *id.* art. 55 (stating that “care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage”).

¹⁷⁹ See Elements of Crimes, *supra* note 10, art. 12, 13. [Reproduced in accompanying notebook at Tab 72]

¹⁸⁰ See IHT Statute, *supra* note 1, art. 13. [Reproduced in accompanying notebook at Tab 14]

¹⁸¹ *Id.*

The removal of food, medical supplies and medical equipment was an act committed against civilian persons in time of war¹⁸² and against persons not taking an active part in the hostilities. Similarly, the destruction of Kuwaiti assets constituted acts committed against protected objects, including houses, schools, hospitals, historic monuments, power stations, roads, stores and oil-related infrastructures. Finally, the destruction of oil wells and the spilling of oil into the Persian Gulf amounted to acts against the environment, which is protected by the IHT Statute.¹⁸³

3. The Act must take Place in the Context of and be Associated with an Armed Conflict

Iraqi perpetrators committed the prohibited acts during an armed conflict. The IHT Statute stipulates that war crimes are applicable only in “armed conflict.”¹⁸⁴ Likewise, the Geneva Convention requires that “war crimes” be committed in cases of “declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”¹⁸⁵ Additionally, “other serious violations of the laws and customs applicable in international armed conflict,” must occur in an international armed conflict.¹⁸⁶ Finally, acts committed against persons not taking an active part in hostilities must be committed during armed conflict.¹⁸⁷

¹⁸² Geneva Convention IV, *supra* note 7 (stating that “persons protected ... are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”). [Reproduced in accompanying notebook at Tab 9]

¹⁸³ IHT Statute, *supra* note 1, art. 13. [Reproduced in accompanying notebook at Tab 14]

¹⁸⁴ *Id.*

¹⁸⁵ Geneva Convention IV, *supra* note 7, art. 2. [Reproduced in accompanying notebook at Tab 9]

¹⁸⁶ IHT Statute, *supra* note 1, art. 13; [Reproduced in accompanying notebook at Tab 14] *See* Babafemi Akinrinade, *International Humanitarian Law and the Conflict in Sierra Leone*, 15 ND J. L. ETHICS & PUB POL’Y 391, 410 (2001) (stating that “for a conflict to be termed ‘international armed conflict,’ it essentially has to be between two sovereign States”). [Reproduced in accompanying notebook at Tab 46]

¹⁸⁷ IHT Statute, *supra* note 1, art. 13. [Reproduced in accompanying notebook at Tab 14]

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.¹⁸⁸ In *Musema*, the ICTR defined “armed conflict” as the “existence of open hostilities between armed forces which are organized to a greater or lesser degree.”¹⁸⁹ To determine the existence of an armed conflict, the court in *Tadic* applied a two-factor test hinging on (1) the intensity of the conflict and (2) the organization of the parties to the conflict.¹⁹⁰ “These criteria are used ‘solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.’”¹⁹¹ It is quite evident from historical accounts that the Iraqi invasion of Kuwait was sufficiently intense, and on the part of the Iraqis, sufficiently organized. For example, the first wave of Iraqi invaders included over one-hundred and twenty thousand soldiers who came in combat aircrafts, battle tanks, armored personnel carriers, infantry fighting vehicles, and armed helicopters.¹⁹² Iraqi commanders instructed these Iraqi troops to take control of the specific Kuwaiti oil fields, cities, and ports.¹⁹³ Additionally, the Gulf War between Iraq and coalition forces was sufficiently intense and organized to

¹⁸⁸ *Blaskic*, *supra* note 135, para. 63. [Reproduced in accompanying notebook at Tab 18]

¹⁸⁹ *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment and Sentence, para. 248 (ICTR Trial Chamber Jan. 27, 2000). [Reproduced in accompanying notebook at Tab 25]

¹⁹⁰ *Tadic* Trial Chamber, *supra* note 9, para. 562. [Reproduced in accompanying notebook at Tab 26]

¹⁹¹ *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgment, para. 84 (ICTY Trial Chamber II, Nov. 30, 2005). [Reproduced in accompanying notebook at Tab 24]

¹⁹² ELAINE SCIOLINO, *THE OUTLAW STATE SADDAM HUSSEIN’S QUEST FOR POWER AND THE GULF CRISIS* (John Wiley & Sons, Inc.) (1991) at 205-06. [Reproduced in accompanying notebook at Tab 31]

¹⁹³ *Id.* at 206.

constitute an armed conflict. Specifically, coalition forces led an intense air campaign for five weeks before commencing an air and land assault to force Saddam out of Kuwait.¹⁹⁴

The absence of open hostilities lasting from August 8, 1990, the date on which Iraq annexed Kuwait, to January 16, 1991, the commencement of the Gulf War, raises the question of whether there was an armed conflict during this time. According to the Department of Defense Military Commission, the phrase

in the context of and was associated with armed conflict...does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus [between the conduct and the armed hostilities] so long as its magnitude or severity rises to the level of an 'armed attack' or an 'act of war' or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force.¹⁹⁵

This novel definition reduces the "armed conflict threshold to require merely a single severe terrorist act."¹⁹⁶

This interpretation of armed conflict advocates two important principles. First, a unilateral attack can be considered armed conflict if it is sufficiently intense. Therefore, the unilateral attacks on Kuwaitis during the Iraqi occupation, which were sufficiently intense, can be considered armed conflict. Second, armed conflict does not require ongoing mutual hostilities. Thus, the gap between the hostilities involving Iraqi and Kuwaiti forces and Iraqi and coalition forces did not terminate the armed conflict. Consistent with this interpretation, the

¹⁹⁴ JOHN NORTON MOORE, *CRISIS IN THE GULF: ENFORCING THE RULE OF LAW* (Oceana Publications, Inc.) (1992) at 253. [Reproduced in accompanying notebook at Tab 37]

¹⁹⁵ Department of Defense Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission, §5(C) (April 30, 2003), available at <http://www.defenselink.mil/news/Feb2003/d20030228dmci.pdf>. (In charging al Qaeda members with war crimes, the United States applied this definition by holding that ongoing mutual hostilities were not required to qualify the attacks of September 11th as an armed conflict). [Reproduced in accompanying notebook at Tab 70]

¹⁹⁶ Michael P. Scharf, "*Terrorism on Trial*": *Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects*, 37 CASE W. RES. J. INT'L. 359, 367 (2005). [Reproduced in accompanying notebook at Tab 61]

ICTY Appeals Chamber in *Tadic* asserted that “international humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”¹⁹⁷

Proving the existence of an armed conflict also requires quashing the validity of the Iraqi annexation of Kuwait. After World War II, the Germans attempted to advance the doctrine of subjugation, which states that once a country becomes annexed, it is no longer protected by the laws of war. The IMT rejected this theory, holding that there can be no annexation of an occupied territory so long as there is an opposing army in the field of battle.¹⁹⁸ As established already, the absence of armed forces in the field is not indicative of the cessation of the armed conflict. Moreover, the Iraqi annexation was facially unlawful. Article 5(3) of the Definition of Aggression states that “no territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.”¹⁹⁹ Additionally, Security Council Resolution 662 held the annexation of Kuwait void.²⁰⁰ Finally, Article 47 of the Geneva Convention IV provides that

¹⁹⁷ *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (ICTY Appeal Decision Oct. 2, 1995). [Hereinafter *Tadic* Appeals Chamber] [Reproduced in accompanying notebook at Tab 27]; *See also* Geneva Conventions, *supra* note 7, art. 2. (stating that the convention continues to apply even if “the said occupation meets no armed resistance”). [Reproduced in accompanying notebook at Tab 6-9]

¹⁹⁸ Howard S. Levie, *War Crimes in the Persian Gulf*, 1996 ST. LOUIS-WARSAW TRANS’L 153, 161 (1996). [Reproduced in accompanying notebook at Tab 51]

¹⁹⁹ G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142 (1974). [Reproduced in accompanying notebook at Tab 5]

²⁰⁰ S.C. Res. 662, U.N. SCOR, 2934th mtg., U.N. Doc. S/RES/662 (Aug. 9, 1990). [Reproduced in accompanying notebook at Tab 35]

protected persons who are in occupied territory shall not be deprived of the benefits of the Convention by any annexation.²⁰¹

4. There must be a Nexus between the Armed Conflict and the Act

The acts of the Iraqi perpetrators were sufficiently linked to the armed conflict. For a war crime to fall within the jurisdiction of the IHT, a sufficient nexus between the armed conflict and the act must exist. A nexus between the armed conflict and the act exists even if the armed conflict does not occur in the regions where the crimes took place.²⁰² “It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.”²⁰³

The acts of the Iraqis were sufficiently connected to the armed conflict. The removal of food, medical supplies and medical equipment and the destruction of Kuwaiti assets and infrastructures were brought about in the context of armed conflict. The Iraqi perpetrators used pillage and destruction as means to suppress, intimidate and torture the Kuwaiti nation. Likewise, the environmental destruction was closely connected to the armed conflict. At the end of the Gulf War, Iraqi forces attacked the environment to delay and impede coalition forces.

5. The Perpetrator must Possess the *Mens Rea* of Knowledge and Intent

The final element, the *mens rea*, must be satisfied for each crime. Specifically, the perpetrator must have knowledge of the factual circumstances that established the protected status of the victim and must have knowledge of the factual circumstances that established the existence of an armed conflict.²⁰⁴ The perpetrator must also have the *mens rea* for the

²⁰¹ Geneva Convention IV, *supra* note 7, art. 47. [Reproduced in accompanying notebook at Tab 9]

²⁰² *Tadic* Trial Chamber, *supra* note 9, para. 573. [Reproduced in accompanying notebook at Tab 26]

²⁰³ *Tadic* Appeals Chamber, *supra* note 197, at para. 70. [Reproduced in accompanying notebook at Tab 27]

²⁰⁴ Elements of Crimes, *supra* note 10, art. 13. [Reproduced in accompanying notebook at Tab 72]

underlying offense.²⁰⁵ These requirements are consistent with the Regime Crimes Liaison Office's interpretation of the IHT Statute, which provides that "unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge."²⁰⁶

a) Knowledge

The IHT statute does not require that the perpetrator conduct a legal evaluation as to the existence of an armed conflict or its character as international or non-international, nor does the statute require that the perpetrator be aware of the facts that establish the conflict as international or non-international. There is only a requirement that the perpetrator was aware of the factual circumstances that established the existence of an armed conflict that is implicit in the terms of "took place in the context of and was associated with."²⁰⁷ In light of these conditions, it is evident that Iraqi perpetrators knew of the armed conflicts between Iraq and Kuwait, and Iraq and coalition forces.

b) Intent

Most crimes under Article 13 require intent.²⁰⁸ Evidence indicates that Iraqi perpetrators intended to remove food, medical supplies and medical equipment from Kuwait to Iraq, intended to destroy Kuwaiti assets and infrastructures, intended to destroy Kuwaiti oil wells, oil refineries and oil tankers, and intended to spill oil into the Persian Gulf. However, like crimes against humanity, prosecutors will have to show that Iraqi perpetrators possessed *dolus indirectus* or

²⁰⁵ *Id.* at art. 13.

²⁰⁶ *Id.* at § 1(2).

²⁰⁷ *Id.* at art. 13(1)(b)(iii).

²⁰⁸ See Van der Vyver, *supra* note 117, at 110 (explaining that words such as "willful," "willfully" or "intentionally" denote the *mens rea* of intent). [Reproduced in accompanying notebook at Tab 53]

dolus eventualis for the removal of food, medical supplies and medical equipment from Kuwait to Iraq.

The prosecution will also want to pay close attention to the war crime of “destruction and appropriation of protected property.” While this offense requires intent, the statute also stipulates that the crime must be carried out “unlawfully and wantonly.”²⁰⁹ “The wanton destruction or appropriation of property adds a dimension to the element of intent, designating a reckless disregard for the rights of others.”²¹⁰ Accordingly, it can be interpreted that this crime requires *dolus directus*. Therefore, the prosecution must prove that Iraqi perpetrators foresaw and desired as their primary goal the destruction of property not justified by military necessity.

IV. CONCLUSION

Iraqi perpetrators committed crimes against humanity and war crimes in violation of Article 12 and 13 of the IHT Statute. Specifically, the removal of food, medical supplies and medical equipment from Kuwait to Iraq constituted crimes against humanity and war crimes, while the destruction of Kuwaiti assets and the crimes against the environment constituted war crimes.

The removal of food, medical supplies and medical equipment amounted to crimes against humanity. This act constituted extermination, torture and other inhuman acts. Additionally, the removal of food, medical supplies and medical equipment was objectively part of widespread and systematic attacks perpetrated against a civilian population. Finally, the perpetrators committed these acts with the requisite *mens rea*, particularly knowledge and *dolus directus*, *dolus indirectus* or *dolus eventualis*.

²⁰⁹ IHT Statute, *supra* note 1, art. 13. [Reproduced in accompanying notebook at Tab 14]

²¹⁰ Van der Vyver, *supra* note 117, at 119-120. [Reproduced in accompanying notebook at Tab 53]

The removal of food, medical supplies and medical equipment along with the destruction of Kuwaiti assets and infrastructures, and the crimes against the environment, constituted war crimes. These acts amounted to violations of the Geneva Convention, the laws and customs applicable in international armed conflict, and acts committed against person not taking an active part in hostilities. The removal of food, medical supplies and medical equipment was equivalent to willful killing; inhumane treatment; willfully causing great suffering, or serious injury to body or health; and appropriation of property. The destruction of Kuwaiti assets and infrastructures amounted to extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly; intentionally directing attacks against civilian objects, that is, objects which are not military objectives; intentionally launching an attack in the knowledge that such attack will cause damage to civilian objects which would be clearly excessive in relation to the concrete and direct overall military advantages anticipated; attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; intentionally directing attacks against buildings that are dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; and destroying or seizing the property of an adverse party unless such destruction or seizure is imperatively demanded by the necessities of war. Finally, crimes against the environment constituted intentionally launching “an attack in the knowledge that such 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.” Iraqi perpetrators committed these war crimes against protected persons and objects during an armed conflict in which there was a nexus between the act and the armed

conflict. The perpetrators also possessed the requisite *mens rea* for the underlying offenses, particularly knowledge, and *dolus directus*, *dolus indirectus* or *dolus eventualis*.

Despite the commission of these crimes, prosecutors will have trouble proving all of the elements of crimes against the environment. The prosecution will likely face difficulties trying to prove long-term damage to the environment. Additionally, it will be difficult to prove that the Iraqi perpetrators knew the environmental attacks would cause widespread, long-term and severe damage to the natural environment. In spite of these obstacles, prosecutors should still prosecute the members of the Iraqi former regime for crimes against the environment because justice requires that these crimes do not go unpunished.

Table 1: The number of deaths during the period of occupation according to age, sex and reason of death.²¹¹

Age (Years)	<12		12- Less than 50		50 –Less than 70		≥ 70		Total
	Male	Female	Male	Female	Male	Female	Male	Female	
Injuries of War	11	4	427	3	15	2	2	1	465
Heart Problems	28	28	61	30	104	105	91	55	492
Car Accidents	12	8	56	23	23	9	8	8	147
Cancer	55	39	21	18	14	7	8	8	170
Renal Failure	-	4	12	10	14	8	7	4	59
Lack of Medication	106	96	113	71	54	43	52	61	596
Unknown	28	13	22	6	12	5	9	4	99
Total	240	182	712	161	236	179	177	141	2028

²¹¹ Atlas of Iraqi War Crimes, *supra* note 42, at 17. [Reproduced in accompanying notebook at Tab 28]

Table 2: The number of houses and buildings that were destroyed and set on fire in the State of Kuwait.²¹²

Area	Burning & Destruction					Total
	Schools	Hospitals	Houses	Public Institutions	Private Institutions	
Bneid Al Gar	-	-	6	1	2	9
Khaldiya	3	-	3	1	4	11
Dasma	3	1	1	1	1	7
Daiya	-	-	5	-	2	7
Safarat	-	-	3	-	-	3
Rawda	2	-	8	4	8	22
Doha	2	-	2	3	2	9
Shamiya	-	-	3	1	1	5
Shuwaikh (Residential)	-	-	4	-	-	4
Shuwaikh (Non-Residential)	2	-	2	10	55	69
Sulaibikhat	1	-	9	3	11	24
Abdullah Al Salem	1	-	2	1	2	6
Idaliya	1	-	1	1	2	5
Granada	-	-	1	-	-	1
Faiha	-	1	6	2	-	9
Qadisiya	-	-	3	-	1	4
Kuwait City	-	-	4	18	191	213
Kaifan	-	-	-	3	6	9
Mansouriya	-	-	2	2	1	5
Nuzha	-	-	2	-	2	4
Bayan	3	-	11	7	2	23
Jabriya	-	-	8	3	5	16
Hawally	7	1	48	3	46	105
Rumaithiya	14	-	18	1	22	55
Salmiya	5	-	35	9	52	101
Salwa	-	-	8	5	1	14
Shaab	1	-	1	2	3	7
Sabah Al Salem	4	-	25	7	8	44
Qurain	-	-	1	4	3	8
Mishref	1	-	2	1	3	7
Andalus	-	-	10	-	-	10
Jileeb Al Shuyoukh	17	-	46	6	75	144
Khaitan	14	-	54	8	36	112

²¹² *Id.* at 25-26.

Rabiya	-	-	8	3	1	12
Riggae	-	1	8	2	2	13
Al Rai	-	-	-	-	29	29
Surra	2	-	-	-	2	4
Sabah Al Nasser	-	-	-	1	2	3
Sabhan	-	-	-	1	10	11
Ardiya	1	-	27	3	9	40
Omariya	1	-	7	3	3	14
Firdous	6	-	26	-	12	44
Farwaniya	2	-	30	12	49	93
Qurtuba	-	-	-	-	1	1
Yarmouk	-	-	1	-	1	2
Abu Halifa	2	-	9	-	3	14
Ahmadi	1	2	16	20	21	60
Oum Al Heman	-	-	13	-	-	13
Rigga	4	-	26	1	9	40
Sabahiya	1	-	39	2	15	57
Dahr	4	-	10	2	-	16
Fahahel	4	-	22	3	52	81
Fintas	1	-	1	-	7	9
Mangaf	2	-	13	2	10	27
Mahboula	-	-	1	-	1	2
Jahra	14	2	47	9	64	136
Sulaibiya	7	1	24	2	18	52
Total	123 6.6%	9 0.8%	662 35.8%	173 9.3%	878 47.5%	1845

Table 3: The number of oil wells that were destroyed in the State of Kuwait by the Iraqi Regime during the occupation.²¹³

Name of Field	Exploded & Burnt Wells	Exploded & Non-Burnt Wells	Destroyed Wells	Non-Destroyed Wells	Total
Magwa	98	6	21	15	140
Ahmadi	60	3	17	6	86
Burghan	291	24	28	67	410
Rawdhatain	62	2	5	3	72
Sabriya	39	4	9	8	60
Ratga	1	-	-	8	9
Bahra	3	2	-	-	5
Total	554	41	80	107	782

²¹³ *Id.* at 23.