

**Ecocide and Genocide in Iraq: International Law, the Marsh Arabs
and Environmental Damage in Non-international Conflicts**

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Envtl. Damage in Iraq

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I. Introduction

Modern warfare has the potential to inflict enormous damage upon the natural environment. In the post-Cold-War world few areas have suffered greater environmental harm from wartime military activities than the area in and around Iraq; two of the most extreme examples were inflicted by the former Iraqi government. In the first Gulf War, Iraqi forces set fire to 600 of Kuwait's oil wells, and uncapped or damaged 175 more.¹ During the same conflict at least six million barrels of oil were deliberately discharged into the Persian Gulf,² adding to the already considerable damage wrought by routine oil industry operations and the hundreds of attacks on tankers and oil facilities during the Iran-Iraq war.³ And following the unsuccessful Shiite rebellion of 1991, Saddam Hussein's government drained the marshlands of Southern Iraq in a successful effort to destroy the lifestyle and culture of the Shiite Ma'Dan, or Marsh Arabs.⁴

The illegality of the Iraqi actions against the environment during the Gulf War, which resulted in an unprecedented imposition of damages for environmental harm,⁵ has been fully

¹ ECONOMIST, *The Spoils of War: What Can the Past Tell About the Effect of Military Conflict on the Environment?* Mar. 27, 2003 ["Spoils of War"].

² *Spoils of War*, *supra* note 1.

³ See Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict*, 22 YALE J. INT'L L. 1, 14 (1997).

⁴ ECONOMIST, *The Marsh Arabs of Iraq: Do They Want to Go Back in Time?* June 5, 2002 ["Marsh Arabs"]; *Spoils of War*, *supra* note 1.

⁵ See S.C. Res. 687, U.N. SCOR, U.N. Doc. S/RES/687 (1991); *see also* S.C. Res. 674, U.N. SCOR, U.N. Doc. S/RES/674 (1990); S.C. Res. 686, U.N. SCOR, U.N. Doc. S/RES/686 (1991).

discussed elsewhere.⁶ The plight of the Marsh Arabs has received less attention from legal scholars than perhaps it should, possibly owing to a lack of information about the region or to the obscurity of international law concerning domestic environmental damage.⁷ This article will attempt to address the legality of the actions against the Marsh Arabs and the wetlands in which they lived.

⁶ On the damage to Kuwait and the Persian Gulf, *see, e.g.*, Margaret Okordudu-Fubara, *Oil in the Persian War: Legal Appraisal of an Environmental Warfare*, 23 ST. MARY'S L.J. 123 (1991); Betsy Baker, *Legal Protections for the Environment in Times of Armed Conflict*, 33 VA. J. INT'L L. 351 (1993) (*see esp.* n.5, listing academic conferences on this topic); Luan Low & David Hodgkinson, *Compensation for Wartime Environmental Damage: Challenges to International Law After the Gulf War*, 35 VA. J. INT'L L. 405 (1995); Walter G. Sharp, Sr., *The Effective Deterrence of Environmental Damage During Armed Conflict: A Case Analysis of the Persian Gulf War*, 137 MIL. L. REV. 1 (1992); Florentino P. Feliciano, *Marine Pollution and Spoliation of Natural Resources as War Measures: A Note on Some International Law Problems in the Gulf War*, 14 HOUS. J. INT'L L. 483 (1992); Philippe Sands, Moderator, *Panel Discussion on the Gulf War: Environment As a Weapon*, 85 AM. SOC'Y INT'L L. PROC. 214 (1991); Marc Ross, Comment, *Environmental Warfare and the Persian Gulf War: Possible Remedies to Combat Intentional Destruction of the Environment*, 10 DICK. J. INT'L L. 515 (1992); Suzanne M. Bernard, Comment, *Environmental Warfare: Iraq's Use of Oil Weapons During the Gulf Conflict*, 6 N.Y. INT'L L. REV. 106 (1993); Shilpi Gupta, Note, *Iraq's Environmental Warfare in the Persian Gulf*, 6 GEO. INT'L ENVTL. L. REV. 251 (1993); Mark T. Caggiano, Comment, *The Legitimacy of Environmental Destruction in Modern Warfare: Customary Substance over Conventional Form*, 20 B.C. ENVTL. AFF. L. REV. 479 (1993); Laura Edgerton, Note, *Eco-Terrorist Acts During the Persian Gulf War: Is International Law Sufficient to Hold Iraq Liable?* 22 GA. J. INT'L & COMP. L. 151 (1992); Stephanie N. Simonds, Note, *Conventional Warfare and Environmental Protection: A Proposal for International Legal Reform*, 29 STAN. J. INT'L L. 165 (1992); Jessica E. Seacor, Note and Comment, *Environmental Terrorism: Lessons from the Oil Fires of Kuwait*, 10 AM. U.J. INT'L L. & POL'Y 481 (1994).

⁷ The plight of the Marsh Arabs has been discussed or mentioned in several articles, however. *See, e.g.*, Michael Posner and Fiona McKay, *The Iraqi Justice System: Challenges in Responding to Iraq's Past Abuses of Human Rights*, 42 JUDGES' J. 14, 15 (2003); Suzette Brooks Masters, *Environmentally Induced Migration: Beyond a Culture of Reaction*, 14 GEORGETOWN IMM. L. J. 855, 867-68 (2000); Joseph W. Dellapenna, *The Two Rivers and the Lands Between: Mesopotamia and the International Law of Transboundary Waters*, 10 BRIGHAM YOUNG U. J. PUBLIC L. 213, 219-20, 224 (1996).

II. The Marsh Arabs

Before the first Gulf War Southern Mesopotamia held southwestern Asia's most extensive wetlands, at the confluence of the Tigris and the Euphrates.⁸ For thousands of years these wetlands, spreading out on all sides of the Tigris, the Euphrates and the Shatt al-Arab, had been occupied by the ancestors of the people known today as the Marsh Arabs, a culture uniquely adapted to the marsh environment.⁹ Today the Marsh Arabs, like a majority of Iraqis, are Shia Muslims. In 1991, after the first Gulf War, the Marsh Arabs and other Shiites in southern Iraq rose up in an unsuccessful attempt to overthrow or at least throw off the control of the Hussein government. The government responded not only with conventional military force but with an attack on the environment: Over the next few years the government built a system of dams, dikes and canals to drain the wetlands, so that today only 7% of the original area remains.¹⁰ While the exact number of deaths and of persons displaced as a result will probably never be known, most sources give numbers of displaced persons between 200,000 and 400,000.¹¹ A similar number may remain in the

⁸ See, e.g., Colin Freeman, *Marsh Arabs Reclaim Paradise*, THE SCOTSMAN, August 16, 2003. The frequent references to "Eden" and "Paradise" in discussions of the Marsh Arabs reflect the belief that the Garden of Eden was located in the region.

⁹ See Freeman, *supra* note 8; *Spoils of War*, *supra* note 1; *Marsh Arabs*, *supra* note 4.

¹⁰ *Marsh Arabs*, *supra* note 4.

¹¹ See, e.g., *Marsh Arabs*, *supra* note 4; Freeman, *supra* note 8. For a much more detailed description of the environmental campaign against the Marsh Arabs, see THE IRAQI MARSHLANDS: A HUMAN AND ENVIRONMENTAL STUDY (Emma Nicholson & Peter Clark eds., Politico's Publishing, London 2002); see also John Fawcett & Victor Tanner, *The Internally Displaced People of Iraq* 29-32, 40, 51, 54 (Brookings Institution 2002).

former marshes in a state of extreme poverty.¹²

Today the Mesopotamian wetlands are parched earth crusted with salt; the reeds are gone, and along with them the smooth-coated otter, the crested porcupine, the grey wolf, the Basrah reed warbler, important staging areas for migrating waterfowl, countless fish and invertebrates, and a crucial food supply for the fish of the Persian Gulf.¹³

III. The Legality of Iraq's Actions Under International Law

At the time of its campaign against the Marsh Arabs, the government of Iraq was party to a number of international conventions bearing on its conduct. In addition, there existed a relevant body of customary international law. This section will examine which obligations under those treaties or under customary international law were violated by Iraq's conduct.

A. Sources of International Law

Article 38(1) of the Statute of the International Court of Justice provides a traditional starting point for examining the sources of international law:

international conventions, . . . international custom, as evidence of a general practice accepted as law, . . . the general principles of law recognized by civilized nations, . . . judicial decisions, and the teachings of the most highly qualified publicists of the various nations[.]¹⁴

¹² The Iraqi Marshlands: Can They Be Saved? Brookings Institution Forum, May 7, 2003 (remarks of Baroness Nicholson of Winterbourne) available at <http://www.brook.edu/comm/events/20030507marsh.htm> (visited August 20, 2003).

¹³ See "The Marsh Arabs and the Marshlands," on the website of AMAR, a charity dedicated to assisting the Marsh Arabs: <http://www.amarappeal.com/about5.htm> (visited August 20, 2003).

¹⁴ Statute of the International Court of Justice, art. 38(1), 59 Stat. 1055, 1060 (1945), T.S. No. 993, 3 Bevens 1153, 1976 Y.B.U.N. 1052.

The sources of law listed in the statute (other than international conventions) can, at the risk of oversimplification, be grouped together under the heading of "customary international law."

B. Conventional International Law: Treaties and Other International Agreements

For as long as there has been war, the environment has suffered from it. Until very recently, however, conventional international law had not addressed the problem directly; environmental protection, where it existed at all, was contained in treaties dealing with other topics. The past century has brought about a dramatic increase in the destructive power available to warring states and factions, and a growing worldwide awareness of the fragility of the natural environment. Weapons now exist, and are available to many countries, that could render the planet unsuitable for human life.¹⁵

The watershed event in the development of law regarding the protection of the environment during wartime was the American defoliation campaign during the Vietnam War. The deliberate American ecocide in Vietnam brought an unprecedented degree of international attention to the problem of environmental destruction during wartime.¹⁶ Prior to that time environmental protection had been incidental to other international agreements regulating the conduct of war,

¹⁵ The supposed existence of such weapons in Iraq was offered by the governments of the United Kingdom and the United States as a justification for war with Iraq, ultimately resulting in considerable embarrassment for both governments.

¹⁶ See, e.g., Neil Popovic, Humanitarian Law, Protection of the Environment, and Human Rights, 8 GEO. INT'L ENVTL. L. REV. 67, 69-70 (1995); Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict*, 22 YALE J. INT'L L. 1, 9-10 (1997); Aaron Schwabach, *Environmental Damage Resulting from the NATO Military Action Against Yugoslavia*, 25 COLUM. J. ENVTL. L. 117, 126 (2000); Florencio J. Yuzon, *Deliberate Environmental Modification Through the Use of Chemical and Biological Weapons: "Greening" the International Laws of Armed Conflict to Establish an Environmentally Protective Regime*, 11 AM. U.J. INT'L L. & POL'Y 793, 795-96 (1996).

rather than a specific end in itself. Between the Vietnam War and the first Gulf War, however, that portion of the *jus in bello*¹⁷ dealing with environmental protection evolved significantly. A number of these post-Vietnam era treaties, and some earlier ones, may have some relevance to the question of the legality of Iraq's conduct.

Pre-Vietnam era treaties did not deal specifically with the problem of environmental protection during wartime, but provided some protection directly. Treaties of this nature that merit discussion here include the Convention against Genocide,¹⁸ 1925 Geneva Gas Protocol¹⁹ and the four Geneva Conventions of 1949.²⁰ Two agreements from the Vietnam war era that deal tangentially with environmental issues in a human rights context are the covenants on Economic and Cultural Rights²¹ and on Civil and Political Rights.²²

In the next category are post-Vietnam era treaties that deal specifically with environmental damage during wartime. Iraq is not a party to these agreements, but some of their provisions may have entered into customary international law. These include the environmental modification treaty

¹⁷ The *jus in bello* is the body of international law pertaining to the conduct of war.

¹⁸ Genocide Convention, *infra* note 31.

¹⁹ Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases and of Bacteriological Methods of Warfare, *infra* note 37.

²⁰ Geneva Convention I, *infra* note 39, art. 50; Geneva Convention II, *infra* note 39, art. 51; Geneva Convention III, *infra* note 39, art. 130; Geneva Convention IV, *infra* note 39, art. 147.

²¹ International Covenant on Economic and Cultural Rights, *infra* note 89.

²² International Covenant on Civil and Political Rights, *infra* note 90.

ENMOD,²³ Protocols I and II to the Geneva Conventions of 1949,²⁴ and the Rome Statute of the International Criminal Court.²⁵

In the final category are several environmental agreements to which Iraq is a party. These agreements deal with peacetime environmental issues, not with warfare, and their applicability to the situation of the Marsh Arabs is limited.

C. Note on Customary International Law

Before discussing the treaties, it is necessary to take a preliminary look at customary international law. General rules of customary international law may bear on the lawfulness or lack thereof of Iraq's actions; in addition, provisions of some of the treaties may have entered into customary international law, and thus Iraq may have been bound by those provisions even if it was not a party to the treaty.

Customary international law is generally described as the practice of states undertaken out of a sense of legal obligation, or *opinio juris*. Of the sources of law mentioned in Article 38(1) of the Statute of the International Court of Justice,²⁶ all but the first could conceivably fall within the

²³ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Dec. 10, 1976, 31 U.S.T. 333, 1108 U.N.T.S. 152 [ENMOD].

²⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144, 16 I.L.M. 1391 (1977) [Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144, 16 I.L.M. 1442 (1977) [Protocol II]. Neither the United States nor Iraq is a party to either protocol, but portions of both may have become customary international law.

²⁵ Rome Statute, *infra* note 80.

²⁶ These are "international custom, as evidence of a general practice accepted as law, . . . the general principles of law recognized by civilized nations, . . . judicial decisions, and the teachings of

category of customary international law, although "general principles of law" have traditionally been seen as a third category of public international law. However, they can also be seen as "supplemental rules" or a "secondary source of law."²⁷ Judicial decisions and the teachings of the most qualified publicists are merely a "subsidiary means for the determination of rules of law."²⁸ In any event, judicial decisions and, to the extent that a state actually observes them, general principles of law *are* state practice undertaken from a sense of legal obligation, and thus form the basis for normative expectations.

D. Conventions Pertaining to the Conduct of War and to Which Iraq is A Party

The Genocide Convention

The attack on the southern Mesopotamian wetlands was probably the largest attack on the environment itself since Operation Ranch Hand, the American defoliation campaign in Vietnam, thirty years earlier. As in Vietnam, the environmental damage was not incidental; the purpose in both cases was to effect a significant change in the natural environment. But the best analogy may not be to Vietnam, but to the deliberate extermination of the buffalo²⁹ during the wars between the United States government and the Plains Indians in the nineteenth century.³⁰ There, as in the

the most highly qualified publicists of the various nations[.]” *See supra* note 14.

²⁷ *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102(4), cmt. 1 & Reporter’s Note 7 (1987).

²⁸ Statute of the International Court of Justice, *supra* note 14.

²⁹ Technically, the animal referred to here is not a buffalo but a North American bison, but everyone except hardcore zoology geeks calls it a buffalo.

³⁰ This similarity was not lost on the Iraqi government: *See* note 47, *infra*, and accompanying text.

Mesopotamian wetlands, the object was genocide: the deliberate eradication of a people and a culture by alteration of the environment upon which that people and that culture depended; or, in the words of the Genocide Convention, “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”³¹

The wars against the Plains Indians predated the Convention by many decades, and in any event are outside the scope of this discussion. The destruction of the Marsh Arabs’ habitat was within the scope of the Convention, at a time when Iraq had agreed to be bound by its terms.³² It is still possible that some of the person responsible for designing and implementing the policy may be brought to trial under Article VI of the Convention. However, no steps have yet been taken in that direction.³³

The Hague and Geneva Regimes

For decades prior to the Vietnam War principles of international law had been in place that

³¹ Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, Dec. 9, 1948, in force Jan. 12, 1951. Iraq acceded to the Convention on Jan. 20, 1959; the United States became a party by ratification on November 25, 1988, forty years after signing the Convention. See <http://www.unhchr.ch/html/menu3/b/treaty1gen.htm> (visited August 20, 2003).

³² The United States’ ratification includes two reservations and five understandings. Understanding 4 addresses situations of this sort: “[A]cts in the course of armed conflicts committed without the specific intent required by article II are not sufficient to constitute genocide as defined by this Convention.” United Nations Treaty Collection, <http://www.unhchr.ch/html/menu3/b/treaty1gen.htm> (visited August 20, 2003). Iraq’s accession to the Convention contains no such provision.

³³ The ecocide-as-genocide argument is explained cogently and convincingly in a Jurist piece by Joseph W. Dellapenna, *The Iraqi Campaign Against the Marsh Arabs: Ecocide as Genocide*, January 31, 2003, available at <http://jurist.law.pitt.edu/forum/forumnew92.php> (visited August 20, 2003).

should have prevented Operation Ranch Hand. The 1868 Declaration of St. Petersburg stated that "the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy."³⁴ While weakening the forces of the enemy (by denying them forest cover) was the objective of Operation Ranch Hand, the 1899 and 1907 Hague Conventions provided that "the right of belligerents to adopt means of injuring the enemy is not unlimited."³⁵ Article 23 of the 1907 Hague Convention prohibited the use of "poison or poisoned weapons,"³⁶ although this was probably not intended to apply to poisons used against plants rather than people. The use of poison gas during World War I in violation of the 1907 Convention led to the more effective 1925 Geneva Gas Protocol.³⁷ In the 78 years since the adoption of the Protocol poison gas has rarely been used,³⁸ and its use has almost always been condemned as a violation of international law.

The four Geneva Conventions of 1949,³⁹ embodying the new awareness of human rights

³⁴ Cited in William A. Wilcox, Jr., *Environmental Protection in Combat*, 17 S. ILL. U.L.J. 299, 303 (1993).

³⁵ Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter "1907 Hague Convention"]. The Convention was the fourth of thirteen to emerge from the 1907 Hague Peace Conference and is thus known as "Hague IV."

³⁶ 1907 Hague Convention, *supra* note 35, art. 23.

³⁷ Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061.

³⁸ One of the rare violators has been Iraq, which is believed to have used poison gas in its war with Iran and against its rebellious Kurdish population, although the latter use was internal and thus possibly outside the scope of the 1925 Protocol. Some writers are of the opinion that Iraq's release and burning of oil violated the 1925 Protocol. *See, e.g.*, Okordudu-Fubara, *supra* note 6, at 190-91.

³⁹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the

that followed World War II, also contained early glimmerings of modern concepts of environmental protection during wartime. The Conventions prohibit the extensive destruction of property, when carried out unlawfully and wantonly and not justified by military necessity.⁴⁰ They also prohibit willfully causing great suffering or injury to health.⁴¹

Common Article 3

At the 1949 Diplomatic Conference at which the four Geneva Conventions⁴² were adopted, there was considerable debate between those parties who wished the protections in the Conventions to apply to all armed conflicts, and those who wished it to apply only to conflicts between states.⁴³ The result was Common Article 3, included in all four conventions. The portion of Common Article 3 that may have some bearing on the situation of the Marsh Arabs provides that:

In the case of armed conflict not of an international character occurring in the territory of

Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [Geneva Conventions I, II, II and IV, respectively].

⁴⁰ Geneva Convention I, *supra* note 39, art. 50; Geneva Convention II, *supra* note 39, art. 51; Geneva Convention IV, *supra* note 39, art. 147.

⁴¹ Geneva Convention I, *supra* note 39, art. 50; Geneva Convention II, *supra* note 39, art. 51; Geneva Convention III, *supra* note 39, art. 130; Geneva Convention IV, *supra* note 39, art. 147.

⁴² Geneva Conventions I, II, III, and IV, *supra* note 39.

⁴³ See Charles Lysaght, *The Scope of Protocol II and Its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments*, 33 AMERICAN U.L.REV. 9, 11-12 (1983).

one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture...⁴⁴

An unknown number of Marsh Arabs were killed outright by Iraqi forces during the drainage operations.⁴⁵ At this time the “hostilities” were largely over, and most or all of those killed would have been taking no active part. And depriving people of their homes and livelihoods can hardly be considered humane treatment. But the protections in Common Article 3 are considerably less extensive than those contained in the remainder of the four Conventions and applicable to international armed conflicts, and more or less co-extensive with the protections contained in the Covenant on Civil and Political Rights.⁴⁶ While they may address some deprivations of individual rights during the drainage campaign, they do not address the larger issue of the campaign itself.

⁴⁴ Geneva Convention I, *supra* note 39, art. 3; Geneva Convention II, *supra* note 39, art. 3; Geneva Convention III, *supra* note 39, art. 3; Geneva Convention IV, *supra* note 39, art. 3.

⁴⁵ See Fawcett & Tanner, *supra* note 11, at 31.

⁴⁶ International Covenant on Civil and Political Rights, *infra* note 90, arts. 4(2), 6, 7 & 10.

The Iraqi response to allegations of genocide and violations of the Geneva Conventions was cynical: "America wiped the Red Indians off the face of the earth and nobody raised an eyebrow."⁴⁷ This followed an earlier propaganda campaign depicting the Marsh Arabs as "monkey-faced" outsiders.⁴⁸

E. Conventions Pertaining to the Conduct of War with Specifically Environmental Provisions and to which Iraq is not a Party

ENMOD

The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)⁴⁹ was intended to prohibit the hostile use of large-scale environmental modification such as the deforestation practiced by the United States in Vietnam, as well as possible new forms of environmental modification including weather control and deliberate destruction of the ozone layer.⁵⁰

ENMOD requires that the effect on the environment, in order to fall under the treaty, be "widespread, long-lasting, or severe."⁵¹ Understanding I of the Conference of the Committee on Disarmament defines the terms as follows: "Widespread" means extending over "several hundred square kilometers"; "long-lasting" means "approximately a season"; "severe" means causing

⁴⁷ 1992 statement of then Parliamentary Speaker Saadi Mehdi Saleh, quoted in Fawcett & Tanner, *supra* note 11, at 32. It's hard to know just where to begin taking issue with this remark, but the comparison is apt, if hardly admirable.

⁴⁸ Fawcett & Tanner, *supra* note 11, at 29.

⁴⁹ ENMOD, *supra* note 23.

⁵⁰ For a much more complete discussion of ENMOD, see Schmitt, *supra* note 16, at 82-85.

⁵¹ ENMOD, *supra* note 23, art. 1.

"serious or significant disruption or harm to human life, natural and economic resources or other assets."⁵²

The damage to the Mesopotamian wetlands meets all of these requirements. The marshes, which had covered an area of nearly 11,000 square kilometers in 1970, had shrunk to 1,084 square kilometers by 2000 and 759 by 2002.⁵³ The damage has lasted for many seasons and may be permanent, although plans for restoration have been proposed. And there has been serious disruption to human life and natural and economic resources: Hundreds of thousands of people have been forced to leave their homes and live as impoverished refugees either within Iraq or across the border in Iran. There has been widespread loss of animal and plant life, with disruption to fisheries and water supplies.

Note that ENMOD does not require that the disruption be widespread, long-lasting, *and* severe; any one of the three is sufficient to constitute a violation. However, Iraq is not a party to ENMOD; it signed the treaty in 1977 but has not ratified it or deposited instruments of accession. It is thus not bound by the treaty unless its provisions have attained the status of customary international law through widespread observation in the practice of states out of a sense of legal obligation.

The expanded definitions in Understanding I, at least, have not attained that status; many of the parties to ENMOD, in fact, have dissented from them.⁵⁴ Thus, Understanding I does not

⁵² Yuzon, *supra* note 16, at 806, citing Understandings I & II of the Conference of the Committee on Disarmament, reprinted in DOCUMENTS ON THE LAW OF WAR 377-78 (Adam Roberts & Richard Guelff eds., 2d ed. 1989).

⁵³ UNEP, "*Jardin de l'Eden*" au sud de l'Irak risque de disparaître d'ici 5 ans, Mar. 22, 2003, available at <http://www.grid.unep.ch/activities/sustainable/tigris/marshlands/index.fr.php> (visited August 22, 2003).

⁵⁴ Yuzon, *supra* note 16, at 807.

represent a consensus even among the parties as to the meaning of these terms.

The language in the treaty itself, prohibiting military use of "widespread, long-lasting, or severe" environmental modification, may have become customary international law. Warring states, even those not bound by ENMOD, have for the most part refrained from such acts.⁵⁵ When they have not refrained (as Saddam Hussein's Iraq did not), the action has generally been met with universal disapproval; thus, there seems to exist an international sense of legal obligation to refrain from strategic or tactical use of widespread, long-lasting, or severe environmental modification. However, ENMOD confines itself to prohibiting the use of such techniques by one state against another state; a purely internal conflict is outside the scope of the treaty.⁵⁶

Protocol I

Protocol I was drafted by the International Committee of the Red Cross between 1974 and 1977. Iraq is not a party to Protocol I. The United States, which signed the Protocol in 1978 but has not yet ratified it, takes the position that much of Protocol I is customary law and thus binding. For the most part this seems to be borne out in the practice of states.

In the post-World War II world conflicts within states have been far more common than conflicts between states, although the line is often very difficult to draw. The dispute over how to treat internal armed conflicts that had led to the adoption of Common Article 3 in the four 1949 Geneva Conventions arose again in the negotiations leading to the adoption of Protocols I and II. Many countries proposed that there should be little or no difference in the treatment of internal and international armed conflicts. Norway, for example, successfully urged the adoption of a

⁵⁵ The United States, incidentally, is a party to ENMOD.

⁵⁶ ENMOD, *supra* note 23, art. I(1).

provision applying the provisions of the four 1949 Conventions and Protocol I to anti-colonial wars.⁵⁷

The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁵⁸

There is considerable ambiguity here: At what point does an armed conflict become a struggle against colonial domination or alien occupation? The Marsh Arabs were not subject to colonial domination or alien occupation in the traditional sense. They do not (or did not) possess national aspirations and national liberation movements as do, for example, the Kurds of northern Iraq. A regime that characterized the Marsh Arabs as “monkey-faced” and “not real Iraqis”⁵⁹ is certainly discriminatory, but whether it is racist depends on what is meant by “race” and “racist.”

“Racist regimes” was, at the time of its inclusion, a specific reference to the governments of South Africa and what was then Rhodesia. The commentary on Protocol

⁵⁷ Lysaght, *supra* note 43, at 9-10.

⁵⁸ Protocol I, *supra* note 24, art. 1(4).

⁵⁹ See Fawcett & Tanner, *supra* note 11, at 29; see note 48, *supra*.

I refers to “minority racist regimes,”⁶⁰ but also states that the term can refer to “if not the existence of two completely distinct peoples, at least a rift within a people which ensures hegemony of one section in accordance with racist ideas.”⁶¹ While the Marsh Arabs are not of a separate race from the majority of Iraqis or from the ruling religious (but not racial) minority during the Hussein years, there is evidently a rift between them and the ruling group, and that group’s hegemony over the Marsh Arabs, if not over the country as a whole, appeared to be based on racist ideas.

Most of the environmental protection provided by Protocol I is, like all such protection previously, indirect. Protocol I also contains direct environmental protections, however. Article 35(1) reiterates the Hague Convention principle that "In any armed conflict, the right of the Parties to the Conflict to choose methods or means of warfare is not unlimited[.]"⁶² Article 35(3) makes this provision specifically applicable to the environment: "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment."

At first glance the wording might appear identical to that of ENMOD, but the choice of conjunction makes an enormous difference: ENMOD prohibits techniques having “widespread,

⁶⁰ Commentary on Protocol I, *supra* note 72, ¶80.

⁶¹ Commentary on Protocol I, *supra* note 72, ¶112.

⁶² Protocol I, *supra* note 24, art 35(1).

long-lasting *or* severe” effects, while Protocol I aims to prevent “widespread, long-term, *and* severe” damage. The Protocol I standard is thus much higher than the ENMOD standard: All three elements must be met, rather than merely one.

There is no reason to assume that the definitions of “widespread, long-term, and severe” contained in Understanding I, which as noted are not customary international law, are applicable to Protocol I. On the contrary, the commentary to Article 55, which uses the same phrase, states that “In the final debate several delegations indicated that in their opinion the words ‘widespread, long-term and severe’ do not have the same meaning in the Protocol as the corresponding words in [ENMOD].”⁶³ The United States delegation expressed the opinion that Article 35 governed a wider scope of activity than ENMOD, as it covered harm inflicted upon the environment by any means rather than only use or modification of the environment itself as a weapon.⁶⁴ By almost any conceivable measure, however, the damage done to the homeland of the Marsh Arabs seems likely not only to meet but to exceed the minimum threshold for all three elements.

Article 54 of Protocol I prohibits attacking, destroying, or rendering useless “objects indispensable to the survival of the civilian population,” including drinking water supplies and installations and agricultural areas for the production of foodstuffs.⁶⁵ While the draining of the wetlands undoubtedly affected water supplies and production of foodstuffs, the wetlands and watercourses may not be “objects” within the meaning of Article 51. It is worth noting, though,

⁶³ International Committee of the Red Cross, Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, ¶2136, available at <http://www.icrc.org/ihl.nsf/COMART?openview> (visited August 24, 2003).

⁶⁴ Commentary on Protocol I, *supra* note 63, ¶1450; *see generally* ¶¶1447-58.

⁶⁵ Protocol I, *supra* note 24, art. 54(2).

that the French text of Protocol I uses the same word for “objects” in Article 54 and “supplies” in Article 69: "*biens indispensables*" for “indispensable objects” and "*biens essentiels*" for “supplies essential [to the survival of the civilian population].”⁶⁶

In addition, the destruction of the wetlands did have “the specific purpose of denying them for their sustenance value to the civilian population” and did “leave the civilian population with such inadequate food and water as to cause its starvation or force its movement,” as prohibited by Article 54.⁶⁷ The destruction was also carried out as a reprisal, also prohibited: “These objects shall not be made the object of reprisals.”⁶⁸

Article 55 of the Protocol is aimed purely at protection of the environment and of civilian populations dependent upon it:

Care shall be taken in warfare to protect the natural environment against widespread, long-term, and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended to or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.⁶⁹

In addition, “Attacks against the natural environment by way of reprisals are prohibited.”

⁷⁰ This treaty provision was designed to prohibit exactly the type of harm that occurred in southern Iraq: Retaliation against a civilian population by damaging the environment upon which that population depended for its health and survival.

⁶⁶ Commentary on Protocol I, *supra* note 63, ¶2086.

⁶⁷ Protocol I, *supra* note 24, art 54(2).

⁶⁸ Protocol I, *supra* note 24, art. 54(4).

⁶⁹ Protocol I, *supra* note 24, art. 55(1).

⁷⁰ Protocol I, *supra* note 24, art. 55(2).

Thus Iraq would at first appear to be in violation of the terms of Protocol I. And if, as seems likely, the environmental provisions of Protocol I have become part of customary international law, Iraq would seem to be in violation of those provisions even though it is not a party to the Protocol, unless it has been a consistent dissenter.

But if the Marsh Arabs were not struggling against a racist regime in exercise of their right of self-determination, Protocol I will be inapplicable: The draining of the wetlands and attacks on the Marsh Arabs happened largely within the borders of Iraq. While the portion of the wetlands lying in Iran has also, inevitably, been affected, those effects seem to have been incidental; the target of the attack was within Iraq.⁷¹ A separate document, Protocol II, applies to armed conflicts within the borders of a single state.

d. Protocol II

Protocol II was adopted to cover non-international conflicts that were not struggles against colonial domination, alien occupation or racist regimes.⁷² The coverage of Common Article 3, Protocol II and Protocol I can be thought of as three concentric circles. The outer, largest circle is Common Article 3; it applies to all non-international armed conflicts. The middle circle is Protocol II; it applies to non-international armed

⁷¹ This does not mean that Iran has no recourse against Iraq for damage to its territory; traditional principles of state responsibility would still apply. See notes 116-118, *infra*, and accompanying text.

⁷² See Protocol II, *supra* note 24, Art. I, and International Committee of the Red Cross, Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), June 8, 1977, ¶¶ 4446-79, available at <http://www.icrc.org/ihl.nsf/COMART?openview> (visited August 24, 2003).

conflicts in which the rebels “exercise such control over a part of [the state’s] territory as to enable them to carry out sustained and concerted military operations and to implement” Protocol II.⁷³ The inner circle is Protocol I; it applies only to international conflicts and to conflicts “in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination[.]”⁷⁴

Conceivably the inner two circles are not concentric, but overlapping; there may be anti-colonial rebel groups that do not exercise control over territory sufficient to allow them to implement Protocol II, but would nonetheless be covered by Protocol I and the four 1949 Conventions.

Although the protections of Protocol II are less extensive than those of Protocol I, Protocol II does contain some measures protecting the environment. Article 14 of Protocol II is similar to Article 54(1) and (2) of Protocol I, but somewhat more narrowly worded. Article 14 provides:

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.⁷⁵

In contrast, Article 54 of Protocol I provides:

⁷³ Protocol II, art. I(1).

⁷⁴ Protocol I, *supra* note 24, art. I(4).

⁷⁵ Protocol II, *supra* note 24, art. 14.

1. Starvation of civilians as a method of warfare is prohibited.⁷⁶
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.⁷⁷

The minor textual difference has significant consequences for the Marsh Arabs. Protocol I, possibly inapplicable to their situation, places the prohibition of destroying indispensable objects in a separate numbered paragraph from the prohibition of starvation. That separate paragraph elaborates further: It is illegal not merely to destroy these objects to starve the civilian population, but also to destroy them to cause the civilians to move away or for any other reason.

If Protocol I were applicable to the situation, a violation could be proved by showing that the marshes were an indispensable object. While this might be difficult, under Protocol II there is a second hurdle: The motive of the Hussein government must have been to starve the civilian population, rather than to injure them in some other way. (Note, though, that the exceptions in Articles 54(1) and 54(3) of Protocol I do not apply to Article 14 of Protocol II.)

Even more distressing is the absence in Protocol II of any specifically

⁷⁶ Protocol I, *supra* note 24, art. 54(1).

⁷⁷ Protocol I, *supra* note 24, art. 54(2).

environmental provision analogous to Article 55 of Protocol I. There is, however, a prohibition on the forced movement of civilians in Article 17 of Protocol II:

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

This provision seems to have been violated. The Marsh Arabs were forced to relocate by the destruction of their environment, and in some cases at gunpoint and by the burning of their villages. This was certainly not for their security. The conflict had already ended, so there could not have been any immediate military necessity, although the Hussein government might have imagined a long-term necessity. And “all possible measures” were not taken to ensure that the Marsh Arabs were “received under satisfactory conditions of shelter, hygiene, health, safety and nutrition,” as their situation today shows.

However, Iraq is not a party to Protocol I or II, and even if the provisions of the Protocols have, as the U.S. maintains, entered into customary law, Iraq has in all probability been a consistent dissenter, preventing the formation of any normative expectation that Iraq will act in accordance with the Protocols or feels obligated to do so.

While countries such as Norway may feel that a single standard should apply to all

armed conflicts, a cynic might observe that the probability that Norway will suffer an internal armed conflict at any time in the foreseeable future is remote. Countries that are more likely to experience such conflicts, including Iraq, may have a greater stake in the formation of rules regarding those conflicts. Nonetheless, it is possible that the Geneva Conventions are *jus cogens* – a norm from which Iraq cannot derogate,⁷⁸ although that may not be true of the 1977 Protocols.⁷⁹

The Rome Statute

The Rome Statute establishes a permanent International Criminal Court to adjudicate crimes against humanity.⁸⁰ Article 8(2)(b)(iv) of the Rome Statute prohibits

[i]ntentionally 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

⁷⁸ See generally, e.g., M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 Va. J. Int'l L. 81 (2001).

⁷⁹ See, e.g., HILAIRE MCCOUBREY, *INTERNATIONAL HUMANITARIAN LAW* 195 (1990): “It might, in the light of the very large number of states party to them, be argued that the whole of the 1949 Geneva Conventions, although not of the 1977 Additional Protocols, have been absorbed into the body of *jus cogens*.” McCoubrey’s approach to *jus cogens* may be somewhat more skeptical than that of many scholars, although a similar or greater skepticism is expressed by many governments. The debate over the existence, nature and extent of *jus cogens* norms is extensive, and beyond the scope of this paper.

⁸⁰ Rome Statute on the International Criminal Court, U.N. Doc. A/CONF. 183/9 (1998), entered into force July 1, 2002. For more information, see <http://www.un.org/law/icc/> (visited August 23, 2003).

anticipated.⁸¹

Iraq's attack on the southern Mesopotamian wetlands was launched not only with the knowledge but also with the intention that it would cause "widespread, long-term, and severe damage to the natural environment." (Note that the standard is identical to that in Articles 35(3) and 55 of Protocol I.)⁸² It certainly seems excessive in relation to any military advantage obtained. Iraq, however, is not a party to the Rome Statute.⁸³

F. Environmental Treaties to which Iraq Is a Party

In addition to the treaties discussed above dealing specifically with wartime environmental damage, none of which Iraq is a party to, Iraq is also a party to 50 treaties with environmental provisions.⁸⁴ Of these, there are a few that merit at least cursory examination in a discussion of the Marsh Arabs and the southern Mesopotamian wetlands:⁸⁵ the Convention Concerning the

⁸¹ Rome Statute, *supra* note 80, art. 8(2)(b)(iv).

⁸² See notes 62-65, *supra*, and accompanying text.

⁸³ See Rome Statute of the International Criminal Court, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (visited August 23, 2003)

⁸⁴ ENTRI: Environmental Treaties and Resource Indicators, Iraq Country Summary, <http://sedac.ciesin.columbia.edu:9080/entri/countryProfile.jsp> (visited August 22, 2003). Iraq has also signed but not ratified two environmental treaties, one of which is ENMOD, *supra* note 23. Iraq has also, along with 80 other former members out of a total of 95, denounced one treaty: the International Convention for the Safety of Life at Sea (June 17, 1960), text available at <http://sedac.ciesin.columbia.edu:9080/entri/texts/acrc/solas60.txt.html> (visited August 22, 2003).

⁸⁵ Iraq is not a party to the Ramsar Wetlands Convention (Feb. 2, 1971), 11 I.L.M. 963 (1972).

Protection of the World Cultural and Natural Heritage,⁸⁶ the United Nations Convention on the Law of the Sea,⁸⁷ the International Plant Protection Convention,⁸⁸ the International Covenant on Economic and Cultural Rights,⁸⁹ the International Covenant on Civil and Political Rights,⁹⁰ the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution,⁹¹ and the Protocol for the Protection of the Marine Environment against Pollution from Land-Based Sources.⁹²

Three of these can be dismissed fairly quickly. The International Plant Protection Convention is aimed at preventing the spread of plant diseases and protecting cultivated plants, not at protecting wild vegetation and plant habitat: “This Convention shall have particular reference to pests and diseases of importance to international trade.”⁹³ And although the

⁸⁶ Convention Concerning the Protection of the World Cultural and Natural Heritage (Nov. 16, 1972), T.I.A.S. No. 8226, 27 U.N.T.S. 37, 11 I.L.M. 1358 (1972)[World Heritage Convention].

⁸⁷ United Nations Convention on the Law of the Sea (Dec. 10, 1982; in force Nov. 16, 1994), U.N. Doc. A/CONF 62/122, 1833 U.N.T.S. 3, 21 I.L.M. 1261.

⁸⁸ International Plant Protection Convention, Art. II(3) (Dec. 6, 1951), Apr. 3, 1952, 23 U.S.T. 2767, 150 U.N.T.S. 67.

⁸⁹ International Covenant on Economic and Cultural Rights (Jan. 3, 1966), 993 U.N.T.S. 3.

⁹⁰ International Covenant on Civil and Political Rights (Dec. 16, 1966), 999 U.N.T.S. 171.

⁹¹ Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (Apr. 24, 1978), 1140 U.N.T.S. 133, 17 I.L.M. 511 (1978)[Kuwait Convention].

⁹² Protocol for the Protection of the Marine Environment against Pollution from Land-Based Sources (Feb. 21, 1990; in force 1993)(copy on file with author)[Protocol to Kuwait Convention].

⁹³ International Plant Protection Convention, *supra* note 88, art. II(3).

destruction of the wetlands is certain to cause an increase in marine pollution in the northern Persian Gulf, the United Nations Convention on the Law of the Sea does not address shore-based coastal marine pollution. Pollution of this sort is addressed by the Convention for the Prevention of Marine Pollution from Land-Based Sources⁹⁴, to which Iraq is not a party, and by the Kuwait Convention⁹⁵ and its Protocol on Pollution from Land-Based Sources.⁹⁶

The third, the Convention Concerning the Protection of the World Cultural and Natural Heritage⁹⁷ allows the designation of certain sites of cultural significance, natural significance or both as World Heritage Sites, and sets up a fund to provide assistance in preserving these sites. The lower Mesopotamian wetlands are not designated as a World Heritage Site.⁹⁸ A designated site, Ashur, is threatened by a proposed dam and has been added to UNESCO's list of World Heritage Sites in Danger.⁹⁹ Iraq's overall program of hydraulic and hydrologic engineering, which threatens Ashur, has also destroyed the southern Mesopotamian wetlands. However, even

⁹⁴ Convention for the Prevention of Marine Pollution from Land-Based Sources (June 4, 1974), 13 I.L.M. 352 (1974).

⁹⁵ Kuwait Convention, *supra* note 91.

⁹⁶ Protocol to the Kuwait Convention, *supra* note 92.

⁹⁷ World Heritage Convention, *supra* note 86.

⁹⁸ The World Heritage List may be viewed at <http://whc.unesco.org/heritage.htm> (visited August 23, 2003). Somewhat surprisingly, considering Iraq's wealth of archaeological sites, only two World Heritage Sites are listed for Iraq.

⁹⁹ Ashur is described at <http://whc.unesco.org/sites/1130.htm> (visited August 23, 2003); the list of World Heritage Sites in Danger may be viewed at <http://whc.unesco.org/toc/mainf4.htm> (visited

this expanded view does not mean that Iraq has violated or is likely to violate any obligations under the Convention.

The Convention imposes specific responsibilities on states with regard to natural or cultural heritage located in the territory of other states: Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage ... situated on the territory of other States Parties to this Convention.”¹⁰⁰ In contrast, with regard to cultural and natural heritage in their own territory, states are subject to a somewhat more vague exhortation to “ensur[e] the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage... and situated on its territory[.]”¹⁰¹

The Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution provides that “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.”¹⁰² While this at first seems more likely to be relevant to the situation of the Marsh Arabs and the southern Mesopotamian marshes, in fact it imposes little actual responsibility on

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¹⁰⁰ World Heritage Convention, *supra* note 86, art. 6(3).

¹⁰¹ World Heritage Convention, *supra* note 86, art. 4.

¹⁰² Kuwait Convention, *supra* note 91, art. VI.

Iraq. Iraq is required to take “all appropriate measures,” not “all possible measures” or “all necessary measures.”¹⁰³

The 1990 Protocol for the Protection of the Marine Environment against Pollution from Land-Based Sources¹⁰⁴ adds a requirement of environmental impact assessment for activities likely to cause pollution below the saltwater line¹⁰⁵ and requires cooperation between states in the event of pollution from a transboundary watercourse such as the lower Mesopotamian wetlands and the Shatt al-Arab.¹⁰⁶ It also provides that “Contracting 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.”¹⁰⁷ This may be helpful to Iraq’s injured neighbors, but provides little benefit to the Marsh Arabs.

The damage to the wetlands may itself be a polluting activity, leading to a short-term increase in the amount of organic matter discharged into the Persian Gulf with consequent

¹⁰³ For a discussion of the significance of these and related differences in wording, *see, e.g.*, Aaron Schwabach, *The United Nations Convention on the Law of Non-Navigational Users of International Watercourses, Customary International Law, and the Interests of Developing Upper Riparians*, 33 TEXAS INT’L L.J. 257, 272-73 (1998).

¹⁰⁴ Protocol to the Kuwait Convention, *supra* note 92.

¹⁰⁵ Protocol to the Kuwait Convention, *supra* note 92, art. VIII(1).

¹⁰⁶ Protocol to the Kuwait Convention, *supra* note 92, art. XI(1).

¹⁰⁷ Protocol to the Kuwait Convention, *supra* note 92, art. XII(1).

eutrophication. The removal of the filtering capacity of the wetlands will also lead to an increase in the quantity of pollutants from other sources ultimately reaching the gulf.

While the Kuwait Convention and its Protocol may provide some recourse for Iraq's neighbors injured by increased marine pollution, they provide none for the Marsh Arabs. The suffering of the Marsh Arabs is the result of the destruction of the marshes, not the result of any consequent pollution of the marine environment.

G. The Human Rights Covenants

The relevant portions of the International Covenant on Economic and Cultural Rights¹⁰⁸ and the International Covenant on Civil and Political Rights¹⁰⁹ are identical. Article 1(2) of each convention provides that

All peoples may, for their own ends, freely dispose of their natural 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.¹¹⁰

Article 25 of the Covenant on Economic and Cultural Rights and Article 47 of the Covenant on Civil and Political Rights are also identical: "Nothing in the present Covenant

¹⁰⁸ International Covenant on Economic and Cultural Rights, *supra* note 108.

¹⁰⁹ International Covenant on Civil and Political Rights, *supra* note 109; the Covenant also contains guarantees of rights identical or analogous to those in Common Article 3 of the Geneva Conventions. *See supra* note 46.

¹¹⁰ International Covenant on Economic and Cultural Rights, *supra* note 108, art. I(2); International Covenant on Civil and Political Rights, *supra* note 109, art. I(2).

shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.”¹¹¹

These provisions illustrate the insoluble problem inherent in the idea of collective rights: What is a “people”? Are the Iraqis a “people”? If so, may they not exploit the waters of the Tigris, the Euphrates and the Shatt al-Arab as they see fit, even to the detriment of some subset of the Iraqi people? Are the Marsh Arabs a “people”? What if some Marsh Arabs actually believe the wetlands should be drained, or benefit from it? Who speaks for the Iraqi “people” or the Marsh Arab “people”? If the Marsh Arabs are not part of the Iraqi “people,” then by extension the Kurds, Assyrians, Chaldeans, Turkomans, minority Sunni Arabs, and fragmented and disempowered Shiite Arabs, among others, are not part of the Iraqi “people,” either; any multicultural state such as Iraq must lack a cultural identity as a “people.”

Collective or third-generation rights are most often discussed in relation to the rights of indigenous or minority “peoples,” such as the Marsh Arabs. But the right to sovereignty over natural resources is generally discussed in relation to the rights of states and national populations, such as Iraq and the Iraqis. Customary international law probably recognizes no collective rights other than the right to existence (addressed by the Genocide Convention¹¹²) and the right to self-

¹¹¹ International Covenant on Economic and Cultural Rights, *supra* note 108, art. 25; International Covenant on Civil and Political Rights, *supra* note 109, art. 47.

¹¹² See notes 30-33, *supra*, and accompanying text.

determination,¹¹³ both of which were violated by the Hussein government's actions. Debating these issues may provide hours of entertainment for academics,¹¹⁴ but as a practical matter it means that the environmental provisions of these two covenants are sufficiently ambiguous to provide little useful guidance. If the Marsh Arabs are a "people" within the meaning of the natural resource provisions of the Conventions, however, they have certainly been deprived of their means of subsistence.

H. Customary International Law

In addition to the treaties mentioned above to which Iraq is not a party but which may have entered into customary international law, there are some general principles of customary international law that may be applicable to the destruction of the southern Mesopotamian wetlands.

¹¹³ See, e.g., Feisal Hussain Naqvi, *People's Rights or Victim's Rights: Reexamining the Conceptualization of Indigenous Rights in International Law*, 71 INDIANA L.J. 673, 724 (1996).

¹¹⁴ For some thoughtful discussions of these issues, see, e.g., PETER R. BAEHR, *HUMAN RIGHTS: UNIVERSALITY IN PRACTICE* (New York: St. Martin's Press, 1999); Maila Stivens, *Introduction: Gender Politics and the Reimagining of Human Rights in the Asia-Pacific*, in *HUMAN RIGHTS AND GENDER POLITICS: ASIA- PACIFIC PERSPECTIVES* 17 (Anne-Marie Hilsdon et al. eds., 2000); Penelope E. Andrews, *Globalization, Human Rights and Critical Race Feminism: Voices from the Margins*, 3 J. GENDER, RACE & JUSTICE 373 (2000); Mahmood Monshipouri, *Promoting Universal Human Rights: Dilemmas of Integrating Developing Countries*, 4 YALE HUMAN RIGHTS & DEVELOPMENT L.J. 25 (2001); Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 CARDOZO L.R. 1095 (2000); Li-ann Thio, *Implementing Human Rights in ASEAN Countries: 'Promises to Keep and Miles to go Before I Sleep'*, 2 YALE HUMAN RIGHTS & DEVELOPMENT L.J. 1 (1999); Prudence E. Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law?*, 10 GEORGETOWN INT'L ENVTL. L.R. 309 (1998); Eric J. Mitnick, *Taking Rights Spherically: Formal and Collective Aspects of Legal Rights*, 34 Wake Forest L.R. 409 (1999).

Most such law deals entirely with relations between states, however. It might thus provide a remedy to Iran for damage to its portion of the wetlands, but none to the Iraqi Marsh Arabs. Customary law might, however, provide guidance in defining terms such as "military necessity" and "widespread, long-term and severe."

The Martens Clause of the 1907 Hague Convention incorporates customary international law to fill any lacunae in the treaty regime governing state conduct during wartime:

Until a more complete code of the laws of war has been issued. . . the inhabitants and belligerents remain under the protection and the 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.¹¹⁵

Thus treaties may derogate from customary international law, but in the absence of such provisions the rules of customary international law are binding on the parties to the Hague Convention. Note also that the Convention itself has attained, through widespread observance or at least aspiration, the status of customary international law. A certain amount of bootstrapping thus results in a universal body of customary international law on the topic, equally binding on all nations.

Customary International Environmental Law

Customary international law deals with transboundary rather than domestic environmental harm.¹¹⁶ The fundamental principle in this area of law is that each state has a duty not to allow its

¹¹⁵ 1907 Hague Convention, *supra* note 35, pmb1.

¹¹⁶ For a fuller exposition of the problems in some of these areas, *see, e.g.*, Aaron Schwabach, *Diverting the Danube: the Gabcikovo-Nagymaros Dispute & International Freshwater Law*, 14 BERKELEY J. INT'L L. 290, 323-40 (1996).

territory to be used so as to injure that of another.¹¹⁷ Principle 21 of the United Nations' Stockholm Declaration on the Human Environment, an aspirational document now widely accepted as a statement of customary international law, provides that states have the "sovereign right to exploit their own resources pursuant to their own environmental policies," but along with this right comes the "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction."¹¹⁸ (The United States and others hold the view that Principle 21 is not applicable to wartime environmental damage.¹¹⁹

There is considerably less evidence of international custom when the destruction takes place within a single country. Principle 21 would seem to excuse such destruction as an exercise of the sovereign right to exploit resources. If, however, the Marsh Arabs are a different "people" from the other Iraqis, their situation may be analogous to that of an occupied territory. During World War II, for example, German civilian officials in occupied Poland were charged with "ruthless exploitation of Polish forestry" including "the wholesale cutting of Polish timber to an extent far in excess of what was necessary to preserve the timber resources of the country."¹²⁰ The Committee of the

¹¹⁷ See, e.g., Trail Smelter Case (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905, 1965 (1941), *reprinted in* 35 AM.J.INT'L L. 684 (1941); Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 21 (Apr. 9, 1949) (determination on the merits); Affaire du Lac Lanoux (Spain v. Fr.), 12 R. Int'l Arb. Awards (1957), digested in 53 AM. J. INT'L L. 156 (1959).

¹¹⁸ Report of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14/Rev.1 (1972), Principle 21. See also World Charter for Nature, Oct. 28, 1982, G.A. Res. 37/7 (Annex), U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51, 22 I.L.M. 455 (1983); Rio Declaration on Environment and Development, June 13, 1992, U.N.Doc. A/CONF.151/26(vol. I)(1992), 31 I.L.M. 874.

¹¹⁹ See Low & Hodgkinson, *supra* note 6, at 445.

¹²⁰ United Nations War Crimes Commission, Case No. 7150 496 (1948).

United Nations War Crimes Commission found that prima facie existence of a war crime had been shown and nine of the officials were listed as accused war criminals.¹²¹

Germany, however, had invaded Poland and was an enemy occupying power at the time. It may not be possible to stretch the definition of occupied territory to cover the homeland of the Marsh Arabs.

Customary International Law Regarding "Military Necessity"

The German officials who looted Poland's forest did not have any immediate military necessity for doing so, however. Customary international law on environmental harm recognizes an exception for military necessity. Excessive environmental damage may be excused if it reasonably appeared necessary to the decision maker at the time the action was undertaken.¹²²

The use of the military necessity exception is limited by the principles of proportionality, humanity, discrimination, and chivalry. The principle of chivalry relates to the use of subterfuge and is not likely to arise in an environmental context. The principle of proportionality, on the other hand, is always at issue when questions of military necessity for inflicting environmental damage arise.

Proportionality requires that the force used be proportional to the desired objective.¹²³ For

¹²¹ HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 496 (1948)

¹²² See, e.g., United States v. List, XI TRIALS OF WAR CRIMINALS BEFORE THE NURNBERG MILITARY TRIBUNALS 1296 (1947-48). See also generally W. Hays Parks, *Air War and the Law of War*, 32 A.F.L. REV. 1, 3 (1990). Note that while this "reasonable commander" standard may provide protection for individual military officers in war crimes trials, it is not necessarily a defense to state liability.

¹²³ See, eg., Yuzon, *supra* note 16, at 810.

example, the 1938 destruction of the Huayuankow Dike by Nationalist forces during the Japanese invasion of China was disproportional: The subsequent flooding killed several thousand Japanese soldiers and succeeded in halting the Japanese advance in the region, but it also killed approximately 750,000 Chinese civilians – probably the greatest loss of life ever caused by a single human action – and caused untold economic damage.¹²⁴

Humanity requires that military forces avoid inflicting suffering, injury, or destruction beyond that actually necessary for the accomplishment of legitimate military objectives.¹²⁵ The destruction of the Huayuankow dike violated the principle of humanity as well.¹²⁶ Discrimination requires that attackers distinguish military targets from civilian ones.¹²⁷

The Iraqi actions seem to have violated all three principles. The destruction of the wetlands was disproportional to the goal of eliminating a handful of impoverished and already defeated rebels. Enormous suffering, injury and destruction was inflicted on the Marsh Arab population as a whole; the military goal of capturing the last few rebels could have been achieved with considerably less destruction. And the vast majority of Marsh Arabs, and even the majority of villages, must have been uninvolved in the rebellion; there was no apparent attempt made to distinguish between civilian and rebel individuals or villages, however.

¹²⁴ See, e.g., Caggiano, *supra* note 6, at n. 73.

¹²⁵ See, e.g., Yuzon, *supra* note 16, at 812.

¹²⁶ Frederick M. Lorenz, Protection of Water Facilities Under International Law 11 (UNESCO Research Paper 2003)(copy on file with author), available at webworld.unesco.org/water/wwap/pccp/cd/pdf/legal_tools/protection_of_water_facilities.pdf (visited August 23, 2003).

¹²⁷ See, e.g., Yuzon, *supra* note 16, at 810-11.

IV. Conclusion

The various environmental treaties to which Iraq is a party and customary international law regarding transboundary environmental harm provide little recourse for the Marsh Arabs, although they may provide the basis for claims to be pursued by neighboring states. Conversely, however, the former Iraqi government is not likely to be exonerated on grounds of military necessity.

Of the treaties to which Iraq is a party, the Genocide Convention most clearly prohibits acts such as those committed by the Iraqi government against the Marsh Arabs. Common Article 3 of the Geneva Conventions addresses individual murders and extrajudicial killings of Marsh Arabs, but probably does not address the problem of the destruction of the wetlands as a whole. The Covenants on Economic and Cultural Rights and Civil and Political Rights provide similar protections, and provide that a people may not be deprived of its means of subsistence, as the Marsh Arabs have been.

Treaties to which Iraq is not a party address the specific problem of environmental modification used in war or as an instrument of persecution of an ethnic group. ENMOD and the Rome Statute prohibit environmental warfare of the type engaged in by Iraq, but it is unlikely that the provisions of either have been accepted as custom in the practice of states.

Protocols I and II, however, are probably expressions of customary international law, and may even express *jus cogens* or non-derogable norms. Of these, Protocol I addresses environmental harm far more directly. Under Protocol I, the Iraqi government's action against the southern Mesopotamian wetlands was illegal because its effects were widespread, long-lasting, and severe, and because it was a prohibited reprisal against the natural environment. Under Protocol II, on the other hand, the action was only illegal if the wetlands were an "object" within the meaning of the convention, and also if the purpose of destroying the wetlands was to starve the Marsh Arabs, as opposed to causing them to leave or harming them in some other way.

The Marsh Arabs will be eligible for the greater protection of Protocol I if they were engaged in a struggle against a racist regime. While the Hussein government was not a racist regime in the traditional sense, the rift between the ruling minority and the Marsh Arabs may have been sufficient to bring the regime within the scope of the Protocol.

Even the smallest degree of military advantage during combat may be worth an enormous amount of post-war disapproval. In addition, rebel soldiers are not likely to restrain their actions for military reasons; if they fail to achieve their military objectives and are defeated by the state against which they are fighting, they can expect to be imprisoned or executed in any event. A trial for environmental war crimes is a remote concern. The lack of any effective constraint on the rebel side may lead to a lack of restraint on the government side.

Balanced against this is self-interest: The territory the government is harming in a non-international conflict is, ultimately, its own territory. In addition to international disapproval, the offending government will bear the costs of the damage.

For the Marsh Arabs themselves, the future is uncertain. Restoration projects are being discussed, but such projects will require a great deal of money that is not likely to be forthcoming while the political situation in Iraq remains unstable. Even if restoration is funded, it is unlikely that the marshes can be fully returned to their original condition. And by that time many of the Marsh Arabs may have drifted away, or perished, although some will doubtless return.¹²⁸ In the meantime, the best way to prevent others from suffering a similar fate is to hold those responsible accountable under international law.

¹²⁸ See, e.g., Freeman, *supra* note 8; *Spoils of War*, *supra* note 1; *Marsh Arabs*, *supra* note 4.