

**University of Edinburgh  
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**International Responsibility for Environmental Damage  
As A Result of Armed Conflicts  
with Special Reference  
to Kuwait**

**Ph.D Thesis**

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- Kazem Buabbas

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Kazem Buabbas

**INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL  
DAMAGE AS A RESULT OF ARMED CONFLICTS WITH  
SPECIAL REFERENCE TO KUWAIT**

**OUTLINE**

**INTRODUCTION:**

CHAPTER ONE:           The Protection of the Environment in  
International Law during the Armed Conflicts

CHAPTER TWO:           The Security Council and the Environment

CHAPTER THREE:        The U.N. Compensation Commission and the  
Environment.

CHAPTER FOUR:         International crimes against the environment.

Conclusions and Recommendations

## **INTRODUCTION**

**J**ust as the world was watching the peaceful efforts and attempts taking place in Jeddah, Saudi Arabia between the delegations of Kuwait and Iraq under the auspices of King Fahd of Saudi Arabia to resolve and settle the so-called Iraqi claims against Kuwait concerning some oil and border disputes and the sudden withdrawal of Iraqi negotiators during the late hours of August 1, 1990, the Kuwaiti people and the whole world were astounded and shocked by the unexpected savagery invasion and occupation of Kuwait by the Iraqi forces claimed to be brethren of the Kuwaiti people!! This most heinous crime took place on August 2, 1990 which corresponded to the Eleventh of *Al-Moharam Al-Haraam*, one of the most sacred months of Islam during which all types of fightings are prohibited under Islamic Law except in true self-defense. No Kuwaiti person could ever forget this sad and unforgettable event in the history of Kuwait, the Gulf Region, and the whole world.

With the unfolding of those dreadful events of the Iraqi invasion and occupation of Kuwait with all the atrocities accompanying the invasion and occupation, we as an elected member of the National Council, the Kuwaiti Parliament, and the head of the Legislative and Legal Committee of the said Council, together with other members of the Council, tried to lead and invigorate the Kuwaiti national struggle against the occupying forces of Iraq. But soon our colleagues and I realized that we were sought by the Iraqi authorities and that all services in Kuwait including health services became at their worst level; universities, schools, and all other educational institutions stopped operating. Pollution reached its highest levels

and Kuwait became nothing but a dim State, a ghost town. Some had no choice but to leave Kuwait until the Iraqi forces were compelled to withdraw.

The world stood with us, the Kuwaiti people, and so did our western friends, Arab and Muslim countries and organizations, and the coalition forces until Kuwait was liberated. Soon after Kuwait was liberated we and others returned home to find the worst destruction and devastation that could have never been expected or imagined. Hundreds of oil-wells were set ablaze by the Iraqi forces before their compelled withdrawal, tens of thousands of oil barrels were left inundating the Gulf waters and thousands more flooding the territory of the State of Kuwait and constituting huge oil lakes. The sky of the whole of Kuwait was burning and became very dark. Acid rain and smoke were everywhere. Even mines and traps were planted all over the country. The Kuwait we knew and loved was no more; only destruction and devastation were everywhere. Pollution and contamination were the utmost concern of all peoples of the world for fear of the global effects on all mankind and life on earth.

In almost all recent armed conflicts the environment has suffered, in one way or another, considerable damage or injury, some conflicts have witnessed great environmental destruction or devastation. Even more important is the use of the environment and its various component as a weapon of war and devastation. The Vietnamese war, the second Gulf Armed Conflict, the wars and armed conflicts in former Yugoslavia have been, so far, the uttermost outrageous examples of conflicts which witnessed widespread and severe destruction of the environment and the use of the environment and its components as weapons of war. The widespread

environmental damage which took place in Vietnam did indeed have its impacts on the development and codification of many new and additional rules of armed conflicts, mainly the 1977 Protocols Additional to the Geneva Conventions and the Enmod Convention as will be seen in relevant parts of the research. Whether these and other developments in the area of international humanitarian law and the law of armed conflicts were adequate to provide effective protection to the environment and its various components in armed conflict situations were not seriously tested until the outbreak of hostilities in the second Gulf War and the widespread and severe environmental destruction and devastation caused by that war. The challenges facing international law rules in this area were so serious and great to the extent that many have expressed the view that such rules were not capable of adequately protecting the environment in armed conflict situations and that new rules were needed.

In fact, the international community faced the challenges posed by the second Gulf War and dealt with it through collective security measures under chapter seven of the UN Charter. Even environmental damage and destruction and the responsibility of Iraq in this connection were among the issues dealt with by the Security Council under chapter seven. The U.N. Compensation Commission was established to deal with claims against Iraq including claims for environmental loss, damage or injury as a result of the Iraqi illegal invasion and occupation of Kuwait. All such developments reshaped the rules of international law concerning the international responsibility for environmental damage and destruction as a result of armed conflicts.

What are those rules? Are they adequate? Do we need new rules to protect the environment in times of war or armed conflict situations? Do we need a permanent

machinery in existence to protect the environment during those dreadful times and to decide matters of international responsibility and compensation for environmental damage as a result of armed conflict? Or should *ad hoc* committees be adequate enough to deal with such matters? What about the rules of international criminal responsibility regarding environmental damage? How can such rules be employed and implemented?

All such issues are indeed involved and must be dealt with if an adequate examination of the subject-matter of international responsibility for environmental damage as a result of armed conflicts is to take place.

The reasons for selecting this topic to be my doctoral dissertation are not in fact all personal; but some of them are. When a person suffers what we in Kuwait suffered as a result of the illegal invasion and occupation of our home-country by the Iraqis and when a people suffers from the serious and atrocious destruction and devastation of our property and environment and the loss of life and health of many of our beloved brethren and sisters, this would be an enough reason for anyone to select this topic or a very closely related one to examine and study. But non-personal reasons had the greatest effects which made me decide to research this topic. Chief among those reasons are the unclarity, uncertainty, incohesiveness, inconsistency and inconclusiveness of the relevant rules and the problems of enforceability of such rules, all which appear polemical on all levels.

The objects and purposes of this research is to attempt to clarify the relevant rules of law and deal with any inconsistency which may appear and make a comprehensive showing and illustration of the body of rules and principles of law insofar as their applicability to the cases and situations of war environmental damage

and the international responsibility for such damage. In addition whether such rules and principles are adequate and whether they are enforceable or are capable of being uniformly enforced are all to be examined and commented on with the aim of providing our recommendations related thereto.

But we must emphasize that we aim to protect the environment and its components broadly defined and connected with human beings or humanity as a whole and not just the natural environment includes all what surrounds man and all what might have any impact on him, or on human life, health, welfare and human culture and thought. This is a reflection of the consensus reached at the *Stockholm* Conference on the Human Environment.

For all those reasons the writer selected to study “International Responsibility for Environment Damage as a result of Armed Conflicts: With Special Reference to Kuwait” as a doctoral dissertation. The study will be divided into several chapters as follows :

**Introduction:**

**Chapter One:** Protection of the Environment in International Law: during  
The Armed Conflicts.

**Chapter Two:** The Security Council and the Environment.

**Chapter Three:** The U.N. Compensation Commission and the Environment.

**Chapter Four:** International Crimes Against the Environment.

## **General Conclusions and Recommendations.**

I hope that this work will help clarify existing rules and shed some light on the new and necessary rules yet to be developed.

# **CHAPTER ONE**

## **The Protection of the Environment**

### **In International Law during the Armed Conflicts**



**Chapter One**  
**The Protection of the Environment**  
**In International Law**

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This introductory chapter is necessary to introduce the subject matter of this dissertation on “International Responsibility for Environmental Damage as a Result of Armed Conflicts with Special Reference to Kuwait”. Some generalities and introductory notes are due before embarking on the bulk of the research. It is important to note that in the past several decades immense efforts have taken place to emphasize the delicate balance on earth and its environment and that environmental concerns have arisen in all parts of the world. The international character of the problems of the environment, the global environmental interdependence, the obligation of all States to protect and not damage or harm the environment, and their responsibility to adopt all necessary policies, standards and measures to prevent, combat and reduce pollution are all emphasized as expressive of the general international law now binding upon all states. The general obligation to protect and not harm the environment has been so firmly established in international law that any violation of which is certain to provoke the international responsibility of the State committing the violation.

The international obligation of states to protect and not harm the environment is the essence of the international responsibility of states for environmental damage or

harm; such responsibility cannot exist without the existence of the said obligation. The generality, firmness, preciseness, and clarity of the obligation do constitute the essential foundations upon which the international environment responsibility is built.

Some authority view that the field of the environment has been witnessing the gradual rise of the strict or absolute liability and that any state which damages or harms or causes damage or harm to the environment of other states or to areas beyond its national jurisdiction is, in fact, violating its international obligation to protect and not damage the environment and must be held liable under international law for that violation. The injured state is entitled to full reparation upon the mere fact that its environment has been harmed. Thus, there is no need to prove or establish the wrongfulness of the state causing the environmental harm or damage. However, there is a widely held view, to which we adhere, that the general rule in the field of the environment is that states are liable only for breach of an obligation and that most of the obligations impose only a duty to act diligently. Yet, there is a growing opinion that strict liability is applicable to environmental harm caused by dangerous or potentially dangerous activities, whereas fault liability is applicable to environmental harm caused by non-dangerous activities. Thus, a state which suffers environmental harm has to establish the wrongfulness of the state claimed to have caused that harm in case of non-dangerous activities. All such views will be discussed in some detail in this chapter. But it should be stressed that our study will focus on the international responsibility and liability of states and not on the individual or civil liability of private persons from such states. The state is a guarantor of the conduct of its nationals and of persons under its jurisdiction or control, but the state's responsibility is direct, "not vicarious".<sup>1</sup> Our study of the topic emphasizes the developments of the

states' obligation to protect and not harm the environment and the states' environmental responsibility in customary international law and in treaty law in the first two parts of this chapter. The third part deals with the definition of environmental harm and compensable environmental damage. Issues of reparation for environmental damage are dealt with in part four.

## I

### **Customary International Law and the Obligation of States not to Harm, Damage Or Injure the Environment**



The thesis which we stress is that a general rule that states are under the obligation to protect and preserve the environment and that they bear the responsibility not to cause any serious, considerable or noticeable harm, damage or injury to the environment, particularly the environment of other states and areas beyond national jurisdiction and not to harm, damage or injure such environment has indeed developed as an established and rooted rule of customary international law. State practice, as evidenced by judicial decisions, dispute-settlement resolutions, consecutive resolutions and declarations of international organizations and international conferences, and various treaties and agreements on the subject, supports the establishment of that general rule:

**Judicial Decisions and**  
**Dispute-Settlement Resolutions:**

A number of cases which have been decided or settled by courts, international arbitration, and other dispute-settlement mechanisms do affirm our notion that rooted rules of customary international law bind all states not to cause harm, damage or injury to the environment of other states and that states are legally liable for violations of such rules.

The *Corfu Channel* is the important case in the contributing to the development of the customary international law rules on the responsibility of states not to harm, damage or injure other states' environment is the *Corfu Channel Case* which contributed to the developments of customary international law on states' international responsibility not to harm or damage other states' property and not to cause any damage or loss of human life. This case involved the finding by the International Court of Justice that Albania was liable for the consequences when British warships hit mines in the Albanian waters of the Corfu Channel and that "Albania is responsible under international law for the explosions which occurred... and for the damage and loss of human life which resulted from them and that there is a duty upon Albania to pay compensation to the United Kingdom."<sup>2</sup> The I.C.J. based its findings on the customary norm "every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states".<sup>3</sup> The mere presence of mines and the failure of Albania to warn the approaching vessels were adequate to establish Albanian liability and there was no need to prove any wrongfulness on the part of Albania.

In the *Lac Lanoux* arbitration between Spain and France the Arbitral Tribunal

declared that Spain's claim to an infringement of rights might have been upheld if Spain could have shown that the hydroelectric project proposed by France would cause pollution or other actual damage.<sup>4</sup> This case involved a claim by Spain to prevent the construction by France of a hydroelectric project comprising a barrage to divert 25 percent of the water of the Carol River and channel it through a hydroelectric power plant. The diverted water was planned to be returned to the river at a point to enable Spanish farmers to use it. The Tribunal found that France was acting within her rights and that the proposed French works did not constitute an infringement of the rights of Spain under treaties existing between Spain and France or under general international law and that Spain did not prove that the construction of the barrage would cause any damage or pollution in Spain, nor did Spain try to prove or present any argument that such pollution or damage might result from the French project.<sup>5</sup> Had Spain proven that the proposed project might have caused pollution or actual damage, Spain would have then been entitled to claim that her rights had been impaired.<sup>6</sup>

The *Nuclear Test* cases (1974 and 1995) are relevant to the development and illustration of the states' international obligation not to harm the environment and not to cause any noticeable or considerable harm, damage or injury to other states' environment or their property and other interests. France conducted a series of atmospheric nuclear tests in the South Pacific region from 1966 to 1972 and prepared for a new series of tests which were to commence in May 1973. The French policy concerning nuclear testing and the actual conduct of nuclear tests faced strong oppositions from countries in the Pacific area. These oppositions climaxed into legal proceedings before the International Court of Justice instituted by Australia and New

Zealand to stop those tests and other atmospheric nuclear tests in the pacific area.

Australia asserted that the tests would :

- (a) violate its rights to be free from atmospheric nuclear weapon tests by any country;
- (b) allow the deposit of radioactive fall-out on its territory and airspace without its consent;
- (c) allow interference with ships and aircraft on the high seas and in the superjacent airspace, and the pollution of the high seas by radioactive fall-out, thereby infringing the freedom of the high seas.<sup>7</sup>

As a result, Australia requested the International Court of Justice to declare that the carrying out of further atmospheric nuclear weapon tests was contrary to applicable rules of international law. Australia requested further that the Court order France not to carry any further such tests.<sup>8</sup>

New Zealand claimed, on the other hand, that the French atmospheric nuclear weapon tests violated the rights of all members of the international community to be free from nuclear tests and any radioactive fallout resulting therefrom and violated the right to be protected from “unjustified artificial radioactive contamination of the terrestrial, maritime and aerial environment”.<sup>9</sup> New Zealand, therefore, bases its claims on an obligation *erga omnes* owed to the members of the international community as a whole as well as on New Zealand’s right to be free from any radioactive fallout resulting from atmospheric nuclear testing and the right to be

protected from unjustified artificial radioactive contamination of the terrestrial, maritime and aerial environment resulting from such tests.

Both Australia and New Zealand requested the Court to impose interim measures of protection requiring that France avoid nuclear tests causing the deposit of radioactive fallout on their territory, pending the I.C.J.'s judgement.<sup>10</sup>

France did not appear in the case but in June 1973 the Court did issue its decision indicating interim measures of protection asking France not to take any action which might aggravate the dispute or prejudice the rights of Australia and New Zealand in carrying out whatever decision the Court might render.<sup>11</sup> Nevertheless, the Court did not address the merits of the case as a result of a unilateral declaration by the French Prime Minister that France would cease to carry out further atmospheric tests in the Pacific region. In December 1974 the I.C.J. held that the French declaration made it unnecessary for the case to proceed as the claims of Australia and New Zealand were satisfied by the French declaration and no further object would be achieved ; the Court was therefore not called upon to give a decision.<sup>12</sup> But it must be clear that the Court did recognize the rights of Australia and New Zealand to rely on the French declaration and to expect that France would act accordingly and respect its unilateral obligation.<sup>13</sup> It is even more important to stress Australia's position that the 1963 Test Ban Treaty "embodied and crystallised an emergent rule of customary international law" which prohibited atmospheric nuclear tests, a rule which might have transformed into a rule of *jus cogens*.<sup>14</sup> This position is important as France was not, at that time, a party to the Test Ban Treaty and it could have not conventionally been bound by the treaty rules on the subject.<sup>15</sup> In addition, Australia stressed that:

where, as a result of a normal and natural use by one state of its territory, a deposit occurs of a territory of another, the latter has no cause of complaint unless it suffers more than merely nominal harm or damage. The use by a state of its territory to the conduct of atmospheric nuclear tests is not a normal or natural use of its territory. The Australian government also contends that the radioactive deposit from the French tests gives rise to more than merely nominal harm or damage to Australia.<sup>16</sup>

It should be emphasized, however, that Australia and New Zealand did not ask the I.C.J. to decide any matters concerning reparation or compensation. The Court did not, therefore, find it necessary to proceed any further with the case as the French declaration satisfied the claims of Australia and New Zealand.

A new phase of the case took place in 1995 following a French declaration dated 13 June 1995 according to which “France would conduct a final series of eight nuclear weapons tests in the South Pacific starting in September 1995”;<sup>17</sup> on August 21, 1995, the Government of New Zealand filed its “Request for an Examination of the Situation in accordance with paragraph 63 of the Court’s Judgement of 20 December 1974 in the Nuclear Tests (New Zealand v. France) case”<sup>18</sup> in which New Zealand indicated that its request “ari[es] out of a proposed action announced by France which will, if carried out, affect the basis of Judgement rendered by the Court on 20 December 1974 in the *Nuclear Tests (New Zealand v. France)* case”<sup>19</sup> Paragraph 63 of the 1974 Judgement of the I.C.J. in the said case reads:

Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgement were to be affected, the applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot constitute by itself an obstacle to the prevention of such a request.<sup>20</sup>

Furthermore, New Zealand claimed in its request that :

Both by virtue of specific treaty undertakings (in the Convention for the Protection of Natural Resources and Environment of the South Pacific Region of 25 November 1986 or "Noumea Convention") and customary international law derived from widespread international practice. France has an obligation to conduct an environmental impact assessment before carrying out any further nuclear tests at Mururoa and Fangataufa;<sup>21</sup>

New Zealand, moreover, asserted that :

France's conduct is illegal in that it causes, or is likely to cause, the introduction into the marine environment of radioactive

material, France being under an obligation, before carrying out its new underground nuclear tests, to provide evidence that they will not result in the introduction of such material to the environment, in accordance with the “precautionary principle” very widely accepted in contemporary international law;<sup>22</sup> ....

New Zealand asked the Court to adjudge and declare:

(One) that the conduct of the proposed nuclear tests will constitute a violation of the rights under international law of New Zealand, as well as of other States;

(Two) that it is unlawful for France to conduct such nuclear tests before it has undertaken an Environmental Impact Assessment according to accepted international standards. Unless such an assessment establishes that the tests will not give rise, directly or indirectly, to radioactive contamination of the marine environment the rights under international law of new Zealand, as well as the rights of other States, will be violated.<sup>23</sup>

New Zealand did, in addition, request the indication of the following provisional measures as a matter of priority and urgency:

(1) that France refrain from conducting any further nuclear tests at Mururoa and Fangataufa Atolls;

(2) that France undertake an environmental impact assessment of the proposed nuclear tests according to accepted international standards and that, unless the assessment establishes that the tests will not give

rise to radioactive contamination of the marine environment, France refrain from conducting the tests;

(3) that France and New Zealand ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decisions the Court may give in this case.<sup>24</sup>

Australia, Samoa, Solomon Islands, Marshall Islands, and the Federated States of Micronesia filed applications for permission to intervene in the case and referred both to the “Request for an Examination of the Situation” and to the “Further Request for the Indication of Provisional Measures” submitted by New Zealand.<sup>25</sup> Those five states associated themselves with the requests of New Zealand. New Zealand on the other hand, based its requests on treaty law and on customary international law. From these requests and from non-official *aide-memoires* presented to the Court, exchanges taking place in the public sittings held by the Court, written statements presented to the Court, and other proceedings before the Court, it was clear that New Zealand invoked and relied on customary international law of the environment and treaty law to support its claims that France was in breach of its obligations towards New Zealand and other states when it proposed to carry out a further series of underground nuclear tests in the Pacific area.<sup>26</sup>

Accordingly, New Zealand asserted that under treaty law and customary international law, (the introduction of radioactive material into the marine environment was forbidden, and that, specifically, “any introduction of radioactive

material into the marine environment as a result of nuclear tests” was forbidden).<sup>27</sup> New Zealand did also maintain that the “precautionary principle” was indeed adopted as a rooted principle of international environmental law.<sup>28</sup>

France claimed that the Court did not have jurisdiction to hear the case.<sup>29</sup> The Court dismissed requests made by New Zealand (“Request for an Examination of the Situation,” and “Further Request for the Indication of Provisional Measures”) and it further dismissed all applications for permission to intervene submitted by the other five Pacific states concerned.<sup>30</sup> The Court based its findings on the fact that all such requests and application did not relate to any “further atmospheric nuclear tests” and therefore, the basis of the 1974 Judgement in the *Nuclear Test (New Zealand V.France)* Case was not affected.<sup>31</sup> But the Court stressed in one of the important passages of its Order that :

Whereas moreover the present Order is without prejudice to the obligations of States to respect and protect the natural environment, obligations to which both New Zealand and France have in the present Instance reaffirmed their commitment,<sup>32</sup>...

In this quoted passage the Court seems to recognize the very important rules and principles of treaty and customary international law concerning the protection of the natural environment to which New Zealand has referred, and which will be a subject of further study in this chapter.

The Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons<sup>33</sup> is yet another important step in the

clarification and illustration of the rooted principles of environmental protection and the rooted obligations of all States to protect and not damage the environment. The Court stressed, in its Advisory Opinion, the “obligations of States to respect and protect the natural environment,” and it considered that such obligations are applicable not only in the context of nuclear testing but also in the context of “the actual use of nuclear weapons in armed conflict”.<sup>34</sup> The Court went on to proclaim:

The Court thus finds that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.<sup>35</sup>

The Advisory Opinion will be subject to further detailed comments in chapter two of this research dealing with the law of environmental responsibility in relationship with armed conflicts. But what we stress here is the I.C.J.’s emphasis on the international obligations of states to protect and safeguard the environment even in times and situations of armed conflict, Further more, the Court stressed that :

the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national

control is now part of the corpus of international law relating to the environment.<sup>36</sup>

In the *Gabcikovo-Nagymaros Project (Hungary-v-Slovakia)* Case decided by I.C.J. on 25 September 1997, the Court had a good chance to address various issues of environmental law and states obligations to protect and safeguard the environment and the responsibility of states for activities harming the environment of other states.<sup>37</sup> In our view, the most important passages dealing in general with environmental protection and states' general and customary obligations in this regard in the judgement of the Court are the following:

The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new

standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.<sup>38</sup>

The case dealt also with the validity and termination of treaties for environmental necessity and issues of responsibility and reparation for environmental damage, such issues will be dealt with in other places in this chapter where there will be further comments on the judgement in this case.

The last set of cases which dealt, among other things, with the protection of the environment and the obligation of states to protect and safeguard the environment and not damage such environment and its components are the Yugoslavia cases, the most important of which is the Case Concerning Legality of Use of Force (*Yugoslavia V. United States of America*), *Request for the Indication of Provisional Measures*, (1999).<sup>39</sup> What concerns us here is the strong emphasis on the general obligations of states not to damage the environment which was stressed in the application by the Federal Republic of Yugoslavia instituting proceedings before the I.C.J. against the United States for violation of the obligation not to use force, and in the request for the indication of provisional measures.<sup>40</sup> The Court dismissed the case for lack of jurisdiction.<sup>41</sup>

The importance of the above-mentioned cases and other cases to be discussed or referred to throughout the research is their contribution to the establishment, development and continued evolution and progress of the international environmental law and of the general obligations of all states to protect, safeguard and not harm the environment, particularly the environment of other states and of areas beyond national jurisdiction. As has been seen, general principles such as the precautionary principle and the preventive principle have been referred to as customary and rooted principles of general international. But, it is useful to follow the development in the declarations and resolutions of international organizations and conferences<sup>42</sup>.

### **Declaration and Resolutions of International Organizations and Conferences:**

In the past several decades immense efforts have taken place to emphasize the delicate balance on earth and its environment, environmental concerns have arisen in all parts of the world. The international character of the problems of the environment and its interdependence and the responsibility of all states to adopt all necessary policies, standards and measures to ensure the adequate and effective protection, preservation and the enhancement of the environment and adopt all necessary policies, standards and measures to prevent and reduce pollution and prevent any loss, damage or harm to the environment have been repeatedly emphasized on all levels. Among the most important international efforts in this regard is the United Nations Conference on the Human Environment which was held in Stockholm from June 5 to June 16, 1972. This Conference achieved consensus on a declaration of principles and adopted a set of recommendations.<sup>43</sup> The Declaration of the United Nations Conference on the Human Environment, sometimes referred to as the Stockholm Declaration, contains a

preamble and a set of principles which are widely held to be reflective of general international law.<sup>44</sup>

The second paragraph of the preamble of the Stockholm declaration reads:

The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world, it is the urgent desire of the peoples of the whole world and the duty of all Governments.<sup>45</sup>

Commentators suggest that this part of the preamble proclaims a legal obligation which lies on all governments the content of which is to protect and preserve the human environment and to prevent any damage or harm to the environment from occurring. The paragraph was paraphrased to read: "The protection and improvement of the environment is the duty of all governments."<sup>46</sup>

Principle 1 of the Stockholm Declaration states in part:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.<sup>47</sup>

This part of Principle 1 balances between man's right to freedom, equality and adequate conditions of life and his responsibility to protect and improve the human environment for present and future generations. Thus, the Stockholm declaration proclaims a legal obligation to protect and improve and not damage or harm the environment. This obligation lies on governments as well as individuals.

Principle 7 of the Declaration is important and imposes an obligation reflective of customary and treaty international law, it reads :

States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or interfere with other legitimate uses of the sea.<sup>48</sup>

The principle thus imposes an obligation on states to "take all possible steps" to prevent pollution of the sea. This principle is not limited to pollution which might inflict serious or irreversible damage upon ecosystems but it covers pollution caused by substance that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or interfere with other legitimate uses of the sea. Any such pollution affects the interest of other states and not just the state causing pollution. The content of this principle is similar to the content of relevant provisions in treaties dealing with the law of the sea,<sup>49</sup> and is a reflection of the customary obligation of all states to exercise due diligence to prevent pollution of the seas as states are under an obligation to "take all possible steps" to prevent pollution of the sea. It is indeed clear from the wording of the principle that the obligation of every state is dependent upon and

hinges on the ability (financial, economic, scientific, technological, technical, ...etc) of the state concerned. As such the principle does not contain absolute obligations nor does it relate to any absolute liability or responsibility.<sup>50</sup>

Closely connected with this and even more important is Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration on Environment and Development.<sup>51</sup> Principle 21 of the Stockholm Declaration reads:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.<sup>52</sup>

This Principle balances between the sovereign right of every state to exploit its own resources pursuant to its environmental policies and its responsibility to ensure that activities within its jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

The United States interpreted this principle asserting that :

[N]othing contained in this principle, elsewhere in the Declaration, diminishes in any way the obligation of States to prevent environmental damage or give rise to any right on

the part of States to take actions in derogation of the rights of other States or of the community of nations. The statement on the responsibility of States for damage caused to the environment of other States or of areas beyond the limits of national jurisdiction is not in any way a limitation on the above obligation, but an affirmation of existing rules concerning liability in the event of default on the obligation.<sup>55</sup>

The Principle did in fact reflect existing and firm rules of international law concerning the sovereign right of every state to exploit its natural resources and its responsibility to ensure that activities within its jurisdiction or control do not cause any damage to the environment of any other state or to areas beyond the limits of national jurisdiction. Accordingly, the rule of responsibility applies to damage caused to the environment of any other State and it equally applies to damage caused to the environment of areas beyond the limits of national jurisdiction. The rule of responsibility applies, furthermore, to state activities and it equally applies to activities of individuals, corporations, and other juridical persons acting or exercising such activities either within the jurisdiction or under the control of the state.”<sup>56</sup>

Principle 2 of the Rio Declaration reads :

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the

responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or to areas beyond the limits of national jurisdiction.<sup>57</sup>

As has been pointed out in connection with Principle 21 of the Stockholm Declaration, Principle 2 of the Rio Declaration balances between the sovereign right of every state to exploit its own resources pursuant to its own environmental and developmental policies and its responsibility to ensure that activities within its jurisdiction or control do not cause damage to the environment of any other State or to areas beyond national jurisdiction. It should be noted that the only variation between the wording of Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration is that Principle 21 used the phrase “pursuant to their own environmental policies” while Principle 2 used the phrase “pursuant to their own environmental and developmental policies; the words “and developmental” which were included in Principle 2 of the Rio Declaration do not limit in any ways the responsibility of States to ensure that activities within their jurisdiction or control do not cause any damage to the environment of other states or to areas beyond national jurisdiction. The comments stated in connection with Principle 21 of the Stockholm Declaration remain true and valid with regard to Principle 2 of the Rio Declaration. It has been asserted that Principle 21 of the Stockholm Declaration corresponding to Principle 2 of the Rio Declaration is the cornerstone of international environmental law.<sup>58</sup> The drafting history of the Stockholm Declaration proves that this Principle obtained the approval of all states.<sup>59</sup> The practice of states prior to the adoption of the Principle in 1972 and afterwards proves that this Principle is indeed a rooted principle of customary

international law.<sup>60</sup> It is indeed an application of the most basic and general principle of customary international law that states shall not cause damage or injury to other states, nor shall they permit their territories or areas under their jurisdiction or control to be used in such a way as to cause damage or injury to other states or their territories, sovereignties, or sovereign rights or interests.<sup>61</sup>

The problem however is with the definition of certain terms such as environmental damage or injury, prohibited environmental damage, and compensable environmental damage. Such issues will be discussed under a separate part of this chapter. But it should be noted also that the wording of Principle 21 of the Stockholm Declaration and that of Principle 2 of the Rio Declaration did not specify the standard of care applicable to state's national jurisdiction or control; the issue to be addressed is whether Principle 21 and 2 require a due diligence obligation or an obligation of result, that is whether states are absolutely responsible not to cause pollution or environmental damage and are absolutely liable for the injury or damage that occurs without having to prove their fault or wrongfulness, or that their obligation not to damage the environment covers only a due diligence obligation and that they may not be liable for environmental damage unless their fault or wrongfulness is established. Principles 21 and 2 could be interpreted to support either of the two positions and the issue will be dealt with under another separate part in this chapter.

Closely connected with Principles 21 and 2 are Principle 22 of the Stockholm Declaration and Principle 13 of the Rio Declaration.<sup>62</sup> Both principles 22 and 13 recognised the present state of international law on the subject of liability and compensation for the victims of pollution and other environmental damage but

demanded that further developments be achieved. Principle 22 of the Stockholm Declaration states:

States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.<sup>63</sup>

This Principle builds upon Principle 21 and is very much connected with it. Although Principle 22 contains an obligation imposed upon states to cooperate to develop further international law regarding liability and compensation for the victims of pollution and other environmental damage, it recognized the existing international law rules on the subject when it used the word “further”.<sup>64</sup> It should also be noted that Principle 22 includes not just an obligation to cooperate regarding procedural matters or duties or standards such as exchange of information, notification, or consultation, but it covers all kinds of rules and principles which could be developed to cover and deal effectively with liability and compensation for pollution and environmental damage. This is a kind of recognition that pollution and environmental damage have to be controlled and that states causing such pollution or environmental damage are bound to accept liability and pay compensation for the victims. This, of course, covers pollution and environmental damage whether caused during peace-time or times of armed-conflicts.<sup>65</sup>

On the other hand, Principle 13 of the Rio Declaration reads:

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects or environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.<sup>66</sup>

Principle 13 of the Rio Declaration is a development of Principle 22 of the Stockholm Declaration. Principle 13 includes certain additions which are considered as adding new obligations upon states and strengthening and enhancing the existing ones. First, Principle 13 imposed a new obligation upon states to “develop national law regarding liability and compensation for the victims of pollution and other environmental damage.” Although this obligation appears as a new addition in Principle 13 and not included in Principle 22 of the Stockholm Declaration, it was in fact a reflection of the developments in the national laws of many states in the world each of which has enacted at least one or two laws on the matter dealing with pollution and environmental damage.

Secondly, Principle 13 of the Rio Declaration is wider in scope than Principle 22 of the Stockholm Declaration insofar as international law is concerned. Principle 22 covers only the obligation of states to “co-operate to develop further the international law regarding liability and compensation *for the victims of pollution and other environmental damage caused* by activities within the jurisdiction or control of such States to areas beyond their jurisdiction”.<sup>67</sup> [Emphasis added]. But principle 13 covers the obligation of

states to “cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction”.<sup>68</sup> Thus the words ((for the victims of pollution and other environmental damage)) included in Principle 22 were replaced by the words “for adverse effects of environmental damage” as included in Principle 13 of the Rio Declaration. Accordingly, environmental damage caused by activities within the jurisdiction or control of any state to areas beyond its jurisdiction whether areas belonging to any other state or areas beyond the jurisdiction of all states is compensable and the state causing it must be held liable and pay such compensation as required by the relevant rules of international law.

Furthermore, just as recognized by Principle 22, new Principle 13 recognizes the existing rules of international law concerning liability and compensation for adverse effects of any environmental damage; but Principle 13 imposes a stronger obligation upon all states to cooperate *in an expeditious and more determined manner to develop further* international law regarding liability and compensation for adverse effects of environmental damage.

Thus, Principles 2 and 13 of the Rio Declaration dealt in a comprehensive and more determined manner with trans-frontier and international pollution and transfrontier and international effects of any activity causing environmental damage, the two principles recognize the rules of international law concerning liability and compensation for such environmental damage. In our view, Principle 2 of these two provides a basis for holding a state responsible for failure to protect the environment from damage where as

Principle 13 requires states to develop the law, and gives some indications of the basis of further development .

Principle 19 of the Rio Declaration is also relevant with regard to transfrontier pollution and transboundary environmental effects of any activity. Providing prior and timely notification and relevant information and consultation are considered as procedural duties of states which must be respected and observed in good faith in any case in which any activity may have a significant adverse transboundary environmental effect.<sup>69</sup>

Of particular importance is Principle 24 of the same Declaration which is directly connected with the subject matter of this research. This principle reads:

Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in time of armed conflict and cooperate in its further development, as necessary.<sup>70</sup>

This Principle recognizes the very strong obligation imposed upon all states to fully respect and observe the rules of international law providing protection for the environment in time of armed conflict. It also requires states to cooperate to develop further international law on the subject.

In sum, the Stockholm Declaration and the Rio Declaration have included a general and overriding obligation upon all states to protect and preserve the environment in all its

aspects in peace times and in times of armed conflicts, and not to cause environmental damage or injury. The two declarations have recognized and affirmed the rules of international law regarding liability and compensation for adverse effects of environmental damage and the responsibility of states causing such damage. The two declarations do represent and reflect the customary rules of international law as developed over the years as evidenced by the consensus of the international community, and have influenced the developments of treaty law and the resolution of environmental disputes and problems as will be seen later in the coming part, but it must be stated that the practice of states prior to and after Stockholm supports the existence of the customary obligation that states are bound to respect and not violate the sovereignty, sovereign rights and the integrity and inviolability of the territory of other states including their environment and environmental rights. We did not find any person who claimed that such an obligation did not exist.<sup>71</sup>

## II

### **Treaty Law and the General Obligation not to Cause Damage to the Environment**



There are many international treaties which contain a general obligation imposed upon states to protect and preserve and not to cause damage or injury to the environment. Examples of such treaties which are of particular importance to the subject-matter of this research are the U.N. Convention on the Law of the Sea and the Kuwait Regional Convention. These two conventions and a number of other important conventions or treaties will be examined or referred to below:

### **The U.N. Law of the Sea Convention:**

The United Nations Convention on the Law of the Sea concluded in 1982 and entered into force in 1994 dealt comprehensively with the marine environment and marine pollution.<sup>72</sup> The Convention includes plenty of provisions dealing with various aspects of the marine environment and marine pollution but part XII of the Convention was reserved for the protection and preservation of the marine environment. The very first article in that part article 192, proclaimed the general obligation that: "States have the obligation to protect and preserve the marine environment." Article 193 is based on and reflects Principle 21 of the Stockholm Declaration on the Human Environment. Article 193 reads:

States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

This article balances between the sovereign right of each state to exploit its natural resources and its duty to protect and preserve the marine environment. Paragraph I of article 194 obligates all states to take "all measures... necessary to prevent, reduce and control pollution of the marine environment from any source....." Moreover, paragraph 2 of the same article declares:

States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other states and their environment, and that pollution arising from incidents or activities under their jurisdiction

or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

This paragraph is also based on and is considered a reflection of Principle 21 of the Stockholm Declaration previously referred to.<sup>73</sup> Thus article 193 and paragraph 2 of article 194 of the U.N. Law of the Sea Convention prove that Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration have been transformed into conventional or treaty rules of law insofar as the marine environment is concerned. Thus rules dealing with transfrontier or transboundary pollution and environmental effects and the rules of international responsibility for such pollution and environmental effects are firmly established in both customary and conventional international law.

The third paragraph of article 194 of the U.N. Law of the Sea Convention stipulates: "The measures taken pursuant to this Part (Part XII of the Convention) shall deal with all sources of pollution of the marine environment..."

Furthermore, article 235 of the Convention stresses that:

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, or compensation funds.

Thus, article 235 of the Law of the Sea Convention expressly recognizes the international responsibility of each and every state to fulfill its international obligation concerning the protection and preservation of the marine environment and its liability under international law regarding any violation of that obligation. In addition, the same article obliges every state to provide national means for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by any natural or juridical person under its jurisdiction. States are also required to cooperate *in the further development of international law* relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes. Furthermore, states are under an international obligation to cooperate *in the further development of international law* regarding responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes. Moreover, states are under a further international obligation to develop "criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds." All such obligations are not

new but they are reflective of the developments of customary and conventional international law rules. In fact such rules as stated in the Law of the Sea Convention are widely accepted as reflective of customary international law binding upon all states.<sup>74</sup>

### **The Space Liability Convention:**

The Space Liability Convention or the 1972 Convention on International Liability for Damage caused by space Objects<sup>75</sup> is one of very few multilateral treaties which included clear provisions imposing absolute obligations and establishing the absolute liability of states for violating such obligations, the Space Liability Convention stipulated that a state which launches a space object is absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight."<sup>76</sup> Not every type of damage is covered by this obligation the Convention defined damage as "loss of life, personal injury or other impairment of health; or loss of or damage to property of states or of persons, natural or judicial, or property of international intergovernmental organisations."<sup>77</sup> Although this definition seems to be very limited and covers only some types of serious damage which do not include environmental damage or harm, the fact is the opposite. The words that are used in the definition are very broad and can be interpreted to cover almost every type of damage including environmental damage or damage to the environment which is a "property of states"; as has been pointed out by some, the term "property of states" covers "environmental assets or other natural resources".<sup>78</sup>

The Space Liability Convention has, in addition, provided for due diligence responsibility or fault liability for damage other than on the surface of the earth to another space object or persons or property on board.<sup>79</sup>

The Convention was tested only once when Canada presented in 1979 to the former USSR a claim for damage caused by the crash of the Soviet Cosmos 954 which disintegrated over Canada, this claim was finally settled by a 1981 agreement between the two parties according to which the USSR agreed to pay to Canada the sum of three million U.S. dollars in full and final compensation which was accepted by Canada as a final settlement of the matter.<sup>80</sup>

### **The Basel Protocol:**

The 1999 Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movement of Hazardous Wastes and their Disposal<sup>81</sup> has been adopted by the Conference of the Parties to the Basel Convention on Hazardous Wastes<sup>82</sup> to provide for a comprehensive regime for liability as well as adequate and prompt compensation for damage resulting from the transboundary movement of hazardous wastes and other wastes including incidents occurring because of illegal traffic in those wastes. As stated in Article 1 of the Protocol:

The objective of the Protocol is to provide for a comprehensive regime for liability and for adequate and prompt compensation for damage resulting from the transboundary movement of hazardous wastes and other wastes and their disposal including illegal traffic in those wastes.

The area of the application of this Protocol is specified in paragraph 1 of article 3 which reads:

The Protocol shall apply to damage due to an incident occurring during a transboundary movement of hazardous wastes and other wastes and their disposal, including illegal traffic from the point where the wastes are loaded on the means of transport in an area under the national jurisdiction of a State of export. Any Contracting Party may by way of notification to the Depositary exclude the application of the Protocol in respect of all transboundary movements for which it is the State of export, for such incidents which occur in an area under its national jurisdiction, as regards damage in its area of national jurisdiction. The Secretariat shall inform all Contracting parties of notifications received in accordance with this Article.

Thus damage occurring in any area during a transboundary movement of hazardous wastes and other wastes and their disposal including illegal traffic is covered by the protocol and is considered compensable damage unless an export state elects not to apply the Protocol to . damage occurring in an area under its jurisdiction provided that such state so notifies the Depositary.

The Protocol has created a two-scheme responsibility, first, strict liability under article 4 and, second, fault based liability under article 5 which adopts the general rules of fault liability under international law<sup>83</sup>

### **The Kuwait Convention:**

Most relevant to this research is the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution and the

accompanying protocol of 1978 and other related instruments.<sup>84</sup> This Convention defines marine pollution as follows:

Marine pollution means the introduction by man, directly or indirectly, of substances or energy into the marine environment resulting or likely to result in such deleterious effects as harm to living resources, hazards to human health, hindrance to marine activities including fishing, impairment of quality for use of seawater and reduction of amenities'.<sup>85</sup>

The Kuwait Convention imposes upon all states parties to it a general obligation to, individually and/or jointly, take all appropriate measures to prevent, abate and combat pollution of the marine environment in the Sea Area of the Gulf.<sup>86</sup> In addition, these states are under another general obligation to “co-operate in the formulation and adoption of other protocols prescribing agreed measures procedures and standards for the implementation of the (Kuwait) Convention.”<sup>87</sup> Furthermore, the Contracting States are under a third general obligation to establish national standards, laws and regulations as required for the effective discharge of the general obligation to prevent, abate and combat pollution of the marine environment in the Sea Area of the Gulf and to endeavour to harmonize their national policies in this regard.<sup>88</sup> A fourth general obligation imposed upon the Contracting States is that such States “shall cooperate with the competent international, regional and sub-regional organizations to establish and adopt regional standards, recommended practices and procedures to prevent, abate and combat pollution from all sources and to assist each other in fulfilling their obligations under the present Convention.”<sup>89</sup> A fifth general obligation is that all Contracting States “shall use their best endeavour to ensure that

the implementation of the present Convention shall not cause transformation of one type of pollution to another which could be more detrimental to the environment.”<sup>90</sup>

Pollution from ships whether caused by intentional or accidental discharges is prohibited under article IV of the Kuwaiti Convention,<sup>91</sup> while pollution caused by dumping from ships and aircraft are prohibited under article V.<sup>92</sup> Article VI prohibits pollution from land-based sources,<sup>93</sup> article VII prohibits pollution resulting from exploitation of the territorial sea and its subsoil and the continental shelf,<sup>94</sup> and, finally, article VIII prohibits pollution from other human activities.<sup>95</sup> The Kuwaiti Convention has, in addition, dealt with the important matter of liability and compensation'. article XIII states:

The Contracting States undertake to co-operate in the formulation and adoption of appropriate rules and procedures for the determination of:

(a) Civil liability and compensation for damage resulting from pollution of the marine environment, bearing in mind applicable international rules and procedures relating to those matters”; and

(b) Liability and compensation for damage resulting from violation of obligations under the present Convention and its protocols

To implement these provisions of article XIII the Council of the Regional Organization for the Protection of the Marine Environment established under the

Kuwait Convention adopted the 1981 Statute of the Judicial Commission for the Settlement of Disputes.<sup>96</sup> This Commission was given the jurisdiction to settle the disputes between the Contracting States *inter alia* concerning:

(I) the interpretation or application of the Convention or any of its protocols;

(ii) the General Obligations provided for under Article III of the Convention;

(iii) the fulfilment of the obligations provided for under the Action plan;

(iv) the measures provided for protection of marine environment and combating pollution in the Convention and its Protocol.<sup>97</sup>

In addition the Commission was empowered to settle disputes relating to the determination of civil liability and compensation for damage resulting from pollution of the marine environment.<sup>98</sup>

The decisions of the Commission are final and binding;<sup>99</sup> such decisions are enforceable in the contracting states through their respective executing agencies.<sup>100</sup>

Moreover, the Commission has an advisory jurisdiction under article 23 of its Statute which reads:

1. The Commission shall have jurisdiction to give an advisory opinion in all legal questions at the request of the Council concerning:
  - (i) the interpretation of a treaty on the protection of the marine environment from pollution;
  - (ii) application of rules of International Law relating to prevention, abatement and combating of marine pollution
  - (iii) the existence and extent of liability of any fact which if established, would constitute a breach of an international obligation concerning the protection of marine environment;
  - (iv) the interpretation of rules and procedures of the Organization;
  - (v) any other matter referred to it by the Council.
  
2. Advisory Opinion has no binding force and does not constitute *res judicata*, but it is expected to be treated with respect and as authoritative statement of the Law.

Thus, disputes between the contracting states concerning the interpretation or application of the Kuwait Regional Convention or any of its protocols, disputes between the contracting states concerning the general obligations provided for under article III of the Convention which were referred to earlier in this text,<sup>101</sup> disputes between the contracting states concerning the fulfilment of the obligations provided for under the Action plan referred to in article I(e) of the Convention, and disputes between the contracting states concerning the measures provided for the protection of the marine environment and combating pollution in the Convention and its Protocols' Area are all within the jurisdiction of the Judicial Commission. In addition, disputes

relating to the determination of civil liability and compensation for damage resulting from pollution of the marine environment come within the jurisdiction of the Commission. But the Statute of the Commission did not specify the requirements or the conditions according to which it is to exercise its jurisdiction concerning civil liability and compensation cases; nor did the Statute provide for any requirements concerning the parties to any such disputes.

The Commission shall apply the principles of Islamic Law and International Law and, in particular, it shall apply the Kuwait Regional Convention, international conventional law and international rules relating to the preservation and protection of the marine environment or the rule of international environmental law, and the general principles which are common in the laws of the Contracting States;<sup>102</sup> the Commission also has the power to decide the case *ex aequa et bono* upon the agreement of the parties.<sup>103</sup>

It should be emphasized, however, that the Judicial Commission has so far not been constituted owing to the fact that Iraq has waged two wars of aggression against Iran and Kuwait which made it impossible for the Contracting States to nominate their nominees to be approved by the Council. Had it not been for the Iraqi wars of aggression, the Judicial Commission would have been constituted and could have been effective in exercising its functions and the environment could have been better protected.<sup>104</sup>

The Protocol Concerning Regional Co-operation in Combating Pollution by Oil and Other Harmful Substances in Case of Emergency accompanying the Kuwait Convention has also been incorporated into the Kuwaiti internal legal system and has become internally binding upon all authorities.<sup>105</sup> This Protocol has defined the term "marine emergency" as follows:

"Marine Emergency" means any casualty, incident, occurrence or situation, however caused, resulting in substantial pollution or imminent threat of substantial pollution to the marine environment by oil or other harmful substances and includes, *inter alia*, collisions, strandings and other incidents involving ships, including tankers, blow-outs arising from petroleum drilling and production activities, and the presence of oil or other harmful substances arising from the failure of industrial installations,<sup>106</sup>

It is argued that this definition covers every type of casualty, incident, occurrence or imminent threat of substantial pollution to the marine environment by oil or other harmful substances whether the casualty, incident, occurrence or situation takes place during peace-time or times of armed-conflicts. The measures and other provisions stipulated in the Protocol to deal with such marine emergencies are binding upon all States parties to the Kuwait Convention and the Protocol, and have been passed into the domestic laws of such States including Kuwait and Iraq.<sup>107</sup> The Contracting States parties to the Kuwait Convention wanted to strengthen the Convention by giving more adequate treatment to land-based sources of the marine

pollution. The State parties concluded the 1990 Protocol for the Protection of the Marine Environment against Pollution from Land-Based Sources. This Protocol redefined the term "Area" for its purposes to mean: "The area to which this Protocol applies (hereinafter referred to as the "Protocol Area") shall be the Sea Area as defined in Article II, paragraph (a) of the (Kuwait) Convention, together with the waters on the landward side of the baselines from which the breadth of the territorial sea of the Contracting States is measured and extending, in the case of watercourses, up to the freshwater limit and including intertidal zones and salt-water marshes communicating with the sea." [Article II].

Paragraph 8 of article I of the Protocol defined "land-based sources" to mean "municipal, industrial or agricultural sources, both fixed and mobile on land, discharges from which reach the Marine Environment, as outlined in Article III of this Protocol," Article III of the same Protocol reads:

This Protocol shall apply to discharges reaching the Protocol Area from land-based sources within the territories of the Contracting States,

In particular:

- (a) from outfalls and pipelines discharging into the sea;
- (b) through rivers, canals or other watercourses, including underground resources;
- (c) from fixed or mobile offshore facilities serving purposes other than exploration and exploitation

of the sea bed, its subsoil and the continental shelf; and

- (d) from any other land-based sources situated within the territories of the Contracting States, whether through water, through the atmosphere or directly from the coast."

The Protocol consists of 16 articles and three annexes and aims at protecting the marine environment from all land-based sources of pollution and filling the vacuum in the systems and regulations in various State parties.<sup>108</sup>

Parties to the Kuwait Regional Convention have recently concluded a 1998 protocol concerning the Control of Sea Transboundary Transport of Dangerous and Other Wastes and their Discharges which aimed at controlling, reducing, abating and preventing the production, generation, and transport of such wastes.<sup>109</sup>

From all the above stated treaties and from all other environmental and pollution treaties and agreements one could easily conclude that such treaties have participated in the development of customary international law rules, independent of those treaties and representing state practice that states are under a general obligation to protect and preserve the environment and control, reduce, prevent and combat pollution of all types and all sources; that states bear the general responsibility not to violate the said general obligation and not to cause damage or injury to the environment of other states or of areas beyond their jurisdiction; and that states are liable under international law for damage or injury they cause to the environment of

other states or to areas beyond national jurisdiction. In fact treaties, declarations and resolutions referred to in this chapter and many more do constitute and reflect state practice and the customary developments of international law on the subject.<sup>110</sup>

### III

#### **Compensable Environmental Damage**

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To some, damage under international law means something more than injury. The mere violation by a state of any of its international obligations towards any other state constitutes an injury to that other state; but damage is something more.<sup>111</sup> But, in general, most writers and judicial decisions make no difference between “injury” and “damage;” thus, an international delict is defined, by some, as an internationally wrongful act from which emerges a damage for another subject of international law”.<sup>112</sup> Damage includes "all impairments suffered by the other State on it or its citizens' rights so far as they are protected by international law".<sup>113</sup> The definition covers both material damage and moral damage; if the reputation, dignity or honour of a state is affected, a moral damage is involved. The mere flying over a state's territory without its consent constitutes a moral damage which is sufficient to produce an obligation to reparation. Every breach of international law constitutes, at least, a moral damage or injury that produces an obligation to reparation.<sup>114</sup> But if we focus on the definition of environmental damage or injury, we find that various approaches were followed and that treaties and state practice did not agree on any one definite approach. Philippe Sands suggests:

A narrow definition of environmental damage is limited to damage to natural resources alone (air, water, soil, fauna and flora, and their interaction); a more extensive approach includes damage to natural resources *and* property which forms part of the cultural heritage; the most extensive definition includes landscape and environmental amenity. On each approach environmental damage does not include damage to persons or damage to property, although such damage can be consequential to environmental damage.... Loss of environmental amenity... could be treated as environmental damage or damage to property, depending on the definition of the latter.<sup>115</sup>

Another writer, Julio Barbosa, adopts a similar view and suggests that environmental damage is "damage done to the components of the environment, as well as the loss or diminution of environmental values caused by the deterioration or destruction of such components."<sup>116</sup> He further suggests that "[m]ost aspects of damage caused to persons or property as a consequence of the deterioration of the environment are already covered in the existing notion of damage to persons or property"<sup>117</sup>, and, therefore, damage caused to persons and property cannot be included under the definition or concept of environmental damage as damage to persons or property is damage to environmental components and values.<sup>118</sup> The same writer suggested that the term "harm to the environment" should include:

- (a) the cost of reasonable measures taken or to be taken to restore or replace destroyed or damaged natural resources or, where

reasonable, to introduce the equivalent of these resources into the environment;

- (b) the cost of preventive measures and any further damage caused by such measures
- (c) the compensation that may be granted by a judge in accordance with the principles of equity and justice if the measures indicated in subparagraph (i) were impossible, unreasonable or insufficient to achieve a situation acceptably close to the *status quo ante*. Such compensation should be used to improve the environment of the effected region.<sup>119</sup>

This quoted proposal was introduced by the said writer to be included in a report submitted to the International Law Commission for its consideration as the writer being the Special Rapporteur for the topic of *Liability for the Injurious Consequences Arising Out of Acts Not Prohibited by International Law*.<sup>120</sup>

However, we tend to consider that environmental damage does indeed include damage to persons and damage to property if any such damage is caused by or as a result of damage to environmental components or values broadly defined.

Other concepts were used and included under the title "environmental damage" such as "pollution" and "adverse effects".<sup>121</sup>

Convention on Civil Liability for oil pollution damage, London, 27 November 1992 and Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, London, 27 November 1992, with protocols of 1992.

These two conventions were adopted by "IMO" in 1992 to replace earlier treaties with the same title concluded at Brussels on 24 November 1969 and 18

December 1971 respectively. They are notable because they deal with liability for ultra-hazardous activities by facilitating direct recourse against the polluter, without involving states. The liability convention creates a common scheme of civil liability for oil pollution damage, including environmental damage, caused by oil tankers. This scheme is based on the principle of strict but limited liability, channelled, in this case, to shipowners. The fund convention provides for additional compensation funded by industry, in this case primarily the cargo owners.

Both conventions were amended by protocols in 1984 which did not enter into force and were replaced by further protocols in 1984 which did not enter into force and were replaced by further protocols of amendment, adopted 27 November 1992.

The relationship between the 1992 conventions and earlier texts is referred to in resolutions 1-5 of the final act of the conference on the revision of the 1969 Civil Liability Convention and the 1971 fund convention, IMO/LEG/CONF. 9/7/1992.

The 1992 Liability Convention requires ten parties, including four states each with not less than one million units of gross tanker tonnage, before it can enter into force.

The 1992 fund convention requires eight parties with a liability to contribute in respect of at least 450 million tons of oil before it can enter into force. Both conventions: 6 parties 24 february 1995.<sup>122</sup>

Convention on Civil Liability for damage resulting from activities dangerous to the environment, Lugano, 21 June 1993.

This is a Council of Europe Convention which makes provision for harmonization of national laws on environmental liability in member states, in accordance with principle 13 of the 1992 Rio declaration on environment and development (q-v) it imposes a common scheme of strict liability for dangerous activities or dangerous

substance on the operator of the activity in question, or in the case of permanently deposited waste, or the operator of the site. Unlike earlier liability conventions, liability is not limited in amount, but recovery is similarly assured by compulsory insurance or other financial security. Damage is widely defined and includes impairment of the environment, which may include the cost of reasonable preventative measures, reinstatement, and loss of profit. Jurisdiction is based on the provisions of the 1968 Brussels Convention on jurisdiction and enforcement of judgments in Civil and Commercial matters, OJEC L 304/77. Although not yet widely ratified, the liability convention, provides an illustrative example of the elements required for regional harmonization of environmental liability.

The Convention had no parties in 1994. It requires three ratifications to enter into force in accordance with article 32. Reservations may only be made in the terms of article 35. Text reper.32 ILM(1993) 1228; 4 YIEL (1993) 691; ETS 150 for commentary see council of Europe, explanatory report (1992); CDCJ (92) 50, Addendum. See also D Wilkinson, The Council of Europe Convention on Civil Liability for damage resulting from activities dangerous to the environment. A comparative review, European Environmental LR(1993) 13 off; A Bianchi, The Harmonization of laws on liability for Environmental Damage in Europe; 6 JEL (1994).

The problem which faced the efforts to define environmental damage or harm, however, is the assessment of damage and determining which environmental damage is "compensable environmental damage." Very few writers consider all environmental damage as compensable damage;<sup>123</sup> most writers, however, do not accept that view and require certain qualifications to be included; thus, terms such as "significant",

"substantial", or "serious" are used in this regard to qualify "environmental damage".<sup>124</sup> As a result, compensable environmental damage must be significant, substantial, or serious. The word "appreciable" is also used to qualify environmental damage' this suggests a marginally less onerous threshold for liability to be triggered.<sup>125</sup> It is further suggested that not every transmission of chemical or other matter into another state's territory, or into the global commons, will create a legal cause of action in international law.<sup>126</sup> This view was reflected in the exchange between the President of the International Court of Justice and the Government of Australia in the *Nuclear Tests Case*.<sup>127</sup> It was also held, by the Arbitral Tribunal in the *Trail Smelter Case*, that the injury justifying a claim must have a "serious consequence". States which made relevant claims used terms such as "irreparable damage to, or substantially prejudice" the legal rights or interests;<sup>128</sup> the term "unfit for use" was used to describe damage to land caused by the Soviet Cosmos 954.<sup>129</sup> But in fact the violation by any state of its obligation not to cause damage or injury to the environment is, in our view, sufficient to establish and maintain a claim under international law in favour of the injured state or the state whose rights or legal interests are infringed. Any violation by a state of its obligation not to cause damage or injury to the environment of another state or to areas beyond national jurisdiction and not to cause transfrontier or transboundary pollution is in itself a wrongful act which is not allowed under international law and which gives rise to international claims against the state committing such violations. The terms "damage" and "injury" do not refer to ordinary matters but to intolerable, unusual, or unacceptable occurrences, events, incidents, or situations. The term "pollution" has, however, not been uniformly used in various international instruments: a precise definition of the

term has not been universally agreed upon. Each instrument or treaty dealing with any aspect of pollution defines that term for its purposes.<sup>130</sup> But it should be stressed that pollution which causes damage or injury to the environment is to be prevented, reduced or controlled under the general obligation to protect and not to cause any damage or injury to the environment.

Sandvik and Suikkari tried to assess environmental damage and recognized that compensable environmental damage would cover elements such as personal injury, property damage, economic losses, damage to the environment *per se*, and costs of preventive measures.<sup>131</sup> Professors Birnie and Boyle refer to the difficulties relative to the definition and assessment of environmental harm and the threshold to be followed in individual cases; the harm or damage must, in their view, reach some level of seriousness in order to qualify as compensable and they quoted the word "appreciable" as used by the ILC to qualify the degree of harm or pollution.<sup>132</sup> They also considered the concept of "equitable considerations or balance of interests" to connect it with the threshold of environmental harm and suggested that the threshold depended upon that concept. The two writers recognized, however, that "[w]hile states may choose to regulate transboundary pollution in this way, neither the international case law nor treaty definitions of harm or damage support thresholds determined by equitable balancing outside the context of international watercourse law or living resources."<sup>133</sup>

The two writers continued:

Nor is the case for making customary threshold of serious harm dependent on a balance of interests a strong one. The

notion that states must act with due diligence to prevent serious harm is a formula which already allows for flexibility in individual cases and excludes *de minimis* pollution. To add more variables would be subversive of efforts to establish minimum standards of environmental protection and prove too favourable to the polluter. Only if the obligation of prevention is an absolute one might it then be justifiable to resort to equitable manipulation of the threshold of harm in order to mitigate the rigors of an otherwise extreme rule.<sup>134</sup>

In another important article, Professor Boyle has illustrated difficulties that face states and other factors in practical situations when environmental damage occurs and has shown that in most cases of transboundary environmental harm “the matter is not dealt with through inter-state claims, either because no claim is made, or because the issue is handled in a different way.”<sup>135</sup> With regard to damage or harm to common spaces, Boyle reaches the following conclusion:

Securing compensation for harm to common spaces through the law of state responsibility, in situations where there is no tangible harm to other states and no clean-up or restoration costs, is unrealistic, unprecedented, and largely unworkable.<sup>136</sup>

Another problem which is of relative importance is the distinction between the so called “direct” and “indirect” damage to the environment. In fact, it has been asserted that the distinction between “direct” and “indirect” damage is no more than

an illusion and an obsolete criterion; indeed, “international law recognizes no distinction whatsoever between “direct” and “indirect” damage, but rather only between damage that is compensable and damage that is not.”<sup>137</sup> Richard B. Lillich and Charles Brower have studied the topic and the many cases related thereto and reached the conclusion that for liability purposes “international law recognizes no distinction whatsoever between “direct” and “indirect” damage, but rather only between damage that is compensable and damage that is not”. They concluded also that the term “direct” “has no meaning other than to emphasize the principle of causality.”<sup>138</sup> They further stated that :

[T]he terms “direct” and “indirect” have no dispositive meaning in contemporary international law. In determining liability for a loss international law requires simply that there be a causal connection between an unlawful act and such loss, and, once such nexus is established, compensates all proximately caused loss, whether it proceeds immediately from the act, *i.e.*, is “direct” or occurs remotely, *i.e.* is remote or “indirect”.<sup>139</sup>

Thus, once causation exists between the state’s wrongful act and the environmental damage or injury, that damage or injury becomes compensable whether “direct” or “indirect”. This topic will further be studied in detail in Chapter Four of this research which deals with the United Nations Compensation Commission established under U.N. Security Council Resolution 687 to deal with issues of liability and compensation for the damage, injury, or loss resulting from Iraq’s illegal invasion and occupation of Kuwait.

## **The Work of the I L C and Compensable**

### **Environmental Damage or Harm:**

The issues of transboundary harm and transboundary environmental harm have been dealt with by the International Law Commission under the title “*International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (Prevention of Transboundary Damage from Hazardous Activities)*,” this topic was first placed on the Commission’s agenda in 1978 and several reports were prepared and discussed,<sup>140</sup> but our study here will depend on the last reports of the Commission Convention on the Prevention of Significant Transboundary Harm states :

The present draft articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.<sup>141</sup>

Article 2 of the same draft is particularly relevant and it deals with the use of certain terms; this article states:

Use of terms

For the purposes of the present articles:

- (a) “risk of causing significant transboundary harm” means such a risk ranging from a high probability of causing significant harm to a low probability of causing disastrous harm;
- (b) “harm” includes harm caused to persons, property or the environment;
- (c) “transboundary harm” means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the state of origin , whether or not the states concerned share a common border;
- (d) “State of origin” means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in draft article 1 are carried out;
- (e) “State likely to be affected” means the State in the territory of which the significant transboundary harm is likely to occur or which has jurisdiction or control over any other place where such harm is likely to occur;
- (f) “States concerned” means the State of origin and the States likely to be affected.<sup>142</sup>

The ILC emphasized the fact that prevention of transboundary harm arising from hazardous activities was stressed by principle 2 of the Rio Declaration and was declared by I.C.J. to be forming part of the corpus of international law.<sup>143</sup> The ILC also emphasized that the prevention principle was stressed in many other fora and in multilateral treaties.<sup>144</sup> The important thing about transboundary harm is that it must be “significant”. Thus as defined in article 2 of the draft Convention, the risk of

transboundary harm means “such a risks ranging from a high probability of causing significant harm to low probability of causing disastrous harm”. This threshold is designed so as not to cover every type of activity originally not prohibited under international law in order to strike a balance between the interests of the states concerned.<sup>145</sup> The report of the Commission stated that the definition of “risk of causing significant transboundary harm”:

allows for a spectrum of relationships between “risk and harm”, all of which would reach the level of “significant”. The definition identifies two poles within which the activities under these articles fall. One pole is where there is a *low probability* of causing *disastrous* harm. This is normally the characteristic of ultrahazardous activities. The other pole is where there is a *high probability* of causing *other significant* harm. This includes activities which have a high probability of causing harm which, while not disastrous, is still significant. But it would exclude activities where there is a *very low* probability of causing significant transboundary harm. The word “encompasses” in the second line intended to highlight the intentions that the definition is providing a spectrum within which the activities under these articles will fall.<sup>146</sup>

The Commission recognized the ambiguity of the word “significant” and asserted that:

a determination has to be made in each specific case. It involves more factual considerations than legal determination. It is to be understood that *“significant” is something more than “detectable” but need not be at the level of “serious” or “substantial”*. The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards.<sup>147</sup>

The Commission continued :

The ecological unity of the planet does not correspond to political boundaries. In carrying out lawful activities within their own territories States have impacts on each other. These mutual impacts, so long as they have not reached the level of *“significant”*, are considered tolerable. Considering that the obligations imposed on States by these articles deal with activities that are not prohibited by international law, the threshold of intolerance of harm cannot be placed below *“significant”*.<sup>148</sup>

The Commission has further stressed that the term *“significant”* is determined by factual and objective criteria as well as value determination depending on the circumstances of each particular case and the period in which such determination is

made; scientific knowledge and human appreciation for any particular resource do change from time to time and from case to case.<sup>149</sup>

In our view the work of the ILC did not clarify the definition of compensable damage or harm and the threshold to be used according to the draft articles but it added more ambiguity to already ambiguous rules. The only sure thing is that each and every case will be settled differently according to the specific circumstances and merits of each particular case, the factual and objective criteria used in each case, value determination and value judgement, the time of the determination of each case, the scientific knowledge available to the parties at the time of determination, human appreciation of each particular resource, and the equitable balance of interests of the parties to each case. Thus, no uniform rules and no uniform solutions are or will be available.

### **The Standard of Care and**

### **the Type of Liability Involved:**

The prevailing view among writers is that responsibility for environmental damage or harm is based on the breach of a treaty or customary international law obligation and that the mere occurrence of environmental harm is not sufficient to establish the responsibility of states, i.e. state environmental responsibility is a fault-based or a fault-caused responsibility, and that in a very limited number of cases based on express treaty provisions, state responsibility for environmental damage is strict or absolute. Thus, a failure of due diligence obligation must be proven in order to establish states' responsibility for environmental damage or harm.<sup>150</sup> Arguing against

the ILC attempt to distinguish between liability for lawful activities and responsibility for wrongful ones and its suggestions that “an alternative conceptual basis is needed in order to accommodate strict or absolute liability for lawful activities which cause environmental harm without any failure of due diligence” Professors Patricia Birnie and Alan Boyle wrote:

The cogency of this thesis is doubtful in the view of many writers, who argue that the case law, such as *Trail Smelter* and *Corfu Channel*, is based on responsibility for breach of obligation and not on some alternative theory, and that what matters is the content of the relevant rules of international law. Moreover, the point has already been made that the Commission’s attempt to avoid prohibition of environmentally harmful activities by distinguishing between liability for lawful activities and responsibility for wrongful ones is fundamentally misconceived. It fails to appreciate that much of the law of state responsibility, including the *Trail Smelter* case, is concerned with lawful activities which have caused harm and that it is not the activity itself which is prohibited, but the harm which it causes. This is the perspective from which the tribunal in *Trail Smelter* approached the issues: its final order required that the smelter be prevented from causing damage through fumes, and to that end it prescribed a control regime. Nowhere was it suggested that the operation of such industrial plants was prohibited or wrongful.

Thus the reasons advanced by the ILC do not make it necessary to depart, even in an environmental context, from the view that responsibility in international law rests primarily on some breach of obligation, however defined.<sup>151</sup>

Fault as the basis of international responsibility in international law is based on an objective test and not a subjective one; accordingly, intention, malice and/or recklessness are not required to be proven as elements of fault of grounds upon which fault is based.<sup>152</sup> Only the breach of an international obligation which is required to prove fault and establish state responsibility; the most important thing in this connection is, however, how to define due diligence.<sup>153</sup> This is important because, in general, international law obligations concerning the protection of the environment and the prevention of pollution and environmental harm are obligations of due diligence, and only in very rare circumstances absolute obligations of results are or would be involved. Due diligence obligations entail the adoption and introduction by states of legislation, administrative controls and other measures applicable to public and private conduct “which are capable of effectively protecting other states and the global environment, and it can be expressed as the conduct to be expected of a good government.<sup>154</sup> The flexibility of this standard makes it justify differing degrees of diligence depending upon considerations of the effectiveness of territorial control, the resources available to the state and the nature of the activity.<sup>155</sup> The standard is thus ambiguous and leaves much room for every state to define for itself the contents, extent, and limits of its due diligence obligations in environmental matters. A more useful and helpful approach is to follow internationally accepted minimum standards

specified in treaties and/or in resolutions and decisions of relevant international organizations.<sup>156</sup>

It should be stressed, however, that the rule of absolute or strict liability has been accepted in very few situations and that this rule is gaining increasing acceptance in the international community, particularly in the field of dangerous and ultra-hazardous activities. Arguing in favour of strict liability, the Commission of the European Communities in its most recent white paper on Environmental Liability stated:

Strict liability means that fault of the actor need not be established, only the fact that the act (or the omission) caused the damage. At first sight, fault based liability may seem more economically efficient than strict liability since incentives towards abatement costs do not exceed the benefits from reduced emissions. However, recent national and international environmental liability regimes tend to be based on the principle of strict liability, because of the assumption that environmental objectives are better reached that way. One reason for this is that it is very difficult for plaintiffs to establish fault of the defendant in environmental liability cases. Another reason is the view that someone who is carrying out an inherently hazardous activity should bear the risk if damage is caused by it, rather than the victim or society at large. These reasons argue in favour of an EC regime based, as a general rule, on strict liability.<sup>157</sup>

The same white paper took the position that strict liability would cover damage to persons and goods, contaminated sites, damage to biodiversity and protected natural resources, and damage caused by dangerous and potentially dangerous activities.<sup>158</sup>

#### IV

### Reparation for Environmental

### Damage or Injury

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It is a rooted principle of international law that a state committing or causing the commission of an internationally wrongful act is under an overriding legal obligation to make reparation for the consequences of its act. The Permanent Court of International Justice used a very wide formula of reparation in its most frequently quoted judgement in the *Chorzow Case*, the Court declared:

...reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which restitution in kind would bear, the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.<sup>159</sup>

This formula as used by the PCIJ is so wide and far-reaching that it covers all aspects and all forms of violations of international obligations and the all resulting consequences including any environmental injury or damage. Reparation for the violation of an international environmental obligation may take any or a combination of the following forms; (1) restitution in kind, (2) compensation, (3) satisfaction, and (4) assurances and guarantees of non-repetition.<sup>162</sup> Philippe Sands adds to these forms the form of “a declaration by an international tribunal on the legal position which is favourable to the person who has been wronged.”<sup>160</sup> State practice supports the use of all such forms whether singly or in combination.

It is interesting to note that the International Court of Justice has, in a recent case, emphasized the formula used by its predecessor, the PCIJ, and added new illustrative dimensions; the I.C.J. considered that the resumption of cooperation by the parties would wipe out all the consequences of the wrongful act of both parties to the dispute “as far as possible” and, as a result, the resumption or re-establishment of cooperation would be a form of reparation.<sup>161</sup>

It is useful to quote an EC Commission Green Paper on Environmental Liability which acknowledges some of the difficulties of legal and policy issues regarding some forms of reparations concerning environmental damage or injury:

An identical reconstruction may not be possible, of course. An extinct species cannot be replaced. Pollutants emitted into the air or water are difficult to retrieve. From an environmental point of view, however, there should be a goal to clean-up and restore the environment

to the state which, if not identical to that which existed before the damage occurred, at least maintains its necessary permanent functions. Even if restoration or clean-up is physically possible, it may not be economically feasible. It is unreasonable to expect the restoration to a virgin state if humans have interacted with that environment for generations. Moreover, restoring an environment to the state it was in before the damage occurred could involve expenditure disproportionate to the desired results. In such a case, it might be argued that restoration should only be carried out to the point where it is still “cost-effective”. Such determination involve difficult balancing of economic and environmental values.<sup>162</sup>

In addition, the ILC has proposed an important qualification with regard to reparation when it adopted paragraph 3 of proposed article 42 on “Reparation”. This paragraph reads: “In no case shall reparation result in depriving the population of a State of its own means of subsistence.”<sup>163</sup> Reparation must, therefore, take a form that does not result in depriving the population of the state making reparation of its own means of subsistence. For example, if the costs of clean-up and the financial value of compensation are too high to be borne by that state to the extent that payment in full and at one would result in eating up the whole or substantial part of the national income of the state and depriving its population or substantial part thereof of its own means of subsistence, then arrangements have to be made for periodic installments.

Some members of the Commission have however objected to the inclusion of paragraph (3) of the proposed article 42 and took the view that “the provision was

inappropriate and that in any event the provision should not apply where the population of the injured state would be similarly disadvantaged by a failure to make full reparation on such grounds.”<sup>164</sup> The Commission has nevertheless adopted the provision and noted that :

There are examples in history of the burden of “full reparation” being taken to such a point as to endanger the whole social system of the State concerned, for example in the context of a peace treaty following the defeat of a particular state. These are of course extreme cases, but within the whole spectrum of possible cases of responsibility the extreme case may not be excluded. Accordingly, paragraph 3 provides that reparation is not to result in depriving the population of a State of its own means of subsistence. This has, of course, nothing to do with the obligation of cessation, including the return to the injured State, for example, of territory wrongfully seized. But in other contexts-e.g. the payment of sums of money by way of compensation or satisfaction- the amounts required, or the terms on which payment is required to be made should not be such as to deprive the population of its own means of subsistence.<sup>165</sup>

The Commission has stressed the fact that the language of paragraph 3 of proposed article 42 was drawn from article 1, paragraph 2, of the International Covenants on Human Rights of 1966.<sup>166</sup> Paragraph 2 of article 1 of the International Covenant on Economic, Social and Cultural Rights<sup>167</sup> and paragraph 2 of article 1 of

the International Covenant on Civil and Political Rights <sup>168</sup> are identical; they read as follows:

All peoples may, for their own ends, freely dispose of their wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Thus, the principle that in no case may a people be deprived of its own means of subsistence and that in no case shall reparation result in depriving the population of a state of its own means of subsistence “reflects a legal principle of general application”<sup>169</sup> or a fundamental principle of world public order. But it should be stressed further that the application of this principle shall not result in or lead to depriving the population of the injured State of its own means of subsistence. If the application of the principle would cause this result, the principle will be inapplicable.

In a later development the Drafting Committee of Commission dropped the text of paragraph 3 of article 42 commented on above on the grounds that it need not be inserted as its part of existing treaty law as explained above.<sup>170</sup>

## **Concluding Remarks**

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The introductory chapter deals with important introductory issues before embarking on the main research on the international responsibility for environmental damage because of armed conflict, with special reference to Kuwait. Customary International Law and the responsibility of states not to damage or injure the environment, treaty law and the general obligation not to cause harm or damage to the environment, compensable environmental damage, and reparation for such damage or injury are important introductory subjects which are studied in this chapter. In fact we have reached the conclusions that although international law incorporates a firmly established general obligation binding upon all states to protect and not harm or damage or cause harm or damage to the environment, not every environmental harm or damage is compensable, but only significant environmental damage is. Significant environmental damage is less than serious but more detectable. Every case is or will be decided or settled upon its own merits, circumstances, time, and place of occurrence. International law now does not recognize any distinction between direct and indirect damage but it recognizes only compensable environmental damage which is significant environmental damage. In environmental matters fault-based or fault-caused liability arising out of the violation of due diligence obligations is the generally accepted type of state liability but strict liability is emerging to be applicable in cases of particularly serious, dangerous, hazardous and ultra-hazardous activities. Any act of state which causes significant environmental damage to any other state or to areas beyond national jurisdiction or which causes transboundary

adverse environmental effect or pollution is proscribed under international law irrespective of the fact that the act or activity itself was not originally prohibited. The injured state is entitled to full reparation, reparation may take any one form or a number of forms but it “must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.” Restitution in kind, compensation, satisfaction, and assurances and guarantees of non-repetition are the common forms of reparation, but the parties may agree to other forms. Nevertheless, reparation may not and shall not result in depriving the population of the state concerned of its own means of subsistence.

But what about the rules of responsibility of states for environmental damage or injury they inflict or cause to be inflicted during or because of armed conflict? The following chapters attempt to deal with this question and the issues arising in connection therewith, and attempt to find solutions to the problems and issues posed by the question as have been raised in actual cases to be dealt with in the bulk of this research.

## NOTES TO CHAPTER ONE

### Section One

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- 1 Jay E. Austin *The Environmental Consequences of War, lessons from other legal Regimes*, op.cit. 183.

See too United Environment Program, report of the working group of experts on liability and compensation for environmental damage arising from military activities (May 17, 1996).

On the work of the Tribunals, see William Fenirck, "The development of the law of armed conflict through the jurisprudence of the international criminal tribunal for the former Yugoslavia", in Michael N.Schmitt and Leslie C.Green (ed.) *The law of armed conflict: into the next millennium* (Newport, R.I.: Naval war college, 1998); see also Dr.Chrif Bassiouni, *The law of the international criminal tribunal for the former Yugoslavia* (Irvington-on-Hudson, N.Y.: Transnational publishers, 1996).

2. P.Birnie & A. Boyle adopt the same view in their book, *International Law & the Environment*, 1994 at 140.
3. *Corfu Channel (United Kingdom v. Albania)* 1949 ICJ Rep.4, at 23
4. *Id.* At 4 *et seq.* The quote is mentioned by P.Sands in *Principles of International Environmental Law*, Vol. I, 33 (1995).
5. (*Spain v. France*), 12 U.N.R.I.A.A. 281, 303(1957).
6. *Id.*
7. *Id.* At 303

8. *Nuclear Tests (Australia v. France) (Interim Measures) I.C.J. Reports 1973*, 99, 103.
9. *Id.*
10. *Nuclear Tests Case (New Zealand v. France) (Interim Measures) I.C.J. Rep. 1973*, 135, 139.
11. *Nuclear Tests (Australia v. France)*, *supra* note 10; *Nuclear Tests (New Zealand v. France)*, note 11, *id.*
12. *Nuclear Tests (Australia v. France) id.*; *Nuclear Tests (New Zealand v. France) id.*
13. *Nuclear Tests (Australia v. France) (Jurisdiction) I.C.J. Reports 1974*, 253; *Nuclear Tests (New Zealand v. France) (Jurisdiction) I.C.J. Reports 1974*, 457.
14. In this connection the Court stated:  

“One of the basic principles governing the creation and performance of legal obligations, whatever their sources, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular, in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus the interested States may take cognisance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.” *I.C.J.Reports 1974*; 267, 268.
15. *Id.* At 502.
16. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, (Mosco) 5 August 1963, in force 10 October 1963; 480 UNTS 43. Hereinafter cited as the Test Ban Treaty *or* the Nuclear Test Ban Treaty.
17. Australia also contended:

“...the basic principle is that intrusion of any sort into foreign territory is an infringement of sovereignty. Needless to say, the government of Australia does not deny that the practice of states has modified the application of this principle in respect of the interdependence of territories. It has already referred to the instance of smoke drifting across national boundaries. It concedes that there may be no illegality in respect of certain types of chemical fumes in the absence of special types of harm. What it does emphasise is that the legality thus sanctioned by the practice of states is the outcome of the toleration extended to certain activities which produce these emissions, which activities are generally regarded as natural uses of territory in modern industrial society and are tolerated because, while perhaps producing some inconvenience, they have a community benefit.” *Id.* At 525-26.

18. Request for an Examination of the Situation in Accordance with paragraph 63 of the Court’s Judgment of 20 December 1974 in the *Nuclear Tests (New Zealand v. France)* Case, 22 September 1995 (Order); *I.C.J. Reports* 1995, 288, 289, [Hereinafter cited as Request for an Examination of the Situation].
19. *Id.*; see text above note 22 for the exact wording of paragraph 63 referred to; see also, *I.C.J. Reports* 1974, p. 477.
20. Request for an Examination of the Situation, at 289.
21. *Id.* At 289 & 302; *I.C.J. Reports* 1974, at 477.
22. Request for an Examination of the Situation, at 290.
23. *Id.*
24. *Id.* At 291.
25. *Id.* At 291-92
26. *Id.* At 292

27. *Id.* At 293 *et seq.*

28. *Id.* At 298; the Court stated:

“Whereas during its oral statements New Zealand further contended that changes in the law were capable of affecting the basis of the 1974 Judgment; since the Court must have been aware at the time of the Judgment in 1974 of “proposed of a significant forward surge in the evolution of standards and procedures” in the field of international environmental law; that such an evolution had indeed taken place both in customary international law and by virtue of the Noumea Convention; that, under current customary law, especially stringent controls applied to the marine environment, so that, in general, the introduction of radioactive material into the marine environment was forbidden’ and that, specifically, “any introduction of radioactive material into the marine environment as a result of nuclear tests” was forbidden; that the standard of proof to which New Zealand should be subject in seeking to demonstrate that France was in breach of its obligations was a *prima facie* test; and that by virtue of the adoption into environmental law of the “Precautionary Principle”, the burden of proof fell on a State wishing to engage in potentially damaging environmental conduct to show in advance that its activities would not cause contamination;

Whereas New Zealand reiterated in its oral statements that Article 12 of the Noumea Convention required France to “take all appropriate measures to prevent, reduce and control pollution in the Convention Area which might result from the testing of the nuclear devices”; that Article 16 of that Convention required the carrying out of an environmental impact assessment before any major project “which might affect the marine environment” was

embarked upon; that a similar obligation existed under customary law; that, moreover, such obligation was not subject to any exception recognized in international law concerning national security; that the Precautionary Principle required France to carry out such an assessment as a precondition for undertaking the activities, and to demonstrate that there was no risk associated with them; and that France's failure to comply with these obligations had affected the basis of the 1974 Judgment;" *id.* at 298-99.

29. *Id.*

30. *Id.* at 292 *et seq.*

31. *Id.* at 307-308

32. *Id.* at 305-306.

33. *Id.* at 306.

34. I.C.J.'s Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, *I.C.J. Reports 1996*, 226.

35. *Id.* at 243

36. *Id.* at 243.

37. *Id.* at 241-42

38. *Case Concerning the Gabčíkovo –Nagymaros Project (Hungary v. Slovakia)* (Judgment), *I.C.J. Reports 1997*, 1.

39. *Id.* at 78.

40. *Case Concerning Legality of Use of Force (Yugoslavia v. United States of America)*, *Request for the Indication of Provisional Measures*, (Order) 2 June 1999, *I.C.J. Reports 1999*.

41. *Id.* at paras 1-8.

42. *Id.*

One of the other most frequently cited cases and referred to in this regard is the *Gut Dam* Arbitration between the United States and Canada; this case involved the construction of a dam between Adams Island in the Territory of Canada and Les Galops belonging to United States for the purpose of improving navigation in the St. Lawrence River. The dam was constructed in two stages and was completed in 1904 after the approval of the competent authorities in both Canada and the United States. But during the period from 1904 to 1951 several manmade construction and changes took place which affected the flow of water in the Great Lakes – St. Lawrence River basin. The Gut Dam itself was not altered or changed in any way, but the level of water in the river and nearby Lake Ontario increased because of the construction and changes taking place from 1904 to 1951. In 1951-52 the level of water had sharply increased and reached unprecedented heights. Due to this unprecedented increase in water levels and other natural phenomena, extensive flooding and erosion damage on both the north and south shores of all the lakes occurred. A dispute had arisen between Canada and the United States concerning U.S. claims for damages allegedly resulting from the presence of the Gut Dam. A claims tribunal, the Lake Ontario Claims Tribunal was set up by the two countries to settle the claims. Canada removed the dam in 1953 as a part of the construction of the St. Lawrence Seaway. The claims tribunal found that Canada had an obligation to all citizens of the United States and not just to the owner of Les Galops; it found also that such responsibility was not limited in time to some initial testing period. The tribunal reached the conclusion that the dam caused the damage for which claims were filed and approved a negotiated settlement of a lump-sum payment from Canada to the

United States “in full and final satisfaction of all claims of United States nationals for alleged damage caused by Gut Dam.” The tribunal refused to consider any arguments for or against fault or negligence in planning and construction of the Gut Dam and it refused to consider whether Canada knew or ought to have known what injuries might occur. The Tribunal thus based its decision on the rules of liability without fault.

For the details of the Case *see*; Canada-United States Settlement of Gut Dam Claims, Sept. 22, 1968, Report of the Agent of the United States before the Lake Ontario Claims Tribunal, *in* 8 I.L.M. 118 (1969). For the Tribunal’s Decision of February 12, 1968 *see, id.* at 138. For the settlement approved by the Tribunal *see*: Agreement on Settlement of Claims Relating to Gut Dam, Nov. 18, 1968, (1968)6 U.S.T. 7863; T.I.A.S. No. 6624. See also the Decision of the Tribunal in 8 I.L.M. 138 (1969).

43. For several reasons, Dr. Alan Boyle in his 2<sup>nd</sup> edition set out the claim that the precautionary principle is customary law because in his view untenable and wholly unsupported by authority or state practice.
44. Declaration of the United Nations Conference on the Human Environment is contained in the REPORT OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, Stockholm, 5-16 June 1972, U.N. Doc. A/CONF.48/14/Rev. 1 (1973) at 3-5. The text of the Recommendations appears at 6-28, *id.*
45. *See; e.g. Sohn, The Stockholm Declaration on the Human Environment, 14 Harv. Int’l L.J. 433, passim, (1973).*
46. *Supra* note 44 at 3.
47. Sohn, *supra* note 45 at 440.

48. *Supra* note 44 at 4.
49. *Id.*
50. The U.N. Convention on the Law of the Sea contained a whole part dealing with the protection of the marine environment; relevant provisions of this part will be referred to in this text above notes 71 *et seq. Infra. See, in particular*, arts. 192 & 194 of the Convention.
51. For a somewhat similar view *see*; Sohn, *supra* note 45 at 463.
52. The Stockholm Declaration, *supra* note at 5; The Rio Declaration on Environment and Development, U.N. Doc. A/CONF. 151/5/Rev. 1; (13 June 1992). The Rio Declaration was republished in 31 I.L.M. 874 (1992).
53. *Supra* note 44 at 5.
54. U.N.Doc. A/CONF. 48/14, at 118 (1972).
55. Shon, *supra* note 45 at 492-93
56. The Rio Declaration, *supra* note 52.
57. Philippe SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, Vol.I, at 186(1995).
58. *Id.* at 186 *et seq.* & 190 *et seq.*
59. Professor Sands adopts a similar view; he asserted that principles 21 of the Stockholm Declaration and 2 of the Rio Declaration do constitute “the basic obligation underlying international environmental law and the source of its further elaboration in rules of greater specificity.” *Id.* at 186. He further states that “principle 21 is widely recognized to reflect a rule of customary international law, placing international law limits on the right of states in respect of activities carried out within their territory or under their jurisdiction.” *Id.* at 190-91.

60. *Id.* at 190 et seq.; Sohn, *supra* note 45 at 485 et seq.; Birnie & Boyle, *supra* note 1 at 94.
61. The Stockholm Declaration, *supra* note 44 at 5; the Rio Declaration, *supra* note 52.
62. *Supra* note 44 at 5.
63. See the text of the principle and its wording, this text above note 62, *Id.* See also Sohn, *supra* note 45 at 495-96.
64. See chapter 2 of this research.
65. *Supra* note 52.
66. See the text of principle 22 above note 62 *supra*.
67. Emphasis added.
68. For a detailed study of procedural duties of States and procedural standards of the protection of the environment and prevention and control of pollution of significant international effects see e.g. G.HUSSEIN, ENVIRONMENTAL STANDARDS AND DEVELOPING COUNTRIES, (1986), AT 123 et seq.
69. The Rio Declaration, *supra* note 52.
70. See this text above note 57 et seq. and see notes 57-60 the International Court of Justice and the International Law Commission referred to principle 21 of the Stockholm Declaration as considering a customarily basic and rooted principle of international Law and recognized the obligation that states are bound to respect and not violate the sovereignty and the integrity and inviolability of the territory of other states, see e.g. Legality of the threat or Use of Nuclear Weapons. Advisory Opinion of 8 July 1996, *I.C.J. Reports* [1996] p.241; I.L.C. Report 1998 Chapter 4 p.8 (<http://www.un.org/law/ilc/reports/1998/chp4.htm>).

71. The United Nations Convention on the Law of the Sea, done at Montego Bay, December 10, 1982, U.N. Docs A/CONF.62/122(1982), A/CONF.62/122/Corr. 3 (1982); A/CONF. 62/122/Corr.8 (1982). The text of the Convention appears also *in* 21 I.L.M. 1261 (1982).
72. *See* this text above note 53 *et seq.*
73. *see, e.g.* Sands, *supra* note 57 at 183-242 & 291-345, Hussein, *supra* note 68 at 73 *et seq.*
74. Convention on International Liability for Damage Caused by Space Objects (London, Moscow, Washington) 29 March 1972, in force 1 September 1972, 961 UNTs 187, [hereinafter cited as the Space Liability Convention].
75. *Id.* art. II.
76. *Id.* art (a).
77. Sands, *supra* note 57 at 646.
78. The Space Liability Convention; *supra* note 74, art III
79. For the Canadian claim against the U.S.S.R. *see*, Canada Claim against the USSR for Damage Caused by Soviet Cosmos 954, 23 January 1979, 18 I.L.M. (1979), 899-908. For the settlement *see*, Protocol between Canada and U.S.S.R. 2 April 1981, 20 I.L.M.(1981), 689.
80. Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, adopted on 14 December 1999 by the Conference of the Basel Convention, UNEP News Release(15/12/1999).
81. Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, (Basel) 22 March 1989, in force 24 May 1992, 28 I.L.M. (1989) 657.

82. Article 4 of the Protocol defined the persons and states strictly liable during the movements of hazardous and other wastes and their final disposal. On the other hand, article 5 dealt with fault-based liability it states:

“Without prejudice to Article 4, any person shall be liable for damage caused or contributed to by his lack of compliance with the provisions implementing the Convention or by his wrongful intentional, reckless or negligent acts or omissions. This article shall not affect the domestic law of the Contracting Parties governing liability of servants and agents.”

83. KUWAIT REGIONAL CONVENTION FOR CO-OPERATION ON THE PROTECTION OF THE MARINE ENVIRONMENT FROM POLLUTION & THE PROTOCOL CONCERNING REGIONAL CO-OPERATION IN COMBATING POLLUTION BY OIL AND OTHER HARMFUL SUBSTANCES IN CASE OF EMERGENCY, 1978; this Convention entered into force on 30 June 1979.

84. Kuwait Convention. *Id.* art I, para (a).

85. *Id.* art. III, para (e).

86. *Id.* art. III, para.(b).

87. *Id.* art.III, para., ©.

88. *Id.* art. III, para (d)

89. *Id.* art, III,para(e).

90. *Id.* art. IV which reads:

“The Contracting States shall take all appropriate measures in conformity with the present Convention and the applicable rules of international law to prevent, abate and combat pollution in the Sea Area caused by intentional or accidental discharges from ships, and shall ensure effective compliance in the Sea Area with applicable international rules

relating to the control of this type of pollution, including load-on-top, segregated and crude oil washing procedures for tankers.

91. *Id.* art. V which reads:

“The Contracting States shall take all appropriate measures to prevent, abate and combat pollution in the Sea Area caused by dumping of wastes and other matter from ships and aircraft, and shall ensure effective compliance in the Sea Area with applicable international rules relating to the control of this type of pollution as provided for in relevant international conventions.”

92. *Id.* Art. VI which reads:

“The Contracting States shall take all appropriate measures to prevent, abate and combat pollution caused by discharges from land reaching the Sea Area whether water-borne, air-borne or directly from the coast including outfalls and pipelines”.

93. *Id.* art VII which reads:

“The Contracting States shall take all appropriate measures to prevent, abate and combat pollution in the Sea Area resulting from exploration and exploitation of the bed of the territorial sea and its subsoil and the continental shelf, including the prevention of accidents and the combating of pollution emergencies resulting in damage to the marine environment.”

94. *Id.* Art. VIII which reads:

“The Contracting States shall take all appropriate measures to prevent, abate, and combat pollution of the Sea Area resulting from land reclamation and associated suction dredging and coastal dredging.”

95. STATUTE OF THE JUDICIAL COMMISSION FOR THE SETTLEMENT OF DISPUTES, adopted by the Council of the Regional Organization for the Protection of the Marine Environment, April 1981.

96. *Id.* Art. 18.
97. *Id.* Art. 19.
98. *Id.* Art. 20, para. 1.
99. *Id.* Art. 21.
100. The Kuwait Convention, *supra* note 83.
101. Statute of the Judicial Commission, *supra* note 95, art. 24, para. 1.
102. *Id.* Art. 24, para. 2.
103. *see* chapters 3 and 4, *infra*.
104. The Protocol, note 83, *supra*.
105. *Id.* Art. 1, para 2.
106. But it should be emphasized that the Regional Organisation for the Protection of the Marine Environment (ROPME) established in accordance with the Kuwait Convention has not been successful in dealing with some of the most important marine environment and marine pollution problems of the Gulf Area resulting from the Iraq-Iran armed-conflict and Iraq's illegal invasion and occupation of Kuwait. On May 10, 1997, we forwarded a number of questions to the ROPME Secretary-General concerning the application of the Kuwait Convention and the successive protocols to the Iraq-Iran dispute and the cases arising out of or as a result of the Iraqi illegal invasion and occupation of Kuwait and the Iraqi environmental aggression against Kuwait and the Gulf Area. The Secretary-General did not reply. The present writer concludes that ROPME has not been effective in dealing with serious environmental problems of the Gulf Area such as those arising out of or as a result of Iraq's aggression against Kuwait and the illegal invasion and occupation of Kuwait. ROPME did not even condemn the Iraqi environmental aggression or the

illegal invasion and occupation of Kuwait and the environmental effects of such aggression.

Iraq's membership in ROPME has in fact be suspended because of the existence of ROPME headquarters in Kuwait and not because of any legal action adopted by the Oraganization. The writer recommends the reinvigoration of ROPME and enhancing its role and the role of its Judicial Commission in order to be able to take effective decisions concerning serious environmental problems and violations by any Contracting State party to the Kuwait Convention.

It should also be noticed that in his reply to a question by Kuwaiti M.P. Dr. Hasan Gohar concerning whether Iraq has violated the Kuwait Regional Convention, whether Iraq is legally responsible for any such violations and whether compensation can be demanded from Iraq for its violation of the said Convention, the Deputy Prime Minister and Minister of Foreign Affairs of Kuwait stated the following points:

First: During its occupation of Kuwait, Iraq did indeed commit serious violations of the Kuwait Regional Convention and its protocols, polluting the marine environment through pumping of Kuwaiti oil into the sea and drowing of many ships and vessels carrying crude oil.

Second: ROPME and the Kuwait National Environmental Agency requested the Kuwait Institute For Scientific Research to assess all environmental losses and damage suffered by Kuwait in order to, well, prepare Kuwaiti claims in this connection. ROPME, prepared further claims on behalf of other Gulf States.

Third: The Kuwait Regional Convention did not include any specific sanctions or penalties to be applied to the states violating the Convention. But the freezing of Iraq's membership in ROPME by the Ministerial Council of the Organization amounts to a strong condemnation of Iraq by ROPME. See letter dated Feb. 9, 2000, by the Deputy Prime Minister and Minister of Foreign Affairs of the State of Kuwait to the Speaker of the Kuwaiti National Council, a copy of which was provided to the present writer by Kuwaiti M.P. Dr. Gohar who presented his questions upon the initiative of the present writer.

107. See note 106, *Id.*
108. Protocol concerning the Control of Sea Transboundary Transport of Dangerous and Other Wastes and their Discharges, ROPME, 1998.
109. For a study of the roles of treaties, declarations and resolutions of international organizations and international conferences in the development and evolution of customary international law rules see, in addition to the general books on international law, e.g., M.BYERS, CUSTOMS, POWER AND THE POWER OF RULES, *International Relations and Customary International Law* (1999), at 129-221, *passim*.
110. See; e.g., YBILC 1970, I,P. 218; Handl, *Territorial Sovereignty and the Problem of Transnational Pollution*, 69 *AJIL*(1975) at 60; J. de Arèchaga, *International Law in the Past Third of a Century*, 159 *RdC*, 1978-1, p. 26; B. Graefrath, *Responsibility and Damages Caused*, *RdC* 1984-II, p.2 *et.seq.*
111. A Schule quoted by Graefrath, *id.* at 46; see also; Graefrath, *id.* at 45; P.M.Kuris, *Violations of International Law and State Responsibility*, (1973),

- p.114; V.A. Vassilenko, *International Responsibility of States for Violations of International Law*, (1975), p.119.
112. Schule, cited by Graefrath, *supra* note 110, at 46.
  113. Graefrath, *id.*, at 45-46.
  114. Sands, *supra* note 57, at 633.
  115. Barboza, *the ILC and Environmental Damage*, in P.WETTERSETIN (ed.), *HARM TO THE ENVIRONMENT: THE RIGHT TO COMPENSATION AND THE ASSESSMENT OF DAMAGES*, 73 at 76 (1997).
  116. *Id.* at 76.
  117. *Id.*
  118. *Id.* at 80-81.
  119. *Id.* at 80.
  120. The terms “pollution”, “adverse effects” and such other related terms are defined in this research in different ways, just as differently used in various treaties and other international instruments referred to, cited or quoted through this research.
  121. For parties, reservations and declarations see IMO, status of multilateral conventions and instruments in respect of which the IMO or its secretary. General performs depository or other functions (current year) . For information on the operation of the fund see international oil pollution compensation fund, annual reports.
  122. Hussein, *supra* note 68 at 181 *et seq.*
  123. *See*; e.g. Sands, *supra* note 57 at 635-36.
  124. Sands, *id.*
  125. *Id.*

126. See comments made by Sands concerning this exchange, *id.*, at 245-46.
127. Sands, *supra* note 57, at 635 *et seq.*
128. See Sands, *id.* at 647. For the details of the Canada Claim see *Canada, Claim against the USSR for Damage Caused by Soviet Cosmos 954*, 23 January 1979, 18 I.L.M. (1979) pp. 899-908. For the settlement of this claim see the Protocol between Canada and the USSR, 2 April 1981, 20 I.L.M. (1981) at 689.
129. See generally, *Birnie and Boyle, supra* note 1 at 101-102. The U.N. Law of the Sea Convention defined pollution of the marine environment as follows:  
  
    ((“pollution of the marine environment” means the introduction by man directly or indirectly of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of the sea water and reduction of amenities.)) Art. 1, para. 1(4) of the Convention. This probably is the widest definition of marine pollution included in a treaty. Definitions included in other treaties are referred to in this research whenever necessary.
130. Sandvik & Suikkari, *Harm and Reparation in International Treaty Regimes: An Overview*, in Wetterstein, *supra* note 115, 57, *passim*.
131. Birnie & Boyle *supra* note 1 at 98 *et seq.*
132. *Id.* at 99.
133. *Id.*
134. *Id.*

135. Boyle, *Remedying Harm to International Common Spaces and Resources: Compensation and Other Approaches*, in Wetterstein, *supra* note 115, 83, at 88.
136. *Id.* at 99.
137. Brower, Richard and B.Lillich, *the United Nations Compensation Commission: Goodbye Forever to “Direct” versus “Indirect” Damages*, 38. Va.J.Int’l L. 21 (1997), *passim*; Lillich and Brower, *Opinion Regarding the Jurisdiction and Powers of the United Nations Compensation Commission*, February 10,1992, 38 Va.J.Int’l L. 25 (1997), *passim*.
138. *Id. passim*.
139. Lillich and Brower, *Id.* at 35.
140. ILC Report .1998, Chapter IV, International Liability for Injurious Consequence Arising Out of Acts Not Prohibited by International Law (Prevention of Transboundary Damage from Hazardous Activities), para. 47, <http://w.w.w.un.org/law/ilc/reports/1998/chp4.htm>.
141. Convention on the Prevention of Significant Transboundary Harm, Draft preamble and revised draft articles proposed by the Special Rapporteur agreed by the commission to be referred to the Drafting committee, ILC 2643 rd meeting, 20 July 2000; GAOR, 55<sup>th</sup> sess. Supp. No. 10 (A/55/10), Para.721.
142. *Id.*
143. *Supra* note 139, text of the draft articles with commentaries thereto, subpara.3.
144. *Id.* subpara. 4.
145. Art.2, Commentary, *id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* In another important development, the Commission accepted the Special Rapporteur’s expression that the draft convention would cover “all activities,

including military ones, if they caused transboundary harm, assuming that they were fully permissible under international law.” G.A.O.R. 55<sup>th</sup> Sess. Supp. No.10 (A/55/10) para. 696, (2000).

150. Birnie & Boyle, *supra* note 1 at 92, *et seq.* and at 139 *et seq.*; Sands, *supra* note 57 at 637.
151. Birnie & Boyle *supra* note 1 at 140-41.
152. *Id.* at 141-2; *but see* Sands, *supra* note 57 at 637.
153. Birnie & Boyle, *supra* note 1 at 92-4 and at 142.
154. *Id.* at 92-3.
155. *Id.* at 93.
156. *Id.* at 93-4; Hussein, *supra* note 68, *passim*.
157. White Paper on Environmental Liability, presented by the Commission of the European Communities, Brussels, 9.2.2000, COM (2000) 66 final, at 16-17, para. 4.3.
158. *Id.* at 5..
159. *Chorzow Factory (Germany v. Poland)*, (1927) *P.C.I.J.*, Ser. A, No.17 at 47.
160. Graefrath, *supra* note 110 at 69 *et seq.*
161. Sands. *Supra* note 57 at 639.
162. I.C.J. Reports (1997), *supra* note 39 at 80.
163. Communication from the EC Commission to the EC Council and the EC Commission to the EC Council and European Parliament on Environmental Liability, para. 5.2, p.32 (1993), quoted by Sands, *supra* note 57, at 639-40.
164. ILC Report (1996), Ch.III, State Responsibility, Draft Articles on State Responsibility, art. 42, para 3. But see later developments, regarding the 2000 Draft Articles provisionally adopted by the Drafting Committee on second reading, *Infra* note 173.

165. *Id.* Text of draft article 42, (para.3), 47 and 51 to 53 with commentaries thereto provisionally adopted by the Commission at its forty-eighth session, para.66; but see *infra* note 173.
166. *Id.*
167. *Id.*
168. 993 U.N.T.S. 3; 6 I.L.M. 360 (1967).
169. 999 U.N.T.S. 171; 6 I.L.M. 368 (1967).
170. ILC Report (1996), *supra* note 167.
171. It should be stressed the ILC 1996 text referred to in this text above notes 166-169 and note 172 *supra* has been revised by the ILC Drafting Committee which adopted a 2000 State responsibility Draft Articles. This new Draft Articles was provisionally adopted by the Drafting Committee on second reading at its fiftieth and its fifty-first sessions. U.N. Doc. A/C N. 4/L.569 and A/C N.4/L. 574 and Corrs. 1 (English only), 2 (French only), 3 and 4 (Spanish only); U.N. Doc. A/CN. 4/L. 600, 21 August 2000. The Drafting Committee dropped the proposed rule referred to in former paragraph 3 of article 42 and re-numbered the chapter dealing with reparation to be from article 35 to article 40 inclusive.

## Section Two

# The Law of International Environmental Responsibility Relative to Armed Conflicts

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This chapter will be devoted to the law of International responsibility as it relates to armed conflicts. Treaties or conventional international law and customs or customary international law do constitute the most important sources of the law of such responsibility. Subsidiary sources for the determination of such law do exist and they mainly include judicial decisions and resolutions and works of international organizations and conferences. Some of the rules and principles of the law of the international responsibility for environmental damage caused during or because of armed conflicts have developed to constitute peremptory norms of general international law (*jus cogens*).

Our study in this chapter will focus on the treaty or conventional sources and customary international law. Subsidiary sources will be referred to as far as they relate to the constitution of any treaty or customary rule. Resolutions and acts of international organizations will be discussed in detail in chapters 3 and 4 dealing with the “the Security Council and the Environment” and “the U.N. Compensation Commission” respectively. These two chapters will focus mainly on the Gulf War and Kuwait environmental damage and the Iraqi responsibility as “a case study”. Chapter 1 dealt, in some respects, with some aspects of the resolutions and acts of international organizations, agencies and conferences. Our study in this chapter will therefore deal with the following issues, each of which will be studied in a separate section.

1. The General Prohibition on the Threat or Use of Force which causes Environmental Damage and the Self-Defence Exception.
2. Protected Areas in International Law Limitation on the Use of Force.
3. The International Law Applicable to the Actual Conduct of War (*jus in bello*) and the Relevance to Environmental Damage.
4. Conclusions.

### **1. Environment impacts of war.**

The environmental impacts of war are often multi-dimensional. They also often have repercussions in areas long distances away from those of concentrated battle and over prolonged periods of time, long after the wars have ended. Several possible environment impacts of war are explored below.

#### **Impacts of Land:**

Land is affected both by direct war actions and by military operations (preparations for war). Bombs and missiles contribute to the formation of craters, compaction and erosion of soil, and soil contamination by toxic and hazardous residues. Land use patterns often change over prolonged periods of time due to the continued presence of landmines and other remnants of war. Use of biological chemical and nuclear weapons is also likely to change land use patterns significantly by precluding and productive use of land for very long periods of time- even centuries.

There are also those activities that specifically target land resources, for example, deliberate deforestation efforts can alter the prevailing land, water and biotic regimes with any number of resulting adverse consequences. Another example is the degradation of soil conditions that resulted from oil fires in Kuwait.

Use of land for military operations also contribute significantly to environment damage. Globally, it is estimated that the amount of land used for these purposes ranges between 750,000 and 1,500,000Km<sup>2</sup>, an area that is likely larger than the total surface areas of France and United Kingdom combined(797,000Km<sup>2</sup>),

### **Impact on water:**

Water contamination (of both surface and ground water) is also a common result of various types of warfare. Use of chemical, biological, or nuclear weapons can contribute to long-term water pollution, with attendant health hazards for humans and the associated eco-systems. Appropriate remedial techniques for such contamination are often technologically impossible or extremely expensive, technologically complex and require very high levels of scientific expertise.

### **Impacts of Air quality**

In addition to the atmospheric emissions from the vehicles and other equipments used during routine war activities and military operations, serious air pollution often occurs as a result of the use of chemical, biological, and nuclear weapons. The aggressive act of setting fire to the Kuwaiti oilfields resulted in extensive air pollution in the region. Depending on the extent and nature of the air pollution and the prevailing topographical and atmospheric conditions around the area where it originates, airborne pollutants can travel over long distances, contribute to acid rain, and cause serious health hazards for humans and other living organisms located within the affected zone.

**II**  
**The General Prohibition on the Threat**  
**or Use of Force which causes**  
**Environmental Damage**  
**And**  
**The Self-Defence Exception**  
=====

In past centuries war and the use of force by states had been recognized as legitimate under international law; the role of international law was to recognize and give effect to the results of war. Gradually rules of law were introduced to regulate the conduct of combatants and lessen the atrocities and horrors of war. But until the early part of this century, resort to war by states was still legitimate and no serious attempts had been made to outlaw war and the use of force. The first major attempt to outlaw war was incidental, limited and dependent upon the operation of the dispute-settlement mechanisms of the League of Nations, but the Covenant of the League of Nations did not pronounce war illegal.<sup>1</sup> Most important of all efforts during the period between World War I and War II was the signing of the 1928 Kellogg-Briand pact which sought to eliminate war of aggression and proscribe the use of force in international relations.<sup>2</sup> But all of those efforts had failed and World War II broke out.

Unlike previous efforts, the Charter of the United Nations included clear provisions, proscribing not just the use of force, but, even more assertively and decisively, proscribed the threat to use force, the use of force and acts of aggression against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.<sup>3</sup> Under the U.N. Charter, the use of force by states is permitted only in case of individual or collective self-defence (Article 51 of the Charter).<sup>4</sup> In addition, the Security Council is

empowered to take action which may include the use of force in cases involving threats to the peace, breaches of the peace and/or acts of aggression, and it may authorize regional arrangements or agencies to take enforcement action provided that such action is taken under the authority of the Security Council.<sup>5</sup>

It is now accepted in international law and international relations that the U.N. Charter provisions concerning the prohibition of the threat or use of force have been firmly rooted in the realm of peremptory norms of general international law (*jus cogens*).<sup>6</sup> Thus any violation of such provisions gives rise to the international responsibility of the violator, But under the U.N. Charter can the unlawful use of force which caused environmental damage be considered as an act giving rise to the international responsibility of the violator? And can the environment and/or the environmental damage be considered as “force“ the threat or use of which is prohibited under the Charter and gives rise to the international responsibility of the violator? One would not find any difficulty in asserting that any unlawful use of force by a State which causes any damage including environmental damage, to any other State, would satisfy the requirements of a “wrongful act” giving rise to the international responsibility of the State using force unlawfully regardless of Security Council Resolution No. 687 of 1991 which covers only direct loss or damage.<sup>7</sup> General international law of State’s international responsibility for damage or loss caused by its unlawful use of force or other unlawful activities does not limit such responsibility to only direct loss or damage (this point will be elaborated in detail in chapter 4 of this research since this chapter “2” focuses only on the determination of wrongful acts or other acts giving rise to the international responsibility for environmental damage in respect with war or armed conflict).<sup>8</sup>

With regard to the second, question, it is considered, by far, one of the most important issues generating an overwhelming challenge to international law, that is whether the use or that to use the environment as a weapon can be considered as “force” which is prohibited under the U.N. Charter; and therefore, any threat or use of such a weapon as “force” raises the international responsibility of the violator? The term “force” was not defined in any international instrument attempting to outlaw war; the U.N. Charter itself did not include any definition of that term. But, traditionally, the term “force” in the context of “war” was used to including not only “armed force” or “military force” but also any kind of force that wins a war or helps in winning a war. Some writers have, however, attempted to restrict the term “force” embodied in Article 2/4 of the U.N. Charter to include only “armed force” since this latter term was used in the preamble of the U.N. Charter.<sup>9</sup> Other have rightly rejected this view and stressed that it is groundless since the text of paragraph 4 of Article 2 of the Charter does not contain any qualification or restriction suggesting that the term “force” be confined to only “armed forces” and since any attempt to introduce any qualification or restriction was intentionally avoided.<sup>10</sup> Recent practice suggests that the term “force” as used in Article 2/4 of the U.N. Charter is free from any qualification or restriction.<sup>11</sup> Thus, the threat or use of any type or degree of force “against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations will be considered as a flagrant violation of the Charter of the United Nations (Article 2/4) and an undisputed breach of International law which constitutes the wrongful act giving rise to the international responsibility of the violator. Consequently, the threat or use of environment and/or environmental damage as a weapon of war will fulfill the requirements of force, which is prohibited under the U.N. Charter if directed against

the territorial integrity or political independence of any state or if used in any other manner inconsistent with the purposes of the United Nations. In connection with this, some writers suggest that “deliberate employment of natural forces by a state”,<sup>12</sup> “the release of large quantities of water down a valley” and “the spreading of fire through a built up area or wood land across a frontier”,<sup>13</sup> are examples of the use of force. Some other examples which may be introduced by the present writer may include poisoning the sea adjacent to a state and killing the fish constituting the vital source of food and income for the people of the state, building a dam to cut off completely water flowing down a river or a stream running into another state, thus threatening and/or attacking the life and very existence of that other state and its people. In fact destruction of forests, burning of oil, destruction of cultural properties and other aspects of environmental “force” were deliberately used in recent wars to achieve political and military objectives.<sup>14</sup> In at least one of these events the Security Council has recognized the illegality of the use of force and the international responsibility of the state damaging or causing damage to the environment of another state.<sup>15</sup>

A relating issue is the possibility of the use of oil as a war weapon constituting force and the possibility of its selection as a target for military attacks. Has oil been used as a weapon of war to achieve military or warlike objectives? Has it been selected as a military target or an object of military attacks? As we will see in chapter 3 of this research, oil has indeed been used as a weapon of war constituting force and has been targeted as an object of military attacks. The use of oil in recent conflicts as a weapon of war on the one hand and targeting it as an object of military attacks on the other hand have led some to speak of “environmental aggression” and “environmental

terrorism”, terms which have been widely used during and after the two recent Gulf conflicts.<sup>16</sup> Thus if a state uses oil as an instrument of aggression in violation of article 2/4 of the U.N. Charter or in violation of the requirements of self- defense, that use will be illegal and constitute the wrongful act establishing the international responsibility of the state using oil as an instrument of aggression. And if oil is targeted, by a state, as an object of military attacks, this will be illegal if it is targeted in violation of the U.N.Charter provisions or other rules of international law prohibiting aggression or the use of force against the territorial integrity or political independence of any other state or in any other manner inconsistent with the purposes of the United Nations. If the state targeting oil as an object of military attacks is the aggressor state, all of its actions become unlawful under international law and do constitute wrongful acts establishing the responsibility of the aggressor state just as the case of Iraq which was the aggressor state when it invaded and illegally occupied Kuwait in August 1990 and beyond.<sup>17</sup> But if the State uses oil as a weapon or instrument of defense against an armed attack or aggression or the state targets oil as an object of attacks as necessary defensive measures, then the case might be different. If such use or targeting is within the confines and strict conditions of self-defense and does not violate any of the law<sup>18</sup>, such use or targeting becomes perfectly legitimate under international law.<sup>19</sup> Nevertheless, if the use of oil as a defensive weapon or instrument exceeds the limits and confines of self-defense or if targeting oil is of a manner, degree or scale so as to cause unnecessary human sufferings or to cause massive damage to the environment,<sup>20</sup> then such use or targeting becomes unlawful.

Finally, it must be emphasized that the use of the environment or any of its components and elements as a weapon of war and the targeting of the environment as

an object for military attacks are prohibited under the U.N. Charter whenever used or targeted in violation of article 2/4 as explained above, whenever used or targeted in excess of the limits and requirements of the lawful use of force allowed under the Charter or under general international law such as the excessive use of force in violation of the requirements of the right of self-defense as recognized under article 51 of the Charter and general international law.<sup>21</sup> In all such cases and the like the violator would be considered as the party committing the wrongful act establishing his liability under international law.

**Self-Defence as a Claim to  
Permissible Use of Force which  
May Affect or Cause Injury  
To the Environment**

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The plea of self-defence is perhaps the most frequently heard justification for a particular use of force. Obviously, it is closely related to the charge of initiation of coercion, for a state acting in self-defence is by definition not the initiator of illegal use of force. But even given the fact of the initiation of coercion there remains much to be said about self-defense. Traditionally rules of international law, whether derived from customary practices, conventional law or the United Nations Charter, have recognized the right of every sovereign state to self-defense. This involves the recognition of the characteristics of the right itself, the legal requirements and the values intended to be conserved.

A meaningful conception of self-defence seems to have been established under an organized global system of law as enshrined in the U.N.Charter (Article 51). The League of Nations and the United Nations centralized, at different levels of

effectiveness, the necessary powers for law enforcement as well as measures for the juridical qualification of coercive measures. Within this legal framework, the distinction between self-defence on the one hand, and self-help and other uses of force on the other hand, is no longer valid. Rather, the demarcation line is drawn between lawful and unlawful use of coercion or force. Force exercised in self-defence or authorized expressly by an organized world or regional institution is permissible. All other major uses of coercion on the international level are not permissible.<sup>22</sup>

Professor McDougal and Dr. Felciano stated that from a perspective seeking movement toward a world order of human dignity:

The coercion characterized as “permissible” and authorized by the general community in the cause of “self-defense,” should be limited to responses to initiating coercion that is so intense as to have created in the target state reasonable expectations, as those expectations may be reviewed by others, that a military reaction was indispensably necessary to protect such consequential bases of power as territorial integrity and political independence.<sup>23</sup>

### **The Basic Legal Requirements of Self-Defense:**

The legal limits of the use of force by sovereign states rank among the most important and the most controversial problems of international law. The basic rule that force may not be imposed aggressively but only in self-defense is too broad to be of much guidance. It is uncertain what is covered by the term “aggression” and what is left for self-defense. For this reason the basic community interest in restricting

coercion resulted in the formulation of two essential requirements imposed by law upon measures taken in self-defense. The first is the requirement of “necessity” and the second is “proportionality”. In assessing the responding coercion, a third party decision-maker must take into account these two requisites in concert.

**A) Necessity:**

The element of “necessity” in self-defense should be first distinguished from the “doctrine of necessity”<sup>24</sup>. The latter after categorized as an aspect of self preservation was used by States to justify whatever measures allegedly taken for securing essential interests. This doctrine has been widely criticized on the ground that it is “destructive of the entire legal order.”<sup>25</sup>

In addition, “necessity” as a prerequisite for the legitimate use of force in self-defense must be distinguished from “military necessity” used as a limitation, qualification, or even justification for the use of a certain kind or degree of military force or weapons or certain activities and/or the infliction of a certain type or degree of damage under the rules of *jus in bello*, military necessity will be dealt with in some detail under the title “Customary International Law Applicable to the Actual Conduct of Military Operations and the Relevance to Environmental Damage” which will be referred later in this chapter.

Defensive “necessity” is a condition which compels the target state to use force in response to initiated coercion. It is prerequisite, legitimizing the function of self-defense. But since every aggressive act does not necessarily justify a defensive reaction, there are certain qualifications of that “necessity”. The Webster formula provided certain characteristics that “necessity” should be

“instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>26</sup> These restrictive specifications of necessity, it should be recalled, were formulated in the context of anticipatory self-defense which always requires a high degree of necessity. The policy reason for this is to avoid an open-ended conception of self-defense which might be employed as a screen for deliberate aggression.<sup>27</sup>

This formulation, however, has been criticized as being abstract and narrow. A U.S. State Department legal analysis noted that the cases which would exactly fit Webster’s formula are “rare”<sup>28</sup>. Professor Mallison, criticizing its highly narrow scope, stated that :

In the contemporary era of nuclear and thermo-nuclear weapons and rapid missile delivery techniques. Secretary Webster’s formulation could result in national suicide if it actually were applied instead of merely repeated.<sup>29</sup>

International law has never recognized a hard and fast instrument which mechanically measures the degree of necessity required for self-defense.<sup>30</sup> Necessity should always be construed in the context of serving the policy objective of self-defense, the conservation of the community’s major values. The decision-makers of the target state, in exercising defensive use of force, are required to conduct a comprehensive appraisal of the type, intensity and dimension of the means of coercion utilized by the initiating state.<sup>31</sup> Their decision will always be subject to the review and assessment of the world community.

The International Court of Justice has recognized the requirement of necessity as one of the essential requirements of self-defense under customary international law, thus in the *Nicaragua Case* the I.C.J. stated: “there is a specific rule whereby self-defense would warrant only measures which are proportionate to the armed attack and necessary to respond to it, a rule well established in customary international law”<sup>32</sup> Again the I.C.J. has repeated and stressed this stand in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons of 1996 in which the Court stated: “The submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law. This dual condition applied equally to Article 51 of the Charter , whatever the means of force employed.”<sup>33</sup> The I.C.J. seems to limit the right of self-defense to situations where armed attack occurs against the state taking the defensive measures necessary to deal with the attack, as it clearly appears from the text quoted from the *Nicaragua Case*.

### **B) Proportionality:**

The customary right of self-defense involves the assumption that the use of force must be proportionate to the threat. If necessity is a qualitative requirement, proportionality is quantitative in character, the responding coercion must be proportionate to the initiated violence.<sup>34</sup> The formula used by Webster in relation to the *Caroline* incident has attracted writers because of his insistence that self-defense must involve “nothing unreasonable or excessive, since the act justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it”.<sup>35</sup> The legal concept of self-defense comprehends proportionality, and the emphasis on proportionality as a special requirement in the law of nations may represent an attempt to create the necessary distinction between self-defense and self-help in

reaction to the historical tendency to confuse them. It was not until the period of the League that proportionality was mentioned with any frequency. In his report to the League, Mr. Broucekere said, "Legitimate defense implies the adoption of measures proportionate to the seriousness of the danger."<sup>36</sup> Bowett advances the view that the use of force is lawful as exercise of the right of self-defense in the case of subversion or economic threats to the political independence of a state.<sup>37</sup> The fact that such views of the law are expressed indicates the controversial aspects of proportionality. In summation, to use Secretary Hull's words, "The breadth of our self-defense must be at all times equal to the breadth of the dangers which threaten us."<sup>38</sup>

As with the element of necessity, proportionality has been subject to criticism. Professor Mallison contends that the simplistic characterization of proportionality as a mere relationship between the initiating coercion and the responding coercion "without regard to meaningful factual context and international community objectives in maintaining at least minimum world public order, irrational, and indeed suicidal, decision would be facilitated."<sup>39</sup> Although the requirement of proportionality as customarily established is narrow and rigid, Professor Kunz went further to discard it. Kunz, who is of the opinion that Article 51 narrowed down the customary concept of self-defense, erroneously stated that "necessity and proportionality are no conditions for the exercise of self-defense under Article 51 "because every armed attack is illegal".<sup>40</sup> Higgins, on the other hand, considered that Article 51 "in no way impaired the traditional requirement of proportionality and reasonableness" and that this fact was "clearly shown by the United Nations practice."<sup>41</sup>

The underlying policy of the requirement of proportionality, subject always to all the variables of a given situation, is that measures taken in self-defense should not involve more coercion than is necessary for protection of substantive rights.

McDougal and Feliciano correctly wrote:

The objective is to cause the initiating participant to diminish its coercion to the more tolerable levels of “ordinary coercion”....The principle of proportionality is seen as but one specific form of the more general principle of economy in coercion and as a logical corollary of the fundamental community policy against change by destructive modes.<sup>42</sup>

Support of this rationale was voiced in the debate of the Special Committee on Defining Aggression. The Thirteen power draft suggested the inclusion of the requirement of “proportionality” in the proposed definition. A number of participants argued that it was in the interest of the world community that the amount of force used to repel armed attack must commensurate with the attack, and that the unlimited use of defensive force could not provide protection.<sup>43</sup>

We must stress again that the I.C.J. has indeed recognized the condition of proportionality as being one of the requirements of self-defense under customary international law. We have previously quoted texts from the *Nicaragua Case* and the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* of 1996 which include the requirement under customary international law.<sup>44</sup>

In addition, in the I.C.J. Order in the *Request for an Examination of the Situation in Accordance with paragraph 63 of the Court’s Judgement of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*<sup>45</sup> and in its 1996 Advisory Opinion, referred to above, the I.C.J. stresses the obligations of states to respect and

protect the natural environment in all times and in assessing the conditions of necessity and proportionality.<sup>46</sup>

### **National Self-Defense Measures and**

### **Environmental Damage or Destruction:**

It has been recognized that measures, methods and means taken or used by the state exercising its right of national self-defense within the prescribed self-defense requirements, necessity and proportionality, may cause environmental damage or destruction. Thus, we find that paragraph 5 of article 54 of the 1977 Protocol I tolerates the use, by a state, of measures, tactics, methods and/or means which may destroy, remove, or render useless objects indispensable to the survival of the civilian population provided that such objects are located within its "territory under its own control where required by imperative military necessity."<sup>47</sup> It is further recognized that under general customary international law of self-defense, such measure tactics, methods and/or means may be taken even against objects indispensable to the survival of civilian population located within the territory of the enemy state provided that such tactics, methods and/or means satisfy the strict requirements of national self-defense (necessity and proportionality as specified above)<sup>48</sup>. Moreover, the text of article 56 of Protocol I does not prevent the taking or use of measures, tactics, methods and means which may include attacks on dams, dykes, or nuclear electrical generating stations provided that such measures, tactics, methods and/or means satisfy the strict requirements of national self-defense.<sup>49</sup> Furthermore, it seems that the text of article 55 of the same Protocol does not prevent the use of methods or means of warfare which cause or may cause widespread, long-term and severe damage to the natural environment provided that such measures or means satisfy strict requirements of

national self-defense.<sup>50</sup> In fact, the International Court of Justice has made it clear that it does not consider Protocol I, the Enmod Convention, and all other environmental treaties and norms “could have intended to deprive a State of the exercise of its right of self-defense under international law because of its obligations to protect the environment.”<sup>51</sup>

The International Court of Justice stressed, however, that environmental considerations must be taken into account by states exercising self-defense “when assessing what is necessary and proportionate,” and that “Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.”<sup>52</sup> Despite their widespread, long-term and severe effects on the natural environment and all humanity, nuclear weapons can lawfully be used only in extreme cases of self-defense, “in which the very survival of a State would be at stake,”<sup>53</sup> but this must be within the very strict requirements of self-defence.<sup>54</sup>

From all of the above one can conclude that the requirements of self-defense tolerate measures, tactics, methods, and/or means which may cause environmental damage or destruction provided that such measures, tactics, methods and/or means must meet the strict requirements of self-defence, necessity and proportionality, and that failure to meet any of the two requirements renders the measures, tactics, methods, and/or means illegal. The state violating any of the requirements of self-defense becomes, *ipso facto*, responsible for any environmental damage or destruction that caused its action.

But, can it be suggested that the use of oil by Iraq as a weapon or force and the targeting by Iraq of Kuwaiti oil as an object of military attacks satisfy the requirements of self-defense and are therefore legitimate under international law? Although the use of oil as a weapon or force and the targeting of oil as an object of military attacks might have been considered to have achieved certain military objectives, which is a doubtful conclusion, such use and targeting could not be accepted to satisfy the prerequisites or requirements of self-defense. Iraq was the aggressor when it invaded and occupied Kuwait, Iraq was again the aggressor when it rejected to withdraw its forces from Kuwait in accordance with the requirements of various Security Council resolutions dealing with the situation beginning from resolution 660 to resolution 678 which demanded that Iraq unconditionally withdraw its forces from Kuwait and implement all Security Council resolutions and authorized member states cooperating with the Government of Kuwait “to use all necessary means to uphold and implement Security Council resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.”<sup>55</sup> Iraq had no right to defend itself against the military measures taken by the member states cooperating with the Government of Kuwait to oust the Iraqi forces from Kuwait in accordance with U.N. Security Council resolutions including resolution 678 and in accordance with the great and immutable law of self-defense. An aggressor does not have any right to defend itself against any act taken in self-defense against the aggression committed by that aggression. Again, an aggressor does not have any right to defend itself against measures or acts adopted or taken under or in accordance with a Security Council authority or authorization. If the aggressor is said to have a right to self-defense against defensive acts taken by the state against which the aggression was or is still being committed or against acts of collective defence or against measures and acts of

collective security adopted by or under a Security Council authority or authorization, then the whole base and foundation and the very existence of the world or international public order, the United Nations system and international law will be dismantled and eliminated all together.

**III**  
**The International Law Applicable To the**  
**Actual Conduct of War (*Jus in bello*)**  
**And**  
**The Relevance to Environmental Damage**

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This section will be divided into three sub-sections. Sub-section one deals with Treaties Prohibiting Certain Weapons which have Significant Environmental Impacts, sub-section two deals with Treaties Prohibiting Military Activities, Operations, and/or Conducts which Significantly Affect the Environment. Finally, sub-section three deals with the Rules and Principles of Customary International Law Applicable to the Actual Conduct of War (*Jus in bello*) and the Relevance to environmental damage during or because of armed conflicts.

**III.1**  
**Treaties Prohibiting Certain**  
**Weapons which have Significant**  
**Environmental Impacts**

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The field of chemical and biological weapons was one of the fields that witnessed the earliest attempts to outlaw certain types of such weapons and to prohibit them completely. Thus, the Hague Declaration (IV.2) concerning Asphyxiating

Gases of 1899 proscribed the use of projectile, the sole object of which is the diffusion of asphyxiating or deleterious gases.<sup>56</sup> The Hague Convention (IV) Respecting the laws and Customs of War on Land of 1907 prohibits the employment of poison or poisoned weapons.<sup>57</sup> The 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare prohibits the use of asphyxiating poisonous or other gases, it also prohibits all analogous materials, liquids, or devices. Bacteriological methods of warfare are proscribed as well.<sup>58</sup> The most comprehensive convention concerning bacteriological weapons is the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction which proscribes, *inter alia*, the use, in war or armed conflicts or other hostile purposes, of bacteriological (biological) and toxin weapons.<sup>59</sup>

The 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (hereinafter cited as the Chemical Weapons Convention or CWC) aims at excluding "completely the possibility of the use of chemical weapons"<sup>60</sup> As a result, the Convention included in its first article the general and basic obligation of states in this connection. This article reads:

1. Each State Party to this Convention undertakes never under any circumstances:

- (a) To develop, produce, otherwise acquire, stockpile, or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
  - (b) To use chemical weapons;
  - (c) To engage in any military preparations to use chemical weapons;
  - (d) To assist, encourage, or induce in any way, anyone to engage in any activity prohibited to a state party under this Convention.
2. Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.
  3. Each State Party undertakes to destroy all chemical weapons it abandoned on the territory of another State Party, in accordance with the provisions of this Convention.
  4. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.
  5. Each State Party undertakes not to use riot control agents as a method of warfare.”

All those basic obligations will, indeed, insure the complete exclusion of all types of chemical weapons from ever being used in warfare or armed conflicts or in

any other hostile situations. The absolute proscription of chemical weapons is a significant first step towards the elimination of all weapons of mass-destruction.

It should in this connection be noted that, as widely reported, Iraq did in fact use poisonous, bacteriological and chemical weapons against Iran in the first Gulf Armed Conflict (1980-88) and against Kurds in northern Iraq several times, and it should also be noted that as will be seen in chapter three, Security resolutions oblige Iraq to disclose all information it has concerning its weapons of mass destruction. Such resolutions order the dismantling and elimination of all Iraq's weapons of mass destruction.

With regard to the remaining type of weapons of mass-destruction not yet completely proscribed, the nuclear weapons, we referred earlier to examples of treaties establishing nuclear-free-zones or areas; but most important are the declarations made by the five nuclear-weapons states on the occasion of the extension of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT). These declarations include commitments by each of the five states not to use nuclear weapons against non-nuclear weapon states that were parties to the NPT; the U.N. Security Council noted with appreciation these commitments in its resolution No.984(1995) which was adopted unanimously on the eleventh of April, 1995. Thus, we may fairly assert that the commitments made by the five-nuclear-weapons states on the occasion of the extension of the NPT do amount to an almost, but not yet total, proscription against the use of nuclear weapons in warfare or armed conflicts or other hostile situations. The International Court of Justice (I.C.J.) did not, however, find that all nuclear weapon treaties have, so far, amounted to "a comprehensive and universal conventional

prohibition on the use or the threat to use those weapons as such.<sup>61</sup> But, the Court noted also that according to the said treaties and the declarations made by the five-nuclear weapon states, “a number of States have undertaken not to use nuclear weapons in specific zones (Latin America, the South Pacific) or against certain other States (non-nuclear-weapon States which are parties to the Treaty on the Non-Proliferation of Nuclear Weapons).<sup>62</sup>

The use of conventional weapons in warfare and other hostile situations have been subject to increasing restriction. Explosive projectiles under 400 grammes, dum-dum bullets, mines, booby traps and other devices have been either proscribed or restricted. But the treaty which is of utmost importance insofar as this research is concerned because of its environmental relevance is the 1980 Convention on Prohibitions or restrictions on the use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (hereinafter cited as the Inhumane Weapons Convention).<sup>63</sup> This convention restricts the use of certain weapons including those methods and means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment, in addition, it bans making “forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal, or camouflage combatants or other military objectives, or are themselves military objectives.”<sup>64</sup>

**III.2.**  
**Treaties Prohibiting Military Activities**  
**And Operations which Significantly**  
**Affect the Environment**

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Most relevant in this regard are the two 1977 Protocols Additional to the Geneva Conventions of 12 August 1949, and the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977 which will be discussed below, but we must first refer to relevant provisions in the Geneva Convention IV.

**A) Geneva Convention IV:**

Although the Geneva Conventions of 1949 did not say much about the protection of the environment, Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War signed at Geneva on 12 August 1949 (hereinafter the Geneva Civilians Convention)<sup>65</sup> included a provision which is directly relevant; article 53 reads:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

Although this article applies only to occupied territories, it provides considerable protection against environmental damage or destruction as such damage or destruction occurs in most cases by the occupying forces during the time of

occupation and, in particular, at the time during which such forces are being fought out and forced out. In the armed conflict in the Gulf, much of the environmental damage and destruction occurred as a result of massive destruction of property carried out in occupied Kuwaiti territory by the Iraqi forces; the destruction of hundreds of Kuwaiti oil wells by the Iraqi forces is a clear example.<sup>66</sup> In addition, the environment of the state is a property of that state and any damage or destruction of the environment of the occupied territory of a state is a destruction of the property of that state which is prohibited under article 53 of the Geneva Civilians Convention and other relevant rules of international law.<sup>67</sup>

Furthermore, the Geneva Civilians Convention has included a provision proscribing the “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”<sup>68</sup> This provision is also a ground for claiming the illegality of much of the environmental damage and destruction that took place in the territory of Kuwait by the Iraqi forces.

The four Geneva Conventions of 12 August 1949 are now considered the most universally recognized instruments in the law of armed conflict and international humanitarian law and are considered to have been universally accepted as part of customary international law binding upon all states. Iraq itself has been a party to the four Geneva Conventions since 1956 and is of course bound by all the provisions referred to above. Had Iraq been willing to respect and observe its obligations arising from the international humanitarian law, it would have never violated the rules of the Geneva Civilians Convention including articles 53 and 147. And had Iraq been

willing to respect and observe its basic international obligations, it would have never thought of invading Kuwait and occupying its territory.

**B) Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts. (Protocol I):**

The rise of environmental concerns and fears during the early seventies of the twentieth century and the international reaction to widespread and severe environmental damage caused by the war in Vietnam have influenced the formulation of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) [hereinafter cited as Protocol I] . This Protocol included provisions concerning the protection of the environment and environmental objects during armed conflicts.

**First:** Article 54 of Protocol I dealt with the protection of objects indispensable to the survival of the civilian population; paragraph 2 of this article states:

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural area for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

Although it appears that this provision offers a wide and high-level of protection to the objects or targets stated in it, qualifications and exceptions introduced in the same paragraph and other paragraphs in article 54 severely weaken this protection. The first qualification was stated in paragraph 2 itself when it declared that the prohibition against the attack or destruction of the said objects applies “for the specific purpose of denying them for their sustenance value to the civilian population or to adverse Party”; therefore, if the purpose is not to deprive civilians of the sustenance value of such objects, then such objects may be subjected to any attack or destruction which would be legal unless proscribed by some other rules of law. The exceptions to the prohibition are stated in paragraphs 3 and 5 in the same article; paragraph 3 reads:

The prohibition in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:

- (a) as sustenance solely for the members of its armed forces, or
- (b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall action against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

Thus, the object, otherwise protected, may be lawfully attacked or destroyed if used by the enemy as sustenance solely for the members of its armed forces or if used forces or if used to directly support the enemy’s military action. Paragraph 5 states:

In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

Accordingly, the vital requirements of any party to an armed conflict in the defence of its national territory against invasion allow that party to attack or destroy objects, otherwise protected under paragraph 2, provided that such objects are located within territory under its control. We may add to this exception that an attack against or destruction of such protected objects may be tolerated under the requirements of national self-defence even if attacked or destroyed object is located within the enemy's territory.<sup>69</sup>

**Secondly:** Article 56 of Protocol I provides for works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations; paragraph 1 of this article reads:

Works or installations containing dangerous force, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be

made the object of attack if such attack may cause the release of dangerous force from the works or installations and consequent severe losses among the civilian population.

But an attack may lawfully be made against a nuclear electrical generating station “only if it provides electric power in regular, significant and direct support of military operations” provided that “such attack is the only feasible way to terminate such support.”<sup>70</sup> In addition, dams and dykes may be subjected to a lawful attack if they are used for other than their normal functions and in regular, significant and direct support of military operations” provided that such attack is “the only feasible way to terminate such support.”<sup>71</sup>

**Thirdly:** Article 55 of Protocol I deals with the protection of the natural environment; it states:

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods of means of warfare which are intended or may be expected to cause such damage to natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited.

In this connection, article 35(3) reads: "It is prohibited to employ methods or means of warfare which are intended, may be expected, to cause widespread, long-term and severe damage to the natural environment."

Hence, Protocol I protects the natural environment against only "widespread, long-term and severe damage." But if the damage to the environment is not widespread, long-term and severe, the protection under Protocol I will not apply.

But methods of means of warfare will be unlawful if deliberately used or employed to cause widespread, long term and severe damage to the natural environment or if not deliberately used or employed to cause such damage, they may be expected to cause it. However, it should be stressed that Protocol I did not define any of the terms "widespread", "long-term", or "severe". But the *travaux préparatoires* to the Protocol included an explanation of the term "long-term" as being the element of duration which:

was considered by some to be measured in decades. Reference to twenty or thirty years was made by some representatives as being a minimum. Others referred to battlefield destruction in France in the First World War as being outside the scope of the prohibition..... It appeared to be a widely shared assumption that battlefield damage incidental to conventional warfare would not normally be proscribed by this provision.<sup>72</sup>

The *travaux préparatoires* did not define or explain the other two terms. The explanation of the element of duration "long-term" stated above did not include any widely agreed upon definition of that term; it merely expressed the views of "some" representatives as to "duration" and as to the exclusion of "incidental damage". Therefore, one is inclined to accept the view that the definitions of these terms would

be the same as the identical or similar terms included in the Understanding annexed to the Convention on the Prohibition of Military or Any other hostile Use of Environmental Modification Techniques (the Emmod Convention)<sup>73</sup> which seem to be reasonable. “Widespread” would thus mean “encompassing an area on the scale of several hundred square kilometers”; “long-term” or “long-lasting” as the term used in the Emmod Convention would mean “lasting for a period of months, or approximately a season”; and “severe” would mean “involving serious or significant disruption or harm to human life, natural and economic resources or other assets.”<sup>74</sup>

Thus, in our view, articles 35(3) and 55 of Protocol I confers upon the natural environment total and complete protection against any widespread, long-term and severe damage during or because of armed conflicts without any other qualifications.

In our view, these conventional rules included in articles 35(3) and 55 of Protocol I proscribing the employment of methods or means of warfare which are intended or may be expected to cause widespread long-term and severe damage to the natural environment are obligatory and binding upon all states and all parties to any war or armed conflicts irrespective of whether or not they have become parties to Protocol I as these rules constitute part of the general international law binding upon all states. Although this view is contested by some writers<sup>75</sup>, the great majority of those who have written on the subject have adopted the view that the rules included in articles 35(3) and 55 of Protocol I do constitute part of customary international law or that they are reflective of customary international law.<sup>76</sup> Some went even to suggest that such rules are part of the fundamentals of general international law.<sup>77</sup> In addition, the International Court of Justice seems to have accepted the view that the provisions

of the Additional Protocols are being expressive of the Hague law and Geneva law and they, therefore, constitute part of customary international law.<sup>78</sup>

Thus, it is evident that Protocol I as expressive of the general international law bestows upon the natural environment in any war situation total and complete protection against the use or employment of any methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage. In addition, it must be asserted that any activity or any method or means which may be lawful under any provision in Protocol I or under customary international law would become unlawful if in any particular circumstances could be expected to cause widespread, long-term and severe damage to the natural environment.

As a result of the customary nature of Protocol I and its binding force, Iraq was under a fundamental international obligation to fully respect and observe the rules incorporated in articles 35(3) and 55 of Protocol I concerning the prohibition of employment of methods or means of warfare which were intended, or might have been expected, to cause widespread, long-term and severe damage to the natural environment of Kuwait during the 1990-91 Gulf War even though Iraq had not ratified Protocol I and has not yet become party to the said Protocol. Iraq's action against the Kuwaiti environment was deliberate and it caused widespread, long-term and severe damage to that environment as will be illustrated in detail in chapter three, *infra*. Iraq's actions represent a flagrant violation by Iraq of its international obligations under customary and fundamental general international law embodied in Protocol I.<sup>78</sup> Iraq is liable to pay compensation for such damage (see chapter four, *infra*).

C) **Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts: (Protocol II):**

Although the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) [hereinafter cited as Protocol II] applies only to internal or non-international armed conflicts, yet it contained a number of provisions giving protection to certain environmental objects. Thus, article 14 of the Protocol confers protection, without any qualifications or exceptions, upon works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations. Moreover, article 16 of the same Protocol confers protection upon cultural objects and places of worship, this article states:

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monument, works of art or places of worship which constitute or spiritual heritage of peoples, and to use them in support of the military effort.

This provision is unique in the sense that a similar provision was not included Protocol I. It must be stressed, however, that a provision on the protection of natural environment was not included in Protocol II.

D) **Convention on the Prohibition of Military  
Or Any Other Hostile Use of Environmental**

**Modification Techniques:**

The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (hereinafter cited as the Enmod Convention) was signed at Geneva on 18 May 1977 and entered into force on 5 October 1978.<sup>79</sup> This Convention is designed to combat the use of the environment as a method or means of warfare; thus the first paragraph of the preamble states:

The States Parties to this Convention, guided by the interest of consolidating peace, and wishing to contribute to the cause of halting the arms race, and of bringing about general and complete disarmament under strict and effective international control, and of saving mankind from the danger of using new means of warfare,.....

In order to achieve this aim, the Enmod Convention stipulated in its first article that:

1. 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.
2. Each State Party to this Convention undertakes not to assist, encourage or induce any State, group of States or international organizations to engage in activities contrary to the provisions of paragraph 1 of this article.

Accordingly, the Enmod Convention prohibits acts, activities or operations which have “widespread, long-lasting or severe effects as the means of destruction, damage or injury”; therefore it is enough for the effect of effects to satisfy one qualification only, either widespread, or long-lasting or severe.<sup>80</sup> Widespread was interpreted to mean “encompassing an area on the scale of several hundred square kilometres;” while “long-lasting” was interpreted to mean “lasting for a period of months, or approximately a season”, on the other hand “severe” was interpreted to mean “involving serious or significant disruption or harm to human life, natural and economic resources or other assets”.<sup>81</sup>

In addition, the environmental modification techniques which are prohibited under the Enmod Convention must be directed at achieving destruction, damage or injury; the element of “intent” must, therefore, exist in order to satisfy the requirements of “prohibition” under the Enmod Convention.<sup>82</sup>

As a result, the Convention does not prohibit or hinder “the use of environmental modification techniques for peaceful purposes.”<sup>83</sup>

The term “environmental modification techniques” was defined in the second article of the Enmod Convention to mean; “any technique for changing through the deliberate manipulation of natural processes the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.”

In our view, the prohibition of the 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 services

three types of purposes; (a) environmental purposes, (b) arms control and disarmament, and (c) establishing the international responsibility of the violators whether in peace-time or in war and armed conflict situations. Thus if a state uses environmental modification techniques as a method or means of warfare to achieve war or military objective, that state would be internationally responsible for any destruction, damage or injury to the enemy state, or to any other state.

In this connection, the Iraqis' caused oil spills and oil fires in Kuwait and the Iraqis' caused damage to the environment of Kuwait have been subject to an extensive debate centered on the applicability of the provisions of the Enmod Convention and whether the Iraqi actions causing the oil spills and oil fires in Kuwait were prohibited under this Convention.<sup>84</sup> In our view, Iraq has indeed violated the provisions of the Enmod Convention, even though Iraq was not a party to the said Convention, for the following reasons:

**Firstly:** It is clear that Iraq deliberately used oil spills and oil fires; the element of intent required by the Enmod Convention did exist.

**Secondly :** The Enmod Convention does not include an exhaustive list of techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other state, the Convention refers to "any technique". It is widely accepted that oil spills and oil fires are among the techniques that would be proscribed under the Enmod Convention if deliberately used to effect wide-spread, long-lasting or severe destruction, damage or injury to any other state.<sup>85</sup>

**Thirdly:** Causing wide-spread, long-lasting or severe destruction, damage or injury in a deliberate form, to the environment of any other state runs contrary to customary

international law in time of peace and to customary and conventional international law in time of war (international humanitarian law), and exceeds the requirements of necessity and proportionality required by the laws and armed conflicts.<sup>85</sup>

### III.3

**Customary International Law Applicable  
To the Actual Conduct of Military Operations in  
War or Armed Conflicts (*Jus in bello*)  
And the Relevance to Environmental Damage**

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**A. The Martens Clause as Customary International  
Law and the Customary Principles of Warfare:**

The Martens Clause was first included in the 1899 Hague Convention II with Respect to the Laws and Customs of War on Land which stated that “in cases not included in the regulations adopted by them (the Hague Contracting Parties), populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience”.<sup>86</sup> The 1907 Hague Convention(IV) Respecting the Laws and Customs of War on Land included the same clause with a minor modification in wording; it states that “in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”<sup>87</sup> It appears from the two quoted

texts that the minor changes in the wording do not effect any change in the meanings of the two texts which are identical. A modern formulation of the Martens Clause was included in the second paragraph of Article 1 of Protocol I of 1977 which reads :

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

The importance of the Martens Clause is represented in the fact that it manifests the incorporation of customary international law rules protecting civilians and combatants into conventional norms and the application of such rules to states that have not adhered to treaties governing or regulating the law of war or armed conflict. The Martens Clause has universally been accepted to be binding upon all states. A seemingly wide consensus on certain principles of customary international law of warfare which have direct bearing on the protection of the environment has developed ; the most important of these principles are; (a) the principle of humanity, (b) the principle of proportionality, (c) the principle of discrimination, and (d) the principle of necessity. It seems that there is a universal agreement that these four principles constitute the cardinal principles of the customary international law of warfare and the essentials of international humanitarian law. A discussion of these principles insofar as they relate to the protection of the environment and the international responsibility for environmental damage resulting from armed conflict follows below:

## 1. The Principle of Humanity:

The principle of humanity prohibits the use, in the conduct of warfare or hostilities, of any weapon or tactic which causes unnecessary suffering to its victims “whether this by way of prolonged or painful death or is in a form calculated to cause severe fright or terror.”<sup>88</sup> The first version of this principle was included in the 1868 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight;<sup>89</sup> This declaration proscribed “The employment of arms which uselessly aggravate the sufferings of disabled men, or render their death, inevitable” and declared that “the employment of such arms would, therefore, be contrary to the laws of humanity”.<sup>90</sup> The Regulations Annexed to the 1899 Convention(II) with Respect to the Laws and Customs of War on Land prohibited the employment of “arms, projectiles, or material of a nature to cause superfluous injury”.<sup>91</sup> While the Regulations Annexed to the 1907 Convention (IV) Respecting the Laws and Customs of War on Land prohibited the employment of “arms, projectiles, or material calculated to cause unnecessary suffering”.<sup>92</sup> It seems to the writer that the difference in the wording of the 1899 and 1907 Conventions do not change the meaning of the two texts which are identical. The principle of humanity which prohibits any weapon or tactic which causes unnecessary suffering or injury or severe fright or terror has been recognized as rooted in customary international law binding upon all states. As a result, all forms of environmental warfare and deliberate environmental damage or destruction are contrary to the international humanitarian law as they are likely to cause unnecessary injury or suffering or severe fright or terror. Consequently, any state which engages in environmental warfare or causes deliberate environmental

damage or destruction must be legally held in breach of customary humanitarian law and responsible for any such damage or destruction.<sup>93</sup>

The ICJ has recognized “elementary considerations of humanity” when it found that Albania was bound to notify approaching warships of a known danger from mines.<sup>94</sup> The principles of humanity was again recognized by the ICJ when it declared in another case that : “if a State lays mines in any waters whatever in which the vessels of another state have rights of access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law...”<sup>95</sup>

## **2. The Principle of Proportionality:**

In the context of warfare, proportionality means that weapons, tactics, methods or means of attack must be selected in type, size, and degree that is proportionate to the military objectives to be achieved; and excessive damage or destruction is prohibited and is contrary to the customary humanitarian law. Any state violating this rule and causes damage or destruction to the environment of another state must, therefore, be held responsible.<sup>96</sup>

## **3. The Principle of Discrimination:**

According to the principle of discrimination, weapons, tactics, means and/or methods of attack or warfare employed by any of the parties to a military conflict must clearly discriminate between military and non-military targets, non-military targets are not legitimate objects of a military attack. Consequently, “indiscriminate warfare is illegal *per se*”<sup>97</sup> The customary principle of discrimination was first

incorporated into the 1868 St. Petersburg Declaration, referred to earlier,<sup>98</sup> when it declared that “the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy”.<sup>99</sup> Thus, non-military targets including the environment may not be subject to military attacks. Article 48 of the 1977 Protocol I incorporated the principle of discrimination when it declared that parties to a military conflict “shall direct their operations only against military objectives.” This Protocol proscribed attacks on the natural environment as it has been pointed out earlier.<sup>100</sup>

#### 4. **The Principle of Necessity:**

The principle of necessity in the context of warfare differs from the requirements of necessity as one of the essential prerequisites of self-defence as illustrated earlier.<sup>101</sup> The principle of necessity in the context of the conduct of warfare or armed-conflicts refers to military necessities, thus, only weapons, tactics, methods and/or means of attack or warfare which are not prohibited by international law and without which military objectives cannot be accomplished are allowed to be used or employed to achieve such objectives. Any excessive use or employment of such weapons, tactics, methods, or means of attack or warfare which is not necessary to achieve or accomplish the user’s military objectives is, therefore, unlawful.<sup>102</sup>

Article 23(g) of the Regulations Respecting the Laws and Customs of War on Land annexed to the 1899 Hague Convention (II) and the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land<sup>103</sup> and article 53 of the 1949 Geneva Civilians Convention (IV)<sup>103</sup> include a codification of the customary law

principle of military necessity. Thus it is prohibited to “destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”.<sup>105</sup> Moreover:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.<sup>106</sup>

An essential element of consideration to be used in evaluating the acts of the state or power inflicting destruction is whether such acts are taken or carried out in the context of a lawful self-defense or in the context of an unlawful aggression.<sup>107</sup> Consequently, any destruction of the environment or any use of any method or techniques of environmental warfare which is not absolutely necessary to repel and defeat the aggressor must be considered unlawful and prohibited. Iraq’s actions against Kuwait’s environment and Kuwaiti oil must therefore be considered prohibited and unlawful.

## NOTES TO CHAPTER ONE

### Section Two

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1. See e.g. Macdonald, the Use of Force by States in International Law in M.BEDJAOU, ed., INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS, UNESCO, 717 at 718 (1991).
2. *Id.* at 718-19.
3. The CHARTER OF THE UNITED NATIONS [hereinafter cited as the U.N. Charter], art. 2 para. 4.
4. Art. 51 of the U.N. Charter reads:  
“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.” See *infra* text above notes 17-49.
5. U.N. Charter, ch. VII & art. 53 in ch. VIII.
6. Art. 2 (4) and art. 51 of the U.N. Charter. For the jus cogens character of the prohibition of the use of force by States in violation of the U.N. Charter and considering it as a norm of international law see, e.g. Macdonald, *supra* note 1, passim.
7. Security Council Resolution No. 687 (1991) will be subject to a detailed study in ch.3 entitled “The Security Council and the Environment.”
8. See ch. 3 *infra*.

9. J.L. BRIELY, THE LAW OF NATIONS 415 (Sir Humphrey Waldock ed.,) 6<sup>th</sup> ed. 1963.
10. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES, 362 (1963). L. HENKIN and others, INTERNATIONAL LAW, 892-94 (1993); Leibler, Deliberate Wartime Environmental Damage: New Challenges for International Law, 23 Calif. Western Int'l L.J., 67 at 88(1992).
11. I.Brownlie, *id.*, Henkin *id.*, Leibler, *id.* See also the Nicaragua Case, *infra* note 32, *passim*.
12. I. Brownlie, *id.*, at 376; Leibler, *id.* at 88.
13. I.Brownlie, *id.*, 362-63; Leibler, *id.*
14. Leibler, *id.* at 88-89
15. See ch. 3 *infra*.
16. The terms "environmental aggression" and "environmental terrorism" have been widely used in recent conflicts by officials and writers alike, particularly during and after the recent conflict in the Gulf area between Iraq, on the one hand, and the coalition forces which forced Iraqis out of Kuwait, on the other hand. President Bush was quick to use the term "environmental terrorism" in his address before a joint session of the Congress on the State of the Union, 1 PUB. PAPERS 74, 79 (1991).
17. See chapter 3 *infra, passim*.
18. See this text above notes 22-55 & 72-128 *infra*.
19. See this text above notes 22-55 *infra*.
20. See this text above notes 72-128 *infra*.

21. Art. 51 of the U.N. Charter is quoted in no.4 *supra*, see also text above notes 22-55, *infra*.
22. MCDOUGAL AND FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 138-143 (1961).
23. *Id.* 259.
24. RODICK, THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW (1928) at pp.1 *et.seq.*
25. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 35 (1958).

In its judgment in the *Gabcikovo Case* the I.C.J. discussed necessity “the state of necessity” and required the state invoking the state of necessity to prove that a real “grave” and “imminent” “peril” existed. The Court then concluded “even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Evn if found justified, it does not termiante a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but unless the parties by mutual agreement termiante the Treaty it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives”. The *Gabcikovo Case*, *supra* note 39 chapter 1, pp.42 *et seq.* And quotation from P.63.

In addition, the 2000 Drat Articles on State Responsibility provisionally adopted by the Drafting Committee on second reading included an article dealing with the state of necessity which goes along the lines adopted by the I.C.J. referred to above. This article states:

“State of necessity”

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of any act not in conformity with an international obligation of that State unless the act:
    - (a) Is the only means for the State to safeguard an essential interest against a grave and imminent peril; and
    - (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
  2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
    - (a) The international obligation in question arises from a peremptory norm of general international law;
    - (b) The international obligation in question excludes the possibility of invoking necessity; or
    - (c) The State has contributed to the situation of necessity.

U.N. Doc/A/CN.4/L.600. 21 August 2000 article 26, p.7.
26. This formula was suggested in the context of the *CAROLINE CASE*, see Letter from Mr. Webster to Mr. Fox, April 24, 1841, 29 BRITISH AND FOREIGN STATE PAPERS, 1129, 1138 (1840-41); Note made by Mr. Webster, August 6, 1842, 2 MOORE, DIGEST OF INTERNATIONAL LAW 409-414 (1906); HYDE, INTERNATIONAL LAW, 239-40, 821-22 (2<sup>nd</sup> ed. 1945); Jennings *The Caroline and Mcleod Cases*, 32 *AJIL* 82 (1938).
27. Mallison, *Limited Naval Blockade or Quarantine Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 *Geo. Wash. L.Rev.* 347.355 (1962).
28. Hearing Before the (U.S.) Senate Committee on Foreign Relations on the North Atlantic Treaty, 81 St. Cong., Sess. Exec. L. pt. 1, at 101, 102 (1949).
29. Mallison, *supra* note 27, at 348, 355.

30. Rodick, *supra* note 24, at 119.
31. McDougal and Feliciano, *supra* note 22, at 200
32. The Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua V. United States of America), I.C.J. Reports 1986. P.94 para 176.
33. I.C.J. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, July 8, 1996, (1996), I.C.J. Reports 226 (1996).
34. Pompe, AGGRESSIVE WAR: AN INTERNATIONAL CRIME 104(1953).
35. The Caroline Case, *supra* note 26.
36. Quoted in Brownlie, The Use of Force in Self Defence, 37 BYBLIL 218, 229 (1961).
37. Bowett, *supra* note 25, at 54, 113.
38. U.S.Dept. State Bull. 380 (1941).
39. Mallison, *supra* note 27, at 355.
40. Kunz, Individual and Collective Self Defense, in Article 51 of the Charter of the United Nations, 41 *A.J.I.L.* 827, 878 (1947).
41. Higgins, The Development of International Law Through the Political Organs of the United Nations 205 (1963).
42. McDougal and Feliciano, *supra* note 22, at 242-243, (emphasis added).
43. 25 U.N. GAOR, Supp. No. 19 (A/8019) 47-49 (1970).

44. See, text above notes 32 & 33.
45. Order of 22 September 1995 I.C.J. Reports 1995, p.306, para.
46. Advisory Opinion, *supra* note 33 at 24-43.
47. PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I), 16 I.L.M. 1391 (1977), art. 54, para. 5.
48. See text above notes 24-46, *infra*. The I.C.J. adopts an identical view when it declares:  
“Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.” I.C.J. Advisory Opinion, *supra* note 33 at 242.
49. Protocol I, art. 56, para.2.
50. *Id.* art. 55, para 1.
51. I.C.J. Advisory Opinion, *supra* note 33 at 242.
52. *Id.*
53. *Id.* art. 263.
54. The I.C.J. unanimously declared:  
“A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;” *id.* at 266. For further detailed studies of the I.C.J. Advisory Opinion see, e.g., Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 19 AJIL 417 (1997); Chesterman. *The International Court of Justice, Nuclear Weapons and the Law*, NILR, vol. XLIV. Issue 2, 149 (1997); Falk, *Nuclear Weapons, International Law and the World Court: A Historic Encounter*. 91 AJIL 64, (1997).
55. UNSC Res. 678 (1990), para 2, see for details ch.3, *infra*.

56. Gr. Brit. T.S. No. (Cmd. 3751); A.J.I.L. vo. 1, 1907, Suppl. Pp. 155-57.
57. A.J.I.L. vo. 2, 1908, suppl. Pp.90-117, Handbook of the International Red Cross 1971, pp.9-20, see art. 23(a) of the Regulations Annexed to the Convention.
58. L.N.T.S. vol. XCIV, 1929, p.65; A.J.I.L. vol. 25, 1931.
59. 1015 U.N.T.S. 164.
60. Text provided by the U.N. Secretariat.
61. I.C.J. Advisory Opinion, *supra* note 33 at 253.
62. *Id.*
63. 19 I.L.M. 1523 (1980)
64. The Inhumane Weapons Convention, *id.* the preamble, para. 4 & Protocol (III) on the Prohibition or Restrictions on the Use of Incendiary Weapons annexed to the Convention, 19 I.L.M. 1523 (1980).
65. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, signed at Geneva, 12 August 1949, entered into force 21 October 1950, 75 UNTS 287; 6 UST 3516, TIAS No. 3365, [hereinafter the Geneva Civilians Convention].
66. See. e.g. Schmitt, Green War: An Assessment of the Environmental Law of International Armed Conflict, 22 Yale J.Int'l L. 1 (1997) at 66.
67. See subsequent discussion of Protocol I and Protocol II, this text above note 85, *et seq.*
68. The Geneva Civilians Convention, art. 147.
69. *See* text above notes 47-54.
70. Protocol I, art. 56, para. 2 (b).
71. *Id.* art. 56 para 2.(a).
72. *Id.* art. 56 para. 2©.
73. Report of Committee III, Second Session (CDDH/215/Rev. 1, para 27), Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Official Records (1974-1977).
74. 1108 U.N.T.S. 151.
75. These definitions are included in the Understandings (Understanding relating to Article 1) embodied in the Annex to the Enmod Convention. We accept the definitions of terms specified in the Understanding as corresponding to the

- same or similar terms included in protocol I (articles 35 (3) and 55) even though the understanding itself stated that these definition were intended exclusively for the Enmod Convention and were not intended to “prejudice the interpretation of the same or similar terms if used in connection with any other international agreement”.
76. Libeler, *supra* note 10 at 112; Low and Hodgkinson, Compensation for Wartime Environmental Damage: Challenges to International Law after the Gulf War, 35 Virginia J.Int’l L. 405 at 429 *et seq.* (1995).
  77. See e.g. G. Abi-Saab, The 1977 Additional Protocol and General International Law: Some Preliminary Reflections, in A. DELISSEN & G. TANJA (EDS.), HUMANITARIAN LAW OF ARMED CONFLICTS: CHALLENGES AHEAD, 155 at 120 *et seq.* (1992); Falk, Environmental Disruption by Military Means and International Law, in A. WESTING, (ed.) ENVIRONMENTAL WARFARE, 33 at 39 (1984).
  78. See; e.g. Aldrich, Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions, 85 *A.J.I.L.* 1, 14 & 19, (1991).
  79. I.C.J. Advisory Opinion, *supra* note 33 at 256.
  80. See chs. 3 & 4 , *infra*.
  81. 1108 U.N.T.S. 151.
  82. Compare with art, 35 para. 3 & art. 55 of Protocol I.
  83. These definitions are included in the Understandings (Understanding relating to Article 1) embodied in the Annex to the Enmod Convention.
  84. Leibler, *supra* note 10, at 110; see also, Goldblat, The Environmental Modification Convention of 1977: An Analysis, in A. WESTING, ed., ENVIRONMENTAL WARFARE; A Technical, Legal and Policy Appraisal, 53 at 55 *et seq.* (1984).
  85. The Enmod Convention, art. 3.
  86. See, e.g., plant, Environmental Damage and the Laws of War: points addressed to Military Lawyers, in 2 Armed conflict and the New Law 159, 168 (H.FOX & M. MEYER eds., 1993); Reiskind, the Ottawa Conference of Experts on the Use of the Environment as a Took of Conventional Warfare: A Synopsis, in H.B. Schiefer (ed.), Verifying Obligations Respecting Arms Control and the Environment: A post Gulf War Assessment at 159-6-(1992); Low & Hodgkinson, *supra* note 92 at 430-434; Paul Szasz, Remarks, in the Gulf War:

- Environment As a Weapon, The American Society of International Law Proceedings 214-216 (1991); Okorodudu-Fubara, Oil in the Persian Gulf War: Legal Appraisal of an Environmental Warfare, 23 St. Mary's L.J., 123, 176 (1991); Roots, International Agreements to Prohibit or Control Modification of the Environment for Military Purposes: An Historical Overview and Comments on Current Issues, in H.B. Schiefer (ed.). Verifying Obligations Respecting Arms Control and the Environment, *id* at 23-24.
87. See, e.g., Low & Hodgkinson, *supra* note 92 at 432-33.
  88. AJIL, vol. 1, 1907, Suppl., pp. 129-153, the Preamble, para 9.
  89. *Supra* note 73, the Preamble, para 8.
  90. R. Falk, The Environmental Law of War: An Introduction, in G.PLANT, ENVIRONMENTAL PROTECTION AND THE LAW OF WAR, 78, at 84-85.
  91. AJIL, vol.1, 1907, suppl., pp.95-96.
  92. *Id.* paras, 4 & 5.
  93. *Supra* note 107 Annex, art. 23, para (e).
  94. *Supra* note 73 Annex, art. 23, para (e).
  95. This is natural result of the rules of the international responsibility of states for their wrongful acts which cause injury or damage to any other state; see ch. 3 and 4 *infra*.
  96. Corfu Channel (United Kingdom v Albania) ICJ Reports 4, 22 (1949).
  97. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) Merits, ICJ Reports (1986) para 215. (*supra* note 32).
  98. Falk, *supra* note 109 at 84; Simonds, Conventional Warfare and Environmental Protection: A Proposal for International Legal Reform, 29 Stanford J.Int'l L 165, 168-69, (1992).
  99. Falk, *Id.*
  100. *Supra* note 110.
  101. *Id.* para.2.
  102. Protocol I, arts. 35(3) & 55. See also I.C.J. Advisory Opinion, *supra* note 33 at 242 *et. seq.*
  103. U.S. Statute at Large vol. 32, pp.1803-1826., AJIL vol. 1, 1907. Suppl., pp.129-153.
  104. *Supra* note 76.

105. Art. 23(g) of the Regulations Respecting the Laws and Customs of War on Land annexed to the 1899 Hague Convention (II) and the 1907 Hague Convention (IV), *supra* notes 107 & 72, respectively.
106. The 1949 Geneva Civilians Convention (IV), art. 53, *supra* note 81.
107. For a similar view see Zedalis, Military Necessity and Iraqi Destruction of Kuwaiti Oil, *Revue Belge de Droit International* 1990/2 vol. XXIII 333 at 339.

**CHAPTER TWO**

**THE SECURITY COUNCIL AND THE ENVIRONMENT:  
CASE STUDY ON THE IRAQ-KUWAIT CONFLICT**



**CHAPTER TWO**  
**THE SECURITY COUNCIL AND THE ENVIRONMENT:**  
**CASE STUDY ON THE IRAQ-KUWAIT CONFLICT**

**I**

**INTRODUCTION**

**Oil Spill:**

The months of January and February of 1991 witnessed the most destructive ecological crime ever committed in the history of mankind on earth. Responding to Coalition air force attacks on Iraq's military targets in both Kuwait and Iraq, Iraq intentionally released millions of barrels of crude oil from the Kuwait Oil Company Sea Island terminal off Mina Al-Ahmedi and from five oil tankers anchored off Al-Ahmadi and, also, from oil wells close to the Gulf. In addition, Iraq dumped large quantities of crude oil from Mina Al-Bakr offshore terminal near the Kuwaiti borders. Although estimates of the volume of crude oil dumped by Iraq into the Gulf water varied from as low as 3 million barrels to as high as 13 million barrels or even higher, Kuwaiti sources put the volume at 6 million barrels or more.<sup>1</sup> This is by far the largest oil spill ever known in the history of mankind. It was a premeditated crime committed by the Iraqi authorities against the Kuwaiti environment and the environment of the whole Gulf area. An oil slick, the largest in history, extending thousands of square kilometers across the sea area of the Gulf resulted from the spill. This slick detrimentally affected the whole Gulf and the shores of Gulf states. The very stressed environment of the Gulf area and Gulf water has been severely damaged. Floating tar

balls and petroleum hydrocarbon residues in water, sediment and biota caused by the oil spill have adversely affected the delicate ecosystem of the Gulf. Desalination installations were detrimentally affected. Great losses to bird, mammal, and fish population of the sea area of the Gulf have been observed. The destruction of shrimp industry and other sea related industries has been noticed. Fresh water sources have been harmed.<sup>2</sup>

### **Oil Fires:**

Another serious crime committed by the Iraqi authorities during the second Gulf War was the burning of oil wells in Kuwait which was “the most widely known and obvious consequence of the Iraq-Kuwait conflict.”<sup>3</sup> When it became clear that Iraqi forces were being defeated and were preparing to withdraw from Kuwait, these forces executed the carefully prepared plan to burn Kuwaiti oil wells. A total of 727 oil wells were set on fire.<sup>4</sup> Large amounts of other wells were destroyed without being set ablaze which led to the constitution of huge oil lakes.<sup>5</sup> In addition, large oil storage facilities and two of the largest oil refineries in Kuwait were also set on fire.<sup>6</sup> This was a premeditated serious crime committed by the Iraqi authorities. It caused the world’s greatest environmental disasters in the history of mankind.

Fires and smoke resulting from burning oil wells have the most serious air pollution ever known in history; large clouds of smoke have covered the Gulf area and appeared as far as the countries of eastern Europe, the southern part of the former Soviet Union, Iran, Afghanistan, and Pakistan. Black rain and soot were also observed in the same areas. In Kuwait, huge numbers of plants and birds were killed because of

the very large oil lakes which were expected to cause major environmental damage and land degradation on a large scale.<sup>7</sup> Moreover, “(a) lower temperatures from lack of sunlight which could shorten agricultural growing seasons; (b) the covering of crops, grass and palm trees with oil; and (c) consequential damage through the food chain,” all of which did have severe effects on Kuwait and other Gulf states and will continue to have such effects for many years to come.<sup>8</sup> The levels of toxic and noxious materials and particles which are very harmful to the health and well-being of the people of Kuwait and other Gulf states are reported to be much higher than the maximum acceptable levels. Many other harmful effects are being reported.<sup>9</sup> Studies are being carried out in various scientific institutions to determine the exact long-term harmful effects of the Gulf War environmental crimes committed by the Iraqi authorities or under orders from those authorities.

Now, what was the Security Council’s response to Iraqi crimes against the Kuwait environment and that of the Gulf and other States? And did the Council have the power and authority to adopt the measures it adopted?

Below we will study the actions adopted by the Security Council and the authority of the Council to adopt such actions. The U.N. Compensation Commission established by Security Council resolution 687 and its role with regard to matters of liability and compensation concerning environmental losses, damage or destruction and the depletion of natural resources will be dealt with in a separate chapter (Chapter 3 *infra*).

## II

### SECURITY COUNCIL'S ACTIONS

Soon after the end of the second Gulf War and on April 3, 1991 the U.N. Security Council adopted its Resolution No. 687 in which the Council dealt with the conditions of a permanent cease-fire and the restoration of peace and security in the area. This resolution included a number of provisions concerning compensation for environmental damage and the depletion of natural resources. Thus the Security Council:

16. *Reaffirms* that Iraq.....is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait;

.....

18. *Decides* to create a Fund to pay compensation for claims that fall within paragraph 16 above and to establish a Commission that will administer the Fund;

19. *Directs* the Secretary-General to develop and present to the Council for decision, no later than 30 days following the adoption of this resolution, recommendations for the Fund to meet the requirement for the payment of claims established in accordance with paragraph 18 above and for a

programmed implement the decisions in paragraphs 16, 17,  
and 18 above,.....<sup>10</sup>

The provisions quoted above from Resolution 687 did, in fact, reaffirm and elaborate the provisions stated in paragraphs 8 and 9 of Security Council Resolution 674 of 29 October 1990 in which the Security Council:

8. Reminds Iraq that under international law it is liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq;
9. Invites States to collect relevant information regarding their claims, and those of their nationals and corporations, for restitution or financial compensation by Iraq with a view to such arrangements as may be established in accordance with international law;.....<sup>11</sup>

The importance of paragraphs 8 and 9 of Resolution 674 quoted above lies in the fact that it was the first time that the Security Council referred to the Iraqi liability, under international law, for any wartime loss, damage or injury as a result of “the invasion and illegal occupation of Kuwait by Iraq” and that a claim settlement process ensuring that restitution or financial compensation by Iraq would be established and effected. But, Resolution 687 was unprecedented in the sense that it was the first time in history that the Security Council recognized in very clear and unequivocal terms that any environmental loss or damage and the depletion of natural

resources during or as a result of armed conflicts were compensable under international law.<sup>12</sup>

Furthermore, Security Council Resolution 687 specified that Iraq's liability is based on its "invasion and illegal occupation of Kuwait"; thus, the Council selected to base Iraq's liability on its unlawful use of force in violation of the U.N. Charter regardless of whether or not Iraq violated the laws governing and regulating the actual conduct of war or *jus in bello*.<sup>13</sup>

However, the Security Council acknowledged, in paragraph 16 of its resolution 687 previously quoted, that only "direct" loss or damage "as a result of the invasion and illegal occupation of Kuwait" was compensable; but any or all direct losses and damage were compensable. This is in conformity with international law which requires a link between the state's action or conduct violating any of that state's international obligations and the loss or damage occurred or occurring.<sup>14</sup>

In order to enforce Iraq's liability, the Security Council decided "to create a fund to pay compensation for claims" and "to establish a Commission that will administer the Fund".<sup>15</sup> The U.N. Secretary-General proposed that the Fund would be established as "a special account of the United Nations"<sup>16</sup> and would be known as "the United Nations Compensation Fund"<sup>17</sup> which enjoys the privileges and immunities of the United Nations.<sup>18</sup> In addition, the Secretary-General proposed the Commission administering the Fund would be known as "the United Nations Compensation Commission"<sup>19</sup> and would "function under the authority of the Security Council"<sup>20</sup> and would "be a subsidiary organ thereof."<sup>21</sup> The U.N. Security Council approved the

Secretary-General's report including these proposals by its Resolution No.692 of 20 May 1991 in which the Council:

3. *Decides* to establish the Fund and the Commission referred to in paragraph 18 of resolution 687 (1991) in accordance with section 1 of the Secretary-General's report, and that the Governing Council will be located at the United Nations Office at Geneva and that the Governing Council may decide whether some of the activities of the Commission should be carried out elsewhere;.....

5. *Directs* the Governing Council to proceed in an expeditious manner to implement the provisions of Section E of resolution 687(1991), taking into account the recommendations in Section II of the Secretary General's report;.....

9. *Decides* that if the Governing Council notifies the Security Council that Iraq has failed to carry out decisions of the Governing Council taken pursuant to paragraph 5 of the present resolution, the Security Council intends to retain or to take action to reimpose the prohibition against the import of petroleum and petroleum products originating in Iraq and financial transactions related thereto;...<sup>22</sup>

Section E of Security Council resolution 687 referred to in paragraph 5 of Resolution 692 quoted above deals with Iraq's liability under international law for losses and damage caused because of Iraq's invasion and illegal occupation of Kuwait, Iraq's obligations concerning servicing and repayment of its foreign debt, the establishment of the U.N.Compensation Fund and the Commission administering the

Fund, and the proposals to be made by the U.N. Secretary-General for the operation and running of the Fund and the Commission.<sup>23</sup>

The Governing Council of the Commission was set to be constituted of “the representatives of the current members of the Security Council at any given time.”<sup>24</sup> The Security Council decided to set the compensation to be paid by Iraq into the Compensation Fund at a maximum rate of 30% of the annual value of the exports of petroleum and petroleum products from Iraq; thus the Security Council in its Resolution 705 of 15 August 1991:

2. *Decides* that .....compensation to be paid by Iraq (as arising from section E of resolution 687) shall not exceed 30 per cent of the annual value of the exports of petroleum and petroleum products from Iraq;

3. *Decides* Further.....to review the figure established in paragraph 2 above from time to time in light of data and assumptions contained in the letter of the Secretary-General (S/22661) and other relevant documents.<sup>25</sup>

Later resolutions of the Security Council set the maximum rate to be paid by Iraq into the Compensation Fund at 25 per cent of the annual value of the exports of petroleum and petroleum products from Iraq.<sup>26</sup>

A detailed study of the Fund and the Commission, its jurisdiction and work in relation to the environment, the rules it adopted for the establishment of Iraq’s

liability in this connection, and further developments and actions by the Security Council will be the subject of chapter four of this dissertation.

**III**

**THE AUTHORITY OF THE SECURITY COUNCIL TO  
DETERMINE ISSUES OF LIABILITY AND  
COMPENSATION AND TO ESTABLISH THE U.N.  
COMPENSATION FUND AND THE COMMISSION**

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**THE AUTHORITY OF THE SECURITY COUNCIL  
TO ACT AS A LEGISLATOR AND JUDICIARY  
AND TO ESTABLISH ORGANS FUNCTIONING AS COURTS**

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Article 24 of the U.N.Charter stipulates :

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.
3. ....

Thus, the Security Council is entrusted with “primary responsibility for the maintenance of international peace and security.” The Security Council must “act in accordance with the Purposes and Principles of the United Nations” and within the scope of specific powers granted to it in the Charter as laid down in Chapters VI, VII, VIII and XII. Chapter VI deals with Pacific Settlement of Disputes, Chapter VII deals with Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Chapter VIII deals with Regional Arrangements, and, finally, Chapter XII deals with the International Trusteeship System. The question as to whether the U.N. Security Council has the authority to determine issues of liability and compensation and to establish the U.N. Compensation Fund and the Commission and the impacts on issues of environmental damage caused during or as a result of armed conflicts have caused many problems and has not been agreed upon between international law writers. Some writers have criticized the Security Council and the actions it took as either *ultra vires* or at least as fallen outside the specific powers of the Council. Some have suggested that the Security Council should not have acted as a legislature or a judiciary. But the correct view, in our view, is that the Security Council has acted legally and has violated none of the provisions of the Charter. In the following pages we will discuss the two opposing views regarding this matter.

## A

### The Views Criticizing the Security Council and the Actions it Adopted

Some writers and even some states criticized the Security Council and claimed that it did not possess the power to determine issues of liability and compensation. It has been stated that :

The Security Council, under the Charter does not have the power to make decisions as to liability or to determine compensation or restitution, such as a court might do. The only references in the Charter to such matters appear in Article 92, which quite clearly defines the International Court of Justice as the principal judicial organ of the United Nations. The only reference in the entire Charter to the issue of compensation or restitution is to be found in Article 36 of the Statute of the International Court of Justice.<sup>27</sup>

This line of argumentation goes to the very heart of the problem of competence of the Security Council and was used by Cuba to justify its opposition to resolution 674 reminding Iraq that it is liable, under international law, “for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq” and its opposition to resolutions 686 and 687 which included similar clauses. Thus Cuba’s line of argumentation suggests that the Security Council does not have any judicial power or the power to make decision as to liability or to determine compensation or restitution; such a power lies with the International Court of Justice

or other international courts or arbitration. It is suggested also that, under the Charter of the United Nations, the Security Council is a “political” and an “executive” organ which has political and executive powers and should not have judicial or legislative powers; Thus, the Security Council is not authorized by the Charter “to *decide* issues of liability and compensation.”<sup>28</sup> But it is authorized to “*recommend* terms of settlement which may include terms relating to liability and compensation.”<sup>29</sup> The powers of the Security Council to decide or to issue binding decisions can only be exercised under articles 41 and 42 of the U.N.Charter after the Council has made, in accordance with article 39 a finding that a threat to the peace, a breach of the peace, or an act of aggression has existed. Article 42 states:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate; it may take such action by air, sea or land force as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

It is clear then that article 42 deals with measures involving the use of armed force and it thus becomes inapplicable to the determination of liability and compensation and the creation of the Compensation Commission as such matters do not involve the use of force. Nor is article 41 applicable as it deals with sanctions or enforcement measures not involving the use of armed force. Article 41 provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Whence, it is claimed that article 41 does not lend support to “the imposition of liability and the creation of the Compensation Commission”<sup>30</sup> and that the “creation of a Compensation Commission is not an enforcement measure but a means of settling a dispute.”<sup>31</sup>

Another line of argumentation rests upon the principle of the separation of powers suggesting that the U.N. Charter envisaged a system which can be compared with that of any democratic state. The Security Council is entrusted with the political or executive powers, the General Assembly is entrusted with legislative or semi-legislative powers, and the International Court of Justice is entrusted with the judicial powers or the juridical settlement of disputes.<sup>32</sup> It is inappropriate for the Security Council to consider and decide matters that involve legal issues or the juridical settlement of disputes. The Statute of the International Court of Justice which as stipulated in article 92 of the U.N. Charter forms an integral part of that Charter vests the Court with the primary jurisdiction and power to settle legal disputes concerning;

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a

- breach of an international obligation;
- d. the nature or existence of the reparation to be made for the breach of an international obligation;<sup>33</sup>

Whence, if the Security Council is faced with a legal issue or problem it should refer it to the I.C.J. for an advisory opinion, or should request the parties to refer it to the Court for a legal decision. The U.N. Charter declared that the Security Council should “take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.”<sup>34</sup> Consequently, all legal claims concerning the determination of Iraq’s liability and compensation should have been referred to the I.C.J. or another judicial form or international arbitration agreed upon by the parties; the role of the Security Council should have been to recommend the reference of such claims and disputes by the parties to the appropriate judicial forum of their choice, as such claims and disputes raise legal issues which require adjudication in a proper international judicial or arbitration forum.<sup>35</sup>

Furthermore, it has been suggested that the Security Council should not decide matters of liability, compensation and restitution and other legal disputes, for it will be inappropriate for the Council to decide such matters because its decisions are influenced by national self-interest and that decisions of the Council require political considerations.<sup>36</sup> The Security Council is composed of states each of which has its national self-interest and uses its voting power to protect such interests, and as it has been voiced:

When national self-interest generally prejudices an institution, it cannot be expected to apply the law judicially. A dichotomy exists

between the rule of law and the interests of states, which influences a political institution's adjudication of questions.....Therefore, to empower the Security Council, which is composed of states primarily guided by political forces, is to invite a non-judicial application of the law. The Council's actions are unjust and, therefore, inappropriate to the extent that a dissonance exists between a legal conclusion and the Security Council's political conclusion.<sup>37</sup>

Thus it becomes clear that whilst the rules of law may provide a certain answer or solution to a legal dispute or a legal issue, the Security Council may adopt a different and perhaps an entirely opposite solution, as the Council is certain to be guided by the political interests of its members in its decision-making process. Such a solution would obviously be unjust and biased. And, "a biased decision-maker is repugnant to any notion of fairness or justice."<sup>38</sup> Should we then entrust the Security Council which is a political institution vested with political and executive powers with the power to decide "juridical question requiring in-depth legal analysis when there are appropriate fora for the adjudication of such issues"?<sup>39</sup>

Moreover, it is asserted that Security Council's members' national political interests do "solely" guide it because of the lack of procedural safeguards and rules which protect the rights of disputants and ensure due process and the realization of justice and fairness,<sup>40</sup> while it is recognized that "due process rights and procedural safeguards are general principles of law or customary international law."<sup>41</sup> If the Security Council continues to decide legal issues and legal disputes it must follow procedural rules that are similar to those followed by courts of law or international

arbitration and it must respect and ensure procedural rights of the disputants; the composition of the Council must also be changed to guarantee that at any given time a member of the Council who is at the same time is a party to a dispute before the Council may not appear or participate as member or influence the Council to adopt a particular decision; such a member may only be allowed to participate in the proceedings on an equal footing with the other party to the dispute.<sup>42</sup>

It has additionally been maintained:

By failing to refer questions of law – which would normally be addressed by a court – to the I.C.J., the Council dramatically diminishes the I.C.J.'s legitimacy as a coordinating organ of the United Nations...[T]he Council's actions seem counterproductive. By ignoring the clear separation of function and power set forth in the Charter, the Security Council diminishes the legitimacy of the entire U.N.system.<sup>43</sup>

And it has been finally contended that the Council may not and cannot legally establish judicial or semi-judicial organizations or bodies under article 29 of the Charter or any other Charter provision to decide on matters of liability and compensation including those relating to environmental damage or loss, as the Security Council may not and cannot legally establish subsidiary organs or bodies which have or exercise powers that the Council itself does not have nor can it exercise. The Charter does not contain any provision which permits the Council to act as a judicial organ, and only Security Council's decisions under articles 41 and 42 are legally binding and obligatory while decisions under Chapter VI concerning the pacific settlement of disputes and decisions under article 40 concerning provisional

measures are of recommendatory nature. Therefore, the Security Council does not have the authority to act as a court settling legal disputes, nor does it have the authority to establish subsidiary organs or bodies having judicial or semi-judicial powers.<sup>44</sup>

## **B**

### **The Views Supporting the Security Council**

#### **And the Actions it Adopted**

The basic rules concerning Iraq's liability for loss, damage or injury to "foreign Governments, national and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait" included in Security Council resolution 687 are not unprecedented. In fact, resolution 686 concerning the temporary cease-fire and earlier resolution 674 included similar provisions. Resolution 686 of 2 March 1991 included its second paragraph in which the Security Council:

2. *Demands* that Iraq implements its acceptance of all twelve resolutions noted above and in particular that Iraq:

(a).....

(b) accept in principle its liability under international law for any loss, damage, or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq.

Resolution 674 included a reminder that Iraq is liable under international law for “any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq”. Thus it clearly appears that the Security Council is merely stating the rules of international law concerning the responsibility of any state for grossly violating its international obligations and its liability for any loss, damage or injury caused by or as a result of such violation. Resolution 674 purely reminds Iraq of the rules of international law on the matter whereas resolution 686 demands that Iraq “accept in principle” its liability under such rules.

Resolution 687, on the other hand, reaffirms, in paragraph 16, Iraq’s liability as stated in previous resolutions. Thus, it is obvious that Security Council’s action concerning the determination of Iraq’s liability has in no way violated the rules of international law. In this respect, Security Council’s action is not unprecedented; there, in fact, exist a good number of resolutions in which the Security Council affirms the responsibility and liability of states for loss, damage, or injury caused to other states and the right of injured states to receive compensation for such loss, damage, or injury. For example, resolution 290 of 8 December 1970 included a Security Council’s demand that “full compensation by the Government of Portugal be paid to the Republic of Guinea for the extensive damage to life and property caused by the armed attack and invasion.”” In addition, in resolution 387 of 31 March 1976, the Security Council called upon “the Government of South Africa to meet the just claims of the People’s Republic of Angola for a full compensation for the damage and destruction inflicted on its state”. Moreover resolution 487 of 19 June 1981 included that the Security Council:

1. *Strongly condemns* the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct;.....

2. *Considers* that Iraq is entitled to appropriate redress for the destruction it has suffered, responsibility for which has been acknowledged by Israel;.....<sup>45</sup>

Thus, it is manifestly clear that the Security Council has long been deciding matters of responsibility of states for violations which could be considered or which may involve a threat to the peace, a breach of the peace, or an act of aggression, and has been deciding matters of liability for such violations.

Resolution 687 is, however, unprecedented, insofar as matters of liability and compensation are concerned, in two main respects. First, the resolution expressly includes “environmental damage and the depletion of natural resources” among the compensable loss or damage. Secondly, the resolution created a machinery to enforce the provisions on liability and compensation; this machinery included the creation of “a Fund to pay compensation for claims” and the establishment of “a Commission that will administer the Fund.”<sup>46</sup> As to the first point, the inclusion of environmental damage and the depletion of natural resources among the loss or damage to be compensated for by Iraq, it appears that the Security Council did not violate the rules of international law or the U.N.Charter, as the Council has stated the rules of international law and did not exceed such rules.<sup>47</sup> The resolution should be commended since it covers compensation for ecological damage or what is called “non-property damage”.<sup>48</sup>

As to the second point which has caused extensive debate, the Security Council does have the authority to create the Fund and establish the Commission and empower it with the authority to determine issues of liability thus exercising judicial or quasi-judicial functions. The Security Council is conferred upon with “the primary responsibility for the maintenance of international peace and security”<sup>49</sup> and, accordingly, states are obliged to “accept and carry out the decisions of the Security Council in accordance with the present Charter.”<sup>50</sup> In order to facilitate its functions, the Security Council is empowered to “establish such subsidiary organs as it deems necessary for the performance of its functions.”<sup>51</sup> Thus it appears that the Security Council can establish subsidiary organs which are necessary for the performance of “its” functions, but it cannot establish any subsidiary organ which exercises any function that cannot be exercised by the Council or which falls outside its jurisdiction or exceeds its powers.

In assessing the functions of the United Nations Compensation Commission and their nature, the U.N. Secretary-General has stated:

The process by which funds will be allocated and claims paid, the appropriate procedures for evaluating losses, the listing of claims and the verification of their validity and the resolution of dispute claims as set out in paragraph 19 of resolution 687(1991) –the claims procedure- is the central purpose and object of paragraphs 16 to 19 of resolution 687(1991). It is this area of the Commission’s work that the distinction between policy-making and function is most important. The Commission is not a court or

an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved.<sup>52</sup>

Thus, the Commission is intended to be a political organ that performs a fact-finding function, but it also performs a “quasi-judicial” function involving the assessment of payments and the resolution of disputed claims.

### **The Attitude of the I.C.J.Supports**

#### **The Validity of Security Council Actions:**

In evaluating whether the U.N. Security Council has the power to exercise such functions or establish organs that have such powers and exercise such functions as those conferred upon the U.N. Compensation Commission, one must consider the attitude of the International Court of Justice in cases which may have a direct bearing on the subject matter. As stated in Article 92 of the U.N. Charter, the I.C.J. is “the principal judicial organ of the United Nations” and is empowered to decide on the legality and validity of actions taken or adopted by other U.N. organs, including the Security Council, if any of such actions are challenged before the I.C.J. as invalid, illegal, or *ultra vires*. This could be done through either a contentious proceeding between two or more of the States members in the United Nations or an advisory opinion to be delivered by the I.C.J. upon the request of the Security Council itself or the General Assembly. The I.C.J. will surely be governed and guided by the law of the Charter of the United Nations when it delivers its decision or advisory opinion on the matter. A thorough examination of various I.C.J. decisions and advisory opinions

proves that the Court's attitude supports the legality and validity of the actions taken by the Security Council concerning the determination of Iraq's liability and the establishment of the U.N. Compensation Commission. Thus in its Advisory Opinion on *Reparations for Injuries Suffered in the Service of the United Nations*, the I.C.J. declared: "[t]he rights and duties of the entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."<sup>53</sup> Accordingly, purposes and functions of the Security Council are not only those explicitly specified in the U.N. Charter, functions which could be implied from the Charter and those functions that have developed in practice fall within the competence of the Security Council. This opens the way for infinite possibilities without any restriction except that the Council must act in accordance with the purposes and principles of the United Nations as stated in paragraph 2 of article 24 of the U.N. Charter.

In addition, in its Advisory Opinion on *Certain Expenses of the United Nations*, the I.C.J. declared that "when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires*."<sup>54</sup> Thus, the presumption is that such action is *intra vires* "since it fell to each organ to determine, in the first place, its own jurisdiction."<sup>55</sup> U.N. organs do, therefore, enjoy a presumption that they act *intra vires* and not *ultra vires* and that their actions are legally valid unless and until this presumption is overturned by a competent authority which has proper jurisdiction, such an authority does not, so far, exist in the strict legal sense insofar as the Security Council is concerned. This is so because I.C.J.'s advisory opinions are not legally binding on the Security Council and, as such, they

cannot overturn any Security Council's action; besides, the decisions or judgements of the Court issued in contentious cases are binding only upon the states that appear before the Court as disputants in each case.

Again, the I.C.J., in its Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (The Namibia Case)* dealt with Security Council resolutions which were not explicitly covered by the wording of various articles in chapters VI and VII of the U.N. Charter. The Court declared that the Council had, in addition to the specific powers, conferred upon it by the Charter, certain general powers under article 24(1) of the Charter : those powers relating to "primary responsibility for the maintenance of international peace and security". This formula covers a very wide range of actions.<sup>56</sup> The Court, in the same opinion expressed its view that it did not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned .<sup>57</sup> This supports the view we have just stated above.

In its Order on *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident on Lockerbie (Libya v. U.K.; Libya v. U.S.)*,<sup>58</sup> the I.C.J. did not suggest that the Security Council acted unlawfully by exercising a traditionally judicial power or that the Council had in any way exceeded its powers and authorities under the Charter.

In sum, the notions of "implied powers", "the presumption that actions taken by any U.N. organ are not *ultra vires*", and "general powers" used by the I.C.J. all support our view that the attitude of the I.C.J. supports the legality of the actions

taken by the Security Council concerning the determination of Iraq's liability and the creation of the Compensation Fund and the Commission administering the Fund, as illustrated before.<sup>59</sup>

**The Security Council Does Have the Power  
to Exercise Judicial or Quasi-Judicial Functions  
and to establish Judicial or Quasi-Judicial Organs:**

It has been suggested by some that the Security Council did not possess the power to exercise judicial or quasi-judicial functions or to act as court and, as a result, it did not have the power to establish judicial or quasi-judicial organs as the Council could not establish organs to exercise functions that it could not itself exercise.<sup>60</sup> Truly, the U.N. Charter established the International Court of Justice as the principal organ of the United Nations and provided that the Security Council should "take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."<sup>61</sup> But, it is absolutely accurate to state that the U.N. Charter did not specify that the I.C.J. was the only or the sole judicial organ of the United Nations. The Charter did not even provide the Court with the power to review or overturn the actions of the Security Council or the General Assembly or any of the principal organs of the United Nations as specified in the Charter. Although the U.N. Charter conferred on the Security Council primary responsibility for the maintenance of international peace and security and it suggested that legal disputes should be referred by the parties to the I.C.J., it did not bar the Council from resolving legal disputes. The Charter's suggestion that legal disputes should be referred by the parties to the I.C.J. is limited to disputes or situations which fall within Chapter VI dealing with the pacific settlement of disputes and not those disputes or situations

which involve threats to the peace, breaches of the peace, or acts of aggression covered by Chapter VII provisions.<sup>62</sup>

The practice of the Security Council over the years does in fact show that it has preferred to handle or decide legal issues or questions involved in or arising in connection with matters under Chapters VI and VII of the Charter. The Council has generally been unwilling to refer issues to the I.C.J.<sup>63</sup> The Lockerbie Case is a recent case which clearly illustrates this point, in this case the Security Council adopted several actions which prejudice the legal rights of Libya under international law, but the I.C.J. refused to order provisional measures requested by Libya and declared that Libya's obligations under Security Council resolution were superior to its obligations under other treaties or international law.<sup>64</sup> In his dissenting opinion, Judge Bedjaoui stated:

[T]he difficulty in the present case lies in the fact that the Security Council not only has decided to take a number of political measures against Libya, but has also demanded from it the extradition of two nationals. It is this specific demand of the Council that creates an overlap with respect to the substance of the legal dispute with which the Court must deal, in a legal manner, on the basis of the 1971 Montreal Convention and international law in general.<sup>65</sup>

In addition, Judge Ni stated:

[T]he Security Council, as a political organ, is more concerned with the elimination of international terrorism and the maintenance of international peace and security, while the International Court of Justice as the principal judicial organ of the United Nations, is more concerned with legal procedures such as questions of extradition and proceedings in connection with prosecution of offenders and assessment of compensation, etc. But these functions may be correlated with each other. What would be required between the two is co-ordination and co-operation, not competition or mutual exclusion.<sup>66</sup>

These two judges, although did not agree with the I.C.J. Order, did recognize the overlap between the functions of both the Security Council and the I.C.J. Judges of the Court did not suggest that that the Council acted unlawfully when it exercised a judicial function, all what some suggested is that the Council did exercise a function that was not among the functions and powers specifically assigned to it in the U.N. Charter. But, as suggested before, the Charter did not preclude the Council from exercising judicial functions, and the I.C.J. did not declare that Council's actions were unlawful.

If the Council is not precluded under the Charter from exercising judicial or quasi-judicial powers and functions when it deems it necessary or desirable for the maintenance of international peace and security on the handling of a dispute or situation which involves a threat to the peace, a breach of the peace, or an act of

aggression; then the Council could not be barred from establishing judicial or quasi-judicial organs if it deems the establishment of such an organ is necessary or desirable for the maintenance of international peace and security or the handling of a dispute or situation which involves a threat to the peace, a breach of the peace, or an act of aggression. Actions taken by the Security Council concerning the determination of Iraq's liability and the establishment of the U.N. Compensation Fund and the U.N. Compensation Commission are based on Chapter VII of the U.N. Charter. This means that the Council deemed its actions necessary to handle a situation which involved breach of the peace and acts of aggression and necessary to restore international peace and security. Whence, it must be concluded that the Council has acted within its powers under the Charter and that the Council has violated none of the provisions of the Charter when it took such actions.

**The Charter Authorizes the Security Council to deal with Matters of Liability and Compensation:**

Although some writers have argued that the Security Council did not have the authority to decide the issues of liability and compensation and that the U.N. Charter did not strictly authorize the Council to decide such issues,<sup>67</sup> we maintain that the Security Council has the authority to deal with and decide issues of liability and compensation in certain cases including those covered by provisions of paragraph 16 of resolution 687 and other relevant resolutions, and that the Charter did not prevent the Council from dealing with and deciding such issues. The notions suggested by the I.C.J. including "implied powers", "the practice of the organization," "general powers" and "the presumption that actions taken by any U.N. organ are not ultra vires"<sup>68</sup> and

the fact that the I.C.J. has never suggested that an action taken by any of the principal organs of the United Nations was unlawful or *ultra vires* all are relevant. Any action which the Security Council deems necessary for the maintenance of international peace and security or necessary to deal with a dispute or situation involving a threat to the peace, breach of the peace, or acts of aggression and/or restore international peace and security is within the jurisdiction of the Council in accordance with article 24(1), “primary responsibility for the maintenance of international peace and security” clause, and article 39 of the U.N. Charter which states:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Examples of measures referred to in article 41 are not conclusive, all measures not involving the use of force but deemed, by the Security Council, necessary or desirable for the maintenance or restoration of international peace and security are included under article 41. Thus, if the Security Council finds that handling or deciding issues of liability and compensation, such as those included in resolution 687 and other relevant resolutions, is necessary or desirable for the maintenance or restoration of international peace and security, then the Council will have the full power and competence to adopt such measures including the handling or deciding of issues of liability and compensation.

In adopting resolution 687 and other relevant resolutions, the Security Council was explicitly involving Chapter VII of the U.N.Charter. This itself is a clear indication that the Council was basing its resolution 687 and other relevant resolutions on its powers under article 41 which are binding upon all states.<sup>69</sup> Handling issues of Iraq's liability for "any direct loss, damage, including environmental damage and the depletion of natural resources or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait" and the creation of the U.N. Compensation Fund and the establishment of the U.N.Compensation Commission was envisaged by the Council as constituting some of the measures necessary for the restoration of international peace and security and the restoration of conditions of normalcy in the area so that Iraq may not, once more, threaten the peace of the area or international peace and security. This view was justified in view of the Iraq's past and continued aggressive conducts in the area in violation of the U.N. Charter, international law and the norms of international conduct. In this connection we may add that paragraph 33 of resolution 687 is a clear indication that Iraq was bound by this resolution and it had to accept its provisions in order that a formal cease-fire becomes effective. This paragraph states that the Security Council:

Declares that, upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the provisions above, a formal cease-fire becomes effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with resolution 678(1990);.....

Some writers have suggested that this quoted paragraph supported the view that provisions embodied in resolution 687 including those provisions on liability and compensation and the settlement of disputes are recommendatory and are not measures within the ambit of article 41 but are based upon Chapter VI of the U.N.Charter, since the Security Council has no power to impose a settlement.<sup>70</sup> This view is, however, misleading and is not based on sound legal justifications: The quoted paragraph (33) clearly states that a formal cease-fire will not be effective unless and until Iraq officially notifies the U.N. General Secretary and the Security Council that it accepts all the provisions of resolution 687. Failing such acceptance would have meant that the state of belligerency was still existing and that Iraq was still an outlawed nation subject to enforcement measures involving the use of force under article 42 of the U.N.Charter and Security Council resolution 687.

**Does Resolution 687 Constitute the Terms of a Peace Settlement Lawfully imposed upon Iraq?**

It was suggested by some writers that Security Council resolution 687 constituted a peace treaty concluded between Kuwait and the States cooperating with it, on the one hand, and Iraq, on the other hand, and that Iraq's consent to the provisions of resolution 687 constituted its consent to this peace treaty. They supported their views by claiming that the Security Council did not have the power to impose a peace settlement or a peace treaty and that it had the power only to recommend terms of a settlement and if such terms were accepted by the parties, they constitute the terms of a peace treaty concluded by the parties upon their consent, and that the provisions included in resolution 687 are "reminiscent of provisions of the Treaty of Versailles and other peace treaties"<sup>71</sup> But we agree with

others who took the view that the provisions of resolution 687 do constitute the terms of a settlement lawfully imposed by the Security Council upon Iraq.<sup>72</sup>

If a dispute or a situation reaches the point of being or involving a threat to the peace, a breach of the peace, or an act of aggression, then the Council is empowered to act under Chapter VII of the U.N. Charter. Accordingly, the Security Council “shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security.”<sup>73</sup> Resolution 687, one of the longest and most comprehensive resolutions ever adopted by the Security Council, was based upon the powers of the Security Council under Chapter VII as constituting comprehensive measures, adopted by the Council to end the second Gulf War and restore international peace and security through the imposition of formal cease-fire conditions and the imposition of a peace settlement. The legality and validity of the terms of settlement included in resolution 687 arise from the essential authority of the Security Council, under Chapter VII, to restore international peace and security and not from Iraq’s consent and acceptance of the provisions of the resolution.<sup>74</sup> By adopting the measures included in resolution 687, the Security Council tried to restore international peace and security in the area and eliminate any future threat of aggression or any future aggression by Iraq in view of its past aggressive behaviour. Provisions on liability and compensation are among those measures deemed by the Council necessary to achieve such purposes.

To suggest that the provisions of resolution 687 constitute a peace treaty is to make the legal validity of such provisions dependent upon Iraq’s capitulation or accession. That is to say that Iraq’s capitulation or acceptance has no role in

conferring legal validity on the provisions of resolution 687 and the resolution cannot therefore be considered as a peace treaty.<sup>75</sup> The resolution comprises the terms of a peace settlement lawfully imposed upon Iraq by the Security Council in accordance with its inherent authority under the Charter.

**The Practice of the Security Council Afterwards**  
**Includes the Determination of Issues of**  
**Liability and Compensation:**

Subsequent practice of the Security Council shows that it has dealt with issues of liability and compensation. The most important case, apart from the Second Gulf War and resolution 687 and other relevant resolutions, is probably the Lockerbie Case. In this case the Security Council, responding to a request made by the United Kingdom and the United States, adopted its resolution No.731 in which the Council “*urge[d]* the Libyan Government immediately to provide a full and effective response to those requests.”<sup>76</sup> Requests referred to in this part of the resolution include, *inter alia*, the payment of compensation to the victims of the Pan Am flight 103 which was bombed by the Libyan Government agents over Lockerbie on Dec.21, 1988, as alleged by the United States and the United Kingdom.<sup>77</sup> The Security Council, furthermore, adopted its resolution 748 while the I.C.J. was about to issue its orders regarding Libyan request to impose provisional measures against the U.K. and the U.S.<sup>78</sup> Security Council resolution 748 was based on Chapter VII of the U.N.Charter and in it the Council decided “that the Libyan Government must now comply without any further delay with paragraph 3 of resolution 731” which included the reference, among other things to the payment by the Government of Libya of full compensation to the victims of the Pan Am flight.<sup>79</sup>

In determining that the Government of Libya must pay full compensation to the victims of the Lockerbie incident, the Security Council must have decided that Libya was directly responsible for the explosion and destruction of the Pan Am flight over Lockerbie.<sup>80</sup>

The I.C.J. has, in fact, given support to the Security Council's authority to determine and decide issues of responsibility, liability, and financial compensation in *the Lockerbie Case* when the Court declined to deliver the provisional orders requested by Libya and declared that under article 103 of the U.N. Charter, member states' obligations under the Charter including their obligation to carry out Security Council decisions prevailed over their obligations under any other international agreements and as a result Libya's obligation to carry out Security Council resolution 748, which is based on Chapter VII of the Charter, prevailed over its obligations under the Montreal Convention, and whatever rights that Libya may enjoy under the Convention must yield to its obligations under the resolution.<sup>81</sup>

Developed practice of the organization is one of the sources of powers and functions of the organization and its organs, this was unequivocally expressed by the I.C.J. in an advisory opinion referred to earlier.<sup>82</sup> It is clear that the practice of the U.N. Security Council supports the position that the Council has the full authority and power to deal with and decide issues of liability and compensation and that at no point, in any of its judgments, orders, or opinions, did the I.C.J. declare that the Council had acted unlawfully or that its actions were *ultra vires*.<sup>83</sup>

**Subsequent Practice of the Security Council**  
**Includes the Establishment of Judicial Organs:**

In order to avert the aggravating situation and to deal with the gross violations of human rights and international humanitarian law and atrocities committed in former Yugoslavia and responding to the calls of various groups and organizations, the U.N. Security Council adopted its resolution 808 on 22 February 1993 by which the Council decided to establish an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.<sup>84</sup> The Security Council further requested the Secretary-General to submit for the consideration of the Council's report on all aspects of the matter concerning the establishment of the tribunal.<sup>85</sup> On the third of May 1993, the U.N. Secretary-General submitted its report,<sup>86</sup> and on the 25<sup>th</sup> of May of the same year, the Security Council adopted its resolution 827 establishing the tribunal.<sup>87</sup> Other successive Security Council resolutions dealt with various aspects of the tribunal.<sup>88</sup> The tribunal began its work, and in its First Annual Report, the International Criminal Tribunal for the Former Yugoslavia observed that its mandate was "to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace."<sup>89</sup>

Resolution 808, the first of a successive Security Council resolutions dealing with the establishment of the said tribunal and various aspects thereto, has indicated that the Council is basing its authority in establishing the tribunal on Chapter VII of the Charter, the resolution states in the preamble that the Council:

*Expressing once again* its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including reports of mass killings and the continuance of the practice of “ethnic cleansing”,

*Determining* that this situation constitutes a threat to international peace and security,

*Determined* to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

*Convinced* that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace...<sup>90</sup>

In addition, the Report of the Secretary-General prepared in accordance with this resolution explicitly stated that in adopting the Statute of the Tribunal, the Council would be acting pursuant to its authority under Chapter VII of the U.N.Charter.<sup>91</sup>

The Council’s authority to establish this tribunal was tested in the Tadic case which was settled by the Appeals Chamber of the Tribunal<sup>92</sup> In this case Dusko Tadic, who is a Bosian Serb, and who was the first defendant of whom the Tribunal had custody, objected to the jurisdiction of Tribunal. He based his objection on several grounds, the most relevant to the subject-matter of this research are those relating to the unlawful establishment of the tribunal Tadi attacked the authority of the Security Council to establish the tribunal and claimed that the Council had no authority under the U.N. Charter to establish subsidiary organs with judicial powers and that the establishment of the tribunal was not an appropriate measure under

Chapter VII of the U.N. Charter. He further claimed that the establishment of the tribunal was contrary to the general principle whereby courts must be “established by law”.<sup>93</sup> The Trial Chamber of the Tribunal decided that it had no power to decide whether the Security Council exceeded its authority under the Charter when it acted to establish the tribunal but the Appeals Chamber decided that it had jurisdiction to consider whether it was lawfully established and whether it had subject-matter jurisdiction. The Appeals Chamber concluded that (the International Tribunal matches perfectly the description in Article 41 of “measures not involving the use of force”)<sup>94</sup> and that (the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve “the use of force”. It is a negative definition)<sup>95</sup>. The Chamber added that literal and logical analysis of Article 41 supports the view that “the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41.”<sup>96</sup>

In considering whether the Security Council can establish a subsidiary organ with judicial powers, the Appeals Chamber declared:

The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own functions or the exercise of some of its own powers. Nor does it mean in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.<sup>97</sup>

The Appeals Chamber supported its view with the fact that the U.N. General Assembly “did not need to have military and police functions and powers in order to be able to establish the United Nations Emergency force in the Middle East (“UNEF”) in 1956,”; nor did it have to be a judicial organ in order to be able to establish the U.N. Administrative Tribunal.<sup>98</sup>

The Appeals Chamber concluded also that because of the wide discretionary powers enjoyed by the Security Council under article 39, the Council’s action establishing the Tribunal was appropriate under the Charter.<sup>99</sup>

With regard to the defendant’s contention that the establishment of the Tribunal was contrary to the general principle that courts must be “established by law”, the Appeals Chamber declared that the correctness of this argument depended on the meaning of “established by law”. The Chamber concluded that a domestic law test could not apply within the international legal system, for “[i]t is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting”<sup>100</sup>, and for exists no organ “formally empowered to enact laws directly binding on international legal subjects.”<sup>101</sup> An acceptable interpretation would “refer to establishment of international courts by a body which, though not a Parliament, has a limited power to take binding decisions” such as “the Security Council when acting under Chapter VII of the United Nations Charter”.<sup>102</sup> The Chamber further suggested that within the context of international law the term “established by law” must mean that an international court “must be established in accordance with the proper international

standards, it must provide guarantees of fairness, justice and even handedness, in full conformity with internationally recognized human rights instructions.”<sup>103</sup> The Chamber then concluded that (the International Tribunal has been established in accordance with the appropriate procedures under the United Nations Charter and provides all necessary safeguards of a fair trial. It is thus “established by law”)<sup>104</sup>

Another tribunal was established by the Security Council, “an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States between 1 January 1994 and 31 December 1994”. The Statute of the International Criminal Tribunal for Rwanda was adopted by the Council and annexed to resolution 955 of 8 Nov. 1994 establishing the tribunal. In establishing this tribunal and adopting its statute, the Council was acting under Chapter VII of the Charter. In the preamble of this resolution, the Security Council used similar justifications as those stated in resolution 808 quoted earlier.<sup>106</sup>

Thus it is evident that the subsequent practice of the Security Council supported by the international community, included the establishment of political organs. This gives an added support to the view that the Council was acting within its full powers when it established the U.N. Compensation Commission.

## **Subsequent Practice of the Security Council**

### **Shows that the Council dealt with various**

#### **Aspects of the Environment:** <sup>107</sup>

The war in the former Yugoslavia and particularly in the Republic of Bosnia and Herzegovina has caused widespread and almost total destruction in many towns and villages, heavy losses of human life and massive killings every where, material damage and destruction of properties on a massive scale, forcible expulsion of persons from areas where they lives and what became known as the practice of “ethnic cleansing”, the changing of ethnic composition of the population, changing of the character of cities, towns and other areas as multi-cultural , multi-ethnic and plurireligious centres, destruction of hospitals and cultural and religious places, and many other untold human sufferings. The Security Council dealt with all these matters which indeed constitute different forms of widespread and extensive damage and destruction to the human environment and its components in Bosnia and Herzegovina . Dozens of Security Council resolutions based on Chapter VII of the U.N.Charter have repeatedly condemned such acts, considered them as flagrant violations of international humanitarian law and declared them to be serious war crimes and crimes against humanity.<sup>108</sup>

The Council established the International Criminal Tribunal for the former Yugoslavia and entrusted it with the function of trying persons responsible for such acts and other serious violations of international humanitarian law committed in the territory of the former Yugoslavia.<sup>109</sup>

Another situation which involved extensive damage and untold losses of human life, mass killings, forcible expulsion of hundreds of thousands of people, and perhaps millions, and pollution of fresh water sources and other forms of pollution is that of Rwanda. After condemning these acts and other serious violations of international humanitarian law in a number of resolutions, the Security Council had to declare that the situations in Rwanda and the serious violations of international humanitarian law committed there constituted a threat to the international peace and security, thus paving the way to act under Chapter VII of the U.N.Charter and establish the International Tribunal for Rwanda Acts, such as genocide and related crimes, murder, extermination, enslavement, deportation, torture, rape, persecutions on political, racial, and religious grounds, other inhumane acts, and other serious violations of international humanitarian law are within the jurisdiction of the Tribunal.<sup>110</sup>

Genocide has been defined by Article 2 of the Statute of the Tribunal as follows:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such :

(One) Killing members of the group;

(Two) Causing serious bodily or mental harm to members of a group;

(Three) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(Four) Imposing measures intended to prevent births within the  
group

(Five) forcibly transferring children of the group to another  
group.<sup>111</sup>

It is clear then that the jurisdiction of the Tribunal extends to acts or crimes which threaten the very existence of a national, ethnic, racial, or religious group and/or change the composition of the population in Rwanda, thus affecting destructively the human environment and the very existence of life in Rwanda. For these reasons paragraph 3 of the same article (2) stipulates:

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Thus it is evident that Security Council attempted, by its actions concerning conflicts in the territory of the former Yugoslavia and the situation in Rwanda, to eliminate very serious threats not just to international peace and security but to the very existence of large national, ethnic, racial, or religious groups.

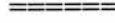
Besides, a question which is being raised is whether the Security Council can use its powers to preserve or save the environment, and if so, would that be true only

in times of armed conflicts or in peace time as well. The reason for this question is what seems as a policy of increasing interferences by the Council in peace-time and not just in times of armed conflicts. In fact, the Security Council does not possess an express general or specific power to protect, preserve or save the environment *per se*. Nowhere in the Charter does exist any such power. As it has been pointed out by some, powers of the Security Council under Chapter VII of the U.N. Charter “were not designed for dealing with environmental rather than military concerns.”<sup>112</sup> The Council does act when it finds its action is appropriate to maintain or restore international peace and security. In peace-time, as well as in times of armed conflicts, the effect of protecting or saving the environment of it finds that such measures are appropriate to maintain or restore international peace and security in cases where the Council decides that a threat to the peace exists.

But, it appears that the Security Council has recently adopted a policy of increasing interference in peace time situations, and not just in times of armed-conflicts, if such interference is considered, by the Council, as appropriate to eliminate sources of any possible threat to peace and security or appropriate to maintain such peace and security. The Security Council has thus declared: “The non-military sources of instability in the economic, humanitarian and ecological fields may become a threat to the peace and security.”<sup>113</sup> Thus, if instability in the ecological fields may become a threat to the peace and security, as the Security Council may find, then the Council will have a free hand in deciding what measures are appropriate under Chapter VII of the U.N. Charter. Then the Council will be exercising an original function it possesses under Chapter VII.

### III

#### CONCLUSIONS



By this Chapter on “the Security Council and the Environment: The Authority of the Council to Deal with Environmental Issues , Case Study on the Iraq-Kuwait Conflict”, we have seen the widespread and serious environmental crimes committed by the Iraqi regime and its forces against the environment of Kuwait and that of other Gulf and other States and the widespread, serious, and long-term or long-lasting environmental damage caused by Iraqi action during the second Gulf War<sup>114</sup> and how the Security Council dealt with these issues by determining Iraq’s liability and establishing the U.N. Compensation Fund and the Commission administering the Fund. We also dealt with the debate which was centered on whether the Security Council had the authority to adopt the actions it adopted and whether it had acted properly. Those who suggested that the Council did not have the authority to act as it did or that it had acted improperly base their view on the action that the Council did not have the authority to decide legal issues or legal disputes and, as a result, the Council did not have the authority to determine issues of liability and compensation as the determination of such issues is purely within the competence of international courts or arbitration tribunals. Nor did the Council, in their view, have the authority to establish judicial or quasi-judicial organs such as the United Nations Compensation Commission, as the Council itself did not have the authority to act as a court or to act in a judicial or quasi-judicial capacity. They also suggested that the U.N. Charter envisaged a system of the separation of powers, the Security Council is entrusted with political and executive powers, the General Assembly with legislative or quasi-

legislative powers and the International Court of Justice with the settlement of disputes. And the Charter itself requested the Security Council to refer legal disputes to the I.C.J. They concluded that the Security Council did not have the authority under the U.N. Charter to act as it did and that it had acted improperly.<sup>115</sup>

On the other hand, this writer supports those who adopt the view that the Council acted lawfully and within its powers and violated none of the provisions of the Charter. It is not true that the Charter created a system of the separation of powers or that it entrusted the I.C.J. with the settlement of disputes and barred the Security Council from dealing with or settling disputes of legal nature. Methods of settling disputes specified in article 33 of the U.N. Charter include negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means chosen by the parties to the dispute. In addition, article 35(1) of the Charter provides that any member of the United Nations may bring any dispute, or any situation which might lead to international friction or the continuance of which is likely to endanger international peace and security, to the attention of the Security Council or the General Assembly. The Charter has, thus, created some sort of what may be called "concurrent jurisdiction of political and judicial organs of the United Nations".<sup>116</sup> In fact, under the Charter, several methods or means of settling disputes, including judicial, non-judicial, and political methods or means, may be employed to settle one single dispute or more. Hence, the International Court of Justice is not the only organ empowered to settle "legal" disputes. The Court itself does not have the power to review the legality, lawfulness, constitutionality, or even the propriety or properness of any act or decision of any of the political organs of the United Nations. An examination of the

practice of the Security Council shows that in most cases the Council did not refer disputes to the I.C.J. even if such disputes did have some legal bearings. In most cases, the Council elected to exercise its authority and power concerning disputes brought before it under Chapter VI of the Charter concerning the pacific settlement of disputes.<sup>117</sup>

Furthermore, Chapter VII of the Charter confers upon the Security Council very broad, indeed unlimited and illimitable, discretionary powers to decide whether any dispute or situation constitutes a threat to the peace, a breach of the peace, or an act of aggression and select to “make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”<sup>118</sup> Under Chapter VII of the Charter, the Security Council may adopt any measures to maintain or restore international peace and security which may include enforcement measures not involving the use of armed forces in accordance with article 41 and/or measures not involving the use of armed forces in accordance with article 42 of the Charter. In dealing with the Iraq-Kuwait conflict, the Security Council deemed it necessary to decide that it reaffirms Iraq’s liability “under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait”,<sup>119</sup> and to create the U.N. Compensation Fund to pay compensation for claims of loss, damage, or injury for which Iraq is liable and to establish a Commission to administer the Fund.<sup>120</sup> Other relevant measures were adopted by the Council.

Although Security Council resolution 687 was unprecedented in some important respects including the determination of Iraq's liability for environmental damage and the depletion of natural resources as a result of Iraq's unlawful invasion and occupation of Kuwait, yet it has violated neither the Charter of the United Nations nor the principles and rules of international law. The Security Council did merely reaffirm the rules of international law which establish Iraq's liability as it was stated in resolution 687 and other relevant resolutions. In addition, the determination of issues of liability and compensation is not outside the jurisdiction of the Council if it decides that the determination of such issues is among the measures to be adopted to maintain or restore international peace and security under its primary responsibility clause and within its powers of determination and decision provided for in article 39 and other relevant articles in Chapter VII of the Charter.

Similarly, the Council's action creating the U.N. Compensation Fund and the U.N. Compensation Commission violated neither the U.N. Charter nor any rule of international law. General international law included no rule which bars the Council from acting the way it did. In fact the primary responsibility clause of the Charter, article 29, and Chapter VII of the Charter confer upon the Council the powers to establish such organs to perform some of its functions concerning the maintenance or restoration of international peace and security and to adopt any measures aimed at achieving this purpose including the determination of issues of liability and compensation and the establishment of judicial or quasi-judicial organs.

Moreover, the attitude of the International Court of Justice supported the validity of Security Council's actions, notions such as "implied powers as developed

in practice”, “the general powers of the organization”, “the presumption that any action taken by any U.N.Organ is not *ultra vires*”, and “the *prima facie* validity of Security Council resolution” which all developed and used by the I.C.J. on various occasions show that the Court would support the legality and validity of Security Council’s actions concerning the determination of Iraq’s liability and the establishment of the U.N. Compensation Commission to administer the Fund and other relevant measures.

Subsequent practice of the Security Council included the determination of matters of liability and compensation and the establishment of judicial organs (see what was previously stated concerning the Lockerbie Case,<sup>121</sup> and the establishment of the International Criminal Court for the former Yugoslavia and the International Court for Rwanda.)<sup>122</sup> Thus the developed practice of the Council supports its previous actions concerning the determination of Iraq’s liability and establishment of the Compensation Fund and the Commission including the determination of Iraq’s liability for environmental damage and the depletion of natural resources.

Besides, we might fairly assert that Security Council’s actions and measures embodied in resolution 687 and other relevant resolutions were accepted by the international community and they did not face any serious objection from states or major powers. In fact Iraq, itself accepted these measures and pledged to cooperate fully with the Council regarding the performance of its obligations arising under resolution 687 and other resolutions.<sup>123</sup> The U.N. Compensation Commission and its work concerning the determination of Iraq’s liability for environment

## NOTES TO CHAPTER TWO



1. See; e.g., *The Destruction of Oil Wells in Iraqi Documents: Environment and Economic Damage and the Kuwaiti Efforts for the Preservation of Oil wealth*, prepared by a group of experts under the supervision of Abdullah Yusif Al Ghonaim, Center for Research and Studies on Kuwait (in Arabic), 1995, p.241 *et seq.* [*hereinafter* cited as *The Destruction of Oil wells*].
2. *Id.* at 243 *et seq.*
3. *Environmental Assessment of the Gulf Crisis*, Report of the Secretary-General of the Conference on Environment and Development, U.N.Doc. A/CONF.151/PC/72, 15 July 1991 at 12.
4. *The Destruction of Oil Wells*, *supra* note 1 at 200.
5. *Id.* at 200 *et seq.*
6. *Id.*
7. *Id.*
8. *Id.* Quotation from Low & Hodgkinson, *Compensation for Wartime Environmental Damage: Challenges to International Law After the Gulf War*, 35 Virginia J.Int'l L. 405, 411-12, (1995).
9. *The Destruction of Oil Wells*, *supra* note 1 at 223 *et seq.*
10. S.C. Resolution 687, 3 April 1991, was adopted at the 2981<sup>st</sup> meeting by 12 votes in favor, 1 against (Cuba), 2)Yemen and Ecuador) abstaining . In addition to the matters discussed in the text, resolution 687 dealt also with other important matters in an unprecedented way such as the demarcation of boundaries between Iraq and Kuwait, the removal of all Iraqi weapons of mass destruction and the establishment of a special committee for that purpose, the return of Kuwaiti property, the liability of Iraq, the return and repatriation of all Kuwaiti and third country nations, Iraq's obligation to renounce

- international terrorism and renounce all acts, methods and practices of terrorism,... etc.
11. S.C. Resolution 674, 29 October 1990, was adopted at the 2951<sup>st</sup> meeting.
  12. Low & Hodgkinson, *supra* note 8 at 455 *et seq.*
  13. *Id.* at 456; for the laws of war and the environment, see ch. 2 *supra*.
  14. See for details of the rules of the international responsibility of states in the field of environment, ch.1., *supra*. For details direct v. indirect loss, see ch. 4 text above note *et seq.* Low & Hodgkinson, *supra* note 8, at 459.
  15. S.C. Resolution 687, para 18.
  16. *Report of the Secretary –General Pursuant to Paragraph 19 of Security Council Resolution 687 (1991)*, U.N. Doc. S/22559, 2 May 1991, para 3, reprinted in 30 I.L.M. 1706 (1991), [*hereinafter* cited as Report of the Secretary General].
  17. *Id.*
  18. *Id.*
  19. *Id.* para. 4.
  20. *Id.*
  21. *Id.*
  22. S.C. Resolution 692 (1991), 20 May 1991, was adopted at the 2987<sup>th</sup> meeting by 14 votes in favor, none against, Cuba abstaining.
  23. Details of these topics will be studied in ch.4 *infra*.
  24. Report of the Secretary-General, *supra* note 16, para 5.
  25. S.C. Resolution 705 (1991), 15 August 1991, was adopted unanimously at the 3004<sup>th</sup> meeting.
  26. This was effected by the “oil for food and medicine program” adopted by the Security Council resolution 986 (1995) and other consecutive resolutions.
  27. Speech given by Mr. Alarcon de Quesada (Cuba) in relation to Resolution 674, U.N.SCOR, 45<sup>th</sup> Sess., 2951<sup>st</sup> mtg. at 32, U.N.Doc. S/PV.2951. See also, Low & Hodgkinson, *supra* note 8 at 472.
  28. See. Speech given by Mr. Al Anbari (Iraq) prior to the vote on Resolution 674, U.N.SCOR, 45<sup>th</sup> sess., 2951<sup>st</sup> mtg. at 32, U.N.Doc.S/PV.2951. See also , Low & Hodgkinson, *supra* note 8 at 472.
  29. Low & Hodgkinson, *supra* note 8 at 473 *et. seq.*

30. *Id.* at 474, see also notes 457 & 458 in *id.* at 474.
31. *Id.*
32. L. Goodrich & A. Simons, THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY 15 (1955); Harper, *Does the United Nations Security Council Have the Competence to Act as Court and Legislature?*, 27 N.Y.U.J. Int'l L. & Pol., 103, *passim* (1994).
33. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 36, para 2, [*hereinafter* cited as I.C.J. STATUTE]
34. THE U.N. CHARTER, art. 36, para.3.
35. Harper, *supra* note 32 at 129 *et seq.*
36. *Id.* at 133-137.
37. *Id.* at 133-134.
38. *Id.* at 135.
39. *Id.* at 135; *see also* notes 136 & 137 at *id.*, p. 135.
40. *Id.* at 137.
41. *Id.* at 138; B. CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, 258-326 (1987).
42. Harper, *supra* note 32 at 140, CHENG, *supra* note 41, at 279-89.
43. Harper, *supra* note 32 at 142.
44. *See* text above notes 27-43. But *see* this text above note 60 *et seq.* and notes 84 *et seq.*
45. S.C. Resolution 487 (1981) was adopted at the 2288<sup>th</sup> meeting on 19 June 1981. This resolution was adopted by the Security Council to respond to the premeditated Israeli air attack on Iraqi nuclear installations on 7 June 1981.
46. S.C. Resolution 687, paras. 16, 18 & 19.
47. For a reference of such rules *see* ch. 1, *supra*.
48. For details *see* ch. 4, *infra*.
49. THE U.N. CHARTER, art. 24. para 1.
50. *Id.* art. 25.
51. *Id.* art. 29
52. Report of the Secretary General, *supra* note 16, para 20.
53. 1949 I.C.J. Reports, 180.

54. 1962 I.C.J. Reports 151, 168.
55. D.W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS, 419 (4<sup>th</sup> ed.) (1982).
56. See 1971 I.C.J. Reports.
57. *Id.* at 16 & 45.
58. 1992 I.C.J. 3, 1154 (Order of 14 April), [*hereinafter* cited as the Lockerbie Order].
59. See text above notes 10-26, *supra*.
60. See text above notes 27-44, *supra*; see also Bowett, the Impact of Security Council Decisions on Dispute Settlement Procedures, AJIL, vol.5, No.1 (1994), *passim*; Fassbender, Review Essay: *Quis judicabit?* The Security Council Its Powers and Its Legal *Control*, EJIL, vol. 11 No. 1 (2000) *passim*.
61. THE U.N. CHARTER, art. 36, para 3; see also art. 92.
62. Article 36 of the U.N.Charter which recommends the reference of legal disputes to the I.C.J. is located in Chapter VI of the Charter and it deals with disputes or situations the continuance of which are likely to endanger the maintenance of international peace and security. Article 36 does not deal with any dispute or situation determined by the Security Council to constitute or involve a threat to the peace, a breach of the peace, or an act of aggression. Hence the recommendation concerning reference to the I.C.J. included in article 36 does not apply to Chapter VII disputes or situations which require prompt, adequate, and offensive action by the Council to maintain or restore international peace and security.
63. Low & Hodgkinson, *supra* note 8, at 471, T.J.KAHING, LAW, POLITICS AND THE SECURITY COUNCIL. An Inquiry into the Handling of Legal Questions involved in International Disputes and Situations, 227 (2<sup>nd</sup> ed. 1969).
64. *The Lockerbie Order, Passim*.
65. *Id.* at 144-145, [dissenting opinion of Judge Bedjaoui].
66. *Id.* at 134.
67. Low & Hodgkinson, *supra* note 8 at 472.
68. See this text above notes 53-59, *supra*.

69. See Low & Hodgkinson, *supra* note 8 at 474; see also generally, L.GOODRICH & E. HAMBRO, CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS, 277 (2<sup>nd</sup> ed. 1949).
70. This seems to be the opinion adopted by Low & Hodgkinson, *supra* note 8, at 474-75.
71. *Id.* at 475; Garmise, The Iraqi Claims Process and the Ghost of Versailles, 67 N.Y.U.L. Rev. 840, 840(1992).
72. Harper; *supra* note 32, at 113.
73. THE U.N. CHARTER, art. 39.
74. Harper adopts a similar view, see Harper, *supra* note 32, at 113.
75. *But compare with* Low & Hodgkinson, *supra* note 8 at 475.
76. S.C. Resolution 731, U.N. SCOR, 47<sup>th</sup> Sess., Res & Dec. at 51, para.3, U.N. Doc. S/INF/48 (1992).
77. See Letter dated 20 December 1991 from the Permanent Representatives of France, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the Secretary-General, U.N. GAOR, 46<sup>th</sup> Sess., Agenda Item 125, U.N. Doc. A/46/828, S/23309 (1991); Letter dated 20 December 1991 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. GAOR, 46<sup>th</sup> Sess, Agenda Item 125, U.N. Doc. A/46/827, S/23308 (1991).
78. S.C. Resolution 748, U.N. SCOR, 47<sup>th</sup> Sess., Res. & Dec., at 52 U.N. Doc. S/INF/48 (1992).
79. For comments on this point and the role of the Security Council, see Harper, *supra* note 32, at 123.
80. In fact the two Security Council resolutions 731 and 748 included a condemnation of Libya as a state responsible for and supporting international terrorism, see the resolutions as a whole.
81. *The Lockerbie Order*, *supra* note 58.
82. See this text above note 53 and the Advisory Opinion referred to therein.
83. See this text above notes 53-59 and the cases referred to therein.
84. S.C. Resolution 808, U.N. SCOR, 48<sup>th</sup> Sess., 317<sup>th</sup> mtg. at 1, U.N. Doc. S/RES/808 (22 Feb. 1993).
85. *Id.* para. 2.

86. *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 1993*, U.N. Doc. S/25704 (3 May 1993), [hereinafter Report].
87. S.C.Resolution 827, UN SCOR, 48<sup>th</sup> Sess., 3217<sup>th</sup> mtg., U.N.Doc. S/RES/827 (25 May 1993).
88. See e.g. S.C. Resolution 857, U.N. SCOR, 48<sup>th</sup> Sess., 3265<sup>th</sup> mtg., U.N.Doc. S/RES/857 (20 August 1993) (concerning the election of Judges).
89. *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. GAOR, 49<sup>th</sup> Sess., U.N.Doc. A/49/342, S/1994/1007 (29 Aug. 1994), para. 11 & 12.
90. S.C.Resolution 808, *supra* note 84, the Preamble, paras. 6-9.
91. Report, *supra* note 86, para 30.
92. Prosecutor v. Tadic, Case No. IT – 94-1-AR72, Appeal on Jurisdiction (Oct.2, 1995), Decision of the U.N. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian law committed in the Territory of former Yugoslavia since 1991, Reproduced in 35 I.L.M. 32 (1996), *hereinafter* cited as *the Tadic Decision* and reference will be made to the I.L.M. publication.
93. *Id.* at 36-48.
94. *Id.* at 44.
95. *Id.*
96. *Id.* at 45.
97. *Id.*
98. *Id.*
99. *Id.*

100. *Id.* at 46.
101. *Id.*
102. *Id.* at 47.
103. *Id.*
104. *Id.* at 47-48. For comments on the *Tadic Case* see, e.g. Aldrich, *Jurisdiction of the International Criminal Tribunal for the former Yugoslavia*, 90 A.J.I.L. 64 (1996); Warbrick & Rowe, *The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the Tadic Case*, 45 Int'l & Comp. L.Q. 691 (1996); Greenwood, *International Humanitarian Law and the Tadic Case*, EJIL, vol. 7, No.2, 1996, *passim*.
105. S.C. Resolution 955, U.N.SCOR, 3453<sup>rd</sup> mtg. S/RES/955 (8 Nov. 1994).
106. *Id.* the Preamble, paras. 4-10.
107. See various definitions and concepts given to the term "environment" in the Introduction to thesis and ch. 1, *supra*.
108. For a valuable study of this topic see M. BASSIOUNI, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, *passim*, (1996).
109. See S.C.Resolutions 808 & 827, *supra* notes 84 & 87.
110. Statute of the International Tribunal for Rwanda, annexed to S.C.Resolution 955, *supra* note 105, arts. 2, 3, & 4.
111. *Id.* art. 2, para 2.
112. Szasz, Restructuring the International Organizational Framework, in E.WEISS(ed.), ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW; NEW CHALLENGES AND DIMENSIONS, 340 *et seq.* 360.

113. Final Declaration of the Meeting of the Security Council Attended by the Heads of States and of Governments, 31 Jan. 1992, U.N. Doc. S/23500, p.3. For a general support of the Security Council and actions it adopted together with the developments of the authority of the Security Council and the necessity of such developments see Fassbender, Review Essay: *Quis judicabit?* The Security Council, Its Powers and Its Legal Control, *European Journal of International Law*, Vol. 11 No.1, (2000), passim. For a discussion of the same topics see Blokker, *Is the Authorization Authorized? Powers and Practice of the U.N. Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"*, *EJIL*, *id.* Vol. 11 No.3 (2000) passim; A. GREIG, The Role of the Security Council: An Opportunity for Reform, Master's thesis, 1996, Webster University, Vienna, Austria, *Passim*; Bowett, The Impact of Security Council Decisions on Dispute Settlement Procedures, *EJIL* vol. 5 No. 1 (1994), *passim*.
114. Actions committed by the Iraqi regime and its forces against the environment during the second Gulf War fall within the definition of international crimes adopted by the International Law Commission, *see Report of the International Law Commission*, 28<sup>th</sup> session, New York, 1977, ch.3, art. 19; see a detailed study of "environmental crimes" in ch.5 *infra*.
115. See this text above notes 27-44, *supra*.
116. The term "concurrent jurisdiction of political and judicial organs" was used by Gowlland-Debbas in his article on *The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 *AJIL* 643, 643 (1994).
117. Low & Hodgkinson, *supra* note 8, art. 471.
118. THE U.N. CHARTER, art. 471.
119. S.C. Resolution 687, para 16.
120. *Id.* paras, 18 & 19.
121. See this text above notes 58, 67-70 & 76-83, *supra*.

122. See this text above notes 84-106, *supra*.
123. Iraq's acceptance of the terms and measures embodied in S.C. Resolution 687 was relayed to the United Nations in Identical letters dated 6 April 1991 from the Minister of Foreign Affairs of the republic of Iraq addressed respectively to the U.N. Secretary General and the President of the Security Council, annexed to the Iraqi permanent Representative's identical letters dated 6 April 1991 from the Permanent Representative of Iraq to the united Nations addressed respectively to the Secretary General and the President of the Security Council , U.N. Doc. S/22456 (1991) & U.N. Doc. S/22457(1991).

**CHAPTER THREE**  
**THE U.N.COMPENSATION COMMISSION**  
**AND ENVIRONMENTAL CLAIMS**



**CHAPTER THREE**  
**THE U.N. COMPENSATION COMMISSION**  
**AND ENVIRONMENTAL CLAIM**

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The authority of the Security Council to establish the U.N. Compensation Commission and to determine issues of liability and compensation was dealt with in the preceding chapter; this chapter deals with the U.N.C.C. and the determination of Iraq's liability for environmental damage, losses, and destruction caused as a result of Iraq's illegal invasion and occupation of Kuwait. This Chapter will be divided into three main parts: the first will deal with the constitutional structure of the U.N.C.C., its nature and the nature of its work, while the second deals with the work of the U.N.C.C. with regard to environmental claims. The third part will deal with the Kuwaiti environmental claims before the Commission.

**I**

**THE CONSTITUTIONAL STRUCTURE**  
**OF THE U.N.C.C. AND ITS NATURE**  
**AND THE NATURE OF ITS WORKS**

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**A**

**The Constitutional Structure of the U.N.C.C.**

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As has been previously stated, the U.N.C.C. was established by S.C. resolution 687 to administer the U.N. Compensation Fund.<sup>1</sup> And as stipulated, the U.N.C.C. or the Commission functions "under the authority of the Security Council"<sup>2</sup> and "a

subsidiary organ thereof.”<sup>3</sup> The U.N.C.C. is constituted of a governing board, a body of commissioners and a secretariat.<sup>4</sup>

### **The Governing Council:**

The Commission’s Governing Council is the principal organ of the commission and is composed of the representatives of all the current members of the Security Council at any given time<sup>5</sup> (15 members at any given time). The Governing Council has to exercise two types of tasks; first, the Governing Council is the policy-making organ of the Commission and, as such, it has “the responsibility for establishing guidelines on all policy matters, in particular, those relating to the administration and financing of the Fund, the organization of the work of the Commission and the procedures to be applied to the processing of claims and to the settlement of disputed claims, as well as to the payments to be made from the Fund.”<sup>6</sup> Secondly, the Governing Council performs “important functional tasks with respect to claims presented to the Commission.”<sup>7</sup>

Decisions of the Governing Council are generally adopted by a majority of at least nine of its members (any nine members; no veto applies); but decisions concerning “the method of ensuring that payments are made to the Fund” should be decided by consensus.<sup>8</sup> Any member of the Governing Council may request referral of any matter to the Security Council for its consideration provided that such matter is among the matters to be decided by the consensus of the Governing Council and that such consensus could not be achieved.<sup>9</sup>

Members of the Governing Council enjoy the privileges and immunities enjoyed by representatives of states and provided for in the Convention on the Privileges and Immunities of the United Nations of 13 Feb. 1946.<sup>10</sup>

The work of the U.N.C.C. Governing Council extends to a number of areas, mainly, the administration of the U.N. Compensation Fund, the resolution of claims and some other matters. The Governing Council adopted a number of decisions and measures concerning the administration of the Fund; legal, financial, market and other technical aspects of Iraq's oil production and trade, holding and managing revenues from Iraqi exports of petroleum and petroleum products were subject to study and decision by the Governing Council. These decisions included arrangements for ensuring payments to the Compensation Fund.<sup>11</sup> The U.N.C.C. Governing Council has, in addition, adopted a good number of decisions regulating the submission and processing of claims and the determination of compensable losses; procedural matters related thereto have been also adopted by the Governing Council.<sup>12</sup> Furthermore, the Governing Council is entrusted with the authority to approve the reports and recommendations of various panels of commissioners.<sup>13</sup>

**The Commissioners:**

The commissioners are to "carry out such tasks and responsibilities as may be assigned to them by the Governing Council" of the Commission.<sup>14</sup> The exact number of commissioners are to be determined by the Governing Council in the light of the tasks to be assigned to them by the said Council. Therefore, the commissioners must be "experts in fields such as finance, law, accountancy, insurance and environmental

damage assessment”,<sup>15</sup> the U.N. Secretary General nominates persons to be appointed as commissioners and proposes their specific tasks and terms and they are appointed by the Governing Council.<sup>16</sup> “In nominating the commissioners, the Secretary General will pay due regard to the need for geographical representation, professional qualification, experience and integrity. The Secretary General will establish a register of experts which might be drawn upon when commissioners are to be appointed.”<sup>17</sup>

Processing claims, including the verification and evaluation of such claims, is carried out by panels, each of which is comprised of three commissioners. Recommendations of the panels of commissioners regarding the verification and evaluation of claims are “final and subject only to the approval of the Governing Council, which shall make the final determination.”<sup>18</sup>

Commissioners enjoy the privileges and immunities enjoyed by experts on missions within the meaning of article VI of the Convention on the privileges and immunities of the United Nations.<sup>19</sup>

Examples of cases decided by panels of commissioners will be referred to or studied throughout this chapter.

### **The Secretariat:**

The secretariat which was established to service the Commission is composed of an Executive Secretary and the necessary staff. The secretariat works under the direction of the Executive Secretary and carried out “such tasks as may be assigned to it by the Governing Council and the commissioners.”<sup>20</sup> The primary function of the Executive Secretary is the technical administration of the U.N. Compensation Fund

and the servicing of the Commission. With regard to the processing of claims, the secretariat makes a preliminary assessment of each claim to determine whether it meets the formal requirements established by the Governing Council before submitting it to a panel of three commissioners for verification and evaluation.<sup>21</sup> The U.N. Secretary-General appoints the Executive Secretary after consulting with the U.N.C.C. Governing Council and appoints the staff of the secretariat. The Executive Secretary and the staff serve under the U.N. Staff Regulations and Rules. They enjoy the privileges and immunities enjoyed by “officials” within the meaning of article V and VII of the Convention on the privileges and immunities of the United Nations.<sup>22</sup> The role of the secretariat in assisting panels of commissioners and in processing claims will be referred to in this chapter whenever necessary.

### **Headquarters of the Commission:**

Although the Secretary-General’s Report pursuant to paragraph 19 of Security Council resolution 687 (1991) proposed that the Headquarters of the Commission should be in New York, the Security Council decided in its resolution 692 (1991) that the Governing Council of the Commission “will be located at the United Nations Office at Geneva and that the Governing Council may decide whether some of the activities of the Commission should be carried out elsewhere.”<sup>23</sup>

**B**  
**The Nature of the U.N.C.C.**  
**And**  
**The Nature of its Work**

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The U.N.C.C. has the responsibility to administer the U.N.Compensation Fund, including the determination of the level of Iraq's contribution to it and the allocation of funds and payments of claims. In addition, the U.N.C.C. has the responsibility to organize the procedures and the resolution of claims for losses resulting from Iraq's unlawful invasion and occupation of Kuwait, including the procedures for evaluating losses, listing claims and verifying their validity, and to resolve disputed claims.<sup>24</sup> In order to exercise all such tasks and responsibilities, the U.N.C.C. deals with "a variety of complex administrative, financial, legal and policy issues."<sup>25</sup> In an important passage of his report referred to earlier, the U.N.Secretary-General suggested that :

The process by which funds will be allocated and claims paid, the appropriate procedures for evaluating losses, the listing of claims and the verification of their validity and the resolution of disputed claims as set out in paragraph 19 of resolution 687(1991) – the claims procedure – is the central purpose and object of paragraphs 16 and 19 of resolution 687 (1991). It is in this area of the Commission's work that the distinction between policy-making and function is most important. The Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved. Given the nature of the Commission, it is all the more important

that some element of due process be built into the procedure. It will be the function of the commissioners to provide this element. As the policy-making decision of the Commission, it will fall to the Governing Council to establish the guidelines regarding the claims procedure. The commissioners will implement the guidelines in respect of claims that are presented and in resolving disputed claims. They will make the appropriate recommendations to the Governing Council, which in turn will make the final determination.<sup>26</sup>

Thus, although the U.N.C.C. was established as a subsidiary organ of the Security Council under article 29 of the Charter and in accordance with relevant provisions of Chapter VII of the U.N. Charter, it exercises tasks and functions of multifarious nature. But the one function which has so far raised a lot of concerns and caused significant disagreement is the one that involves “examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims.” Despite the fact that the Secretary-General, in the portion of his report just quoted, has designated such task as fallen within the fact-finding function of the Commission (U.N.C.C.), they certainly involve judicial or quasi-judicial elements or arbitral process. This means that the Commission will have to exercise some sort of a judicial, quasi-judicial or arbitral function, and, as such, the Commission must satisfy and respect principles and guarantees of judicial, quasi-judicial or arbitral settlements.

The U.N.C.C. has in fact been criticized for it does not satisfy and respect many of the principles and guarantees of judicial, quasi-judicial, or arbitral settlements.<sup>27</sup> This would lead us to investigate the matter more thoroughly. But in order to be fair and objective we must stress certain points which are relevant to the discussion:

**First;** the U.N.C.C. is a product of armed-conflict involved the aggression of Iraq against Kuwait and the illegal invasion and occupation of Kuwait by the Iraqi armed forces.

**Second;** the U.N.C.C. was established by the Security Council in accordance with its authority under the primary responsibility clause of the U.N. Charter and under Chapter VII of the Charter to facilitate the restoration and maintenance of international peace and security.

**Third;** the U.N.C.C. is not an ordinary court of law but a subsidiary organ of the Security Council entrusted with certain tasks and functions including certain quasi-judicial or quasi-arbitral functions as provided for in the relevant Security Council resolutions to guarantee the effective restoration and maintenance of international peace and security.

Therefore, the U.N.C.C. cannot and should not be compared with an ordinary international court established by a treaty concluded by and between states, such as the International Court of Justice, to settle normal international disputes under conditions of normalcy prevailing between states seeking peaceful settlement of their disputes. Nor can or should the U.N.C.C. be compared with normal international arbitration tribunals established by the agreements of the parties or in accordance with the processes and procedures agreed upon by such parties as a normal international method of settling their disputes. Probably, the most logical comparison is to be made with the claims commissions used to be established to settle claims and grievances

arising out of wars and armed conflicts.<sup>28</sup> Although there are considerable differences between the U.N.C.C. on the one hand, and many of such commissions, on the other hand, the U.N.C.C. and other claims commissions are similar in many respects.

**Points of Differences between the U.N.C.C. and Claims Commissions:**

**First:** Claims commissions were in most cases established by treaties or international agreements imposed upon the weak or the defeated state or power by the victor; such treaties and agreements are now known as unequal treaties,<sup>29</sup> while the U.N.C.C. was established by a U.N. Security Council resolution which represents the will of the whole international community and is binding upon all states. Hence, the resolution establishing the U.N.C.C. and other relevant Security Council resolutions confer upon this Commission (the U.N.C.C.) the widest and most universal international legality and legitimacy which could not be conferred upon any claims commission established by a treaty imposed upon the defeated state by the victorious state.

**Secondly:** Claims commissions reflected the power of the victorious state or states imposing treaties whence such commissions sprang, whilst the U.N.C.C. reflects the power of the whole community of nations members in the United Nations.

**Thirdly:** In most cases, the processes of selecting members of many of the traditional claims and reparation commissions were fixed in a way so as to ensure that only persons from victorious states could sit on such commissions whilst persons from the defeated states were excluded. This was so to ensure that the final outcome of the

claims and reparation proceedings were to be in favour of the victorious states and their citizens.<sup>30</sup> In some other cases, a third party arbitration or umpire was referred to, but conditions of arbitration could not guarantee adequate justice or fairness; such conditions were imposed by the victor to ensure that only claims and grievances of the victorious states and their nationals, and sometimes those of neutral states and their nationals, were heard and favourable decisions were issued.<sup>31</sup>

But, as it has been previously pointed out, the Governing Council of the U.N.C.C. is composed of the representatives of all the current members of the Security Council upon nomination by the U.N. Secretary- General. The Executive Secretary of the Commission is appointed by the U.N. Secretary –General after consulting with the Governing Council, while staff members of the secretariat are appointed by the U.N. Secretary-General. Thus, it appears that methods and processes of the appointment of the U.N.C.C. commissioners and the secretariat ensure their credibility, impartiality, efficiency, and experience. Iraq is not represented and is not expected to be represented on the U.N.C.C. Governing Council as Iraq is not a member and is not expected to be a member in the U.N. Security Council in the foreseeable future because of the sanctions imposed upon it by the Security Council, but the rules and processes of selecting commissioners and those concerning the appointment of the members of the staff of the secretariat are not devised to ensure the exclusion of Iraqi nationals,<sup>32</sup> although none of the Iraqi nationals has so far been selected or appointed to hold any such offices. However, Iraq's participation in the work of the U.N.C.C. is contemplated and encouraged.<sup>33</sup> Thus in his previously quoted report, the U.N. Secretary General suggested that: "Iraq will be informed of all claims and will have the right to present its comments to the commissioners within

time-delays to be fixed by the Governing Council or the Panel dealing with the individual claim.”<sup>34</sup> The U.N.C.C.’s Provisional Rules for Claims Procedure developed this by specifying that the Executive Secretary’s reports made to the Governing Council concerning claims received “will be promptly circulated to the Government of Iraq as well as to all Governments and international organizations that have submitted claims.”<sup>35</sup> In order to guarantee prompt reply by Iraq and any other concerned party and to guarantee that neither Iraq nor any other party will be able to unduly delay or frustrate the procedures, the said Provisional Rules stipulated:

Within 30 days in case of categories A, B and C, and 90 days in case of claims in other categories, of the date of the circulation of the Executive Secretary’s report, the Government of Iraq as well as Governments and international organizations that have submitted claims, may present their additional information and views concerning the report to the Executive Secretary for transmission to panels of Commissioners in accordance with article 32. There shall be no extensions of the time-limits specified in this paragraph.<sup>36</sup>

Article 32 referred to above deals with the submission of claims to panels. In this connection, paragraph 2 of article 32 of the quoted Provisional Rules stipulates:

Any information received by the secretariat after the expiration of the time-limits as established in article 16 will be submitted when received, but the work of the panel will not be delayed pending receipt or consideration of such information.<sup>37</sup>

**Fourthly:** Traditional claims and reparation commissions were usually entrusted with deciding matters of contracts and properties lost, damaged, or affected by or as a result of actions of the defeated party or any action relating thereto, whilst the U.N.C.C. is entrusted with deciding matters of liability imposed upon Iraq for

“environmental damage and depletion of natural resources” in addition to the other traditional matters including loss, damage, or injury to foreign governments, nationals and corporations as a result of Iraq’s illegal invasion and occupation of Kuwait. Thus it is evident that the jurisdiction of the U.N.C.C. with regard to dispute settlement is wider in scope than jurisdictions which were entertained by traditional claims and reparation commissions.<sup>39</sup>

**Points of Agreements between the U.N.C.C. and Claims Commissions:**

**First:** The U.N.C.C. was established to deal with grievances suffered as a result of Iraq’s aggression and its illegal invasion and occupation of Kuwait, just as traditional claims and reparation commissions were the product of wars or armed conflicts and rebellions. As claimed by some, claims and reparation institutions or commissions were “the stepchildren of war and rebellion.”<sup>40</sup> This is true with the U.N.C.C. traditional claims and reparation commissions were *imposed* by the victorious states upon the defeated ones; the U.N.C.C. was congruously *imposed* by the international community represented in the United Nations Security Council, acting under chapter VII of the U.N.Charter, on Iraq, the defeated aggressor. Thus it is not surprising to find a lot of similarities between the rules and provisions establishing and operating traditional claims and reparation commissions and those establishing and operating the U.N.C.C. as illustrated below.

**Secondly:** In most cases of traditional claims and reparation commissions,s the defeated states and their nationals were not allowed to bring cases or claims before such commissions;<sup>41</sup> similarly, the Iraqi Government and the Iraqi nationals

and corporations are not allowed to bring any claims before the U.N.C.C. Indeed, the U.N.C.C. is not empowered to receive, hear, or decide any Iraqi claim or any of the claims of Iraqi nationals or corporations. It is empowered only to receive and decide claims with regard to “any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait.”<sup>42</sup> This, however, does not cause and should not be interpreted as causing any injustices to Iraq or any of its nationals or corporations, for Iraq was the aggressor and its unlawful invasion and occupation of Kuwait was the unlawful and wrongful act causing loss, damage, or injury for which Iraq is liable under international law and for the U.N.C.C. is established by the Security Council under chapter VII of the U.N. Charter as an appropriate measure to facilitate the restoration and maintenance of international peace and security breached and threatened by Iraq, the aggressor, and as such, the U.N.C.C. is not an ordinary court or a dispute settlement body but it is a body of limited jurisdiction available only to achieve the objectives of the Security Council under chapter VII of the U.N. Charter.

**Thirdly:** The U.N.C.C. is not empowered to receive or decide claims concerning Iraq’s debts and other obligations arising prior to 2 August 1990, the date on which Iraq initiated its military aggression and unlawful invasion and occupation of Kuwait. Clause 16 of Security Council resolution 687 stipulates that such debts and obligations “will be addressed through the normal mechanisms.” This corresponds to some past practice under the Versailles Treaty following World War I according to which debts and financial obligations owed by Germany or its nationals to the Allied powers and their nationals prior to the War were not referred to the

Reparation Commission but to another special mechanism created specifically for that purpose.<sup>43</sup>

**Fourthly:** Traditional claims and reparation commissions operated under the general rule that the defeated states, the aggressors, were responsible under international law for any damage, loss or injury caused by or as a result of the war they waged.<sup>44</sup> Similarly, the U.N.C.C. operates under the general rule stipulated in clause 16 of Security Council resolution 687 that Iraq is liable under international law for any loss, damage, or injury to foreign Governments, nationals and corporations as a result of Iraq's unlawful invasion and occupation of Kuwait.

In addition, traditional claims and reparation commissions applied some sort of international law or international law sources or general principles and rules of law, equity, or justice as interpreted within the context of international law.<sup>45</sup> Similarly, commissioners of the U.N.C.C. apply:

Security Council Resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, Commissioners shall apply other relevant rules of international law.<sup>46</sup>

Thus, it seems that the U.N.C.C. uses a jurisprudential approach which is similar in many respects to the approaches used by traditional claims and reparation commissions.<sup>47</sup> Examples of the jurisprudential approach followed by the U.N.C.C. will be illustrated in the study of various claims referred to in the following two parts of this chapter.

## II

### THE U.N.C.C. AND ENVIRONMENTAL CLAIMS LIMITS AND QUALIFICATIONS

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In this section we will deal with the general rules adopted by the U.N.C.C. concerning the admissibility of environmental claims and the determination of compensable damage. Security Council resolution 687 did not include any reference as to what was meant by the wording concerning “environmental damage and the depletion of natural resources”. The U.N.C.C. had to deal with the matter, the U.N.C.C. Governing Council issued a decision on *Criteria for additional Categories of Claims* which was adopted by Governing Council during its third session, at the 18<sup>th</sup> meeting, held on 28 Nov. 1991, and revised it at the 24<sup>th</sup> meeting held on 16 March 1992.<sup>48</sup> These criteria as revised included a number of provisions concerning environmental claims, paragraph 35 of these Criteria is most essential. It specifies:

These payments are available with respect to direct environmental damage and the depletion of natural resources as a result of Iraq’s unlawful invasion and occupation of Kuwait. This will include losses or expenses resulting from:

- (a) Abatement and prevention of environmental damage, including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters;
- (b) Reasonable measures already taken to clean and restore the environment of future measures which can

be documented as reasonably necessary to clean and restore the environment.

(c) Reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment.

(d) Reasonable monitoring of public health and performing medical screening for the purposes of investigation and combating increased health risks as a result of the environment damage, and;

(e) Depletion of or damage to natural resources.<sup>49</sup>

In addition, paragraph 36 is also relevant as it states in part that: “These payments will include loss of or damage to property of a Government,....”<sup>50</sup>

These provisions as approved by the Governing Council of the U.N.C.C. invite and, indeed, require certain comments, explanations, and clarifications.

### **First: The Requirement of Direct Damage:**

As stated in paragraph 35 of the Criteria for additional Categories of Claims, quoted above, “payments are available with respect to direct environmental damage”.

Thus, indirect environmental damage is not compensable under these Criteria; this might be said to be in conformity with the provisions of paragraph 16 of Security Council resolution 687 and the rules of public international law on the matter. Resolution 687 reaffirms Iraq’s liability under international law for “any direct loss, damage, including environmental damage”. But it seems to the present writer that

there is some difference between the wording of paragraph 16 of Security Council resolution 687 and the wording of paragraph 35 of the Criteria for additional Categories of Claims. The wording of paragraph 16 of resolution 687 appears to include every type of environmental damage as a result of Iraq's unlawful invasion and occupation of Kuwait among the compensable loss or damage or injury for which Iraq is liable under resolution 687 and international law. Truly, resolution 687 recognizes only Iraq's liability for any direct loss, damage, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait; but, in our view, it is equally true that the resolution considers "environmental damage" as "direct loss or damage". This means that every type of environmental damage is always compensable damage because it is included under "direct" loss or damage for which Iraq is liable under resolution 687. Therefore, the Criteria for additional Categories of Claims should not have specified that payments were available "with respect to direct environmental damage" and the word "direct" should not have been inserted in the wording of paragraph 35 of the Criteria. Moreover, we tend to agree with some writers who assert that the insertion of the word "direct" into clause 16 did in no way limit or qualify the liability of Iraq for any damage, loss or injury caused as a result of Iraq's invasion and illegal occupation of Kuwait. Security Council resolution 674, 678, 686, 687 and 692 are all connected and deal with Iraq's liability under international law. Richard Lillich and Charles Brower astutely claimed:

*The only Consistent Reading of Security Council Resolution 674, 678, 686, and 687 in Respect of Iraq's Liability Under International law is that Iraq is to be held liable for "any" loss, damage, or injury resulting from its unlawful invasion and occupation of Kuwait.<sup>51</sup>*

The first Security Council resolution to deal with Iraq's liability under international law is resolution 674 of 1990 in which the Security Council reminded Iraq that under international law it is liable for "any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq."<sup>52</sup> In addition, Security Council resolution 678 of 1990 reaffirmed resolution 674 including the provisions on Iraq's liability.<sup>53</sup> Moreover, Security Council resolution 686 of 1991 reaffirmed the previous resolutions and demanded that Iraq "[a]ccept in principle its liability under international law for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq."<sup>54</sup> In fact, all the quoted resolutions which dealt with Iraq's liability did not make any qualification concerning the nature or degree of the loss, damage, or injury, i.e., any loss, damage or injury suffices to establish Iraq's liability under international law since such loss, damage, or injury is a result of the invasion and illegal occupation of Kuwait by Iraq. Furthermore, Security Council resolution 687 which included the word "direct" before the words "loss, damage" did reaffirm previous resolutions and, in particular, resolution 674. This reaffirmation coupled with a further reaffirmation included in a following resolution (Security Council resolution 692)<sup>55</sup> proves that the Security Council did in no way intend to limit Iraq's liability under international law. In this connection, Lillich and Brower wrote:

Indeed, it would be contrary to the terms of Resolution 687 itself to find that the addition of the word "direct" in that resolution had any limiting effect. Paragraph 1 of Resolution 687

“[a]ffir[ed]” Resolution 674, and, consequently, Iraq’s liability for “*any* loss damage or injury,” “except as expressly changed” thereafter in Resolution 687 itself “to achieve the goals of” such resolution. Apart from the fact that a narrowing of Iraq’s legal liability could hardly be thought to “achieve the goals” of Resolution 687, there is no express change of Resolution 674 in Resolution 687. Insertion of the word “direct” was not the type of express change referred to and required by paragraph 1. One example of the type of express change contemplated by paragraph 1 is found in paragraph 22, in which the Security Council, after also having affirmed Resolution 661 in paragraph 1, decided that upon certified compliance by Iraq with various conditions imposed upon it “the prohibitions against the import of commodities and products originating from Iraq and the prohibition against financial transactions related thereto contained in Resolution 661 (1991) shall have no further force or effect.”

Moreover, had use of the word “direct” in Resolution 687 been intended to narrow the scope of Iraq’s liability, the Security Council would not thereafter in Resolution 692 of May 20, 1991 have referred to Resolution 674 and 686, both of which specify “any loss, damage or injury”, together with Resolution 687, in adopting the Secretary-General’s Report of May 2, 1991. The reference to Resolutions 674, 686 and 687 together in Resolution 692, “concerning the liability of Iraq”, emphasize that they are mutually consistent and that the Security Council never departed

from the view that Iraq is liable under international law for “any loss, damage or injury” resulting from its unlawful invasion and occupation of Kuwait.<sup>56</sup>

It has been, however, asserted by some that :

More important to the discussion of compensation for wartime environmental damage, however, is the argument that wartime environmental damage is compensable only where there is an obligation protecting the environment directly. Unfortunately when the only violation of international law is a violation of obligation affording *indirect* protection to the environment, wartime environmental damage is considered *indirect* and therefore not compensable. This point is significant in the context of compensation for environmental damage resulting from the Gulf War because to the extent that aspects of the environment are not property, Iraq only violated an obligation indirectly protecting the environment.<sup>57</sup>

But this view is, nevertheless, misleading and unacceptable, as it overlooks the basis and juridical foundation of Iraq’s liability for environmental damage it caused as a result of its unlawful invasion and occupation of Kuwait. The bases of Iraq’s liability is not only the violation of the rules of *jus in bello*<sup>58</sup> but also, and even more important, the fundamental breach of the U.N. Charter and the rules of *jus ad bellum* as previously explained in chapter 2, *supra*, and as stipulated in relevant

Security Council resolution (674, 686, 687 and 692) and other relevant resolution. Below is a discussion of the cases of compensable environmental loss or damage as referred to in the relevant parts of the Criteria for additional Categories of Claims adopted by the U.N.C.C. Governing Council, it will be proven that these cases could be widely interpreted to cover every type and every case of environmental loss, damage or injury caused to the environment as a result of Iraq's unlawful invasion and occupation of Kuwait.

It should, nevertheless, be stressed that in other cases not directly involving environmental matters or claims, the U.N.C.C. seems to uphold the distinction between direct and indirect damage in some respects. For example the U.N.C.C. Governing Council acted to exclude from the competence of the Commission claims "for losses suffered as a result of the trade embargo and related measures" and recognized that "[d]irect losses as a result of Iraq's unlawful invasion and occupation of Kuwait are eligible for compensation."<sup>59</sup> Thus, the U.N.C.C. excluded from its jurisdiction embargo and other related claims as it considered such claims not concerning direct losses as a result of Iraq's unlawful invasion and occupation of Kuwait. In addition, in applying the direct loss clause of U.N. Security Council Resolution 687, the U.N.C.C. Governing Council decided that members of the Allied Coalition Armed Forces were not eligible for compensation as a consequence of their involvement in coalition military operations against Iraq except in the following situation.;

- (a) compensation is awarded in accordance with the criteria already adopted by the Council;
- (b) the claimants are prisoners-of-war; and

(c) the loss or injury resulted from mistreatment in violation of international humanitarian law.<sup>60</sup>

Furthermore, panels of commissioners adopted and applied the distinction between direct and indirect loss or damage in the reports of such panels concerning a number of claims which were approved by the U.N.C.C. Governing Council. Thus in the Egyptian Workers Claims the Panel of Commissioners determined that only those claims relating to deposits made on or after 2 July 1990 were within the jurisdiction of the Commission as deposits deposited in Iraqi banks for transfer were, on the average, received in the corresponding banks in Egypt one month after the deposit.<sup>61</sup> Accordingly, only claims relating to deposits made on or after 2 July 1990 were included under the direct loss clause of resolution 687 and were within the jurisdiction of the Commission, and claims relating to deposits made prior to 2 July 1990 were not considered as direct losses and as such they were not considered within the jurisdiction of the Commission.<sup>62</sup>

(a) **Losses and Expenses Resulting from  
Abatement and Prevention of Environmental  
Damage and Clean up Costs:**

Sub-paragraphs (a) and (b) of paragraph 35 of the Criteria for additional Categories of Claims recognized losses and expenses resulting from abatement and prevention of damage and clean-up costs as compensable. Expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters are included as compensable. Clean up costs and costs relating to the restoration of the environment are also included as compensable. All such expenses and costs can

actually be counted in pecuniary value. Equally important is the provision that losses and expenses resulting from “future measures which can be documented as reasonably necessary to clean and restore the environment” are also compensable and covered by the available payments.<sup>63</sup> This of course is an open-ended provision which covers the costs and expenses of all future measures to clean and restore all aspects of the environment so long as such future measures can be documented as reasonably necessary to clean and restore the environment. It is to be noted also that the Criteria cover not only the expenses directly relating to fighting oil fires (irrespective of the sources of such fires) and stemming the flow of oil in coastal water, but also cover such expenses relating to fighting oil fires and stemming the flow of oil in international waters. Thus, the international environment is also covered by the provisions of the said criteria. Some writers cast some doubt “as to the likely success of claims for clean up costs resulting from the Gulf War incurred by countries other than Kuwait, Saudi Arabia and Iran.”<sup>64</sup> They suggest that in view of the decision in *the Amoco Cadiz Case*.<sup>65</sup> in which the judge refused to compensate for the time of volunteers who participated in the cleaning up of the coasts of Brittany from an oil tanker spill. Countries and organizations which “volunteered money and efforts to put out the oil fires and clean up the oil spill resulting from the Gulf War” may face problems in getting compensation decisions from the U.N.C.C.<sup>66</sup> This view is however, overly ignoring the fundamental differences between the facts and circumstances of each case. The *Amoco Cadiz Case* involved an accidental oil tanker spill which caused extensive damage to the coast of Brittany while the Gulf War environmental damage had occurred as a direct result of the flagrant breach by Iraq of its most fundamental obligations under the U.N. Charter and the most basic foundations of world public order, i.e. Iraq’s unlawful invasion and occupation of

Kuwait. In addition, the provisions of paragraph 16 of Security Council resolution 687 and the provisions stated in the Criteria for additional categories of claims cover the money and efforts put up by volunteers or countries and organizations to put out fires and clean up the oil spill resulting from the Gulf War or armed conflict.

Furthermore, the U.N.C.C. decided, in one of the most important cases which is of direct relevance to environmental claims, to grant compensation covering fire-fighting costs and other relevant costs, this is the Well Blowout Control Claim<sup>67</sup> which will be studied in some detail later in this chapter. In the Report and Recommendations made by the Panel of Commissioners appointed to review the Well Blowout Control Claim (the “WBC Claim”), the panel considered, *inter alia*, that costs of international fire-fighting and support services controls,<sup>68</sup> post-capping costs<sup>69</sup>, and fire-fighting support costs<sup>70</sup> were compensable as loss, damage or injury sustained by the claimant as a direct result of Iraq’s invasion and occupation of Kuwait.

**(b) Reinstatement and Restoration Costs:**

Contrary to what was argued by some writers that international law does not recognize ecological damage as compensable,<sup>71</sup> the Criteria for additional Categories of Claims did specifically recognize as compensable losses or expenses resulting from; (a) reasonable measures taken to restore the environment,<sup>72</sup> (b) future measures which can be documented as reasonably necessary to restore the environment,<sup>73</sup> (c) reasonable monitoring and assessment of the environment damage for the purpose of evaluating and abating the harm,<sup>74</sup> (d) reasonable monitoring and assessment of the

environmental damage for the purpose of restoring the environment.<sup>75</sup> These rules cover all aspects of environmental damage including what is known as ecological damage *per se*. A reference to domestic law test to decide whether ecological damage is compensable is not warranted or justified as domestic laws and domestic courts in various countries did not adopt a unified rule in this regard<sup>76</sup> and as the environment or ecology of any state is an essential component of the elements of the sovereignty of the state and a basic ingredient over which the state has full sovereign rights that are fully prevented against any aggression or attack in violation of the U.N.Charter and the fundamental norms of world public order.

It must, nevertheless, be stressed that the Panel of Commissioners in the WBC Claim Report reached the finding that costs which can be placed under reinstatement and restoration costs are compensable; thus costs of construction equipment,<sup>77</sup> and costs of support facilities<sup>78</sup> were considered compensable as loss, damage or injury sustained by the claimant as a direct result of Iraq's invasion and occupation of Kuwait.

**(c) Health and Medical Costs:**

The Criteria for additional Categories of Claims recognized as compensable losses or expenses resulting from reasonable monitoring of public health and performing medical screenings for the purposes of, (a) investigation of increased health risks; and (b) combating increased health risks, as a result of the environmental damage.<sup>79</sup> Thus, the U.N.C.C. recognized as compensable not just any damage or injury to public health but any possible increase of health risks and all measures taken or to be taken or are likely to be taken in the future to combat increased health risks as

a result of the environmental damage. It remains to be seen how these provisions are interpreted by the panels of commissioners in actual claims brought by the various countries and organizations concerned.

### **Second: Depletion of Natural Resources:**

U.N. Security Council resolution 687 reaffirmed, in paragraph 16, Iraq's liability under international law for any depletion of natural resources as a result of its unlawful invasion and occupation of Kuwait. The U.N.C.C. has recognized as compensable "depletion of or damage to natural resources"<sup>80</sup>. A definition of the term "natural resources" was included in neither Security Council resolution 687 nor in the Criteria for additional Categories of Claims. The term has however been used for the past fifty years in countless numbers of resolutions of various U.N. organs, mainly the U.N. General Assembly and the U.N. Economic and Social Council, and organs of other international and regional organizations.<sup>81</sup> Many international treaties and other instruments have included reference to "natural resources" without defining what is meant by this term.<sup>82</sup> Some have defined the term "natural resources" as "primarily an economic concept categorizing the various elements of the natural world *according to their usefulness to man.*"<sup>83</sup> Others have defined it to mean "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by" any nation or state.<sup>84</sup> This second definition, however, favoured by some, does not in fact correspond completely to the wider concept given to the term "natural resources" in international law or international practice. International law and, indeed, Security Council Resolution 687 did not limit the term to only natural

resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the state or the nation, international and worldwide resources which are not subject to the national jurisdiction or control of any state are included under the concept of “natural resources”. In fact different components, elements, features, and attributes constituting the environment are, in our view, considered as natural resources. This corresponds to the developments in international law and international environmental law as represented in principle 2 of the Stockholm declaration on the Human Environment which declares that the natural resources of the earth, including the air, water, land, flora and fauna, and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.<sup>85</sup> Thus, the term “natural resource” can be defined by reference to nature and nature-created sources and by contrast to man-made or man-created sources. Any depletion or damage to natural resources, as hereinabove defined, as a result to Iraq’s unlawful invasion and occupation of Kuwait is compensable under U.N.Security Council resolution 687 and payments will be available in accordance with the provisions specified by the U.N.C.C. in the Criteria for additional Categories of Claims provided that a government or an international organization brings a claim to that effect.

**Third: Only Governments and International  
Organizations Can Claim Compensation for any  
Loss or Damage to the Environment or the  
Depletion of Natural Resources:**

U.N. Security Council resolution 687 did not specify that only governments and international organizations could bring claims of compensation for loss or

damage to the environment or the depletion of natural resources. The wording of paragraph 16 of the said resolution does in fact allow governments, nationals, and corporations to claim compensation for such loss or damage. But the U.N.C.C. has clearly stated that only governments and international organization can bring claims of compensation for any environmental damage or the depletion of or damage to natural resources. The Criteria for additional Categories of Claims listed claims of compensation for environmental damage and the depletion of natural resources under the heading “*Criteria for processing claims of Governments and international organizations*” and specified that :

The following criteria will govern the submission of claims of Governments and international organizations pursuant to resolution 687 (1991). Each Government will submit claims of its own and those of its political subdivisions, or any agency, ministry, instrumentality, or entity controlled by it.<sup>86</sup>

This provision of the Criteria for additional Categories of Claims excludes the submission of claims of individuals and private corporations for compensation for environmental damage and the depletion of natural resources and allows only for the submission of claims of governments and international organizations. However, governments may submit claims of their own as representing their states, and they may submit claims on behalf of their political and administrative organs, constituent subdivisions and agencies, central and local subdivisions and instrumentalities, and entities controlled by such governments such as public corporations.

It is understood that loss, damage or injury to individuals and private corporations resulting from environmental damage or the depletion of natural

resources as a result of Iraq's unlawful invasion and occupation of Kuwait would be submitted under consolidated claims submitted by governments on behalf of their nationals in accordance with Criteria for additional Categories of Claims, title I "Criteria for processing of claims of individuals not otherwise covered"<sup>87</sup> and on behalf of corporations in accordance with a the title II "Criteria for processing claims of corporations and other entities."<sup>88</sup>

But original claims of compensation for environmental damage and the depletion of natural resources *per se* are submitted by governments and international organizations as specified by the Criteria for additional Categories of Claims.<sup>89</sup>

Although under the quoted Criteria adopted by the U.N.C.C. Governing Council only governments and international organizations can claim compensation for any loss or damage to the environment or the depletion of natural resources, the present writer has found that at least two claims involving very important environmental components and deal directly with environmental matters and the depletion of natural resources were filed by corporations and not by governments or international organizations and were decided by one panel of commissioners. Those two cases are the WBC Claim<sup>90</sup> and the Kuwait Petroleum Corporation Claims.<sup>91</sup> The Panel of Commissioners in the WBC Claim has found that although reference to claims for environmental damage and specifically to claims for "expenses directly relating to fighting oil fires" (Decision 7 of the Governing Council) had been made in the context of Category "F" claims submitted by governments, claims for those sorts of losses could also be filed under category "E" by a corporation, as it should be noted that Security Council resolution 687 (1991) referred to "environmental damage

and the depletion of natural resources” as potential heads of claim, without making any qualification as to the legal subject or entity eligible to make such claims, and as it could not have been the intention of the Governing Council to violate resolution 687 or derogate from its provisions.<sup>92</sup> In the Claims of Kuwait Petroleum Corporation the Panel of Commissioners adopted the same view and reached similar conclusions.<sup>93</sup>

#### **Fourth: Rules of Evidence:**

Claims of compensation for environmental damage and the depletion of natural resources “must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss.”<sup>94</sup> This is required since these claims are for substantial amounts.<sup>95</sup> In this connection article 35 of the Provisional Rules for Claims Procedure has specified:

1. Each claimant is responsible for submitting documents and other evidence which demonstrate satisfactorily that a particular claim or group of claims is eligible for compensation pursuant to Security Council resolution 687(1991). Each panel will determine the admissibility, relevance, materiality and weight of any documents and other evidence submitted.
2. ...
3. With respect to claims received under the criteria for processing claims of ... corporations and other entities, and claims of governments and international organizations

(S/AC.29/1991 7/Rev. 1), such claims must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss.

4. A panel of Commissioners may request evidence required under this article.<sup>96</sup>

In addition, article 36 of the same Provisional Rules for Claims Procedure stipulates:

A panel of Commissioners may:

- (a) In unusually large or complex cases, request further written submissions and invite individuals, corporations or other entities, Governments or international organizations to present their views in oral proceedings;
- (b) Request additional information from any other source, including expert advice, as necessary.

Thus, it appears that panels of commissioners do have full powers and complete discretion to decide the admissibility, relevance, materiality and weight of any documents and other evidence submitted, request evidence, request further written submissions, request claimants to present their views in oral proceedings, and request additional information from any other source. The role of the panels of commissioners with regard to evidence is that what we may call “functional activism”. But it remains to be seen how these rules are applied and interpreted in claims of environmental damage and the depletion of natural resources. We may however refer to some of the relevant claims and see how panels of commissioners dealt with the rules of evidence. Thus, the Panel of Commissioners concerning the Egyptian Workers’ Claims<sup>97</sup> decided in one respect to accept a lower standard of proof as “ a lesser degree of documentary

evidence ordinarily will be sufficient...<sup>98</sup> A result, copies of “payment orders” that would include the names of all of the claimants and the amount claimed for each claimant as equivalent to the reasonable minimum evidence prescribed by the Rules.<sup>99</sup> But in some other respects, the Panel refused to carry out investigations, which would have been carried out by a court of law, to prove the existence of payment orders issued from 2 July 1990 that were not received by the Egyptian banks, thus eliminating the possibility of compensation for otherwise valid claims made under Security Council Resolution 687. In this connection the panel said:

In addition, the Panel is of the opinion that embarking on the type of investigation required to deal with Egypt’s request would not be compatible with the nature of the work of the Commission. In particular the Panel is unable, within the time period available for its work, to conduct inquiries of this nature that may or may not determine conclusively the existence, or not, of payment orders issued from 2 July 1990 that were not received by the Egyptian banks.<sup>100</sup>

The Panel did not provide any valid legal reason for its quoted opinion except the time period which could have been extended in order to allow excluded valid claims to be proceeded with. Justice has not been served well in this claim.

On the other hand, we find that the Panel of Commissioners appointed to review the WBC Claim has decided that despite the quasi-judicial function of the Panel, the Panel must make every effort to ensure that the requirements of due process were met. Accordingly, the Panel relied not only on the contribution of the Parties but it assumed an investigative role that went beyond using the adversarial method of

verifying claims.<sup>101</sup> This investigative approach was adopted and followed by panels of commissioners when verifying and deciding other claims.<sup>102</sup>

**Fifth: Deadline for the Submission of Claims:**

The U.N.C.C. had imposed a deadline of Feb. 1, 1997, for the submission of claims for environmental damage.<sup>103</sup> Nine states have submitted environmental claims which are expected to be decided in the not too distant future. But corporate claims which have substantial environmental components will be studied under a separate section as follows:

**THE U.N.C.C. AND KUWAITI CLAIMS CONCERNING  
ENVIRONMENTAL DAMAGE AND THE DEPLETION OF  
NATURAL RESOURCES**

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**A. The Well Blowout Control Claim**

As has been pointed out earlier, environmental claims have been submitted to the U.N.C.C. by nine states but no decision has so far been issued with regard to any of these claims and decisions are expected to be issued in the near future. But the U.N.C.C. Governing Council has, on December 18, 1996, issued a decision approving the recommendations of a panel of commissioners awarding the Kuwait Oil Company the sum of 610,048,547 US Dollars as compensation for the costs and losses it incurred in fighting the massive oil-well fires which were still burning in Kuwait after the forced withdrawal of Iraq forces and the liberation of Kuwait; the "*Well Blowout*

*Control Claim*” (the WBC Claim)<sup>104</sup> is important in many respects as it was the first category “E” corporate claim to be decided by the U.N.C.C. and as it involved environmental aspects covered under paragraph 35 of the Criteria for additional Categories of Claims insofar as matters of environmental damage and the depletion of natural resources are concerned. This Claim was filed before the Commission on July 30, 1993 by the Kuwait Oil Company (“KOC”), a wholly owned subsidiary of Kuwait Petroleum Corporation which was wholly owned by the State of Kuwait. The Claim was filed under category “E” (corporate claims). KOC requested compensation in the amount of US\$950,715,662 for the costs it claimed to have incurred in planning and executing the work of putting the well-head fires still burning after the forced withdrawal of Iraqi forces from Kuwait, stopping the flow of oil and gas from those wells, and making the well-heads safe for the reinstatement of production.<sup>105</sup> the Panel of Commissioners appointed to review this Claim had to deal first with the issue of whether environmental claims envisaged by the U.N.C.C. Governing Council to be filed only by Governments under category “F” claims could be filed by companies or corporations under category “E” claims; the Panel concluded that Security Council Resolution 687(1991) referred, *inter alia*, to “environmental damage and the depletion of natural resources” as a potential heads of claims, without making any qualification as to the legal subject or entity eligible to make such claims, and, accordingly, environmental claims could be filed not only by governments under category “F” claims but also by companies or coporations under category “E” claims without any substantive consequences in terms of the law applicable to such claims.<sup>106</sup> Then the panel of Commissioners appointed to deal with this claim concluded that it had to deal with two main issues:

First, the Panel must determine whether all the costs included by the Claimant in the WBC Claim can be considered a direct result of Iraq's invasion and occupation of Kuwait and thus compensable under the applicable law and the criteria established by the Governing Council. Second, the Panel must verify, using expert advice where necessary, that the costs for which compensation is being sought in the WBC Claim have in fact been incurred by the Claimant.<sup>107</sup>

Thus, the Panel of Commissioners recognized its role in this case as a quasi-judicial organ processing the claim as such.<sup>108</sup> The Panel of Commissioners had to deal with a primary legal question, i.e. whether Iraq was liable for hundreds of oil-well fires that were set ablaze in the days prior to the forced withdrawal of Iraqi forces from Kuwait. Responding to Iraq's denial of "any responsibility for the oil-well fires, arguing that the fires were caused by allied air raids"<sup>109</sup> the Panel of Commissioners declared that :

Although part of the damage may be a result of the allied bombing, the bulk of the oil well fires was directly caused by the explosives placed on the well heads and detonated by Iraqi forces. In this regard the Panel finds the testimony presented by the Claimant's witnesses at the oral proceedings, which included videotapes of the explosives placed on the well heads, as well as the Kalin Report, particularly convincing. The Panel also notes that the evidence referred to by Iraq is consistent with this conclusion.<sup>110</sup>

The Panel of Commissioners has further declared that in accordance with "Governing Council decision 7, Iraq's liability includes any direct loss, damage or injury suffered as a result of military operations or threat of military action by either

side...<sup>111</sup> Decision 7 which was referred to by the Panel of Commissioners is the decision concerning the adoption by the U.N.C.C. Governing Council of the Criteria for additional Categories of Claims which we discussed before.<sup>112</sup> Paragraph 21 of said Criteria stated in part that:

These payments are available with respect to any direct loss, damage, or injury to corporations and other entities as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include any loss suffered as a result of (a) Military operations or threat of military action by either side during the period of 2 August 1990 to 2 March 1991;.....

It is clear that this provision quoted from paragraph 21 of the Criteria for additional Categories of Claims is a correct application and interpretation of the rules of international law concerning Iraq's liability as included in paragraph 16 of Security Council resolution 687 which bases Iraq's liability on its unlawful invasion and occupation of Kuwait, i.e. Iraq's unlawful use of force in violation of the Charter of the United Nations, and not on just *jus in bello*. The Panel of Commissioners adopted a similar line of reasoning when it declared that the Governing Council's decision No.7 is "in accordance with the general principles of international law."<sup>113</sup> and as a result, the Panel declared that "Iraq is liable for any direct loss... caused by its own or by the coalition armed forces."<sup>114</sup>

After verifying the Kuwait Oil Company Claim, the Panel of Commissioners recommended to award the Company the sum of 610,048,547 US Dollars in compensation for costs incurred by the Company in fighting the oil-wells fires left burning in Kuwait after the forced withdrawal of Iraqi forces, and the U.N.C.C. Governing Council approved this recommendation on December 18, 1996.<sup>115</sup>

## B. The Fluid Lost Claim

The Fluid lost Claim<sup>116</sup> was one of the claims filed by the Kuwait Petroleum Corporation (“KPC”) which was entrusted by Kuwait with “realizing the economic value” of Kuwait’s hydro-carbon resources. KPC alleged that, prior to the liberation of Kuwait, Iraqi forces deliberately sabotaged Kuwait’s wells and facilities, burning and destroying crude oil and oil products, and releasing crude oil into the Kuwait desert and the waters offshore Kuwait. KPC claimed that Kuwait had lost approximately 1,250.50 million barrels of reservoir fluids to fires and spills as a result of Iraq’s actions. 417 million barrels out of the total asserted fluid loss had not been covered by any claim and as such they were covered by the Fluid Loss Claim. Components of this claim included volume of the lost reservoir fluids, valuation of the lost fluid, and cost savings.<sup>117</sup> KPC asserted that losses claimed for under this claim were direct losses and were, therefore, compensable under U.N. Resolution 687(1991) and U.N.C.C. Governing Council decision 7.<sup>118</sup>

The panel of Commissioners accepted KPC’s views, cited the WBC Claim Report, and concluded that “[b]ecause the losses alleged in the FL claim are the product of the well blow-outs, they are, to the extent proved by evidence, compensable under Security Council resolution 687 and Governing Council decision 7”<sup>119</sup>. Finally the Panel recommended compensation in the amount of US\$1,172,180,632 for KPC’s fluid loss claim.<sup>120</sup>

It should be noted here that the Panel did not have to deal with the question of whether an environmental claim could be filed by a corporation under category “E” claims as this issue was settled in the WBC claim and as this claim involved clear economic or business losses arising out of the depletion of oil and gas resources in addition to the environmental aspects of the claim.

### **C. Monitoring and Assessment Claims**

Monitoring and Assessment Claims were the first category of state environmental claims to be decided by the Commission. At its 109<sup>th</sup> meeting held on 21 June 2001 at Geneva, the Governing Council of the U.N.C.C. adopted its decision concerning the first installment of “F4” claims approving the recommendations made by the panel of Commissioners and amounts of the recommended awards concerning such claims. Iran was awarded 17,007,070 US Dollars; Jordan was awarded 7,060,625 US Dollars, Kuwait was awarded 108,908,412 US Dollars. Saudi Arabia was awarded 109,584,660 US Dollars, Syrian Arab Republic was awarded 674,200 US Dollars, but Turkey’s claim was rejected. The total amount of compensation awards reached the sum of 243,234,967 US Dollars.<sup>121</sup> All such awards cover claims for monitoring and assessment of environmental damage, depletion of natural resources, monitoring of public health, and performing medical screening for the purposes of investigation and combating increased health risks submitted by the concerned governments. Such claims are hereinafter referred to as “monitoring and assessment claims.”<sup>122</sup>

Following the lines of other panels of Commissioners, the panel of Commissioners appointed to review the monitoring and assessment claims decided to

apply relevant Security Council resolutions, the criteria established by the U.N.C.C. Governing Council for particular categories of claims, pertinent decision of the Governing Council, and other relevant rules of international law.<sup>123</sup>

The panel of Commissioners dealt with the issue of compensable losses or expenses and considered “direct environmental damage and depletion of natural resources” to include losses or expenses resulting from:

- (a) Abatement and prevention of environmental damage , including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters;
- (b) Reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment;
- (c) Reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment;
- (d) Reasonable monitoring of public health and performing medical screenings for the purpose of investigation and combating increased health risks as a result of the environmental damage; and
- (e) Depletion of or damage to natural resources.<sup>124</sup>

Applying such rules to the monitoring and assessment claims, the panel of Commissioners concluded that monitoring and assessment expenses that qualify for compensation are those resulting from:

- (a) Monitoring and assessment of environmental damage that is reasonable for any of the purposes of evaluating and abating the harm and restoring the environment; and
- (b) Monitoring of public health and performing medical screenings that is reasonable for any of the purposes of investigation and combating increased health risks as a result of the environmental damage.<sup>125</sup>

The Claimant sought compensation for expenses resulting from monitoring and assessment activities undertaken or to be undertaken to identify and evaluate damage or loss suffered by them as a result of Iraq's invasion and occupation of Kuwait. These activities relate, *inter alia*, damage from air pollution, depletion of water resources; damage to ground water; damage to cultural heritage resources; oil pollution in the Persian Gulf; damage to coastlines; damage to fisheries, damage to wetland and rangeland; damage to forestry, agricultural and livestock; and damage or risk of damage to public health.<sup>126</sup> As the Claimant alleged, environmental damage, depletion of natural resources and increased health risks resulted from, *inter alia*.

- (a) The release and transport, into the Claimants' territories, of airborne pollutants caused by oil fires resulting from the ignition of hundreds of oil wells in Kuwait by Iraqi forces during Iraq's invasion and occupation of Kuwait;
- (b) Numerous oil rivers and lakes formed by oil from the destroyed oil wells that did not ignite;
- (c) The release by Iraqi forces, of millions of barrels of oil into the sea from oil pipelines, off-shore terminals and oil tankers;

- (d) Disruption of fragile desert and coastal terrain caused by the movement of military vehicles and personnel, coupled with the construction of thousands of kilometers of military trenches and the emplacement of mines, weapons caches and other fortifications, and
- (e) Adverse impacts on the environment resulting from the transit and settlement of the thousands of persons who departed from Iraq and Kuwait as a result of Iraq's invasion and occupation of Kuwait.<sup>127</sup>

The panel of Commissioners focused on the monitoring and assessment claims relating to expenses resulting from three different categories, namely:

- (a) Investigations to ascertain whether environmental damage or depletion of natural resources has occurred;
- (b) Studies to quantify the loss resulting from the damage or depletion; and
- (c) Assessment of methodologies to abate or mitigate the damage or depletion.

Claims relating to activities falling into more than one of the above categories were also focused on by the panel of Commissioners.<sup>128</sup> The monitoring and assessment claims stated above were given priority by the panel upon the request of the State Claimants which was approved by the U.N.C.C. Governing Council.<sup>129</sup>

The fact that monitoring and assessment claims were to be reviewed by the panel of Commissioners before deciding the compensability of any substantive claims presented special problems: Monitoring and assessment claims were being reviewed at a point where it may not have been established that the environmental damage or

depletion of natural resources occurred as a result of Iraq's invasion and occupation of Kuwait. But the panel concluded that:

The result of the monitoring and assessment activities may be critical in enabling claimants to establish the existence of damage and evaluate the quantum of compensation to be claimed. Hence, although it may be correct in some cases to say that a claimant is seeking compensation for monitoring and assessment without prior proof that environmental damage has in fact occurred, it would be both illogical and inequitable to reject a claim for reasonable monitoring and assessment on the sole ground that the claimant did not establish beforehand that environmental damage occurred. To reject a claim for that reason would, in effect, deprive the claimant of the opportunity to generate the very evidence that it needs to demonstrate the nature and extent of damage that may have occurred.<sup>130</sup>

## CONCLUSIONS

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In this chapter on “the U.N. Compensation Commission and Environmental Claims” we discussed the Constitutional Structure of the U.N.C.C. and its Nature and the Nature of its Work, in section I, while we devoted section II to the study of the U.N.C.C. and the Qualifications of Environmental Claims, section III focused on the U.N.C.C. and Kuwait Claims Concerning Environmental Damage and the Depletion of Natural Resources. The U.N.C.C. was established pursuant to Security Council resolution 687 to administer the U.N. Compensation Fund and is constituted of the Governing Council of the Commission, a body of commissioners comprising panels each of which consists of three commissioners, and a secretariat. The Governing Council is the policy-making organ of the Commission and performs important functional tasks with request to claims presented to the Commission.

Commissioners who are appointed by the Governing Council upon nomination by the U.N. Secretary-General must be experts in fields such as finance, law, accountancy, insurance and environmental assessment. Panels of commissioners are responsible for processing claims including the verification and evaluation of such claims and their recommendations are final and subject only to the approval of the Governing Council. Insofar as claims presented to the Commission, are concerned the secretariat of the Commission makes a preliminary assessment of each claim to determine whether it meets the formal requirements established by the Governing Council before submitting it to a panel of commissioners for verification and evaluation.

With regard to the processing of claims, the Commission does not act as a court or an arbitral tribunal before which the parties appear. The Commission is in fact a “political organ that performs an essentially fact-finding functions of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims.” This work of the Commission involves a function of quasi-judicial nature. We have seen that the Commission achieved the requirements of fairness and impartiality and it reflected the universal legality and legitimacy. The Commission applies Security Council resolution 687 and other relevant resolutions as well as the criteria established by the Governing Council and any pertinent decisions of the Governing Council . In addition, the Commission applies other relevant rules of international law where necessary.

With regard to environmental claims and claims concerning the depletion or damage to natural resources, the Governing Council of the Commission established the Criteria for additional Categories of Claims which included certain provisions regarding claims of environmental damage and the depletion of natural resources as a result of Iraq’s unlawful invasion and occupation of Kuwait. These claims involve direct environmental damage or loss and cover losses and expenses resulting from abatement and prevention of environmental damage and clean-up costs, reinstatement and restoration costs and expenses, health and medical costs, and depletion of or damage to natural resources. With respect to all such claims:

[P]ayments are available with respect to any direct loss, damage, or injury to Governments or international organizations as a result of Iraq’s unlawful invasion and occupation of Kuwait. This will include any cost suffered as a result of:

- (a) Military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;
- (b) .....
- (c) Actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;...<sup>131</sup>

**It is to be noted that the Criteria for additional Categories of Claims suggested that only governments and international organizations could claim compensation for any loss or damage to the environment or the depletion of natural resources. But the word “government” was interpreted by the Criteria to give it the widest possible meaning. In addition we have seen claims submitted by corporations or companies which included substantial environmental elements.**

It is important to note, also, that panels of commissioners do enjoy full powers and discretion to decide the admissibility, relevance, materiality and weight of any documents and other evidence submitted, request claimants to present their views in oral proceedings, and request additional information from any other source. The role of panels of commissioners with regard to evidence is that what we have called “functional activism.”

With regard to the two environmental claims filed by the Kuwait Oil Company (“KOC”) and the Kuwait Petroleum Corporation (“KPC”), The Well Blowout Control Claim and the Fluid Lost Claim, we would like to stress the following:

- 1) The Panel of Commissioners adopted a very constructive interpretation of the U.N.C.C. Governing Council decisions and of U.N.Security Council resolution 687, and it resolved the apparent inconsistency between the Governing Council's decisions and U.N.Security Council resolution 687 by appealing to and upholding the resolution and relevant rules of international law.
- 2) Although the Panel recognized its quasi-judicial role, it has emphasized and upheld the requirements of due process, a cardinal principle of justice, particularly in the Anglo-American legal systems. This means that the Commissioners intend to achieve and preserve justice just as courts may do.
- 3) The Panel adopted and followed an investigative approach which went beyond any adversarial system before the courts of law; the Panel of course enjoyed full discretionary powers with regard to the evaluation and admissibility of evidence arising therefrom.

The same observations are true with regard to the third type of claims discussed concerning monitoring and assessment claims filed by states under category "F4" environmental claims. As we have seen the panel of Commissioners required the existence of a sufficient nexus between the activity covered by a monitoring and assessment claim and the environmental damage or depletion of natural resources whether occurred or expected to occur and which would be the subject of a substantive environmental claim.

It is expected that panels of commissioners dealing with category "F" claims, (claims filed by governments and international organizations) will adopt and follow the same rules and methods in order to serve justice in the best possible manner. It should also be noted that category "F" claims which total approximately 300 claims involving the demands of approximately US\$210 billion in compensation have been

sub-categorized into four main sub-categories the fourth of which is reserved for claims for damage to the environment ("F4"). Environmental claims ("F4") have in turn been classified into two main groups; the first group comprises claims for environmental damage and the depletion of natural resources in the Gulf region including those resulting from oil-well fires and the discharge of oil into the sea. This group includes about 30 claims seeking a total of US\$40 billion in compensation. The second group of "F4" claims are claims for costs incurred by governments outside the region in providing assistance to countries that were directly affected by the environmental damage. This assistance included the alleviation of the damage caused by the oil-well fires, the prevention and clean-up of pollution and the provision of manpower and supplies. Such claims seeking a total of approximately US\$23 billion in compensation have been received by the U.N.C.C. The Commission has established a corresponding secretariat team and a panel of commissioners to deal with all sub-category "F4" environmental claims. It is expected that the verification and valuation of these claims will require extensive and time-consuming research and monitoring. Extensive and far-reaching fact-finding and investigative methods will have to be followed. It is, furthermore, expected that environmental claims filed by governments will take until the year 2003 to be finally verified and resolved.<sup>132</sup>

### NOTES TO CHAPTER THREE

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1. U.N. Security Council resolution 687 (1991), paras, 18 & 19; U.N. Security Council resolution 692(1991), para 2-9.
2. *Report of the Secretary General Pursuant to Paragraph 19 of Security Council Resolution 687 (1991)*, U.N. Doc. S/22559, 2 May 1991, reprinted in 30 I.L.M. 1706 (1991) para 4, as approved by U.N. Security Council resolution 692 (1991), para 3, [*hereinafter* , Secretary-General's Report].
3. *Id.*
4. *Id.* See 1.
5. *Id.* para. 5.
6. *Id.* para. 10, Report dated 1 September 1992 on the activities of the United Nations Compensation Commission (July 1991-June 1992), enclosed under a letter dated 21 September 1992 from the President of the Governing Council of the United Nations Compensation Commission to the President of the Security Council, U.N. Doc. S/24589, 28 Sept. 1992 [*hereinafter* cited as Report on the activities of the U.N.C.C. 1992], para 9.
7. Secretary General's Report, *supra* note 2, para. 10.
8. *Id.* para 10, Guidelines for the conduct of the work of the Governing Council of the United Nations Compensation Commission (approved at the 4<sup>th</sup> meeting, held on 25 July 1991), Annex 1 to "Letter dated 2 August 1991 from the President of the Governing Council of the United Nations Compensation Commission to the President of the Security Council, U.N. Doc. S/22885, 2 August 1991, [*hereinafter* cited as the U.N.C.C. Governing Council's Guidelines.], para.3.

9. Secretary-General's Report, para 10, the U.N.C.C. Governing Council's Guidelines, para 4.
10. Secretary-General's Report, para 7.
11. Report on the activities of the U.N.C.C. 1992, S/24589, paras 21-22, see also Decision 6 adopted by the Governing Council of the United Nations Compensation Commission during its second session, held on 18 Oct. 1991 on "Arrangements for ensuring payments to the Compensation Fund". S/AC 26/1991/6.
12. Report on the activities of the U.N.C.C. 1992, paras. 23-33.
13. Examples of reports and recommendations of panels of commissioners as approved by the Governing Council of the U.N.C.C. will be referred to elsewhere in this chapter.
14. Secretary-General's Report, para. 11.
15. *Id.* Para 5, Provisional Rules for Claims Procedure enclosed under Decision 10 Annex 1, Decision taken by the Governing Council of the United Nations Compensation Commission at its sixth session, 27<sup>th</sup> meeting, on 26 June 1992, U.N.Doc. S/24363, annex 1, enclosure (July 30, 1992), reprinted in 31 I.L.M. 1053 (1992), [*hereinafter* cited as Provisional Rules for Claims Procedure], art.19.
16. Secretary-General's Report, para 5. Procedures for the appointment of commissioners have been specified in article 20 of the Provisional Rules for Claims Procedure (*supra* note 15) which states:

**"Article 20. Procedure for appointment"**

1. The Executive Secretary will transmit to the Governing Council the nominations for Commissioners proposed by the Secretary-General,

indicating which Commissioners are to serve on each panel and who, within each panel, will act as a Chairman.

2. The Executive Secretary will recommend to the Secretary-General for nomination as many panels of Commissioners as necessary to process claims in an expeditious manner.
  3. When transmitting to the Governing Council the nominations for Commissioners, the Executive Secretary will specify the claims or categories of claims to be assigned to each panel, indicating the expertise and the number of Commissioners required.
  4. If the Governing Council does not agree on the appointment of a nominee for a panel, it will request the Secretary-General, through the Executive Secretary to submit a new nomination.
  5. If, at the time the Executive Secretary transmits the new nomination the Governing Council is not in session, the new nomination will be communicated to the members of the Governing Council. The Governing Council may approve replacement Commissioners at international meetings.
  6. The same procedure will apply whenever a new Commissioner must be nominated.”
17. Secretary-General’s report, para 5, Provisional Rules for Claims Procedure art. 19, para.1.
18. Secretary-General’s report, para 26. See articles 40, 41 and 43 of the Provisional Rules for Claims Procedure which read as follows:

**“Article 40. Decisions**

1. The amounts recommended by the panels of Commissioners will be subject to approval by the Governing Council. The Governing Council may review the amounts recommended and, where it determines circumstances require, increase to reduce them.
2. The Governing Council may, in its discretion, return a particular claim or group of claims for further review by the Commissioners.
3. The Governing Council will make its decision on amounts to be awarded at each session with respect to claims covered in any reports of

Commissioners, circulated to members of the Governing Council at least 30 days in advance of the session.

4. Decisions of the Governing Council will be final and are not subject to appeal or review on procedural, substantive or other grounds.
5. Decisions of the Governing Council and, after the relevant decision is made, the associated report of the panels of the Commissioners, will be made public, except the Executive Secretary will delete from the reports of panels of Commissioners the identities of individual claimants or other information determined by the panels to be confidential or privileged.”

**“Article 41. Correction of decisions**

1. Computational, clerical, typographical or other errors brought to the attention of the Executive Secretary within 60 days from the publication of the decisions and reports will be reported by the Executive Secretary to the Governing Council
2. The Governing Council will decide whether any action is necessary if it is determined that a correction must be made, the Governing Council will direct the Executive Secretary as to the proper method of correction.

**“Article 43. Additional procedural rulings**

Subject to the provisions of these procedures, Commissioners may make such additional rulings as may be necessary to complete work on particular cases or categories of cases. In so doing, the Commissioners may rely on the relevant rules of the United Nations Commission on International Trade Law for guidance. Commissioners may request the Governing Council to provide further guidance with respect to these procedures at any time. The Governing Council may adopt further procedures or revise these rules when circumstances warrant.

19. Secretary-General's Report, para 7, Provisional Rules for Claims Procedure, art. 26.
20. Secretary-General's Report, paras. 6 & 12.
21. *Id.* Para, 26. In this connection, articles 14 & 15 of the Provisional Rules for Claims Procedure stipulate:

**“Article 14, Preliminary Assessment”**

1. The secretariat will make a preliminary assessment of the claims received in order to determine whether they meet the formal requirements established by the Governing Council. To this end the secretariat will verify:
  - (a) That the claims have been submitted on the appropriate claim forms with the required number of copies, and in English or with an English translation;
  - (b) That the claims contain the names and addresses of the claimants and, where applicable, evidence of the amount, type and causes of losses;
  - (c) That the affirmation by the Government has been included in respect of each consolidated claim stating that, to the best of the information available to it, the claimants are its nationals or residents, and that it has no reason to believe that the information stated in the claims is incorrect;
  - (d) That all required affirmations have been given by each claimant.
  
2. In the case of claims of corporations and other legal entities the secretariat will also verify that each separate claim contains:
  - (a) Documents evidencing the name, address and place of incorporation or organization of the entity;

- (b) Evidence that the corporation or the legal entity was, on the date on which the claim arose, incorporated or organized under the law of the state the Government of which has submitted the claim;
- (b) A general description of the legal structure of the entity;
- (c) An affirmation by the authorized official for each corporation or other entity that the information contained in the claim is correct.))

**“Article 15. Claims not meeting the formal requirements”**

If it is found that the claim does not meet the formal requirements established by the Governing Council, the secretariat will notify the person or body that submitted the claim about that circumstance and will give it 60 days from the date of that notification to remedy the defect. If the formal requirements are not met within this period, the claim shall not be considered as filed.))

22. Secretary-General’s Report, para. 7. The secretariat of the U.N.C.C. has prepared working papers, reports and recommendations to the Governing Council and has assisted and participated in the processing of various claims as requested by the various panels of commissioners. Examples of working papers and reports prepared by the secretariat are the following:

Draft guidelines for conduct of work, S/AC. 26/1991/WP. 1/Rev.1;

Iraqi oil trade perspectives, Report by the Executive Secretary, S/AC.26/1991/WP. 6; Holding and managing oil revenues, Report by the executive

Secretary, S/AC.26/1991/WP. 7, What constitute serious personal injury, S/AC. 26/1991/WP. 10/Rev. 1; Business issues of individuals eligible for consideration under the expedited procedures, S/AC/ 26/1991/WP.11; Recovery from mental pain and anguish, S/AC. 26/1991/WP.12.

Examples of the secretariat's work in processing claims and assisting panels of commissioners will be referred to whenever relevant.

23. U.N. Security Council resolution 692(1991), para.3.
24. Security Council resolution 687 (1991), paras 18 & 19, Secretary-General's Report, para.20.
25. Secretary-General's Report, para 20.
26. *Id.*
27. see generally; Bederman, *the United Nations Compensation Commission and the Tradition of International Claims Settlement*, 27 *N.Y.U.J. Int'l L. & Pol.* 1, *passim* (1994); Harper, *Does the United Nations Security Council have the Competence to act as Court and Legislature*, 27 *N.Y.U.J. Int'l L. & Pol.* 103, 118 *et seq.* (1994).
28. See generally; Bederman, *id. passim*.
29. *Id. passim*.
30. For details see, e.g. Beerman, *id.* at 4 *et seq.*
31. Bederman, *id.*
32. Review for details; Secretary-General's Report, *supra* note 2, paras. See 1; Provisional Rules for Claims Procedure, arts. 18-27.
33. See e.g. Provisional Rules for Claims Procedure, arts. 16, 35 & 36.
34. Secretary-General's Report, para. 26.

35. Provisional Rules for Claims Procedure, art. 16, para.2.
36. *Id.* art. 16, para.3.
37. *Id.* art. 32, para.2.
38. U.N.Security Council resolution 687, para.16; Criteria for additional Categories of Claims, adopted by the Decision taken by the Governing Council of the United Nations Compensation Commission during its third session, at the 18<sup>th</sup> meeting, held on 28 November 1991, as revised at the 24<sup>th</sup> meeting held on 16 March 1992, U.N. Doc. S/23765, Annex (April 3, 1992), [*hereinafter* cited as Criteria for additional Categories of Claims], para.35.
39. This is so because the U.N.C.C. entertains jurisdiction over environmental claims and claims concerning the depletion of natural resources. Such types of claims were not envisaged to be settled by traditional claims and reparations commissions.
40. Bederman, *supra* note 27, at 3.
41. *Id.* at 4 *et. seq.*
42. Criteria for additional Categories of Claims, *supra* note 38 para.35.
43. See for details, Bederman, *supra* note 27, at 8 *et.seq.*
44. Bederman, *id. passim.*
45. *Id.* at 35 *et seq.*
46. Provisional Rules for Claims Procedure, art. 31.
47. Bederman, *supra* note 27, at 35 *et.seq.*
48. Criteria for additional Categories of Claims, *supra* note 38.
49. *Id.* para. 35.
50. *Id.* para. 36.
51. Lillich & Brower, *Opinion Regarding the Jurisdiction and powers of the United Nations Compensation Commission*, February 10, 1992, 38(1) Va.J. Int'l L. 25, 33(1997).
52. U.N.Security Council Resolution 674 of Oct. 29<sup>th</sup>, 1992, para 8.
53. U.N.Security Council Resolution 678, first paragraph of the preamble and operative paragraph.1.
54. U.N.Security Council Resolution 686 of 2 March 1991, paras. 1 & 2 (b).
55. U.N.Security Council Resolution 692 of 20 May 1991, first paragraph of the preamble.

56. Lillich & Brower, *supra* note 51 at 34-35.
57. Low & Hodgkinson, *Compensation for Wartime Environmental Damage Challenged to International Law after the Gulf War*, 35 Virginia J. Int'l L. 405, 449 (1995).
58. See ch. 2 of this dissertation, *supra*,
59. Criteria for Expedited Processing Urgent Claims, S/AC.26/1991/1, para 16, common para. 9 of the three "Criteria for Additional Categories of Claims", in S/AC 26/1991/7, and Form C, "Individual Claim Forms for Damages Up to US\$.100,000".
60. U.N.C.C. Governing Council Decision No. 11, S/24363, annex. II.
61. Report and Recommendations of the Panel of Commissioners Concerning the Egyptian Workers Claims (Jurisdictional Phase) [S/AC. 26/1995/R.20/Rev.1], hereinafter cited as the Egyptian Workers Claims, Report on the Jurisdictional Phase.
62. *Id.*
63. Criteria for additional Categories of Claims, *supra* note 38, para 35(b).
64. Low & Hodgkinson, *supra* note 57, at 461.
65. In re oil spill by the "Amoco Cadiz" off the Coast of France on March 16, 1978, MDL No. 376, 1988 U.S Dist. LEXIS 16832 (N.D. III. 1988), cited by Low & Hodgkinson, *id.* at 461, n. 380.
66. Low & Hodgkinson, *id.* at 461.
67. Decision Concerning the Well Blowout Control Claim, [Decision 40] adopted by the Governing Council of the United Nations Compensation Commission during its 23<sup>rd</sup> session, at its 66<sup>th</sup> meeting U.N. Doc. S/AC. 26 Dec. 40 (1996), [*hereinafter* cited as the WBC Claim].
68. Report and Recommendations Made by the Panel of Commissioners Appointed to Review the Well Blowout Control Claim ("the WBC Claim"), U.N. Doc. S/AC.26/1996/R. 27/Annex (1996), [*hereinafter* cited as WBC Claim Report], paras. 145-150.
69. *Id.* Paras. 151-55
70. *Id.* Para 172-75.
71. Low & Hodgkinson, *supra* note 57 at 461.
72. Criteria for additional Categories of Claims, para 35(b).
73. *Id.*

74. *Id.* para 35©.
75. *Id.*
76. Most countries do not have any domestic laws on the matter, to my knowledge, war environmental damage or environmental damage arising out of or resulting from international armed-conflicts has not so far raised or invoked before national courts except before Kuwait courts, see chapter 6 *infra*.
77. WBC Claim Report, paras 176-81.
78. *Id.* Paras. 189-95.
79. Criteria for additional Claims, para.35(d).
80. *Id.* Para. 35.
81. See; eg. U.N. General Assembly Resolution 626 (VII) of 1952 on Right to Exploit Freely Natural Wealth and Resources, U.N. General Assembly Resolution 1803 (XVII) of 1962 on Permanent Sovereignty Over Natural Resources, U.N. General Assembly Resolution 2158(XXI) of 1966 on Permanent Sovereignty Over Natural Resources; U.N. General Assembly Resolution 2692(XXV) of 1971 on Permanent Sovereignty Over Natural Resources of Developing Countries and Expansion o Domestic Sources of Accumulation for Economic Development, U.N. General Assembly Resolution 3016 (XXVII) of 1972 on Permanent Sovereignty Over Natural Resources of Developing Countries; U.N. General Assembly Resolution 3171 (XXVIII) of 1973 on Permanent Sovereignty Over Natural Resources U.N. General Assembly Resolution 3201 (S-VI) of 1974 on Declaration on the Establishment of a New International Economic Order; U.N. General Assembly Resolution 3202 (S-VI) of 1974 on Programme of Action on Establishment of a New International Economic Order; U.N. General Assembly Resolution 3281 (XXIX) of 1974 on Charter of Economic Rights and Duties of States.
82. *See*; e.g. Kuwait Regional Convention, ch. 1, *supra*.
83. Caldwell, Concepts in Development of International Environmental Policies, in INTERNATIONAL ENVIRONMENTAL LAW 12, 16 (L.TECLAFF & A.UTTON, eds., 1974), (*emphasis added*).
84. Cartwright, *Natural Resources Damage Assessment: the Exxon Valdez Oil Spill and its Implications*, 17 *Rutgers Computer & Tech. L.J.* 451, 463(1991),

the author cited Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (1988) 42 U.S.C. §§ 9601(16).

85. See for the study of this principle ch.1, *supra*.
86. Criteria for Additional Categories of Claims, para.30.
87. *Id.* para. 1-15.
88. *Id.* paras. 16-29.
89. *Id.* paras. 30-42.
90. WBC Claim Report.
91. Report and Recommendations Made by the panel of Commissioners Concerning the Fourth Installment of “E1” Claims, S/AC. 26/2000/16, 29 Sep. 2000; Claims of Kuwait Petroleum Corporation *in id.* Paras. 89-408; the Fluid Loss Claim *in id.* paras 261-408.
92. WBC Claim Report, paras. 51-54. In this connection the Report stated:

“51. The issue before the Panel is the apparent inconsistency between the submission of the WBC Claim as a category “E” claim, on the one hand, and the criteria applicable to the subject-matter of the Claim, on the other. While under Governing Council decision 7 “public sector enterprises” such as KOC were envisaged to file their claims under category “E”, the criteria that appear to specifically apply to the WBC Claim are set out under category “F”. The Panel concurs in the view that the categorization of a claim as an “E” or “F” claim does not necessarily entail any substantive consequences in terms of law applicable to such claim. In this connection, it should be noted that paragraph 16 of Security Council Resolution 687 (1991) provides for the compensability of, *inter alia*, “environmental damage and the depletion of natural resources”, without making any qualifications as to the legal subject or entity eligible to make such claims.

52. In light of the above, the Panel concludes that it could not have been the Governing Council’s intention, when drafting decision 7, to exclude the applicability of the criteria listed under paragraph 35 of decision 7 to a claim filed by a corporate entity should the types of losses described thereunder, including costs incurred infighting the oil-well fires, have been sustained by such an entity, or to declare corporations ineligible to seek compensation for such losses. Indeed, paragraphs 17 and 31 of decision 7

specifically state that “[t]he following criteria are not intended to resolve every issue that may arise” with respect to category “E” and “F” claims.

53. The Panel is also of the opinion that, even if paragraph 35 of decision 7 were not considered to apply to claims brought by corporations, costs incurred in fighting oil-well fires would in any event be compensable under the general language of sub-paragraph © of paragraph 21 of Governing Council decision 7, which is the provision relied on by the Claimant in its Statement of Claim,...

54. Furthermore, the Panel notes that under the general principles of international law relating to mitigation of damages, which have also been recognized by the Governing Council, the Claimant was not only permitted but indeed obligated to take reasonable steps to fight the oil-well fires in order to mitigate the loss, damage or injury being caused by those fires to the property of the Kuwait oil sector companies and the State of Kuwait”. *Id.* paras 51-54.

93. The Fluid Loss Claim, *supra* note 91 in this case Kuwait Petroleum Corporation claimed damage for the losses suffered as a result of Iraqi forces’ sabotage of KPC’s oil wells and oil producing facilities which caused the burning and destruction of crude oil and oil products and the release of crude oil onto the surface and onto the waters offshore Kuwait. The Panel of Commissioners recommended compensation in the amount of US\$1,172,180,632 for the KPC’s fluid loss claim. *Id.* paras. 261-408.
94. Criteria for Additional Categories of Claims, para. 37.
95. *Id.*
96. Provisional Rules for Claims Procedure, art.35.
97. Final Report and Recommendations of the Panel of Commissioners Concerning the Egyptian Workers’ Claims, U.N.Doc. S/AC. 26/1997/3.2 October 1997, [*hereinafter* cited as the Final Report of the Egyptian Workers’ Claims].
98. *Id.* para. 37
99. *Id.* para. 38; this was in accordance with article 2 of the Memorandum of Understanding Concerning the Filing with the United Nations Compensation Commission of Claims Regarding the Remittances of Egyptian Workers in

Iraq (“the MOU”), entered into between the Secretariat of the Commission and the Government of Egypt, referred to in the Final Report of the Egyptian Workers’ Claims, para. 3.

100. Final Report of the Egyptian Workers’ Claims, para.43.
101. WBC Claim Report, para 89; the Panel states in the said report that it “has made every effort to ensure that the requirements of due process have been met. Given the time frames for the review of claims prescribed by the Rules and the volume of documentation underlying the WBC Claim, the Panel has not relied solely on the Parties’ contribution in order to verify the Claim. The Panel has assumed, with the assistance and support of the secretariat and the consultancies retained by the secretariat, an investigative role that goes beyond using the adversarial method of verifying claims.” *Id.* para. 89.
102. E.g.; With regard to the Claims of the Kuwait Petroleum Corporation, the Report of the Panel states:

“The Panel, aided by the secretariat and the Panel’s expert consultants, undertook an investigation of the evidence. This investigation lasted over one year and involved dozens of interviews, numerous formal questions and requests for documents, the review of voluminous documentary evidence, several on-site inspections, and a formal oral proceeding.” *Supra* note 91 para 141.
103. Decision 12, adopted by the Governing Council of the United Nations Compensation Commission during its seventh session, at its 29<sup>th</sup> meeting, held on 24 September 1992, U.N.Doc.S/24611, Annex I (October 5, 1992), para 1 ©.
104. The WBC Claim, *supra* note 67.
105. WBC Claims Report, *supra* note 68.
106. For details, see, this text above notes 90-92 and see note 92.
107. WBC Claim Report, *supra* note 68.
108. *Id.* para. 88.
109. *Id.* para. 85.
110. *Id.* para. 85.
111. *Id.* para.86
112. Criteria for additional Categories of Claims, *supra* note 38.
113. WBC Claim Report, para 86.

114. *Id.*
115. Decision 40, the WBC Claim, *supra* note 67.
116. The Fluid Lost Claim, *supra* note 91.
117. *Id.* para. 261-69.
118. *Id.* para. 289.
119. *Id.* para. 300
120. *Id.* para. 408.
121. Decision concerning the first installment of “F4” claims taken by the Governing Council of the United Nations Compensation Commission at its 109<sup>th</sup> meeting held on 21 June 2001 at Geneva, U.N.Doc./S/AC.26/Dec.132(2001) 21 June 2001.
122. Report and Recommendations Made by the Panel of Commissioners concerning the First Installment of “F4” Claims, U.N.Doc/S/AC.26/2001/16, 22 June 2001.
123. *Id.* para. 6.
124. *Id.* para. 9 & 10.
125. *Id.* para. 11.
126. *Id.* para. 13.
127. *Id.* para. 14.
128. *Id.* para. 28.
129. *Id.* para 3 and paras 15-18.
130. *Id.* para. 29..
131. Criteria for additional Categories of Claims, para. 34.
132. For more details see the U.N.C.C. Web site located at <http://www.uncc.ch>.

**CHAPTER FOUR**  
**INTERNATIONAL CRIMES**  
**AGAINST THE ENVIRONMENT**

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**CHAPTER FOUR**  
**INTERNATIONAL CRIMES**  
**AGAINST THE ENVIRONMENT**

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**INTRODUCTION**

In general, when writers speak of the international responsibility under international law it is thought that the responsibility of states is the one type of responsibility that is meant and is being talked about. But it is the international criminal responsibility of the individuals which has been dealt with for sometime and developed in somewhat clear legal terms under international law as exceptions to the rules and principles of international law which stipulate that individuals are not directly responsible under that law are increasingly growing in a most expeditious way.<sup>1</sup> Although theories recognizing the international personality of the individual (the human being) have not, so far, achieved dominance in international law, the individual's international criminal responsibility with regard to certain offenses has been firmly established. The recognition of such responsibility did not require the recognition of any sort of individual's international personality despite the fact that some international law writers did require the connection between the kind and degree of such responsibility and the kind and degree of the required international personality, i.e., there can be no international responsibility without international personality comparable in kind and degree.<sup>2</sup>

The Nuremberg and other recent trials have been firmly giving an enhanced support for the recognition of the international criminal responsibility of individuals.<sup>3</sup>

The establishment of the International Criminal Court for former Yugoslavia,<sup>4</sup> the International Criminal Court for Rwanda,<sup>5</sup> and the trials of individuals accused of certain crimes before both courts, and the most recently signed Rome Statute for the Establishment and Jurisdiction of the International Criminal Court<sup>6</sup> have all led to the universal recognition of such individuals' criminal responsibility. All of these developments and others will be discussed insofar as they relate to, bear on or touch upon the subject matter of this chapter.

Instances of the determination of the international criminal responsibility of the individuals before the trials of war criminals before the Nuremberg Tribunal had been very rare and had not constituted any important legal precedents in international law.<sup>7</sup> In the following pages we will discuss the various categories of international crimes which bear on the environment and show how they have developed over the years beginning from the Nuremberg Trials until the present time and how they affect or bear on the environment. We will also show how Iraqi officials and individuals, including Saddam Hussein, are liable under international law with regard to each category of these crimes. Jurisdictional issues will also be studied.

I  
**CRIMES AGAINST PEACE**  
**AND THE ENVIRONMENT**  
**(AGGRESSION AND RELATED CRIMES)**  
=====

Crimes against peace or aggression and other related crimes date back to 1945 when the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis was done at London on 8 August 1945.<sup>8</sup> Article 6 of the

Charter of the International Military Tribunal accompanying the London Agreement  
stated in part:

The Tribunal... shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as member of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) *Crimes against peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;<sup>9</sup>

Treaties referred to in this article are the Kellogg-Briand Pact known as the Paris Pact (1928)<sup>10</sup> and some other non-aggression pacts concluded by Germany with other states. Although none of such treaties provided for individual criminal responsibility for violating any of the provisions of any of such treaties or initiating or resorting to war in violation of undertakings stipulated in the said treaties; the 1945 London Agreement declared that crimes against peace including planning, preparation, initiation or waging of a war of aggression, or a war in violation of the

said treaties or participation in a common plan or conspiracy for the accomplishment of any of the foregoing were crimes coming within the jurisdiction of the Nuremberg Tribunal for which their existed individual responsibility. The Nuremberg Tribunal declared "that those who plan and wage such a war with its inevitable and terrible consequences, are committing a crime in so doing"<sup>11</sup> and declared further that:

....it is argued that the (Kellogg-Brained) Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war, yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. *In the opinion of the tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention.*<sup>12</sup> [Emphasis added]

The Tribunal based its opinion on what it declared to be general international law. But some commentators did not agree with the courts opinion and asserted that the establishment of the international responsibility of the individual or the individualization of international criminal responsibility was created by the 1945 London Agreement and had not been part of any treaty law or customary (general) international law prior to the conclusion of the London Agreement and that the Tribunal erroneously declared that such responsibility was firmly rooted in general international law.<sup>13</sup> But even if this view was accepted, it must be stressed that developments after the delivery of the judgment of the Nuremberg International Military Tribunal have emphasized the universality of the recognition of the international criminal responsibility of the individuals and that any acts involving planning, preparation, initiation or waging of war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing have indeed been recognized as international crimes or supreme international crimes as declared by the Tribunal and by the International Military Tribunal for the Far East at Tokyo.<sup>14</sup>

Even more important is the fact that the Charter of the United Nations itself proscribed all acts of aggression and acts involving threats to the peace or breaches of the peace,<sup>15</sup> and has thus created a norm, *a jus cogens*, or peremptory norm of general international law declaring the illegality, proscription and criminality of all threats to the peace, breaches of the peace and acts of aggression. The United Nations General Assembly itself affirmed the Charter and the Judgment of the Nuremberg Tribunal; General Assembly Resolution No. 95 (I) adopted on 11 December 1946, stipulated that the General Assembly:

... ..

Affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal;

Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.<sup>16</sup>

Again in 1947 the U.N. General Assembly issued its resolution No. 177 (II) in which the Assembly directed the 'International Law Commission, which replaced the Committee on the codification of international law to "formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal." The course of the work of the Commission proceeded on the fact that the General Assembly did affirm the principles contained in the Charter and judgment of the Nuremberg Tribunal and that the task of the Commission was not to ascertain to what extent such principles constituted principles of international law nor was it to express any appreciation of such principles as principles of international law but rather to formulate them. During the period from 1950 to 1954, the International Law Commission adopted several drafts including, the 1950 draft enunciating the Nuremberg Principles and affirming that crimes against peace were crimes under international law and that "any person who commits an act which constitutes a crime under international law is responsible thereof and liable to punishment."<sup>17</sup> Again, the 1954 Draft Code of Offences against the Peace and

Security of Mankind adopted by the I.L.C. declared that aggression was an international crime and a crime against the peace and security of mankind "for which responsible individuals shall be punished".<sup>18</sup> By the time (1954) it became clear that a universal and peremptory norm of international law condemning aggression and related crimes as international crimes and crimes against the peace and security of mankind for which responsible individuals shall be punished was firmly established and rooted in international law.<sup>19</sup> The problem, however, was with the definition of aggression.

### **The Definition of Aggression:**

Few terms in international law have been viewed in as many different meanings and concepts and have caused so many conflicts and controversies as has the term "aggression". But The failure of the Security Council to deal with many situations involving threats and use of force and acts of aggression and the enhanced role of the U.N. General Assembly at the time led the Assembly to establish a committee to reach an acceptable definition of aggression" In fact, four successive General Assembly committees worked on "the Question of the Definition of Aggression" for more than twenty years until a consensus resolution on the subject was finally adopted by the Assembly in 1974<sup>20</sup>. Although it was labeled by some commentators<sup>21</sup> as political and of no legal value or effect. the Definition of Aggression was adopted by the U.N General Assembly after long and exhaustive efforts and the participation of almost all states members of the United Nations in the work and deliberations which continued for more than twenty years and led to the adoption of this definition which reflected the unanimous approval of U.N. member

states. In addition, in at least one case some of the provisions of the Definition were held by the International Court of Justice to be declaratory of general international law.<sup>22</sup> Moreover, the International Law Commission has declared that any violation of the Definition of Aggression is an international crime.<sup>23</sup> The legal relevance of Definition was expressed and stressed in the Resolution including the Definition; the ninth paragraph of the preamble of Resolution No.3314(XXIX) including the Definition of Aggression reads:

The General Assembly:

.....

*Convinced* that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim,...

Article 1 of the Definition states:

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

Explanatory note: In this Definition the term “state”.

- (a) Is used without prejudice to questions of recognition or to whether a State is a Member of the United Nations;
- (b) Includes the concept of a “group of States” where appropriate.

Instances of aggression as stipulated in article 3 of the Definition include, *inter alia*:

- (a) The invasion or attack by the armed force of a State of the territory of another State, or any military occupation however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;....

In addition, article 5 of the Definition stipulates:

- 1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.
- 2. A war of aggression is a crime against international peace. Aggression give rise to international responsibility.
- 3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

The above quoted articles include the provisions which are most directly relevant to the subject matter of this chapter. It appears that the quoted provisions are reflective of the various relevant provisions of the Charter of the United Nations and the rules and principles of general international law. Thus, any use of force against the sovereignty, territorial integrity or political independence of any state, or in any other manner inconsistent with the Charter of the United Nations constitutes an act of aggression which is an international crime. The territory of a state includes its land,

territorial sea, and air and space above its territory, all are considered the main components of the environment of the state. But the concept of the environment is much wider as it includes other main components such as population. Nevertheless, for the purpose of this chapter, any use of force against the territory of a state would necessarily involve the environment of that state and any use of force against the environment of a state is use of force against the territory of that state. Any such use of force is indeed an aggression against the State and constitutes an international crime for which the international criminal responsibility of the individual is established and recognized under international law. Subject-matter of jurisdiction will be dealt with at a latter stage of this chapter.<sup>24</sup> But it should be emphasized that the Iraqi officials and the Iraqi military forces have indeed committed aggression against the Kuwaiti environment and the environment of other Gulf states as explained previously in chapters 2,3, and 4. Saddam Hussein and other Iraqi officials must be held criminally responsible under international law for committing such crimes. Saddam Hussein and other Iraqi officials planned, prepared, initiated and waged a war of aggression against Kuwait, its territory and environment.<sup>25</sup> This was stressed and condemned in various U.N.Security Council resolutions as previously stated in chapter 3 and 4. The issue of Immunity and non-immunity of the Iraqi president will be dealt with later in this chapter.<sup>26</sup> But it remains to be stressed that Iraqi aggression against Kuwait and its environment is a supreme international crime containing within itself the accumulation of all the evils of all war crimes.

It remains to be also stressed that the most recently signed Rome Statute of the International Criminal Court has included the crime of aggression among the crimes over which the Court entertains jurisdiction.<sup>27</sup>

**II**  
**WAR CRIMES**  
**AND THE ENVIRONMENT**

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War crimes are generally defined as “acts committed in violation of the laws of war”<sup>28</sup> This definition was not unanimously agreed upon.<sup>29</sup> The framers of the London Agreement and the Charter of the International Military Tribunal (the Nuremberg Tribunal) chose to enumerate the various categories of war crimes in general as crimes against peace, war crimes, and crimes against humanity. Then they selected to list war crimes in the narrow sense as follows:

*War crimes:* namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;...<sup>30</sup>

Such quoted acts are among the instances of war crimes which were included within the jurisdiction of the Nuremberg Military Tribunal and for which individual criminal responsibility under the London Agreement and international law is established . In this connection the Nuremberg Military Tribunal held:

It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as upon States has long been recognized....

[T]he very essence of the (Nuremberg) Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorizing action moves outside its competence under international law.<sup>31</sup>

In the same meaning the Court declared that:

Crimes against international law committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.<sup>32</sup>

The concept of war crimes adopted by the Charter of the Nuremberg Tribunal and the judgement of the Tribunal and the recognition of the Nuremberg principles by the U.N. General Assembly as principles rooted in general international law,<sup>33</sup> all have led to the universal recognition and acceptance of the individual's criminal responsibility for war crimes under international law and of the enlargement of the scope of such crimes. Even if it was true as was held by some writers that the

Nuremberg Charter was “the true legal source of individual responsibility for war crimes, crimes against peace and crimes against humanity”<sup>34</sup>; yet it is true that now international individual responsibility for all such crimes is firmly established rooted in general international law. The developments in the U.N.General Assembly with regard to the codification of international crimes and the drafting of the “Code of Crimes against the Peace and Security of Mankind”<sup>35</sup> and “the International Criminal Code”<sup>36</sup> all lend support to the norm recognizing individual criminal responsibility under international law. The establishment, by the Security Council, of the International Criminal Court for former Yugoslavia, with its jurisdiction to try individuals accused of committing serious violations of the international humanitarian law in former Yugoslavia, is another important and undisputed proof of the firmness of the rooted norm concerning the individual criminal responsibility for war crimes under international law.<sup>37</sup> Thus, article 1 of the Statute of the Tribunal states:

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute:

In addition, article 6 provides:

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.<sup>38</sup>

The stated norm concerning the international criminal responsibility of the individual for war crimes was reiterated and reconfirmed by the establishment of the

International Tribunal for Rwanda and the adoption of its Statute,<sup>39</sup> which included a number of provisions on the subject; article 1 of the Statute provides:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Furthermore, article 5 of the same statute stipulates:

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.<sup>40</sup>

The most recently signed treaty establishing the International Criminal Court<sup>41</sup> has firmly recognized and accepted the international criminal responsibility of individuals for war crimes; Article 1 states:

There is established an International Criminal Court (the Court) which shall have the power to bring persons to justice for the most serious crimes of international concern, and which shall be complementary to national criminal jurisdiction. Its jurisdiction and functioning shall be governed by the provisions of this Statute.

Article 5 includes war crimes among the crimes within the jurisdiction of the Court.<sup>42</sup> Article 8 of the same treaty (Statute) enumerated in detail “war crimes” which will be referred to later in this chapter.<sup>43</sup>

Having referred to the most important developments concerning the recognition of the norm establishing the international criminal responsibility of the individual for war crimes over a very long period of time, we conclude, that the norm concerning the individual’s international criminal responsibility for war crimes has become undisputed and universally recognized as a most basic norm of international law or what is known as a “*jus cogens*” but, the question is whether war crimes include crimes against the environment.

As we have previously stated war crimes were defined in the London Charter of the Nuremberg Tribunal as “violations of the laws or customs of war”. At a later stage the term “violations of the international humanitarian law” has been and continues to be used. The Nuremberg Charter stated that “wanton destruction of cities, towns or villages, or devastation not justified by military necessity”<sup>44</sup> was among war crimes for which international criminal responsibility was established. These quoted terms from the Nuremberg Charter are general and very broad to the extent that they cover a very wide range of violations committed against the environment during or as a result of armed conflicts. The Regulations Respecting the Law and Customs of War on Land annexed to Convention (IV) Respecting the Laws and Customs of War on Land signed at the Hague, 18 October 1907, prohibited the employment of arms, projectiles, or material calculated to cause unnecessary suffering [article 23 (e)] and the destruction or seizure of property unless such

destruction or seizure is imperatively demanded by the necessities of war [article 23(e)]<sup>45</sup>. The Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War signed at Geneva, 12 August 1949, included a similar provision in article 53 which stipulates:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.<sup>46</sup>

Although all of the above-mentioned provisions, as stated in the 1907 Convention (IV) Respecting the Laws and Customs of War on Land, the 1945 Nuremberg Charter, and the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War do give a very high degree of protection to a wide range of environmental objects, we find that the 1977 Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)<sup>47</sup> has spelled out, clarified and codified customary and conventional international law relative to the protection of the environment and environmental objects during armed conflicts or situated or located in territories under occupation. Thus, article 54 prohibits attacks against, destruction or the rendering useless of any objects indispensable to the survival of the civilian population.<sup>48</sup> In addition, article 56 of the same protocol provides protection for and prohibits any attack against or destruction of works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations.<sup>49</sup> Moreover, article 55 of the protocol prohibits any widespread, long-term and severe damage to the natural environment, and it, further prohibits any attack against the

natural environment by way of reprisals.<sup>50</sup> The 1977 Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II) includes provisions concerning the protection of the environment and environmental objects which are similar to those included in Protocol I<sup>51</sup>. Protocol II, furthermore, prohibits the commission of “any acts of hostility directed against historic monuments, works of arts or places of worship which constitute the cultural or spiritual heritage of peoples.”<sup>52</sup>

The 1977 Enmod Convention<sup>53</sup> prohibits any acts, activities or operations which have “widespread, long-lasting or severe effect as the means of destruction, damage, or injury” to any state party to the Convention or to the environment; this prohibition applies to all situations in times of peace as well as in times of armed conflicts.<sup>54</sup> Cultural property as an important aspect of the environment are protected under customary and conventional international law, all states are under an international obligation to refrain from any act of hostility directed against such property.<sup>55</sup> International law, in addition to all of the aforementioned, proscribes the use of certain weapons and means of warfare which cause significant harm to the environment and its different aspects and elements and/or cause unnecessary damage or suffering.<sup>56</sup>

All such acts as are prohibited by the laws and customs of war whether prohibited by treaty or customary international law do constitute war crimes as generally defined as “violations of the laws and customs of war”. Individuals who commit such violations must be held accountable and criminally responsible under international law. Iraqi officials and individuals who ordered the commission of any such acts and those who committed or participated in the commission of any such acts

are accountable and must criminally be held responsible under international law. Seizure and destruction of property, sickening destruction of Kuwait City and other places in Kuwait, burning of over 600 oil wells, causing large oil spills, causing widespread and severe damage to the Kuwait environment and the environment of other Gulf States, the looting and destruction of cultural centers, Kuwait University and other educational, scientific and health institutions, and a whole host of other crimes against the Kuwaiti environment as previously stated in chapters two and three *supra*, all are just instances of crimes committed or ordered to be committed by the Iraqi President and other Iraqi officials and individuals who must be held criminally responsible under international law.<sup>57</sup>

This opinion is even supported by the fact that International Tribunal for former Yugoslavia has jurisdiction to try individuals accused of committing acts of similar nature; thus article 2 of the Statute of the International Tribunal for former Yugoslavia provides in part:

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention;

.....

- (c) wilfully causing great suffering to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;...<sup>58</sup>

Article 3 of the same Statute provides:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilfull damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science'

.....<sup>59</sup>

In addition, article 8 of the 1998 Rome Statute of the International Criminal Court is even more elaborate in this respect; it reads in part:

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:
  - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:  
... ..
  - (b) Wilfully causing great suffering, or serious injury to body or health;
  - (iii) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;  
... ..

(iv) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

... ..

(v) Intentionally directing attacks against civilian objects, that is, objects, which are not military objectives;

... ..

(vi) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or 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;

(vii) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

... ..

(viii) Intentionally directing attacks against buildings 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;

... ..

(ix) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(x) Employing poison or poisonous weapons;

(xi) Employing asphyxiating, poisonous other gases, and all analogous liquids, materials or devices;

... ..

(xii) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict,.....

... ..

(xiii) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts;

.....

(xiv) Intentionally directing attacks against buildings 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;

.....

(xv) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;....<sup>60</sup>

The above quoted provisions of article 8 of the Rome Statute of the International Criminal Court are those provisions which are most relevant to war crimes which affect the environment or any of its elements, forms, or aspects. The said article 8 confers upon the International Criminal Court a very broad jurisdiction with regard to war crimes and war crimes relating to property and the environment or any of its elements, forms, or aspects, broadly defined. It is hard to foresee an armed conflict situation involving any serious damage to the environment or any environmental object, including property, which escapes the jurisdiction of the Court.<sup>61</sup>

It should, however, be stressed that all the relevant provisions enumerating environmental crimes as war crimes as stated in the provisions quoted above from the 1998 Rome Statute of the International Criminal Court do not create new war crimes, for this enumeration is an attempt to list the already existing war crimes as stipulated in the Hague and Geneva Conventions and the two 1977 Protocols additional to the Geneva Conventions. A careful reading of the relevant provisions of

the Rome Statute (article 8) does indeed show that acts listed as war crimes, insofar as the environment is concerned, are stated as violations in the Hague and Geneva Conventions, the 1977 Protocols and the 1945 London Charter. Thus, any violation of any of the provisions of the Hague and Geneva Conventions, or the 1977 Protocols relating to the environment in times of armed conflict as previously studied in Chapter Two of this research is considered a war crime as stated in article 8 of the Rome Statute and as recognized under prior treaties and protocols. This is what fits the definition of war crimes as violations of the laws and customs of war or armed conflict.

As studied and concluded in chapter two, the rules and provisions of the Hague and Geneva Conventions and the Protocols of 1977 (or at least Protocol I) have indeed become part of customary international law of general acceptance binding upon all states. As a result, the war crimes relating to the environment specified in article 8 of the Rome Statute are considered as such under customary international law. It follows from that the conclusion that whether or not Iraq has ratified the Rome Statute and whether or not the Rome Statute will come into force, any act committed by Iraqis in violation of the provisions of article 8 of the Rome Statute must be considered as a war crime under the already existing rules of treaty and customary international law protecting the environment in times of armed conflict or relating thereto. The value of the Rome Statute is however manifested in the fact that it establishes a permanent court empowered with the jurisdiction to try future war criminals. Jurisdictional issues with regard to Iraqis who may be accused of committing war crimes in the second Gulf armed conflict will be studied later in this chapter under the heading "Jurisdictional Issues".

### III

## CRIMES AGAINST HUMANITY AND THE ENVIRONMENT

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Paragraph © of article 6 of the Nuremberg Charter enumerated crimes against humanity for which the international responsibility of the individual is established as follows:

*Crimes against humanity:* namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.

A first reading of this provision might indicate that it has nothing to do with the environment and environmental matters during or as a result of armed conflicts; but if we reread the phrase “and other inhumane acts committed against any civilian population”, we may find environmental relevance. Indeed, inhumane acts committed against any civilian population may contain, *inter alia*, the infliction of severe damage to the environment which might cause unnecessary human suffering to a large or a considerable segment of the civilian population. The infliction of severe damage or destruction to an environmental object or an object of an environmental character such as dams, dykes, and nuclear electric generating stations, is certain to cause unnecessary human suffering. Thus, such acts are and must be

considered as inhumane acts committed against civilian population, i.e. such acts are crimes against humanity.

It should be noted that considerations of humanity had been referred to long before the conclusions of the London Agreement embodying the Nuremberg Charter, the Hague Conventions No. II of 1899 and No. IV of 1907 respecting the Laws and Customs of War on Land referred to “the interests of humanity and the ever increasing requirements of civilization”<sup>62</sup> The 1899 Convention No. II referred to “populations and belligerents remains under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.”<sup>63</sup> The 1907 Convention No. IV stated that “the inhabitants and the belligerents remain under the protection and rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”<sup>64</sup> Accordingly, interests and laws of humanity have been widely accepted to be part of the law of nations or international law. Some considered them to be important source of international law and laws and customs of war.<sup>65</sup>

In fact, what the London Agreement and the Nuremberg Charter had done was to clarify the fact that any violation of the interests and laws of humanity was indeed an international crime, a crime against humanity for which the international criminal responsibility of the individual was established. Considerations and interests of humanity were indeed the bases and cornerstones upon which all Geneva Conventions of 1949 and the two Protocols of 1977 were built.<sup>66</sup> New and other

developments have led to the enlargement and spreading of notions respecting the considerations and interests of humanity with regard to armed conflicts as well as peace-time law such as the many various conventions and other instruments of human rights.<sup>67</sup> These and other developments have led to the express recognition that crimes against the environment are crimes against humanity, crimes against the peace and security of mankind, international crime and universal crimes.<sup>68</sup>

The importance of including crimes against the environment or environmental crimes within the category of crimes against humanity is represented in the fact that such crimes can be considered to have been committed not only in war or armed-conflict situations but in peace-time situations. Thus, the inclusion of environmental crimes into the category of crimes against humanity would give an added protection to the environment. Consequently, environmental crimes would be considered as war crimes if committed in armed-conflict situations and crimes against humanity if committed in peace-time situations. This opinion has not however been widely recognized as an expression of the existing international law and still needs some clarifications and qualifications.

Although the final efforts to codify and spell out crimes included within the jurisdiction of the International Criminal Court have resulted in listing environmental and environment-related crimes under the category of war crimes as illustrated in the previous part of this chapter, article 7 of the Rome Statute of the International Criminal Court dealing with "Crimes against humanity" included a provision which- in our view- has a significant environmental relevance. Article 7 states in part:

1. For the purpose of this Statute, “crimes against humanity” means 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:

.....

- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph I against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

....

Consequently, if acts against the environment of a state or any component thereof were designed to cause great suffering or serious injury to body or to mental or physical health, such acts would be considered crimes against humanity “provided that such acts (a) were committed as part of widespread or systematic attack, (b) that they were committed pursuant to or in furtherance of a state or organizational policy which proves the element of intent, and (c) that they were directed against any civilian population. The existence of an armed conflict or war nexus is not required.<sup>69</sup> It took the international community several decades to drop out the requirement of armed conflict or war insofar as crimes against humanity are concerned,<sup>70</sup> and this

made it possible to claim that the inclusion of environmental or environment-related crimes committed in peace-time situations, non-armed conflict situations and ambiguous situations which have not reached the level of being considered as armed-conflict situations into the category of crimes against humanity is certain to extend the scope of the protection of the environment; thus in armed conflict situations the environment would be protected by the rules and provisions relative to war crimes, whereas in non-armed conflicts or peace-time situations the environment would be protected by the rules and provisions prohibiting crimes against humanity.

The large-scale environmental destruction and damage caused by the Iraqis and the intentional use of the environment as a weapon during the conflict as shown in chapters 2,3 and 4, *supra*, are certain to fit the definitions of crimes and humanity, crimes against the peace and security of mankind, universal crimes and international crimes for which the international responsibility of the individual is established. Article 5 of the Statute of the International Tribunal for former Yugoslavia dealt with crimes against humanity and considered that any inhumane act committed or directed against any civilian population constituted a crime against humanity.<sup>71</sup> The same rule exists with regard to the Statute of the International Tribunal for Rwanda [article 3(I)]<sup>72</sup>. In addition, article 7 of the Rome Statute of the International Criminal Court included a similar rule [article 7(k)].<sup>73</sup> We assert that such a rule applies to acts involving large-scale environmental damage or destruction and to acts involving the use of the environment or environmental objects as weapons of war or armed conflicts since such acts are sure to be directed against any civilian population and are sure to cause unnecessary suffering to such population.

Our view which includes environmental and environment-related crimes within the category of crimes against humanity is, however, not commonly shared by many writers, nor does it reflect existing rules of international law as perceived by most writers and as not supported by the practice of states. Professors Birnie and Boyle studied the developments of the matter in the ILC reports and the 1998 Statute of the International Criminal Court and concluded that drastic changes took place with regard to the position of the ILC concerning the categorization of environmental crimes and the ensuing effects.<sup>74</sup>

Before 1996 the ILC had categorized such crimes as crimes against humanity but in 1996 it moved them into the category of war crimes which, when committed “in a systematic manner or on a large scale” amount to crimes against the peace and security of mankind.<sup>75</sup> Professors Birnie and Boyle wrote:

The effect of this re-classification and re-drafting is that the offence can be committed only during armed conflict, only when the methods and means of warfare are “not justified by military necessity”, and only when the intended environmental damage “gravely prejudices the health or survival of the population”. As defined by the Commission, the offence is far removed from its original form and has lost its autonomous character. Moreover, although it reflects some of the contemporary concern arising out of Iraq’s environmental warfare against Kuwait in 1991, the final ILC text “has emasculated to such an extent that its conditions of applicability will almost never be met”.<sup>76</sup>

The Rome Statute of the International Criminal Court retained the ILC’s basic approach but in a less castrated form. This Statute and the relevant provisions were

studied under the title “War Crimes and the Environment” dealt with in the previous section.<sup>77</sup>

#### IV

### JURISDICTIONAL ISSUES

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The question now are as follows: Which court or tribunal has or may have jurisdiction to try Saddam Hussein, his aides, his subordinates, and the members of his armed forces for the crimes they committed against the environment whether included under the definitions of “crimes against peace”, “war crimes”, “crimes against humanity” or independent “international crimes”? Does the to be established International Criminal Court pursuant to the newly signed Rome Statute have jurisdiction over the above stated crimes committed against Kuwait and its environment? Do we need to establish another international tribunal to try Saddam and his subordinates? Should such a tribunal be established by a Security Council resolution? Or, should it be established by a treaty or an agreement to be concluded by the concerned states? Do Kuwait courts have jurisdiction over the stated crimes? Can they legally try Saddam Hussein and his subordinates for such crimes? Or, do we need to establish a new Kuwaiti Court to be given the power to try such cases pursuant to a new Kuwaiti law to be enacted on the subject?

***First: The International Criminal Court:*** Although the newly signed Rome Statute of the International Criminal Court conferred upon the Court subject-matter jurisdiction over the crime of genocide,<sup>108</sup> crimes against humanity,<sup>109</sup> war crimes,<sup>110</sup> and the crime of aggression,<sup>111</sup> all of which are connected with and cover in some respect or another crimes against the environment as illustrated throughout this

chapter, article 11 of the Rome Statute bars the jurisdiction of the said Court over the crimes committed by Saddam Hussein and his aides and subordinates because of the rules concerning “jurisdiction *ratione temporis*”. This article reads:

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12 is relevant in this regard, it stipulates:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5 [These crimes are, the crime of genocide, crime against humanity, war crimes, and the crime of aggression].
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
  - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
  - (b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that Statute may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Thus, according to these quoted provisions of articles 11 and 12 of the Rome Statute of the International Criminal Court, the Court will not have jurisdiction over crimes committed before the entry into force of the Statute for each of the States concerned. But there is a possibility, however remote, that a State which becomes a Party to the Statute may declare that it accepts the jurisdiction of the Court over crimes that had been committed on its territory prior to the entry into force of the Rome Statute if such crimes are among the four categories of crimes over which the Court has jurisdiction, i.e., the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. In addition, there is another remote possibility that the Security Council acting under Chapter VII of the Charter of the United Nations may decide to refer to the Prosecutor a situation in which one or more of such crimes appear to have been committed [article 13 paragraph (b) of the Rome Statute]. It therefore appears that Kuwait can either refer the crimes committed by Saddam Hussein and his subordinates to the Prosecutor after establishing the Court on the ground that such crimes had been committed on Kuwaiti territory or may request the Security Council to act under Chapter VII of the U.N. Charter and refer such crimes to the Prosecutor under the relevant provisions of the Rome Statute. Nevertheless, such possibilities appear remote as the relevant provisions of the Rome Statute are not clear and are susceptible of conflicting views and contradictory interpretations. In addition, the Rome Statute has not come into force yet and may take years to enter into force.<sup>112</sup>

***Second: An Ad Hoc International Tribunal:*** Probably, the establishment of an *ad hoc* international tribunal to try Saddam Hussein and his subordinates for the crimes they committed against Kuwait, its territory, its population, and its environment is the most logical solution on the international level. Such a tribunal could be established either by a treaty concluded by the concerned States or by a Security Council resolution to be issued under Chapter VII of the U.N. Charter. The states which participated in the Liberation of Kuwait together with the Gulf states including Kuwait could participate in the formation and conclusion of a treaty or an agreement establishing an *ad hoc* tribunal similar to the Nuremberg Tribunal, such an *ad hoc* tribunal would be entrusted with the jurisdiction to try Saddam Hussein and his subordinates for all the crimes they committed against the State of Kuwait, its population, its territory and its environment and all other crimes against peace, war crimes, crimes against humanity and other international crimes committed by Saddam and his subordinates. But after the passage of a little more than a decade now, it may seem doubtful whether the concerned states would see it politically suitable to establish such a tribunal; besides, it may seem now difficult to achieve a unanimous agreement regarding a treaty on the establishment and jurisdiction of the tribunal. It may take years and years to get the proposed treaty concluded and the proposed tribunal operating.

Now we can say convincingly that creating such a Court is necessary in the interests of maintaining international peace and security.

Probably, it is better and easier to have such a tribunal established by the U.N. Security Council acting under Chapter VII of the U.N. Charter. The establishment

of the International Tribunal for former Yugoslavia and the International Tribunal for Rwanda constitutes very useful precedents in this regard.<sup>113</sup>

In this connection we may refer to the concurrent Resolution of the Congress of the United States concerning the urgent need for an international criminal tribunal to try members of the Iraqi regime for crimes against humanity in which it is resolved by the House of Representatives, with Senate concurring, that :

.....

(2) the President and the Secretary of State should

....

(B) Work actively and urgently within the international community for the adoption of a United Nations Security Council resolution establishing an International Criminal Court for Iraq.<sup>114</sup>

Other efforts have been undertaken within the United States, Kuwait and other states to encourage the United Nations Security Council to establish such a tribunal, but so far it appears that the Security Council is reluctant to establish any such tribunal because of the changing international political environment in favour of alleviating the sufferings of the Iraqi people. This has led to the softening of the international community's resolve to hold an international criminal trial for Saddam Hussein and his henchmen. The Kuwaiti jurisdiction and other concerned states' jurisdictions might be the next most logical alternative as illustrated below:

**Third: The Kuwaiti Jurisdiction:** The crimes committed by Saddam Hussein and his subordinates against Kuwait, its territory, its population and its environment do constitute international crimes, crimes against humanity and universal

crimes. Jurisdiction to try individuals who committed such crimes is conferred upon the courts of all states; its is a universal jurisdiction. There are, at least, two international law principles each of which alone gives the Kuwaiti courts the right to entertain jurisdiction over the crimes committed by Saddam Hussein and his subordinates; these principles are : (1) the territorial principle,<sup>115</sup> and (2) the universality principle.<sup>116</sup> Indeed each of these two principles independently confers upon the Kuwaiti Legislature the power and authority to prescribe rules of law defining international crimes and determining their punishments.<sup>117</sup> Saddam Hussein's crimes and those of his subordinates were committed on the territory of Kuwait against the Kuwaiti nationals and the environment; they are also considered crimes against Kuwait's legitimate national and international interests and they are against the interests of the international community and humanity or mankind as a whole. Thus, the two principles are applicable and the Kuwaiti courts have original jurisdiction over such cases even though the Kuwaiti legislature may have not acted to define such crimes and determine their punishments. To be more precise, we invite the Kuwaiti legislature to enact a law defining in detail the crimes committed by Saddam Hussein and his subordinates against Kuwait, its population, its territory and its environment and to determine the corresponding punishment or punishments with regard to each crime . But we must stress once again that Kuwaiti courts do have original jurisdiction over such cases even though the Kuwaiti legislature did not act as yet. The Kuwaiti courts get their power and authority directly from the rules and principles of international law which have passed into and constitute an integral part of Kuwaiti law as will be seen in chapter 6 *infra*.<sup>118</sup> But in response to a question which might be raised as to whether Kuwaiti courts may entertain jurisdiction based on the principle of territoriality to try and punish persons who never entered Kuwait

not caught on Kuwaiti soil, we may easily assert that under the general criminal jurisdiction principles adopted by the Kuwaiti legal system and most of the Arab and Middle Eastern States legal system, the courts of a state do have territorial jurisdiction to try and punish all perpetrators and accomplices of any crime committed in whole or in part or planned to be committed in whole or in part within the territory of that state or any crime having any effect within that territory. Persons accused of committing such crimes and their accomplices can be tried in absentia if not caught by the authorities of the state concerned.<sup>119</sup>

However, the principle of universality may indeed be the most logical and most convincing principle upon which Kuwaiti courts entertain jurisdiction to try and punish Saddam Hussein and his subordinates. Saddam Hussein cannot and may not claim any immunity as the Kuwaiti court trying him would be sitting as an international court applying international law and trying him for serious violations of the rules of international law and international humanitarian law which do not give any person any shield of immunity for violating such rules as has been clearly shown in this chapter.

Recent trials and trial attempts concerning heads of states or governments might be important to refer to in this connection. The last of these cases, so far, is the case against the leader of Libya, Colonel Moammar Kadhafi which was brought before the French courts to allow the criminal proceedings and prosecution of Colonel Kadhafi to continue<sup>120</sup>. Colonel Kadhafi was accused of planning and perpetrating terrorist crimes, namely causing the explosion of a French DC10 Airliner over the Tenere Desert and the killing of all 170 people on board which took place on

September 19, 1989. A very remarkable step was taken by the Paris Court of Appeal on October 20, 2000, when it allowed criminal proceedings against Colonel Kadhafi to continue and decided that “the judge can proceed because immunity does not apply to acts such as terrorism.”<sup>121</sup> Unfortunately, this decision was overruled by the French Court of Cassation, the highest French Court, on March 13, 2001, on the ground that heads of states do enjoy immunity from criminal prosecution in foreign countries.<sup>122</sup>

But, unlike the position adopted by the French Court of Cassation, American and British Courts adopted a different position. Thus, the United States Court of Appeals refused to recognize the immunity of Noriega as the head or acting head of state in Panama and affirmed a lower court’s judgments of convictions against him. The events of this case began when President George Bush directed, in December 1989, U.S. armed forces combat in Panama to safeguard American lives, restore democracy, preserve the Panama Canal treaties, and seize Noriega to face federal drug charges in the United States. As a result of this armed intervention Noriega lost his effective control over Panama and he surrendered to U.S. military officials on January 3, 1990. He was taken to Miami to face the then pending federal charges against him. A lengthy trial took place and the jury found Noriega guilty and district court entered judgments of conviction against him and sentenced him to a number of consecutive long imprisonment terms. Noriega appealed his convictions, and, later, filed in district court a motion for a new trial which was denied by the district court. Noriega filed a second appeal. The U.S. Court of Appeals had to deal with the two appeals. One of the most important grounds upon which Noriega based his appeals was that of the defense of head-of-state immunity according to which the district court should have dismissed the indictment against him. Noriega insisted that he was entitled to

such immunity because he served as the *de facto*, if not the *de jure*, leader of Panama.<sup>123</sup>

The Court of Appeals examined, in detail, the rules of head-of-state immunity as developed and applied in the U.S. legal and judicial system and concluded that Noriega's immunity was not recognized by the Executive Branch, and that "by pursuing Noriega's capture and his prosecution, the Executive Branch has manifested its clear sentiment that Noriega should be denied head-of-state immunity."<sup>124</sup> The Court stressed further that Noriega had never been the constitutional leader of Panama; that Panama had not sought immunity for Noriega; and that under applicable rules of American law, former heads of states did not enjoy any immunity insofar as their private or criminal acts were concerned.<sup>125</sup>

In another important case dealing generally with the immunity of foreign government officials accused of committing crimes against the law of nations or crimes against humanity, the *Filartiga case*, the U.S. Courts, including the U.S. Court of Appeals, declared that torture was an international crime, a crime against the law of nations and a crime against humanity, that the courts of the United States and the courts of all other nations do enjoy universal jurisdiction to hear cases against persons accused of committing torture and persons accused of being implicated in one way or another in the commission of the crime of torture and that all such persons are the enemies of mankind. The court of Appeals declared further that persons accused of committing or implicated in the commission of torture could not invoke the defense of immunity nor could they claim that they were acting under the colour of their authority.<sup>126</sup>

The House of Lords in Great Britain has reached similar conclusions in the *Pinochet* case in its final phase<sup>127</sup> decided on 24<sup>th</sup> of March 1999. The case involved an extradition request made by Spain to the authorities in Great Britain to extradite Pinochet, the former head of State of Chile, who was on a visit to London, to be tried in Spain for various crimes against humanity allegedly committed whilst he was head of state during the period between 1973 and 1990. The House of Lords allowed the appeal but a rehearing of the appeal before a different constituted committee in the House of Lords took place and on that rehearing the House of Lords finally decided that:

[T]orture was an international crime against humanity and *jus cogens* and after the coming into effect of the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 there had been a universal jurisdiction in all the Convention State parties to either extradite or punish a public official who committed torture; that in the light of that universal jurisdiction the state parties could not have intended that an immunity for ex-heads of state for official acts of torture ....would survive their ratification of the Convention; that ....since Chile, Spain and the United Kingdom had all ratified the Convention by 8 December 1988 the applicant could have no immunity for crimes of torture or conspiracy to torture after that date;....<sup>128</sup>

Although extradition of Pinochet could not be effected because of a medical expert opinion that Pinochet would not be able to stand trial proceedings because of lack of medical fitness, the House of Lords' decision is a clear affirmation of the principle of universality. The underpinnings of this decision support the conclusion

that heads of states who are still in power do not enjoy immunity for crimes of torture and related crimes as the 1984 Convention against Torture, upon which the House of Lords bases its decision, excludes any such immunity.<sup>129</sup>

Finally, it might be worthwhile to refer to the efforts of the international community to bring Slobodan Milosevic to justice before the International Criminal Tribunal for the former Yugoslavia. Slobodan Milosevic was until very recently the Head of State of the Federal Republic of Yugoslavia when an indictment was issued against him and four others of his very close aides, including Milan Milutinovic, the President of Serbia, by the International Criminal Tribunal for former Yugoslavia. The charges against Milosevic and his aides included crimes against humanity and war crimes.<sup>130</sup> Efforts to have Milosevic surrendered to the custody of the Court to proceed with his trial have finally achieved success. Milosevic was surrendered to the Custody of the International Criminal Tribunal for former Yugoslavia where he made his first appearance in the arraignment proceedings on the third of July 2001. Criminal proceedings are expected to take several months or even years before they are finally concluded but justice seems to be gaining the day.

## CONCLUSIONS

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We have seen that the international criminal responsibility of the individual has been firmly established in international law since the conclusion of the 1945 London Agreement embodying the Charter of Nuremberg International Military Tribunal. The scope of this responsibility is ever increasing so as to include more crimes and more types of responsibility as time goes by. Many crimes have been added to the various categories of international crimes. Crimes against peace, war crimes, and crimes against humanity, the traditional international crimes include certain environmental elements and factors. War crimes in particular cover a large variety of environmental crimes. But environmental crimes are committed during or as a result of armed conflicts as well as during peace-time situations, this latter category may be included under crimes against humanity or general international crimes. International environmental crimes are even becoming increasingly growing as an independent category of international crimes covering all environmental crimes whether committed in or because of armed conflicts or in peace-time situations.

The international criminal responsibility for environmental crimes is firmly established and recognized under international law. All individuals are responsible under international law for the international crimes they commit, plan or participate in committing, or instigate their commission irrespective of the official positions of such individuals. The official position of any individual, be it a head of a state, a head of government, a minister, a commander-in-chief of the armed forces, or a holder of any

other military or civilian position, does not give that individual any shield or immunity from prosecution nor can such position be a reason for mitigating applicable criminal punishment or punishments.

Under existing rules of international law, superiors are responsible for the international crimes committed by any of their subordinates if such superiors planned, ordered, instigated or participated in the commission of any such crimes. Superiors are equally responsible under existing international law for the international crimes committed by their subordinates if the superior “knew”, “must have known”, “should have known” or “had reason to know” that any of such crimes “was planned”, “was being planned” or “was being committed” and did not take adequate and effective measures to prevent the commission or the completion of the crime. All such rules are applicable to all international crimes including crimes against the environment.

As we have seen, Saddam Hussein is responsible for all international crimes he committed against Kuwait including all the crimes committed against the Kuwaiti environment whether they were listed under “crimes against peace”, “war crimes”, “crimes against humanity” or “independent international crimes”. He, his aides and subordinates are responsible for all the crimes committed against Kuwait, its population, its territory and its environment. An international tribunal could be established by the concerned State or by the Security Council to try Saddam Hussein, his aides and his subordinates. But it must be noted that under the principle of universality the courts of all nations have jurisdiction to try Saddam Hussein, his aides and subordinates. Kuwaiti courts have jurisdiction over such crimes according to the territoriality principle and the universality principle. Each of these principles is

capable by itself of establishing the jurisdiction of the Kuwaiti courts over such crimes.

It is also important to stress the importance of the most recent indictment issued by the International Criminal Court for former Yugoslavia on 27 May 1999 against the President of the Federal Republic of Yugoslavia, the President of Serbia and three other accusing them of committing and ordering the commission of crimes against humanity, genocide, and war crimes in Kosova. It has been further declared that an investigation of the responsibility of the president of the Federal Republic of Yugoslavia for other prior serious violations of the international humanitarian law in former territories of Yugoslavia is underway by the Prosecutor of the Court. This, as has been declared is the first time that a head of State in power is being indicted by an international tribunal. This could be a useful precedent to be followed with Saddam Hussein if an international tribunal is established to try him and set in motion the operative processes of international law.

It should also be stressed that until such a time that Saddam Hussein is caught, arrested, and brought to trial, a trial in absentia can be held to establish his guilt and order all measure related thereto.

It must at last be emphasized that the successful completion of fair criminal proceedings and criminal trials of both Slobodan Milosevic and Saddam Hussein, two of the most notorious planners, instigators, and perpetrators of heinous war crimes and crimes against humanity in modern history, and their henchmen will, if realized, restrain all persons who hold either a *de jure* or a *de facto* authority in their countries

and will make all such persons refrain from ever planning, instigating, committing and/or ordering the commission of such crimes.

## NOTES TO CHAPTER FOUR

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1. General books on international law have not, so far, included any sizable part or section on the international criminal responsibility of states or state crimes; they include relatively few and short notes on the international criminal responsibility of the individual. Specific research topics and articles on the criminal responsibility of states or state crimes and on the individual's criminal responsibility under international law appear to have been increasing during the past decade or so as it will be shown in most of the coming notes.
2. *See generally* ;I.BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 4<sup>th</sup> ed. 561 *et. seq.* (1990); L.SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATION, PUBLISHED in the Series "International Studies in Human Rights, vol. 21, p. 139 *et.seq.* (1991); NORGAARD, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW, *passim*, (1962) Korowicz, *The problem of the International Personality of Individuals*, 50 *AJIL* (1956); Wright, *War Criminals*, 39 *AJIL* 257, 262 *et.seq.* (1945).
3. *See*; Judgment of the Nuremberg International Military Tribunal, Sept. 30, 1946; Full text of the Judgment presented by the Secretary of State for Foreign Affairs to Parliament by Command of His Majesty Cmd. 6964, London, 1946; Full text of the Judgment also *in* 22 Proceedings in the Trial of the Major War Criminals Before the International Military Tribunal 411-589; 41 *AJIL* 172 (1947); 20 *Temp. L.Q.* 167(1947).
4. The International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of former Yugoslavia since 1991 was established by the U.N. Security Council Resolution 827 of 1993 which was adopted by

the Council on 25 May 1993. Judges of the Tribunal renamed it to be the “International Criminal Tribunal for the former Yugoslavia”, a name which appears in all its annual reports and all other subsequent U.N. documents.

5. The International Tribunal for Rwanda was established by U.N. Security Council Resolution No. 955 which was adopted on 8 November 1994. The Statute of International Tribunal for Rwanda was annexed to this resolution.
6. Rome Statute of the International Criminal Court was concluded and opened for signature at Rome, Italy, on 30 July 1998, U.N. Doc. A/CONF. 183/C.1/L.76/Add. 1. This statute envisages the establishment of a permanent international criminal court having jurisdiction over “the most serious crimes of concern to the international community as a whole.” The Court has jurisdiction with respect to the following crimes (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression (Art.5 of the Statute).
7. *See generally for example; Kelsen, will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?; 1 Int’l L.Q. 153, passim, (1947); Schick, The Nuremberg Trial and the International Law of the Future, 41 A.J.I.L. 770, 770 et. seq. (1947); L.SUNGA, note 2 at 17 et.seq.; Wright, supra note 2, passim.*
8. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed at London, 8 August 1945, UNTS, vol. 82, pp. 280-311, No. 251; GBTS, 1946, No. 27, Cmd. 6903; U.S. Statute at Large, vol. 39, pp.1544-1589; 39 AJIL (1945) Suppl., pp. 257-264.
9. *Id.* art. 6 para (a).
10. Kellogg-Briand “pact of Paris” 27 August 1928, 94 L.N.T.S. 57.
11. Judgment of the International Military Tribunal, the copy presented by the Secretary of State for Foreign Affairs, supra note 3 at 39.

12. *Id.* at 40

13. Kelsen, *Will the Judgment* .....*supra* note 7 at 161-162. In this connection the writer said:

“In establishing such individual criminal responsibility the London Agreement created law not yet established by the Briand-Kellogg Pact, or valid as a rule of general international law.

In creating the law to be applied by the tribunal in providing for individual criminal responsibility not only for waging war in violation of existing treaties but also for planning, preparation or initiation of such war and participation in a conspiracy for accomplishment of these actions, the London Agreement has certainly created new law. But the International Military Tribunal established by this Agreement had no part in the creation of this law. Its function was limited to the strict application of the rules laid down in the Agreement to concrete case, there was no creative function in the judgment of the tribunal. This judgment is not a source of law in the sense a true precedent is. The source of law is the London Agreement and it is a source of law only and exclusively for the International Military Tribunal established by this Agreement.”*Id.*

14. *In re Hirota and Others* (International Military Tribunal for the Far East, Tokyo, 1948), [1948 A.D.] 356, *passim*.

15. U.N.Charter, art. 2 para.4, and chapter VII.

16. Affirmation of the Principles of International Law Recognized by Charter of the Nuremberg Tribunal, U.N.General Assembly Resolution 95(1) adopted on 11 December 1946, U.N. GAOR, 1<sup>st</sup> Sess., Part.II, at 188, U.N. Doc. A/64/Add.1(1946).

17. Report of the International Law Commission, 2<sup>nd</sup> Session, [1950] II I.L.C. *Year Book* 364, 374, 376.

18. Report of the International Law Commission, 6<sup>th</sup> Session,[1954] II I.L.C. Year Book, 140, 150.
19. This was so and continues to be true even though a definition of aggression which is legally accepted to be applicable in a court of law and to be universally binding on all states and individuals has not been agreed upon yet.
20. Definition of Aggression, U.N. General Assembly Resolution, 3314(XXIX), 14 December 1974, 29 GAOR, Supp (No. 31) 142, U.N. Doc. A/9631 (1974).
21. Bassiouni, *The History of the Draft Code of Crimes Against the Peace and Security of Mankind*, 27 Is. L.R. 247, 258(1993).
22. *Case concerning Military and Paramilitary Activities in and against Nicaragua (Merits)*,[1986] I.C.J. Rep.14,103.
23. Report of the International Law Commission, 43<sup>rd</sup> Session at 244 (Article 15 (4)), (mimeographed, 1991); Report of the International Law Commission, 48<sup>th</sup> Session at 83-85 (Art.16) (1996), GAOR, 51<sup>st</sup> Session, Supp.No.10(A/51/10).
24. See part IV of this chapter, *infra* text above note 108 *et. seq.*
25. For the details of these crimes and the documentary evidence see, e.g. Hussein Esa *MAL-ALLAH, IRAQI WAR CRIMINALS AND THEIR CRIMES DURING THE IRAQI OCCUPATION OF KUWAIT (in Arabic)*, the Kuwait Center for Research and Studies, (1995),pp.85-195.
26. See this text above note 74 *et.seq.* Part IV of this chapter.
27. *Supra* note 6, art.5; but it should be noted that paragraph 2 of article 5 of the Rome Statute provides:  

“The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with relevant provisions of the Charter of the United nations.”
28. Wright, *supra* note 2 at 260.
29. *Id.* at 260 *et seq.*
30. The Charter of the Nuremberg International Military Tribunal, *supra* note 8, art.6(b).
31. Sunga, *supra* note 2 at 28-29.

32. International Military Tribunal (Nuremberg), Judgment (1946), 1.I.M.T., *supra* note 3 at 223.
33. See note 16 and text above it, *supra*.
34. Sunga, *supra* note 2, at 36, for the same meaning see Kelsen *supra* note 7, at 162.
35. *See generally*; Bassiouni, *supra* note 21, *passim*, Sunga, *supra* note 2, at 34-35.
36. Report of the International Law Commission, U.N.Doc. A/CN.4/20, (1950).
37. *Supra* note 4.
38. U.N.Security Council Resolution 827, *supra* note 4, this resolution embodied the Statute of the International Criminal Tribunal for former Yugoslavia.
39. *See* note 5 *supra*.
40. *Id.*
41. *See* note 6 *supra*.
42. Paragraph 1 of article 5 of the Rome Statute provides:  
 “The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:  
 (a) The crime of genocide;  
 (b) Crimes against humanity;  
 (c) War crimes;  
 (d) The crime of aggression.”  
 For the text of paragraph 2 of the same article *see* note 27 *supra*.
43. See this text above note 60 *infra*.
44. Charter of the Nuremberg International Military Tribunal art.6(b).
45. Convention (IV) Respecting the Laws and Customs of War on Land, signed at the Hague, 18 October 1907, Annexing the Regulations Respecting the Laws and Customs of War on Land, This Convention entered into force on 26 January 1910, U.S.Statutes at Large, vol. 36, pp.2227-2309; Malloy, vol. II, 2269-2290; Bevans, vol.1, pp.631-653; *AJIL*, vol.2, 1908, Suppl. pp.90-117.
46. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, signed at Geneva, 12 August 1949. this Convention entered into force

- on 21 October 1950, U.S.TIAS 3365, UST 6 pp. 3516-3695; *AJIL*, vol.50, 1956, Suppl. pp.724-783.
47. See chapter 2 of this research, note ...*supra*.
  48. *Id.*
  49. *Id.*
  50. *Id.*
  51. See chapter 2 of this research note...*supra*.
  52. Protocol II, *id.*, art.16
  53. See chapter 2, *supra*, at..., and note...
  54. *Id.*
  55. See, e.g. Treaty on the Protection of Artistic and Scientific Institution and Historic Monuments (Roerich Pact), signed at Washington on 15 April 1935, entered into force on 26 August 1935, LNTS, Vol. CLXII, pp. 290-294, No. 3874; Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at the Hague, 14 May 1954, entered into force on 7 August 1956, UNTS, Vol. 249, pp. 240-357; Protocol for the Protection of Cultural Property in the Event of Armed Conflict, signed on 14 May 1954, entered into force on 7 August 1956, UNTS, Vol. 249, pp.358-386.
  56. For a review of such convention and agreements see chapter 2, *supra*.
  57. For the details of such crimes and documentary evidence see Hussein Esa Mal-Allah, *supra* note 25, pp.199-355
  58. *Supra* note 4 and note 38.
  59. *Id.*
  60. *Supra* note 6.
  61. But we must note that the Rome Statute has not been extensively studied and has yet to be examined and commented on; it is open to many conflicting views and opinions.
  62. Convention (II) with Respect to the Laws and Customs of War on Land, signed at the Hague, 29 July 1899, entered into force on 4 September 1900, *AJIL*, Vol.I, 1907, Suppl. Pp. 129-153. Text quoted above this note is from the second paragraph of the Preamble, but the corresponding words from the second paragraph of the 1907 Convention (IV), note 45 *supra*, read as follows, “the interests of humanity and the ever progressive needs of civilization;”

63. The 1899 Convention (II) *id.*, the ninth paragraph of the Preamble.
64. The 1907 Convention (IV), the ninth paragraph of the Preamble.
65. *See*; e.g. I. BROWNLIE, *supra* note 2 at 28.
66. In fact each and every provision in the four Geneva Conventions of 1949 and each and every provision in the two Protocols of 1977 was based on the considerations of humanity or has humanity as its most basic underpinning.
67. For the same meaning *see*; Sunga, *supra* note 2 at 48 *et seq.* & pp.65-97.
68. Sunga, *id. passim*.
69. For more details *see*; Fenrick, *Should Crimes Against Humanity Replace War Crimes?* 37 *Columbia J. Transnational L.* 767 (1999) pp. 777 *et seq.*; *see also id* at 775. For the drafting history of the Rome Statute and the ILC efforts to eliminate the war nexus from crimes against humanity *see*; Schaack, *The Definition of Crimes against Humanity: Resolving the Incoherence*, 37 *Columbia J. Transnational L.* 787 (1999) pp.820 *et seq.*
70. *see* note 69 *id.* Probably, the Nuremberg Trials witnessed the first attempts to eliminate the war nexus from crimes against humanity; the *Einsatzgruppen Case* and the *Justice Case* are the first two such cases, *see* Fenrick, *id.* at 775.
71. *Supra* note 4 & note 38.
72. *Supra* note 5.
73. *Supra* note 6.
74. Birnie and Boyle, *International Law and the Environment*, (2<sup>nd</sup> ed.)Ch.5, forthcoming, text of which is provided by Professor Boyle.
75. *See* Article 12 (4) II Yearbook ILC (1986), pt. 1, 86; Article 14(6), rept. Of ILC (1989) GAOR A/44/10, 168f; article 26 Rept. Of ILC (1991) GAOR A/46/10. And *Compare with* Article 20(g), Rept. Of ILC (1996) GAOR A/51/10, 100-20.
76. Note 74 *supra*.
77. This text above note 60 *et seq. Supra*.
78. Versailles Peace Treaty with Germany, 1919, 2 *Peace Treaties* 1265, 1389, art. 227 of the treaty. *See* Q. Wright, *The Legal Liability of the Kaiser*, 13 *Am. Pol.Sci. Rev.* 120(1919); Wright, *supra* note 2, at 267 *et seq.*
79. For the text of the Dutch note, *see*: J.B.Scott, "The Trial of the Kaiser", *What Really Happened at Paris*, 231, 243-4 (E.M.House and C.Seymour eds., 1921).

80. Nuremberg Judgment, pp. 52-53.
81. *For detailed studies of the Yamashita Case, see* R. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* (1982); A REEL, *THE CASE OF GENERAL YAMASHITA* (1949); W. Parks, *Commands Responsibility for War Crimes*, 62 *MIL.L.REV.*1,22-38(1973); *United States of America v. Tomoyuki Yamashita*, a Military Commission appointed by General Douglas Mac Arthur by Special Order 110, para.24, Headquarters United States Army Forces, Western Pacific, 1 Oct. 1945 at 23 [hereinafter cited as Yamashita Commission Record], *reprinted* in LAEL, *THE YAMASHITA PRECEDENT*, at 80 (emphasis added).
82. 327 U.S.I. (1946) at 14-15.
83. *See, e.g.* T. Wu & Y. Kang, *Criminal Liability For the Actions of Subordinates – The Doctrine of Command Responsibility and its Analogues in United States Law*, 83 *Harvard Int'l L.J.* 272, 291-2, (1997); W. Fentrick, *Some International Law Problems Related to Prosecution before the International Criminal Tribunal for the Former Yugoslavia*, 6 *Duke J.Comp. & Int'l L.* 103, 110-25 (1995).
84. Statute of the International Criminal Tribunal for Former Yugoslavia, *supra* note 4, art. 7, paras 2,3,& 4; Statute of the International Tribunal for Rwanda, *supra* note 5, art. 6, paras 2, 3 & 4. The Rome Statute of the International Criminal Court, *supra* note 6, arts. 23, 24, & 25.
85. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted by U.N. General Assembly Resolution 2391 (XXIII) on 26 November 1968 and entered into force on 11 November 1970.
86. *Id.*
87. *Supra* notes 4 & 38.
88. Wu & Kang, *supra* note 83, at 277.
89. *Id.*
90. *Id.*
91. *Id.* at 277-8
92. *See supra* note 84.
93. *See id.*

94. Report of the International Law Commission on the work of its forty-eighth session, 6 May – 26 July 1996, GAOR, 51<sup>st</sup> Sess. Suppl. No.10 (A/51/10), pp.18, 34 & 39.
95. See Parks, *supra* note 81; see also M.C. BASSIOUNI, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, p. 366(1966).
96. See this text above notes 83-94.
97. See chapter 6 *infra*.
98. See resolutions referred to in chapters 3 & 4, *supra*.
99. See, e.g. Mal-Allah, *supra* note 25, *passim*.
100. This text, *passim*.
101. See, e.g. Mal-Allah, *supra* note 25, *passim*.
102. *Id.*
103. *Id.*
104. *Id.*; see also chapter 3 & 4 *supra*.
105. Mal-Allah, *supra* note 25, *passim*.
106. See chapter 3 & 4 *supra*.
107. *Id.* see also this chapter, *passim*. In this connection, see also: Report on Iraqi War Crimes (Desert Shield/Desert Storm) Unclassified Version, War Crimes Documentation Center, Office of the Judge Advocate General, Headquarters, Department of the Army, Washisngton, D.C. 20310, January 8, 1992, (released February 1993); Saddam Hussein as a War Criminal, by Hon. John Edward Porter of Illinois in the House of Representatives, U.S. Congress, September 21, 2000, Congressional Record: September 22, 2000 (Extensions), [From the Congressional Record Online via GPO Access].
108. The Rome Statute of the Intenational Criminal Court, *supra* note 6, arts. 5 & 6,
109. *Id.* arts. 5 & 7.
110. *Id.* arts. 5 & 8.
111. *Id.* art. 5.
112. The Rome Statute has not so far been ratified by the required number of states and, thus, still not in force.
113. See notes 4, 5 & 38, *supra*.
114. 105<sup>th</sup> Congress of the United States, H.Con. Res. 137, Expressing the sense of the Hosue of Representatives (with the Senate concurring) concerning the

urgent need for an international criminal tribunal to try members of the Iraqi regime for crimes against humanity.

115. The territoriality principle is a universally well-settled and deeply rooted principle of international law and national laws of every state in the world. According to this principle, every state has the right and authority to prescribe rules of law applicable to all activities within its territory and its appurtenances, i.e., its airspace and territorial sea. Each and every state has the right and authority to prescribe and apply within its territory rules of law defining crimes and determining the corresponding punishment or punishments for each crime. The territorial principle, furthermore, confers upon the courts of every state the jurisdiction to try criminals accused of committing any criminal act upon or within the territory of that state. Each and every general book on environmental law includes a sizable part on territory, territorial sovereignty and jurisdiction. *See, e.g.* I. BROWNLIE, *supra* note 2, at 300 *et seq.* The Iraqi crimes including crimes against peace, war crimes, crimes against humanity and all other international crimes as detailed in this chapter are crimes committed upon and within the territory of the State of Kuwait and its appurtenances. Hence, the Kuwaiti courts have original jurisdiction to try all Iraqi criminals accused of committing all such crimes including the Iraqi president, his aides and all his subordinates, all who do not enjoy any immunity under the rooted rules of international law as detailed in this chapter.
116. The universality principle is now well-recognized as a deeply rooted principle of international law under which the courts of each and every state in the world have jurisdiction to try any individuals, irrespective of their nationalities, who are accused of committing crimes against international public order and crimes under international law. The scope of this principle is increasingly growing day by day. Crimes against peace, war crimes, crimes against humanity, other violations of the international humanitarian law, serious violations of international human rights law, crimes against the environment, and other international crimes are included under the principle of universality. *See generally*; I. BROWNLIE, *supra* note 2, at 304-305 and references provided therein; Henkin & Others, *supra* note 118, at 1049, 1082-

6; RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (THIRD) 1986, § 404 provides:

**“Universal Jurisdiction to Define and Punish Certain Offenses:**

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.”

117. See, notes 115-116, *supra*.
118. See chapter 6, *infra*.
119. Trial in absentia is accepted in almost all Arab countries and the countries adopting in one form or another the French Criminal law principles. The Kuwaiti Criminal Law has indeed recognized the Validity of holding trials in absentia. Article 11 of law No. 16 of 1960 establish the jurisdiction of the Kuwaiti Courts in criminal matters on the basis of territoriality.
120. The most authoritative effort to confront the issue of legality of nuclear weaponry was made by the International Court of Justice in its advisory opinion of 1996. The majority decision expressed the strong view that a threat or use of nuclear weapons might possibly be legal in the setting of a state confronting an extreme threat to its own survival, but that all states have a legal duty to pursue disarmament in good faith. See legality of the threat or use of nuclear weapons (July 8, 1996), I.C.J. reports (1996), p.226; see also Richard Falk, “Nuclear weapons, International Law and the World Court: A Historic Encounter,” *A M J. Int’l.* 91(1996), 235-48. Jonathan Schell, *The Gift of Time: The case for abolishing nuclear weapons now* (New York: H. Holt & Co., 1998); Arundhati Roy, “The End of Imagination” *The Nation* (Sept.28, 1998) 11-19.
121. Cour D’Appel de Paris, Chambre d’Accusation 2<sup>ème</sup> section, Arret, prononcé en Chambre du Conseil le 20 Octobre 2000.
122. This decision was taken by the French Court of Cassation on 13 March 2001, *Al Ahram International* p.1, 14 March 2001.

123. *United States of America, Plaintiff – Appellee, v. Manuel Antonio Noriega, Defendant – Appellant, United States Court of Appeals, Eleventh Circuit, Nos. 92-4687, 96-4471, Judgment, July 7, 1997.*  
[[http://laws.findlaw.com/11<sup>th</sup>/924687\\_man.html](http://laws.findlaw.com/11th/924687_man.html)]p.4.  
[hereinafter cited as *Noriega Appeals' Case*]
124. *Id.* at 5-6.
125. *Id.* at 6.
126. *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) *passim*, *Filartiga v. Pena-Irala*, 577 F. Suppl 860 (1984), *Passim*.
127. *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No.3)*, House of Lords, March 24, 1999, *The Weekly Law Reports* 9 April, 1999, pp.(827-927).
128. *Id.* at 828.
129. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 91984), U.N. Doc.A/Res/39/46, see in particular articles 2, 4, 5, 6, 7 8, & 14.
130. *The International Criminal Tribunal for the former Yugoslavia, The Prosecutor of the Tribunal against Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic, and Vljako Stojiljkovic; Indictment*, May 22, 1999 confirmed by judge David Hunt on May 24, 1999. Press release May 27, 1999.

## GENERAL CONCLUSION AND RECOMMENDATIONS

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Our study in this dissertation focused on the “International Responsibility for Environment Damage As A result of Armed Conflicts: with Special Reference to Kuwait”. The first chapter had to deal with the general and basic rules concerning the protection of the environment in international law. International law does include rules establishing a firm general obligation binding upon all states to protect and harm or damage the environment. But international law does not recognize every environmental harm or damage as compensable environmental damage. Only significant environmental damage is compensable. Fault-based or fault-caused liability arising out of the violation of due diligence obligations is the generally accepted type of state liability in international environmental matters under international law, but strict liability is emerging to be applicable in cases of particularly serious, dangerous, hazardous and ultra-hazardous activities. Significant transboundary environmental damage or pollution is prohibited under international law and any act causing significant transboundary environmental harm or pollution is prohibited and must not be allowed to continue irrespective of the fact that such act or activity was not originally prohibited under international law. The injured state is entitled to full reparation which may take any one form or a number of forms but it “must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”

The law of international environmental responsibility relative to armed conflict was dealt with in chapter two. We have seen that the threat to use force and/or the actual use of force by a state or a group of states against another state or group of states is prohibited under the U.N. Charter except in case and within the strict requirements and confines of self-defence. International law and the law of the Charter of the United Nations establish the international responsibility of states for damage or injury done to any other state including environmental damage, injury or destruction caused by unlawful use of force or coercion. There has developed a basic norm of general international law binding upon states and requiring them not to damage or cause damage or destruction to the environment of other states during peace-time as well as wartime situations and situations of armed conflicts.

But it should be emphasized that although international law bars the use of biological and chemical weapons, it does not at present proscribe the use of nuclear weapons in extreme cases of self-defence. Uranium-plated weapons and depleted uranium were reportedly used in recent conflicts but the effects on the environment are not yet clear and assessments of environmental damage have not so far been disclosed. The rules of law in this critical area is unclear and has not developed to give adequate protection to the environment. Nuclear-weapon states which are the most powerful in the world manipulate the process of law-making in this area and it is not expected, therefore, that rules of law protecting the environment against the actual use of nuclear weapons will be firmly established or developed within the near future law in this area yields to power-politics.

The Security Council and the international responsibility of states for environmental damage as a result of armed conflicts were dealt with in chapters three

and four. These two chapters have to focus on the Iraqi aggression and illegal invasion and occupation of Kuwait and all ensuing environmental impacts. The Security Council had to deal with the situation under chapter 7 of the Charter of the United Nation and had to condemn the Iraqi aggression, invasion and illegal occupation of Kuwait. Adequate actions had to be taken by the Security Council under chapter 7 of the Charter. With regard to environmental damage resulting from the illegal invasion and occupation of Kuwait by Iraq and all military operations relation thereto, the Security Council recognized the international responsibility of Iraq for any such damage, loss or injury and decided to establish the U.N. Compensation Fund and the U.N. Compensation Commission to process and verify claims of compensation filed against Iraq for any loss, damage or injury, including environmental damage, resulting from the Iraqi aggression, invasion and occupation of Kuwait. A portion of the proceeds of the sale of Iraqi oil and oil products had to be assigned for payments covering awards of compensation approved by the U.N.Compensation Commission.

The U.N.C.C. has had to deal with millions of claims. Although it is a political body and a subsidiary organ of the U.N.Security Council, the U.N.C.C. has functioned as a quasi-judicial body. The U.N.C.C. and various panels of commissioners applied Security Council resolution 687, other relevant resolutions, U.N.C.C. Governing Council decisions, and other relevant rules of international law. The requirements of due process and other cardinal principles of justice were observed and upheld by various panels of commissioners. The panels have adopted and followed investigative approaches which went beyond many adversarial systems before the courts of law. Evaluation and admissibility of evidence have been subject

to the discretionary powers of the panels but the panels require strict requirements in connection therewith.

The U.N.C.C. has so far processed and verified three types of environmental and environment related claims; the well Blowout Control Claim, The Fluid Lost Claim and the Monitoring and Assessment Claims. The latest group of claims, the monitoring and assessment claims were among the category "F4" claims, environmental claims filed by states and approved by the U.N.C.C. on 21 June 2001. It is expected that all claims including environmental claims will be finally settled and approved by the U.N.C.C. by the end of 2003.

The authority of the Security Council to take all the actions and measures it has taken and to establish the U.N.C.C. and all other bodies it has established was contested by some authors and writers but now it seems that the Security Council's authority has been firmly established within the U.N. system and in state practice. The Security Council has to act and must act in all situations it sees necessary to act in order to deal effectively with any threat to the peace, breach of the peace or acts of aggression.

International crimes and the environment and the protection of the environment through the determination of the international criminal responsibility of individuals have been dealt with in Chapter Five. International law has been developing to include environmental crimes among war crimes. Environmental crimes as war crimes require the existence of a war nexus, a requirement which limits the scope and effectiveness of recognizing certain environmental crimes as war

crimes. It is therefore, essential that environmental crimes be included within the category of crimes against humanity and crimes against peace and security of mankind. Of course certain strict requirements must be required to exist. So far not a single international court or tribunal has the power to try Saddam Hussein, his henchmen, and his subordinates for the crimes they committed against Kuwait, the Kuwaiti people and the environment in the area; but calls have been advancing for the holding of an international trial for Saddam Hussein and his henchmen and subordinates. The proceedings against Slobodan Milosevic which are now taking place before the International Criminal Tribunal for former Yugoslavia are a positive sign that the international community has reached a mature stage of development and that presidents and heads of states have in fact lost immunity against criminal proceedings in respect of serious international crimes. A day will come when Saddam Hussein faces criminal proceedings and international justice achieves victory.

But even if the international community fails to establish a competent international tribunal having proper jurisdiction to try Saddam Hussein, national courts of appropriate jurisdiction may witness the commencement of criminal proceedings against him. Kuwaiti courts may entertain jurisdiction based on the principles of territoriality and universality. But an important development which is unfolding these days in the reported news that a criminal action has been lodged with the appropriate Belgian Authorities. Whether this action will ultimately lead to a successful completion of a criminal trial and judgment against Saddam Hussein is not at all sure, but a criminal action has been launched and proceedings are about to start.

In addition, all treaties to which Kuwait is a party and customary international law rules on the subject of environmental responsibility and the protection of the environment have been incorporated into the Kuwaiti law, and have become legally binding upon all authorities and persons in Kuwait.

The Kuwaiti courts applied relevant Islamic rules and principles, international law, and the Kuwaiti laws to cases of environmental responsibility, but the said courts refrained from exercising jurisdiction over actions filed to obtain compensation for loss, damage, or injury resulting from the Iraqi invasion and illegal occupation of Kuwait and considered that such actions would better be dealt with by the U.N. Compensation Commission in accordance with pertinent Security Council resolutions and other relevant rules of international law.

Our main conclusion is that the rules of international law relative to the international responsibility for environmental damage or injury resulting from armed conflicts are still uncertain and the threshold they establish for their application is too high and too restrictive to the extent that most environmental losses, damage or injuries resulting from armed conflicts are not covered by such rules. The terms “widespread”, “severe” and “long-term” as used in Protocol I to describe the environmental damage or injury are too narrow and too restrictive to the extent that the conditions of the applicability of Protocol I environmental provisions will almost never be met. In addition relative international instruments, including Protocol I, do not contain adequate procedural and structural rules relative to the effective operation and application of environmental provisions of such instruments. The Enmod Convention is probably the only exception as it gives every State Party to the Convention which has reason to believe that any other State Party is acting in breach

of obligations deriving from the provisions of the Convention the right to lodge a complaint with the Security Council of the United Nations; all State Parties to the Convention are under an obligation to cooperate in carrying out any investigation which the Security Council may initiate, in accordance with the provisions of the U.N. Charter. Each State Party to the Enmod Convention is under another obligation to provide assistance, in accordance with the provisions of the U.N. Charter, to any State Party which so requests, if the Security Council decides that such Party has been harmed or is likely to be harmed as a result of violation of the Convention (Article V of the Convention).

Our recommendation in this connection is to loosen up the requirements of the applicability of the environmental provisions of the conventions and instruments of the laws of armed conflicts: Thus the terms “widespread”, “severe”, and “long-term” might be qualified as follows: the term “severe” might be dropped altogether or replaced by the term “serious” ; the term “long-term” might be restricted to a number of months or one year at the most. This of course will need the holding of a new diplomatic conference to review Protocol I or even to prepare a whole new Protocol on the protection of the environment in armed conflict situations.

Another important recommendation we advance is that procedural and structural provisions and devices be included in relative instruments on the laws of armed conflicts. A permanent institution concerned with the protection of the environment in time of armed conflicts and handling claims of international responsibility for damage to the environment has to be established either through the amendment of a relevant international instrument or by the Security Council under chapter 7 of the U.N. Charter.

Claims of environmental damage and claims of loss, damage, or injury resulting from the Iraqi invasion and illegal occupation of Kuwait could not have been adequately dealt with had the Security Council not acted and established the U.N. Compensation Commission and the U.N. Compensation Fund. The Security Council is not guaranteed to act similarly in other situations. Therefore, the establishment of an international agency or institution as that proposed above by the present writer with automatic authority to intervene and act might help avoid any failure to act on the part of the Security Council in any specific situation.

The establishment of the permanent International Criminal Court upon the completion of the required ratifications with the authority it has regarding the holding of trials for individuals accused of committing war crimes including environmental crimes might be one of the most important developments leading to the protection of the environment in time of armed conflicts and established the criminal responsibility of individuals committing crimes against the environment in time of war or armed conflicts and other pertinent situations. This will remain to be judged after the establishment and operation of the said Court. But we strongly support the establishment of International Criminal Court.

Finally, we invite the Kuwaiti National Assembly and all parliaments and legislative bodies in all countries to adopt very clear legislations empowering national courts to try all persons accused of committing, participating in the commission or instigating the commission of war crimes including environmental crimes, crimes against peace and security of mankind and crimes against humanity. Jurisdiction will of course be justified on the basis of the universality principle.

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