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FREEDOM FROM FEAR: PROSECUTING THE IRAQI REGIME FOR THE USE OF CHEMICAL WEAPONS

MARGARET SEWELL*

Weapons of mass destruction constitute the most serious threat to global security in the twenty-first century. The danger of usage has become more extensive as Third World nations develop nuclear, chemical and biological weapons and ballistic missiles beyond the control of international treaties and bodies.¹ Chemical weapons are particularly dangerous due to the ease of development and use.² In the twentieth century, a few nations allegedly have used chemical weapons—Italy in Ethiopia in 1935, and Egypt against Yemen in the 1960's—but the threat of the use of chemical weapons was not fully recognized by the international community until Iraq's use in Iran and against its own Kurdish population.³

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1. China, Iran, Iraq, Israel, Libya, North Korea, South Korea, Syria, Russia, Taiwan and the United States are known to possess or are actively seeking some form of chemical or biological weapons. CENTER FOR DEFENSE INFORMATION, *Who Has Chem-Bio Weapons?*, at <http://www.cdi.org/issues/cbw/factsheet> (last visited Jan. 31, 2003). More than a dozen nations are possessing, pursuing or capable of acquiring nuclear weapons and ballistic missiles. FEDERATION OF AMERICAN SCIENTISTS, *States Possessing, Pursuing or Capable of Acquiring Weapons of Mass Destruction*, at http://www.fas.org/irp/threat/wmd_state (last visited Jan. 31, 2003).

2. See Megan Eshbaugh, *The Chemical Weapons Convention: With Every Step Forward We Take Two Steps Back*, 18 ARIZ. J. INT'L & COMP. LAW 209, 210 (2001) (providing a history of the development of chemical weapons). A chemical weapon is a weapon that is toxic, *i.e.*, it has a negative effect on an organism that has been exposed to the chemical. *Id.* The negative effect can be a reduction in growth rate, irritation, or even death. *Id.* The term "chemical weapons" includes any chemical used in war, including, tear gas, mustard gas, and the like. *Id.*

3. See Kevin J. Fitzgerald, *The Chemical Weapons Convention: Inadequate Protection from Chemical Warfare*, 20 SUFFOLK TRANSNAT'L L. REV. 425, 432 (1997) (noting that Italy was the first country to use chemical weapons after the Geneva Protocol in 1935); see also Ivan Eland, *What Should the United States Do About Saddam Hussein?*, 50 EMORY L.J. 833, 836 (2001)

The international community has never come together on punishing Iraq for its use of chemical weapons for a variety of reasons, including dependence on oil, lucrative commercial ties and lack of common will.⁴ No individual country or global institution was willing to take action until Iraq's 1990 invasion of Kuwait, which provided an unusual opportunity to demand that Saddam Hussein surrender his weapons of mass destruction. The original terms of a resolution between Iraq and the U.N. called for Hussein to comply within a period expected to last a matter of months, but Baghdad managed to stall the process for twelve years, despite the world's toughest economic sanctions, repeated diplomatic pressure and occasional aerial attacks by the United States and Britain.⁵ In the end, Hussein's failure to comply led the Bush administration in the post-September 11th environment to force the world community to consider punitive action. In early 2003, a coalition of forces, led primarily (and almost exclusively) by the United States and Britain, embarked on Operation Iraqi Freedom with the goal of uprooting Saddam Hussein and his regime and destroying Iraq's weapons of mass destruction. The operation was successful as to removing Hussein from power. However, the United States continues to occupy Iraq. Several leaders of the Iraqi regime are in the custody of the United States—most importantly Saddam Hussein.⁶

The prosecution of Hussein and his regime for the use of chemical weapons will set an important precedent on several levels: for a post-war Iraq, the Middle East, rogue nations, and for the world. As one of the most fragmented nations in the Middle East, Iraq faces the ongoing danger of repressive tactics by the regime in Baghdad. Hussein used chemical weapons against the Kurds to end their challenges to his rule. Prosecuting and punishing the Iraqi regime for its use of chemical weapons will send a strong signal that the use of chemical weapons will not be tolerated.

The Middle East has become the world's most volatile region.

(reporting that Nasser used chemical weapons against Egypt in the 1960's, and that Libya and the Soviet Union may have used chemical weapons against Chad and Afghanistan, respectively).

4. Former weapons inspector, Richard Butler, when questioned about the world's indifference to Iraq's use of chemical weapons, stated that "[t]he problems are just too awful and too hard History is replete with such things. Go back to the grand example of the Holocaust. It sounded too hard to do anything about it." Jeffrey Goldberg, *The Great Terror*, THE NEW YORKER, Mar. 2002, at 14. See also SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 173 (2002) (citing "special interests, economic profit and a geopolitical tilt toward Iraq" as reasons the United States did not take action for Iraq's use of chemical weapons).

5. U.N. SCOR, 2981st mtg., Res. 687 U.N. Doc. S/Res/687 (1991).

6. Rajiv Chandrasekaran, *UN Forces Uncover Iraqi Ex-Leader Near Home Town*, WASHINGTON POST, Dec. 15, 2003, at A1.

Chemical weapon proliferation has been intense in the Arab world and has also extended to Iran, Syria and Libya.⁷ Containing the development and use of weapons of mass destruction is particularly important in this region. Likewise, because rogue nations view chemical weapons as a quick way to obtain power, it is necessary to deter development and use. Prosecution of Hussein and his regime will set an important precedent that any government that uses chemicals weapons, either domestically or against another state, will be held accountable.

On a global level, the non-proliferation of weapons of mass destruction has become a top priority of the international community since World War II. One of the goals of the United States after World War II was to achieve a “freedom from fear” as described by President Roosevelt:

In the future days which we seek to make secure, we look forward to a world founded upon four essential human freedoms.

....

The fourth is freedom from fear, which, translated into world terms, means a worldwide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world.⁸

The United Nations and various regional blocks have all worked on promoting conventions, treaties, resolutions and laws, but the world has resisted taking any action against any country in violation. Neither Italy nor Egypt faced any form of punitive action as a result of their use of chemical weapons. Likewise, Iraq has yet to be punished for its prolonged and massive use of chemical weapons against Iran and the Kurds. As a result of the important precedent that it will set, and to finally achieve “freedom from fear,” it is essential to prosecute Hussein and his regime for their use of chemical weapons.

7. FEDERATION OF AMERICAN SCIENTISTS, *States Possessing, Pursuing or Capable of Acquiring Weapons of Mass Destruction*, at http://www.fas.org/irp/threat/wmd_state (last visited Jan. 31 2003).

8. Franklin Delano Roosevelt, *The Four Freedoms* (Jan. 6, 1941), available at <http://www.libertynet.org/~edcivic/fdr/html>. Roosevelt also reportedly said the following in response to reports that the Axis powers were considering the use of poison gas:

[U]se of such weapons has been outlawed by the general opinion of civilized mankind. This country has not used them, and I hope we never will be compelled to use them. I state categorically that we shall under no circumstances resort to the use of such weapons unless they are first used by our enemies.

Paul Warnke, *Chemical Weapons: Designing Operable Systems for Enforcing Restraint*, 83 AM. SOC'Y INT'L L. PROC. 455, 460 (quoting President Roosevelt).

This paper will introduce the Iraqi regime and explore its use of chemical weapons against Iran during the Iran-Iraq War and the Kurdish population in northern Iraq. The effect of the Iraqi regime's use of chemical weapons against these individuals was debilitating, irreversible and, in some instances, is just recently coming to light. This paper will also set forth the relevant evidence that will be used in a prosecution of Hussein and his "most-wanted" associates. A vast array of data has been collected over the past two decades by the United States government, the United Nations and various non-governmental organizations, which can be used in a prosecution. The testimony of live witnesses who are still suffering from the effects of chemical weapons is the most persuasive evidence of the use of chemical weapons. Next, while it seems self-evident that the use of chemical weapons can be categorized as a crime, this paper will discuss the various treaties and international laws that can be used as grounds for prosecuting the Iraqi regime. In addition, this paper will discuss the fora available for such a prosecution, both international and domestic. Finally, this paper will conclude by reiterating that it is critical for the world community, in particular the United States, to prosecute Hussein and his regime for the use of chemical weapons.

I. BACKGROUND

A. THE TARGETS: SADDAM HUSSEIN AND THE IRAQI REGIME

The targets of a prosecution of the Iraqi regime can be broken down into three separate tiers, as advocated by the U.S. State Department.⁹ At the top is Saddam Hussein, the President, Prime Minister and Commander-In-Chief of Iraq and his closest associates, the so-called "dirty dozen."¹⁰ Hussein had the absolute power in Iraq and was in power during the time of the Iran-Iraq War and the Anfal campaign against the Kurds.¹¹ His control of the military and all state institutions was beyond question.¹² On December 13, 2003, members of the U.S. Army's 4th Infantry Division apprehended Hussein in an underground bunker ten miles outside of Tikrit.¹³

9. Robin Wright, *The World Iraq War Crimes Dossier in Works Strategy: The U.S. Effort to Document Abuses by Hussein and his "Dirty Dozen" Reflects Preparation for the Aftermath of Conflict*, L.A. TIMES, Oct. 6, 2002, at A1.

10. *Id.*

11. BRENDA K. UEKERT, *RIVERS OF BLOOD: A COMPARATIVE STUDY OF GOVERNMENT MASSACRES* 79 (1995).

12. *Id.*

13. See Chandrasekaran, *supra* note 6, at A1.

The “dirty dozen” consists of Hussein’s relatives, two sons, three half-brothers and a cousin, as well as members of the Revolutionary Command Council (“RCC”).¹⁴ Prior to Operation Iraqi Freedom, the second “most-wanted” associate after Hussein was his cousin, Ali Hassan Majid, also known as “Chemical Ali” for his role in the use of chemical weapons against Iran and the Kurdish population of northern Iraq.¹⁵ In March 1987, the RCC passed a decree giving Chemical Ali unlimited powers to “preserve security and order and ensure stability.”¹⁶ Despite the fact that Chemical Ali purportedly orchestrated the chemical attacks against the Kurds, Hussein directed the war against the Kurds and was ultimately responsible for all of the acts committed by those beneath him.¹⁷ Chemical Ali was believed to have been killed in an air strike on his home near Basra on April 4, 2003.¹⁸ This information was later retracted, and on August 21, 2003, it was announced that Chemical Ali was captured and is in U.S. custody.¹⁹

Prosecuting Hussein’s top associates is imperative. The U.S. Central Command recently created a new list of the “Iraqi Top 55.”²⁰ After Hussein, his two sons, Qusay and Uday, had been second and third on the list.²¹ Qusay, Saddam Hussein’s younger son, was the head of the Special Republican Guard and the Special Security Organization.²² Uday, Saddam Hussein’s older son, was believed to be particularly violent and unstable.²³ He was the head of the import-export ministries as well as the paramilitary enforcers.²⁴ Both men were killed in Northern Iraq in July of 2003.²⁵ The United States does have in custody, however, the eldest half-brother of

14. Wright, *supra* note 9, at A1.

15. *Id.*

16. UEKERT, *supra* note 11, at 79.

17. *Id.*

18. Daniel Williams, *Iraqi Forces Pull Out of Last Big City; Mosul Falls; Looters on Rampage*, WASH. POST, April 13, 2003, at A1. See, e.g., Lisa Hoffman, *Hussein Henchman ‘Chemical Ali’ Believed Dead in Basra*, THE COMMERCIAL APPEAL, April 8, 2003, at A2.

19. U.S.: ‘Chemical Ali’ in custody, (Aug. 21, 2003), available at <http://www.cnn.com/2003/WORLD/meast/08/21/sprj.iq.main/index.html>.

20. United States Central Com., *Iraqi Top 55*, (Apr. 12, 2003) at http://www.centcom.mil/CENTCOMNews/News_Release.asp?NewsRelease=200304112.txt (last visited Feb. 15, 2004) [hereinafter *Iraqi Top 55*].

21. *Id.*

22. Craig Gordon, *Saddam Relative Caught-Former Chief of Intelligence*, NEWSDAY, Apr. 28, 2003, at A1.

23. See Pamela Constable, *After Uday, Iraqis Release Their Rage*, WASH. POST, July 24, 2003, at A7.

24. Gordon, *supra* note 22, at A1.

25. See Kevin Sullivan & Rajiv Chandrasekaran, *Hussein’s Two Sons Killed in Firefight with U.S. Troops*, WASH. POST, July 23, 2003, at A1.

Hussein, Barzan Hasan, who once was in charge of the Iraqi Intelligence Service.²⁶ Also in United States custody are former Interior Minister, Watban Ibrahim Hasan, and top science adviser, Amir Hamudi Hasan al-Saadi, respectively, numbers fifty one and fifty five on the “Iraqi Top 55” list.²⁷

As will be discussed below, a variety of fora are available for trying this top level, including the creation of an *ad hoc* tribunal or, potentially, the International Criminal Court (“ICC”). However, U.S. ratification of the Rome Treaty establishing the ICC is unlikely under the Bush administration, and Iraq is likewise not a party to the Rome Treaty. A prosecution may also take place by any domestic court that has universal jurisdiction for war crimes, genocide and crimes against humanity.²⁸ The State Department’s current preference, however, is a hybrid court, which would adjudicate in a liberated Iraq and would employ both Iraqi and foreign judges.²⁹

Next, the fifty-six to two hundred military and government officials who carried out the use of chemical weapons against Iran and the Kurds should be prosecuted. The most likely forum for prosecution of these individuals would be local Iraqi courts, applying both national and international law. Prosecution would take place after a new Iraqi government is stabilized, and the new government would control such prosecution.

Finally, the thousands of Iraqi government officials and military personnel ordered to develop and use chemical weapons should also be subject to prosecution. Because of the sheer numbers involved, it would be impossible to try every case. As a result, the State Department advocates handling these individuals through a truth commission similar to that used in South Africa, where amnesty would be granted in exchange for a full accounting of the crimes that were committed.³⁰ Regardless of which fora is eventually chosen, it is critical that Hussein and his regime are brought to justice.

26. Gordon, *supra* note 22, at A1. Hasan is believed to have “extensive knowledge of the regime’s inner workings” and the U.S. hopes to gain information on the whereabouts of the suspected weapons of mass destruction. *Id.*

27. *Id.* See also *Iraqi Top 55*, *supra* note 20.

28. See *infra* Section IV for a discussion of potential prosecution fora.

29. Wright, *supra* note 9, at A1.

30. *Id.*

B. THE ACTS: SADDAM HUSSEIN'S USE OF CHEMICAL WEAPONS

1. Iraq's Use of Chemical Weapons in the Iran-Iraq War

Iraq used chemical weapons during its eight-year war with Iran.³¹ At the beginning of the war, the chemical bombing of the city of Susangerd in November 1980 was the first documented use of chemical weapons by Iraq.³² By February 16, 1984, Iraq had used chemical weapons against Iran at least forty nine times, killing at least 109 and injuring hundreds of others.³³ The final counts done by the CIA in 1991 estimate that Iran had suffered 50,000 casualties, including thousands of deaths, from Iraq's use of chemical weapons.³⁴ But even this number may not tell the whole story as deferred symptoms from low-dose exposure have continued to plague the civilian and military populations of Iran, producing thousands of additional deaths.³⁵

Iraq used chemical weapons to give itself an advantage over the Iranian troops. Whatever the stated purpose may be, the use of chemical weapons is an egregious violation of the law of war.³⁶ Iraq's use of chemical weapons against Iran was a key factor in Tehran's decision to agree to a U.N. ceasefire in 1988, as Iran's medical personnel could not keep up with the increasing chemical casualties.³⁷

There are serious (and often delayed) health ramifications from exposure to chemical weapons. Iraq used two primary chemicals during the Iran-Iraq War: mustard gas and the nerve agent Tabun.³⁸ Mustard gas has both liquid and dry forms, and it emits a garlic-like smell.³⁹ It is particularly dangerous because of its ability to last for many hours and even

31. Lt. Robert A. Bailey, *Why Do States Violate the Law of War?: A Comparison of Iraqi Violations in Two Gulf Wars*, 27 SYRACUSE J. INT'L L. & COM. 103, 114 (2002).

32. Julian Perry Robinson & Jozef Goldblat, *Chemical Warfare in the Iraq-Iran War* May 1984, Stockholm International Peace Research Institute, available at <http://projects.sipri.se/cbw/research/factsheet-1984.html> (last visited Mar. 25, 2004).

33. *Id.*

34. Robin Wright, *Chemical Arms' Effects Linger Long After War*, L.A. TIMES, Nov. 19, 2002, at A9 (citing a declassified 1991 CIA report) [hereinafter *Chemical Arms' Effects*].

35. *Id.*

36. See discussion *infra* at Section III.

37. *Chemical Arms' Effects*, *supra* note 34, at A1.

38. *Id.*

39. See Robinson & Goldblat, *supra* note 32, at 2; *Chemical Arms' Effects*, *supra* note 34, at A1.

days. It burns any body tissue that it touches and can also result in blindness, blistering, skin discoloration and lung damage.⁴⁰ On the other hand, Tabun (nerve gas) works more rapidly than mustard gas.⁴¹ Even a brief exposure to the deadly agent can cause a running nose, sweating, involuntary urination and defecation, vomiting, twitching, convulsions, paralysis and unconsciousness.⁴² The use of chemical weapons by Iraq was not limited to Iran; the Iraqi regime continued to use these weapons against its own people, the Kurds.⁴³

2. Al-Anfal: The Campaign Against the Kurds

On February 23, 1988, Iraqi forces embarked upon a campaign of vicious human rights abuses, which included the use of chemical weapons against the Kurdish population in northern Iraq.⁴⁴ This brutal campaign was officially labeled by the Iraqi regime as “al-anfal” or “the spoils.”⁴⁵ Al-Anfal (“Anfal”) is the name of the eighth revelation to the Prophet Muhammad in the aftermath of the first battle encountered by the Muslim empire, and refers to the plunder of the infidels.⁴⁶ The Iraqi government reportedly used this term as a means of religious justification for the attack on the Kurds, despite the fact that the Kurds are also Muslims.⁴⁷ The attack against the Kurds was allegedly initiated because the Iraqi government believed that the Kurds were united with Iran, with whom Iraq had been at war since 1983.⁴⁸

Hussein directed the chemical attack on the Kurds, and his cousin, Chemical Ali, implemented the attacks.⁴⁹ The attacks had many

40. Robinson & Goldblat, *supra* note 32, at 2. In addition to mustard gas and Tabun, other chemical weapons such as tear gas, choking gas, arsenics, nitrogen mustard, mycotoxins and germ-warfare agents have also allegedly been used by Iraq during the Iran-Iraq War. *Id.*

41. *Id.*

42. *Id.*

43. See HUMAN RIGHTS WATCH, GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS, A MIDDLE EAST WATCH REPORT (1993), available at <http://www.hrw.org/reports/1993/iraqanfal/> [hereinafter GENOCIDE IN IRAQ].

44. *Id.*

45. HUMAN RIGHTS WATCH, THE ANFAL CAMPAIGN IN IRAQI KURDISTAN: THE DESTRUCTION OF KOREME, A REPORT BY MIDDLE EAST WATCH AND PHYSICIANS FOR HUMAN RIGHTS 1 n.1 (1993), available at <http://www.hrw.org/reports/1992/iraqkor/> [hereinafter THE ANFAL CAMPAIGN].

46. *Id.* The revelation of the Prophet Muhammad announced: “He that defies God and His Apostle shall be sternly punished by God. We said to them: ‘Taste this. The scourge of the fire awaits the unbelievers.’” POWER, *supra* note 4, at 172. In light of this passage, Saddam Hussein decreed that “the Kurds of Iraq would be met by the scourge of Iraqi forces.” *Id.*

47. *Id.*

48. See Eshbaugh, *supra* note 2, at 218.

49. See GENOCIDE IN IRAQ, *supra* note 43, at Introduction. The brutality of Chemical Ali is

components, including the mass disappearances of 180,000 Kurds, mass summary executions and the whole-sale destruction of some 4,500 of the 5,000 Kurdish villages, to name a few.⁵⁰ The *modus operandi* of the Iraqi regime was to first use chemical weapons, particularly mustard gas and the nerve agent Sarin.⁵¹ The goal was to dismantle the Kurdish guerrillas, the *peshmerga*, and cause them to retreat.⁵² The Iraqi regime also used chemical weapons to send a message to the civilian population not to support the *peshmerga*.⁵³ The civilians were evicted from their homes so that they could be detained, relocated and killed.⁵⁴ The physical effects of the chemical weapons on the Kurds were reported as paralysis, trembling, shaking, difficulty swallowing and breathing, blindness and even death.⁵⁵

The largest-scale chemical weapons attack against a civilian population in modern time occurred on March 16, 1988, in the town of Halabja. Some 5,000 civilians were killed in the attack and an additional 10,000 were injured.⁵⁶ But the attack at Halabja is just one example of several attacks directed at the Kurds. Iraqi forces killed an estimated 50,000 to 100,000 people during the eight stages of Anfal.⁵⁷ The Iran-Iraq War ended in August 1988 with a U.N. orchestrated ceasefire, which also

demonstrated through his own words, as evidenced by the following quote:

This is my intention, and I want you to take serious note of it. As soon as we complete the deportations, we will start attacking them everywhere according to a systematic military plan. Even their strong holds. In our attacks, we will take back one third or one half of what is under their control. If we can try to take two-thirds, then we will surround them in a small pocket and attack them with chemical weapons. I will not attack them with chemicals just one day, but I will continue to attack them with chemicals for fifteen days.

Id. at Appendix A. He has also been heard to have stated:

‘Why should I let them live there like donkeys who don’t know anything?’ al-Majid asks in one meeting. ‘What did we ever get from them?’ On another occasion, speaking in the same vein: ‘I said probably we will find some good ones among [the Kurds] . . . but we didn’t, never.’ And, ‘I will smash their heads. These kind of dogs, we will crush their heads.’ And again, ‘Take good care of them? No, I will bury them with bulldozers.’

Id. at Introduction.

50. *See id.* at Appendix D for a complete list of the terrors suffered by the Kurdish population during the al-Anfal campaign.

51. *Id.* at Introduction.

52. The term *peshmerga* is translated as “those who face death.” *Id.*

53. *Id.*

54. *See id.* at Appendix C.

55. THE ANFAL CAMPAIGN, *supra* note 45, at 35-41.

56. *Threats to America: Are We Prepared?, Before the Senate Judiciary Committee on Technology, Terrorism and Government and the State Senate Select Comm. on Intelligence on Chemical and Biological Weapons* (1998) (statement of Dr. Christine Gosden), available at http://www.fas.org/irp/congress/1998_hr/s980422-cg.htm [hereinafter Gosden Statement].

57. James P. Rubin, Press Statement, U.S. State Department on the Twelfth Anniversary of the Halabja Massacre (March 16, 2000).

marked the end of Iraq's use of chemical weapons against Iran and the Kurds. In both countries, however, the effects of chemical weapons remain, more than fifteen years later. Iraq's repression of the Kurds in other ways also continues on today.⁵⁸

II. THE EVIDENCE: SADDAM HUSSEIN'S USE OF CHEMICAL WEAPONS

A. PROOF OF IRAQ'S USE OF CHEMICAL WEAPONS AGAINST IRAN

1. Forensic Evidence: The U.N. Inspection Team

An international team of specialists was sent by the United Nations Secretary General to Iran in 1984 to determine if chemical weapons had indeed been used by Iraq.⁵⁹ The specialists conclusively verified one of the chemical-warfare incidents reported by Iran at Hoor-ul-Huzwizeh.⁶⁰ The specialists identified two poisonous gasses used during the Iran-Iraq War: mustard gas and the nerve gas, Tabun.⁶¹ At that time, however, the U.N. could not establish the origin of such chemicals or whether Iraq had used them.⁶² Nevertheless, the U.S. State Department issued a statement that "the U.S. Government has concluded that the available evidence indicates that Iraq has used lethal chemical weapons."⁶³ The U.N. Security Council also issued a statement condemning the use of chemical weapons.⁶⁴ Investigators later connected the use and production of chemical weapons to Iraq.⁶⁵

58. See GENOCIDE IN IRAQ, *supra* note 43, at Introduction (discussing the fact that the repression of the Kurds did not end with the conclusion of the Anfal campaign, as Kurds were not allowed to exercise their full civil rights as Iraqi citizens until they certified that they were loyal to the Iraqi regime). Chemical weapons were not used by Iraq in the Persian Gulf War in 1990-1991. See Bailey, *supra* note 31, at 118. The failure to use chemical weapons has been attributed to the fact that Saddam Hussein may have feared retaliation by the United States in the form of a nuclear attack, and that same fear did not exist with respect to Iran or the Kurds. *Id.*

59. Robinson & Goldblat, *supra* note 32, at 1. See also Eshbaugh, *supra* note 2, at 225 (discussing U.N. investigations of the use of chemical weapons by Iraq prior to the enactment of the Chemical Weapons Convention).

60. Robinson & Goldblat, *supra* note 32.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Eshbaugh, *supra* note 2, at 225.

2. Testimonial Evidence: The Victims and Specialists

The most persuasive evidence of Iraq's use of chemical weapons against Iran is the testimony of the victims. These victims tell a sobering tale of the sights and smells of the attacks and the debilitating physical effects of chemical weapons exposure. Iran is still discovering more victims of Iraq's use of chemical weapons even fifteen years after the Iran-Iraq War, and approximately twenty percent of the new cases are civilians who did not believe they had been exposed.⁶⁶ One Iranian pulmonary specialist has estimated that a majority of the victims of chemical weapons have not yet been seen by medical specialists.⁶⁷

Both the victims and the Iranian medical specialists will provide compelling testimony at trial. Faced with this overwhelming evidence, it has been reported that Iraq indirectly admitted to using chemical weapons during the Iran-Iraq War and against the Kurds.⁶⁸

B. PROOF OF IRAQ'S USE OF CHEMICAL WEAPONS AGAINST THE KURDS

While the evidence set forth above regarding the use of chemical weapons against Iran is compelling, there is stronger and more detailed evidence which proves that Iraq used chemical weapons against the Kurds.

1. Forensic Evidence: Studies by Non-Governmental Organizations ("NGOs") and Dr. Christine Gosden

Investigators for Middle East Watch and Physicians for Human Rights conducted a study of the medical effects of chemical weapons on the village of Birjinni in Kurdistan.⁶⁹ Birjinni is a microcosm of the many villages throughout Kurdistan that were attacked by chemical weapons. A number of investigative techniques were used in the study, including interviews with eyewitnesses, exhumation of victims' bodies, archaeological research (including soil testing and examination of bomb craters) and analysis of bomb canisters found at the village.⁷⁰ Soil samples

66. See *Chemical Arms' Effects*, *supra* note 34, at A1.

67. *Id.*

68. See THE ANFAL CAMPAIGN, *supra* note 45, at 43 n.11 (citing as an example an indirect official statements made by the Iraqi Minister of Defense in September 1988 at a news conference in Baghdad where he stated that while the policy of Iraq is not to use chemical weapons "if this is the rule, then each rule has an exception").

69. HUMAN RIGHTS WATCH, SCIENTIFIC FIRST: SOIL SAMPLES TAKEN FROM BOMB CRATERS IN NORTHERN IRAQ REVEAL NERVE GAS-EVEN FOUR YEARS LATER (1993) [hereinafter SCIENTIFIC FIRST].

70. THE ANFAL CAMPAIGN, *supra* note 45, at 44.

were taken from bomb craters and were found to contain trace evidence of nerve gas, Sarin and mustard gas.⁷¹ This was the first time that scientists were able to corroborate the use of chemical weapons with environmental residues (still detected four years later).⁷² Based on their analysis, the investigators firmly concluded that:

[T]he village of Birjinni [in Kurdistan] was attacked by chemical weapons on or about August 25, 1988; that some or all of the craters investigated by the team archeologist were made by chemical weapons bombs; and that the skeletal remains exhumed by the forensic team were those of chemical weapons victims.⁷³

This finding was consistent with what the United States and the United Nations already believed: Iraq had used chemical weapons during the Iran-Iraq War, and that use extended to Iraqi Kurdistan.

Dr. Christine M. Gosden, a professor of Medical Genetics at the University of Liverpool in the United Kingdom, has also conducted studies on the long-term effects of Iraq's use of chemical weapons in Halabja.⁷⁴ Dr. Gosden visited Iraqi Kurdistan in 1998 and examined more than 700 patients who were exposed to chemical weapons. In recalling her experience in Halabja, she stated that:

What I found was far worse than anything I had suspected, devastating problems occurring 10 years after the attack. These chemicals seriously affected people's eyes and respiratory and neurological systems. Many became blind. Skin disorders which involve severe scarring are frequent, and may progress to skin cancer An increasing amount of children are dying each year of leukemias and lymphomas. The cancers tend to occur in much younger people in Halabja than elsewhere, and many people have aggressive tumors, so that mortality rates are high. No chemotherapy or radiotherapy is available in this region.⁷⁵

Dr. Gosden also researched infertility, congenital malformations and infant mortality, and found that there is a four times greater incidence of such effects in Halabja than in the neighboring town of Suleymania.⁷⁶ She presented her finding to Congress on April 22, 1998, with the dual goal of drawing attention to the suffering in Iraqi Kurdistan as well as helping the United States prepare for a future chemical weapons attack.⁷⁷ Dr. Gosden

71. SCIENTIFIC FIRST, *supra* note 69, at 1.

72. *Id.*

73. See THE ANFAL CAMPAIGN, *supra* note 45, at 44.

74. Christine Gosden, *Why I Went, What I Saw*, WASHINGTON POST, Mar. 11, 1998, at A9.

75. *Id.*

76. *Id.*

77. Gosden Statement, *supra* note 56.

will be a credible expert witness for the prosecution on the fact that chemical weapons were used and the long-term effects of such use on the citizens of Halabja.

2. Testimonial Evidence: Survivors and Medical Experts

The prosecution can use survivors, outside specialists and the medical experts listed above to give testimony on the events and impact of the Anfal campaign. Human Rights Watch conducted field interviews in Kurdistan, and based on eyewitness testimony, has compiled a list of known chemical attacks in Kurdistan from 1987-1988. Like the survivors of the attack on Iran, these eyewitnesses will also provide persuasive evidence of the atrocities that occurred.

3. Documentary Evidence: 5.5 Million Pages

The U.S. Government, in conjunction with human rights and Iraqi opposition groups, has collected 5.5 million pages of official Iraqi documents on the Anfal campaign.⁷⁸ Generally, these documents show the routine nature of the atrocities.⁷⁹ One document from a security director for the Iraqi regime to another security branch requests information on whether the Iranians were providing the “saboteurs,” the Kurds, with anti-chemical protectives.⁸⁰ This document can be read as “undeniable proof” of the Iraqi regime’s genocidal campaign against the Kurds.⁸¹ Another document from the commander of military intelligence in Arbil requests that the various divisions count their stock of “Bio-Chemical Materials.”⁸² The U.S. State Department has also stated that it has preserved videotapes of Iraqi war crimes that can be used in an eventual prosecution.⁸³ In sum, there is overwhelming evidence that Hussein and his regime used chemical weapons against both the Iranians and the Kurds.

78. *International Informational Programs, War Crimes*, U.S. State Department, available at <http://usinfo.state.gov/regional/nea/iraq99h.htm> (last visited Nov. 17, 2002) (on file with author).

79. *Id.*

80. The Iraq Research and Development Project, *Protection Against Chemical Weapons*, Harvard University at <http://www.harvard.edu/~irdp/translations> (last visited Feb. 1, 2003) (on file with author) [hereinafter Iraq Research Development Project].

81. *Id.*

82. James S. Robbins, *War Crimes: The Case of Iraq*, 18 FLETCHER F. WORLD AFF. 45, 52 (1994).

83. Iraq Research and Development Project, *supra* note 80, at 1.

III. THE LAW: PROHIBITIONS ON THE USE OF CHEMICAL WEAPONS

A. THE DEVELOPMENT OF THE LAW PROHIBITING CHEMICAL WEAPONS

The earliest statement on the prohibition of chemical weapons is an agreement between the French and German armies in 1685.⁸⁴ The parties agreed at that time “that no side should use poisoned bullets.”⁸⁵ Nations did not become dedicated to the regulation of chemical weapons until the late nineteenth century, however, when the Hague Conferences of 1899 and 1907 banned the use of poisoned projectiles or projectiles used to distribute poisonous gas.⁸⁶ But the proscriptions of the Hague Conferences did not stop Germany from using chemical weapons during World War I.⁸⁷ So that it would not be in violation of the Hague Conferences, Germany filled canisters with chlorine and let the wind blow the chemicals towards the French troops.⁸⁸ France, England and ultimately the United States, treated Germany’s use of chemical weapons as a breach of the Hague Conventions, and used chemical weapons in retaliation.⁸⁹ Consequently, there were 1.3 million casualties in World War I from the use of chemical weapons, which led to the enactment of the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare (“Geneva Protocol”) in 1925.⁹⁰

The Geneva Protocol outlawed the use of chemical weapons against other states who were party to the Convention. The Protocol is not without its limitations, however. It does not prohibit the development of chemical weapons or preclude stockpiling.⁹¹ Moreover, many countries reserved the right to use chemical weapons in retaliation against another country that used them first.⁹² The imperfections in the Geneva Protocol were noted by the world community when Italy used chemical weapons against Ethiopia in 1935.⁹³ But in the years following this use, the stockpiling and development of chemical weapons continued and still continues today.

Although the United Nations was focused on the threat of nuclear

84. *Id.*

85. Eshbaugh, *supra* note 2, at 216.

86. Fitzgerald, *supra* note 3, at 431.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 431-32.

92. *Id.* at 431.

93. *Id.* at 432.

weapons, it realized that it also needed to curb the development and stockpiling of chemical weapons.⁹⁴ The United Nations consequently created the Conference on Disarmament to negotiate a multilateral convention regarding chemical weapons.⁹⁵ After more than a decade of negotiations, the Chemical Weapons Convention was opened for signature in 1993.⁹⁶

On April 29, 1997, the Chemical Weapons Convention was entered into force with over a 100 nations ratifying the Convention, including the United States, India, China, Russia and Iran.⁹⁷ The Chemical Weapons Convention is unlike the Geneva Protocol in that it prohibits all uses of chemical weapons (not only during times of war) and also prohibits the production, development and stockpiling of chemical weapons.⁹⁸ The Convention also established the Organization for the Prohibition of Chemical Weapons (“OPCW”), which is charged with the task of implementing, monitoring and enforcing the Convention.⁹⁹ According to the Convention, the state parties must report to the OPCW all of their chemical weapons, agents and precursor chemicals, all of their actual production facilities weapons within ten years of accession.¹⁰⁰ The OPCW is also allowed to conduct inspections, and upon a finding of non-compliance, it may impose sanctions, but it is not allowed to use force.¹⁰¹ Despite its laudable goals, the Chemical Weapons Convention has major shortcomings. For one, the Convention does not apply to those countries that have not ratified it, and it does not apply to terrorist groups. Those countries of international concern that have not signed the Convention include Iraq, North Korea and Libya. The limitations of the Chemical Weapons Convention point to the fact that deterrence of both stockpiling and use must be achieved in some other manner, *i.e.*, through prosecution under other existing international laws as discussed below.

The treaties on chemical weapons do not provide for the imposition of

94. Eshbaugh, *supra* note 2, at 218-19.

95. *Id.*

96. *Id.* at 219.

97. Michael P. Scharf, *Clear and Present Danger: Enforcement of the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force and Criminalization*, 20 MICH. J. INT’L L. 477, 484 (1999).

98. *Convention on the Prohibition, Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction*, G.A. Res. 47/39, U.N. GAOR, 74th mtg., U.N. Doc. A/RES/47/39 (1992).

99. *Id.*

100. *Id.* See also Fitzgerald, *supra* note 3, at 437 (discussing the requirements of the Chemical Weapons Convention).

101. Fitzgerald, *supra* note 3, at 440.

mandatory sanctions against violators.¹⁰² The parties to these treaties can individually or collectively impose sanctions, but there is no universal mechanism of enforcement.¹⁰³ As a result, the United Nations — specifically the U.N. Security Council — must play a role in enforcing the prohibition on chemical weapons. Iraq is a member of the United Nations and is required to abide by the U.N. Charter, which states that the peoples of the United Nations reaffirm their faith “in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”¹⁰⁴

As a response to the use of chemical weapons in the Iran-Iraq War, the United Nations unanimously adopted Resolution 620, which condemned the “use of chemical weapons in the conflict between Iran and Iraq.”¹⁰⁵ Resolution 620 was just one of a number of resolutions that had been adopted by the United Nations relating to chemical weapons. A resolution by the General Assembly in 1969 also prohibits during international armed conflict “any chemical agents or warfare-chemical substances, whether gaseous liquid or solid-which might be employed because of their direct toxic effects on man, animals or plants.”¹⁰⁶

After the Gulf War, the U.N. Security Council adopted Resolution 687, which also relates to chemical weapons.¹⁰⁷ Resolution 687 required Iraq to “unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of . . . [a]ll chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support, and manufacturing facilities.”¹⁰⁸ The preamble of Resolution 687 invokes the 1925 Geneva Protocol and the 1972 Biological Weapons Convention as the justification for imposing this requirement.¹⁰⁹ “The destruction of these materials was to be performed under the supervision of the United Nations Special Commission (“UNSCOM”), which was charged with the responsibility for inspection and investigation of all known or suspected weapon sites.”¹¹⁰ However, Baghdad managed to stall this process. Clearly, neither the various treaties regarding chemical weapons, nor the resolutions of the

102. Scharf, *supra* note 97, at 486.

103. *Id.*

104. U.N. CHARTER pmbl.

105. ADAM ROBERTS & RICHARD GUELF, DOCUMENTS ON THE LAW OF WAR 157 (3rd ed. 2000).

106. *Id.* at 156.

107. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., at 6, U.N. Doc. S/Res/687 (1991).

108. *Id.*

109. *Id.*

110. Scharf, *supra* note 97, at 486.

U.N. Security Council, have succeeded in deterring and punishing chemical weapons use.

Hussein and his regime may also be tried under the principles of Nuremberg. The Nuremberg principles are applicable to the conduct of Iraq because they were unanimously adopted by a resolution of the United Nations (of which Iraq is a member state) and are also considered to be customary international law.¹¹¹ Hussein and his regime may be tried for war crimes, crimes against humanity and genocide. The Nuremberg principles have recently been used by the United Nations to bring war criminals in the former Yugoslavia and Rwanda to justice through the mechanism of an *ad hoc* tribunal. A similar *ad hoc* tribunal could be established with respect to Iraq. In addition, the Rome Statute for the establishment of the International Criminal Court also makes “employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices” a war crime.¹¹²

Based on the above, the prosecution will have an arsenal of international treaties, laws and regulations at its disposal under which to prosecute Hussein and his regime for the use of chemical weapons in the Iran-Iraq War and against the Kurds. International law distinguishes, however, between using chemical weapons against another country and using chemical weapons against a country’s own people.¹¹³ As a result of this difference, the treaties and laws applicable to the use of chemical weapons against Iran and the Kurds will be discussed separately.

B. VIOLATIONS OF INTERNATIONAL LAW FOR THE USE OF CHEMICAL WEAPONS AGAINST IRAN

The use of chemical weapons by Iraq against Iran is a violation of several of the international laws and resolutions discussed above. Despite the unavailability of the Chemical Weapons Convention, there are other avenues by which Hussein and his regime could be held liable for the use

111. Judgment of the International Military Tribunal at Nuremberg 1946, *reprinted in* DOCUMENTS ON THE LAW OF WAR, *supra* note 104, at 175-76 [hereinafter “Nuremberg Principles”]. See also James S. Robbins, *War Crimes: The Case of Iraq*, *supra* note 82, (discussing the applicability of the Nuremberg principles to the conduct of Iraq and concluding that Iraq has concurred to the Nuremberg principles and that these principles are also considered customary international law).

112. *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 art. 8(2)(b)(xviii) (1998) [hereinafter Rome Statute].

113. See Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of Aug. 12, 1949, 6 U.S.T. 3516, *reprinted in* DOCUMENTS ON THE LAW OF WAR, *supra* note 104, at 102.

of chemical weapons against Iran.

First, Iraq could be tried for a violation of the Geneva Protocol.¹¹⁴ Iraq ratified the Geneva Protocol on September 8, 1931.¹¹⁵ The Geneva Protocol states:

[T]he use in war of asphyxiating, poisonous [or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilised world.... That the High Contracting Parties... accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound between themselves according to the terms of this declaration.¹¹⁶

The fact that Iraq violated the Geneva Protocol with its use of chemical weapons during the Iran-Iraq War was acknowledged by the U.N. Security Council on March 21, 1986, when it criticized Iraq for “use of chemical weapons in clear violation of the Geneva Protocol of 1925.”¹¹⁷

Second, Iraq has also violated the Additional Protocol of August 12, 1949, on the Protection of Victims of International Armed Conflicts (“Protocol I”), which states in Article 35(2) that “[i]t is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”¹¹⁸

Third, Iraq is a member of the United Nations and is required to abide by the United Nations Charter as well as the various Security Council resolutions prohibiting the use and stockpiling of chemical weapons.

Fourth, the actions of the Iraqi regime constitute a war crime and a crime against humanity as defined by the Nuremberg principles. According to Article 6(b) of the Nuremberg judgment, a war crime is defined as follows:

[V]iolations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or

114. 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, *reprinted in* DOCUMENTS ON THE LAW OF WAR, *supra* note 105, at 158-67 [hereinafter Geneva Protocol].

115. *Id.* at 162.

116. *Id.* at 159.

117. *Id.*

118. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) 125 U.N.T.S. 609 art. 35(2), *reprinted in* DOCUMENTS ON THE LAW OF WAR, *supra* note 105, at 442 [hereinafter Protocol I]; *See* Bailey, *supra* note 31, at 114 (discussing Iraq’s violation of international conventions by its use of chemical weapons).

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.¹¹⁹

Undoubtedly, Iraq's conduct in using chemical weapons against the civilian population in Iran would constitute "murder" or "ill-treatment" and a count for war crimes could be included in a charge against Hussein and his regime.

The use of chemical weapons against Iran is also a crime against humanity. A crime against humanity is defined in the Nuremberg principles as:

[M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions 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.¹²⁰

Based on this definition, Hussein and his regime could also be prosecuted for crimes against humanity.

C. VIOLATIONS OF INTERNATIONAL LAW FOR THE USE OF CHEMICAL WEAPONS AGAINST THE KURDS.

Although the Kurdish population in northern Iraq may not be protected by the Geneva Convention prohibiting the use of chemical weapons, the Kurds are still protected by international law. First and foremost, there is a compelling argument that the use of chemical weapons against the Kurds constitutes genocide. The United Nations Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as:

[A]ny of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: (a) [k]illing the members of the group; (b) [c]ausing serious bodily or mental harm to members of the group; (c) [d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) [i]mposing measures intended to prevent births within the group; (e) [f]orcibly transferring children of the group to another group.¹²¹

119. Nuremberg Principles, *supra* note 111, at 177, art. 6(b).

120. *Id.* at 177, art. 6(c).

121. Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 U.N.T.S. 277, *reprinted in* DOCUMENTS ON THE LAW OF WAR, *supra* note 105, at 181 [hereinafter Genocide Convention].

According to Human Rights Watch and other legal commentators, it is evident that the aim of the Iraqi regime was to destroy the Iraqi Kurds (in part) and it had done so.¹²² Further, Human Rights Watch has reported that “intent and act had been combined, resulting in the consummated crime of genocide.”¹²³ In 1995, the United States finally agreed with Human Rights Watch that the action taken by Hussein against the Kurds was genocide.¹²⁴ Prior to that time, there were many arguments that Iraq had not committed genocide, simply because to many diplomats “it didn’t look like the Holocaust.”¹²⁵ However, once these diplomats had the opportunity to review the language of the Genocide Convention, they recognized that Hussein’s conduct met the definition of genocide.¹²⁶

In addition to genocide, war crimes and crimes against humanity are also applicable to the Iraqi regime’s use of chemical weapons against the Kurds for the same reasons discussed as to the use against Iran. Thus, a prosecutor could recite a litany of crimes in a charge brought against Hussein and his regime.

IV. THE FORA: INTERNATIONAL AND DOMESTIC PROSECUTION OPTIONS

Now that it is clear that the evidence and laws exist for the prosecution of Saddam Hussein and the Iraqi regime for the use of chemical weapons, the next question is where such prosecution should occur.¹²⁷ As mentioned above, there are a variety of locations for prosecution available, both international and domestic, which will be discussed below.

There are a number of considerations that go into the decision of where to prosecute. Accountability is key to the development of a strong legal system in post-war Iraq. At the same time, prosecuting Hussein and the Iraqi regime on Iraqi soil may keep Iraqi citizens stuck in the past rather than moving towards the future. A combination of prosecution options

122. GENOCIDE IN IRAQ, *supra* note 43, at 11. See, e.g., Safwat Rashid Sidqi, *A Criminal Regime: Accountability in Post-Saddam Iraq*, in *HOW TO BUILD A NEW IRAQ* 57 (2002) (stating that “the worst crime committed by Saddam’s regime has been genocide.”)

123. GENOCIDE IN IRAQ, *supra* note 43, at 11.

124. POWER, *supra* note 4, at 245.

125. *Id.* at 244.

126. *Id.*

127. It should be noted that Saddam Hussein and the Iraqi regime may be prosecuted for a plethora of other atrocities, including potential war crimes which occurred during Operation Iraqi Freedom. Without diminishing the grave nature of these atrocities and the importance of an all-encompassing prosecution, this paper is only focused on prosecution for the use of chemical weapons.

may also be imposed. For example, it may be prudent to try the top tier of the Iraqi regime through an international tribunal, while instituting a truth commission for the lower-level government officials who participated in the atrocities at the direction of others. Another key question is who is to make this decision—the United States, who has custody of some of the leaders of the Iraqi regime, the United Nations, who has the authority to establish an *ad hoc* tribunal; the people of Iraq? While there is no clear answer to this question, it is preferable that the United Nations, as a representative of the world community, make this decision.

A. INTERNATIONAL PROSECUTION OPTIONS

1. Creation of an Ad Hoc Tribunal: The International Criminal Tribunal for Iraq (ICTI)

The most obvious forum for the prosecution of Saddam Hussein and the Iraqi regime would be the creation by the United Nations of an *ad hoc* tribunal, such as those established for the former Yugoslavia (“ICTY”) and Rwanda (“ICTR”). The ICTY and ICTR were established by the Security Council through the use of their power under Chapter VII of the U.N. Charter.¹²⁸ The tribunals could have been established through a multilateral convention forwarded to the U.N. General Assembly for adoption by the member states.¹²⁹ However, at the time of the creation of the ICTY and ICTR, it was not likely that a consensus would have been reached on their establishment, because it would have been viewed as a step towards the adoption of the International Criminal Court.¹³⁰ It is also unlikely that the General Assembly would agree to establish such a tribunal with respect to Iraq. Indeed, one commentator has stated that it would take a “Herculean” effort to persuade even the Security Council to agree to an Iraqi Tribunal, especially in light of the opposition within the Security Council to the United States’ policy on war with Iraq.¹³¹

The United States has already contributed \$4 million to a U.N. War Crimes Commission, which would be used if a U.N. Tribunal for Iraqi war

128. U.N. CHARTER art. 39, para. 4.

129. LYAL S. SUNGA, *THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW* 298 (1997).

130. *Id.*

131. Leila Sadat, *What Would U.S. Do With Saddam?*, ST. LOUIS POST-DISPATCH, Mar. 23, 2003, at B1 (discussing the various options for prosecution of Saddam Hussein and other top Iraqi leaders).

crimes was created.¹³² One of the problems with the establishment of an *ad hoc* tribunal is financial viability. As learned through the experiences with ICTY and ICTR, the operation of an *ad hoc* tribunal is expensive. For example, both the ICTY and ICTR both receive \$100 million annually from the U.N. treasury.¹³³ In light of the expenses that will undoubtedly occur in rebuilding Iraq, as well as the continuation of the work of the two current tribunals, it is questionable whether the U.N. will want to devote its resources to the funding of another *ad hoc* tribunal.

There are considerable benefits to the establishment of an *ad hoc* tribunal, however. For one, it demonstrates that the world community is united in its efforts to prosecute Hussein and the Iraqi regime for their use of chemical weapons and other war crimes. Moreover, an *ad hoc* tribunal provides a set of rules to be followed, consolidates resources and works to ensure that there is some consistency among prosecutions. An *ad hoc* tribunal also establishes a body of criminal jurisprudence that is important to the international community as a whole.¹³⁴

Along the same lines, an occupation court—like the ones established for Nuremberg and Tokyo—could be established by an international treaty or a military proclamation. It is reported that the Bush administration is considering this as a possibility for post-war Iraq.¹³⁵ Some of the problems with such a court involve not only cost but also the element of victor's justice, which detracts from the legitimacy of the court. There is also the fear that such a court would not have the support of the international community as a whole, but would merely be run by a "coalition of the willing."¹³⁶

2. The International Criminal Court

A second option would be to try Saddam Hussein and the Iraqi regime in the International Criminal Court ("ICC"). In 1998, representatives of more than 160 countries met to create an International Criminal Court in which war criminals could be brought to justice.¹³⁷ The result of the

132. *Id.*

133. Jess Bravin, *Tribunal in Africa May Serve as Model for Trial of Hussein*, WALL ST. J., Feb. 12, 2003, at B1.

134. See generally Diane F. Orentlicher, *War Crimes Tribunals: The Record and the Prospects*, 13 AM. U. INT'L L. REV. 1 (1988) (discussing a conference between the top leadership of the tribunals and the lessons that can be learned from the experience of the ICTY and ICTR).

135. Sadat, *supra* note 131, at B1.

136. *Id.*

137. U.S. STATE DEPARTMENT OFFICE OF WAR CRIMES ISSUES, *The International Criminal Court*, (May 2002), at <http://www.state.gov/s/wci/fs/2002/9978pf.htm> (last visited Mar. 17, 2003).

conference was a treaty, known as the “Rome Statute,” which created the ICC.¹³⁸ The United States signed the treaty on December 31, 2000.¹³⁹ At the time, President Clinton acknowledged that the treaty was fundamentally flawed, but believed that the United States could play a more active role in its development if it signed the treaty nevertheless.¹⁴⁰

On May 6, 2002, John R. Bolton, the Under Secretary of State for Arms Control and International Security, sent a letter to U.N. Secretary General Kofi Annan stating that the United States did not intend to become a party to the treaty and that it has no legal obligations arising from its signature on December 31, 2000.¹⁴¹ Despite the United States’ purported “unsigned” of the treaty, as of April 11, 2002, the number of countries who ratified the treaty surpassed sixty, which was the amount needed for the ICC to be entered into force.¹⁴² Iraq has not ratified the ICC or accepted the Court’s jurisdiction.

Due to the fact both the United States and Iraq are not parties to the ICC, the only mechanism that could be used to bring a case against Hussein and his regime is a referral from the Security Council under Article 13 of the Rome Statute.¹⁴³ As discussed above, it is unlikely that the Security Council would agree to such measures in light of its resistance to the U.S. war against Iraq. Moreover, it is unlikely that the United States would even seek such a referral, due to the Bush administration’s clear opposition to the ICC.¹⁴⁴ And, it does not seem likely that the United States would work towards developing a less problematic ICC while the Bush administration is in power.

While the problems with the ICC are beyond the scope of this article, some of the concerns of the United States were jurisdiction over nationals of a non-party, the definition of the crime of aggression, and the possibility of a politically motivated prosecutor. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Richard Boucher, Press Statement, U.S. State Dep’t on the International Criminal Court: Letter to U.N. Secretary General Kofi Annan (May 6, 2002), *available at* <http://www.state.gov/r/pa/prs/ps/2002> (last visited Nov. 20, 2002).

142. *Id.*

143. Rome Statute, *supra* note 112, at art. (13)(b). This provision states that:

[T]he Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if . . . [a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.

Id. It is also possible that Iran could become a member of the ICC and seek jurisdiction under Article 12(2)(a) of the Rome Statute, as war crimes took place in Iran. *See id.* at art. 12(2)(a). It is extremely unlikely that Iran would pursue such an option.

144. Sadat, *supra* note 131, at B1 (noting that an ICC referral is unlikely due to the fact that the Bush Administration has “declared itself to be unalterably opposed to the ICC”).

3. Hybrid Courts: The Special Court of Iraq

The third and most probable option for prosecution is the creation hybrid court modeled after the Special Court of Sierra Leone. This option is also favored by the Bush administration, and U.S. officials have stated that the Special Court offers a model that could be used to try Hussein and his associates.¹⁴⁵

There are considerable advantages to creating a court modeled after the Special Court of Sierra Leone. For one, the prosecution will have both international and domestic elements, as it will be conducted by three judges appointed by the Iraqi government and five judges named by the Secretary General of the United Nations.¹⁴⁶ These judges, not a jury, rule on guilt and impose sentences.¹⁴⁷ Another benefit of such a court is that it sits where the crimes took place.¹⁴⁸ If the court were to sit in Kurdistan, for example, witnesses and evidence would be nearby and the local population would be able to attend trials. Like the Sierra Leone court, the Iraqi court could also employ local lawyers and support staff.¹⁴⁹ The location of the court and the involvement of local Kurds would be an important step in the development of a new system of justice in Iraq.

Unlike the ICTY and ICTR, the Special Court of Sierra Leone has a strict budget which is controlled by the United States, a three-year time frame and a limited scope, as only those with the greatest responsibility for the atrocities are tried.¹⁵⁰ A court created for Iraq could also follow these strictures.

The Sierra Leone type court is not without its critics, however. David Scheffer, the Ambassador-at-Large for War Crimes Issues under the Clinton administration, believes that “[t]here’s a real benefit to getting the top leadership out of Iraq and not have them percolating in Iraqi detention centers staffed by Americans.”¹⁵¹ Scheffer believes that it would be disruptive to democracy building to have the “hard-line element still kicking around in Iraq.”¹⁵² Other commentators have stated that it will be difficult to convince the Iraqis to agree to any kind of international court, as the death penalty will not be imposed, and that Iraq should try these crimes

145. Bravin, *supra* note 133, at B1.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

in its own national courts without U.S. intervention.¹⁵³ Overall, the benefits of a tribunal patterned after the Sierra Leone court clearly outweigh the burdens, and this type of court is the best available option for prosecuting the higher level members of the Iraqi regime.

4. Truth and Reconciliation Commissions

For the lower-level government officials who participated in the atrocities, a truth and reconciliation commission is the most feasible option. Truth commissions have been “enthusiastically adopted internationally to promote national renewal and create more inclusive national societies after state repression and violence. The centerpiece of a truth commission is the testimony of individuals as to their suffering.”¹⁵⁴ Truth commissions serve two important goals, as they allow victims the opportunity to tell their story and establish a recording of the past, while at the same time serving to “re-establish a national community.”¹⁵⁵ In a post-war Iraq, it will be necessary to achieve both of these goals.

An Iraqi truth commission could be modeled on the South African Truth and Reconciliation Commission (“TRC”), which was used to produce a comprehensive history of human rights violations under apartheid between 1960 and 1994.¹⁵⁶ While the hearings were victim-centered rather than focused on the perpetrators, the perpetrators were offered the possibility of amnesty in exchange for full disclosure of their participation in the atrocities.¹⁵⁷

A truth and reconciliation commission is not without downsides, however. As learned through the South African experience, it is impossible for all victims to get their stories told, so some are left out of the process.¹⁵⁸ In addition, victims often feel “re-victimized” by the proceeding, listening to perpetrators again recount the humiliating details of their crimes in exchange for amnesty.¹⁵⁹ Moreover, a truth commission does not guarantee that atrocities will be prevented in the future.¹⁶⁰ Despite these downsides, however, a truth and reconciliation commission is the most practical vehicle for addressing the violations of lower-level government officials.

153. *Id.*

154. MICHAEL HUMPHREY, *THE POLITICS OF ATROCITY AND RECONCILIATION, FROM TERROR TO TRAUMA* 106 (2002).

155. *Id.* at 108.

156. *Id.* at 109.

157. *Id.* at 108.

158. *Id.* at 123.

159. *Id.*

160. *Id.*

B. DOMESTIC PROSECUTION OPTIONS

In addition to international prosecution options, there are also domestic prosecution options. As stated above, there is an argument that prosecutions for the use of chemical weapons take place in Iraq once the new government and legal system is formed. This is not a realistic option, however, as it may take a considerable amount of time before a legal infrastructure is in place. In addition, there are downsides to a prosecution run solely by Iraq, as it may be viewed as illegitimate, politically motivated, and self-serving. Moreover, the new leadership in Iraq may not want to prosecute the former regime.

Saddam Hussein and the Iraqi regime may also be prosecuted in any country that has universal jurisdiction over genocide, war crimes and crimes against humanity.¹⁶¹ Universal jurisdiction is the authority of domestic courts to prosecute certain crimes, regardless of where the offense occurred, the nationality of the perpetrator, or the nationality of the victim.¹⁶² Belgium has a broad universal jurisdiction statute, which has resulted in a flood of cases being filed there.¹⁶³ The laws of the United States, on the other hand, only provide for universal jurisdiction over certain terrorist offenses and torture, but not over war crimes, crimes against humanity, or genocide.¹⁶⁴ Thus, the law of the United States is woefully inadequate to address the use of chemical weapons against the Kurds and Iran, as it would be difficult to construe such offenses as torture or international terrorism.

The United States' chemical weapons laws are also inadequate to provide for jurisdiction in the United States' courts. While there is a U.S. statute that addresses the use of chemical weapons, it only applies to chemical weapons used against U.S. nationals. The statute, 18 U.S.C. § 2332a, provides that: "[A]ny person who, 'without lawful authority,' uses or threatens, attempts, or conspires to use a weapon of mass destruction, including any biological agent, toxin, or vector, against a national of the United States shall be punished, whether such national is within the United States or not."¹⁶⁵ Additionally, "[s]ection 2332c of that Title similarly

161. Michael P. Scharf & Thomas C. Fischer, Symposium, *Universal Jurisdiction: Myths, Realities and Prospects*, 35 NEW ENG. L. REV. 227, 227 (2001).

162. *Id.*

163. William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 18 (2002).

164. Scharf & Fischer, *supra* note 161, at 227. See also Douglas Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 421 (2001).

165. Scharf, *supra* note 97, at 505.

punishes any person who, 'without lawful authority,' uses, or attempts or conspires to use a chemical weapon against a national of the United States while such national is outside or within the United States."¹⁶⁶ Of course, these sections would not apply to Iraq's use of chemical weapons against Iran and the Kurds, as they are not United States nationals.

Even if prosecution in the United States' courts was a viable option, there are several factors which would make such a prosecution undesirable. For one, the prosecution of the Iraqi regime should be a global effort towards the establishment of international order and security. Further, prosecution by the United States may be viewed as impartial and paternalistic. On balance, in reviewing all of the available prosecution options, it appears that a court based on the Sierra Leone model would be the most efficient to try the top tier of the Iraqi regime and would achieve the goals to be gained from an international prosecution. In addition, a truth and reconciliation commission should be instituted for those lower level government officials who participated in the use of chemical weapons against the Kurds and Iran.

V. THE CASE FOR PROSECUTION: WHY PROSECUTING SADDAM HUSSEIN IS IMPERATIVE

Based on the above, there exists sufficient evidence to try Hussein and his regime for their use of chemical weapons against Iran and the Kurds under existing international law. There are a number of options for where the prosecution should take place. What is missing, however, is the political will to prosecute. It is imperative for the international community to unite in its prosecution efforts. Now is the time to go forward with a prosecution against Hussein and his regime. On January 17, 2003, Human Rights Watch issued a press release calling for the immediate arrest and prosecution of Chemical Ali, who was visiting Syria, and was also scheduled to visit Egypt, Jordan and Lebanon.¹⁶⁷ Human Rights Watch noted that all four countries have ratified the Geneva Conventions and the United Nations Convention on the Prevention and Punishment of Genocide, which generally require that the party states take affirmative acts to prevent and punish war crimes and genocide.¹⁶⁸

166. *Id.*

167. HUMAN RIGHTS WATCH, *Prosecute Iraq's "Chemical Ali" Saddam Hussein Aide Accused of Genocide Against the Kurds*, (Jan. 17, 2003), available at <http://www.hrw.org/press/2003/01/iraq0117.htm> (last visited Mar. 18, 2004).

168. *Id.* Egypt, Jordan and Lebanon are also parties to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which also imposes on states parties an obligation to prosecute. *Id.*

There are many reasons why prosecution is an absolute necessity. The first is a result of Iraq's political structure, which does not have a system of checks and balances.¹⁶⁹ Citizens who have been victimized by the state have no recourse because there are no independent institutions to hold top government officials accountable for the crimes that they have carried out.¹⁷⁰ A prosecution of Hussein and his regime by the world community would serve to put the political power back in the hands of the people, and send a message to other brutal regimes that repressiveness will not be tolerated and accountability is required.

The second reason to prosecute is so that the United States can rectify the grave error it made years ago when it turned a blind eye to Iraq's use of chemical weapons against Iran and the Kurds. The United States refused to take affirmative action against Iraq because Iran was viewed as an enemy, and it needed Iraq to win the war against Iran. This hands-off approach as to Iraq is illustrated by a statement made by the State Department in 1988, that "the United States does not interfere in internal affairs," clearly referring to the Iraqi Kurds.¹⁷¹ The policy of the United States at the time was to appease Hussein, because he appeared to be pro-Western. As one commentator has so aptly summarized, "the fog of war again obscured an act of genocide."¹⁷²

Neither the Reagan administration nor the first Bush administration spoke out against Hussein's use of chemical weapons. In fact, the Reagan administration worked to kill a bill in the Senate that would have placed severe sanctions against Iraq for its use of chemical weapons.¹⁷³ Likewise, when the first Bush administration took over the White House, Iraq continued to be viewed as a potentially helpful ally, and Hussein was able to get another one billion dollars in agricultural credits from the United States.¹⁷⁴ Instead of punishing Iraq for the use of chemical weapons against Iran and the Kurds, Iraq was, in essence, being rewarded. It was only when Iraq invaded Kuwait that the political tide changed. It goes without saying that the United States has acted hypocritically with regard to Iraq.

Undeniably, the prosecution of Hussein for the use of chemical weapons should have occurred years ago. Nevertheless, it is important for the United States to prosecute Hussein now to send a message that the use of chemical weapons will not be tolerated by the United States and the

169. UEKERT, *supra* note 11, at 49.

170. *Id.*

171. POWER, *supra* note 4, at 199.

172. *Id.* at 193.

173. *Id.* at 226.

174. *Id.* at 233.

world. Further, the United States must adhere to a policy that no one who uses chemical weapons (friend or foe) will go unpunished. The United States should not let anything overshadow the protection of fundamental human rights.

Finally, prosecution would legitimize the rule of international law. So far, by failing to take any legal action against Hussein and his community, the rule of international law has been left weak and undermined.¹⁷⁵ There is considerable value to prosecution and it would put Hussein and his crimes on a worldwide stage. A strong rule of international law would ensure global security as the world moves further into the twenty-first century.

VI. CONCLUSION

In sum, it is clear that a prosecution of Saddam Hussein and his regime is imperative and that the time has come to take steps in this direction. There is overwhelming evidence as well as laws already on the books under which to prosecute Hussein and his regime for the use of chemical weapons against Iran and the Kurds. The prosecution of Saddam Hussein and his regime will be the step in the right direction towards achieving the “freedom from fear,” which has eluded the United States and the world for the past sixty years. Perhaps we may finally be the “good society” that is able to confront without fear the “schemes of world domination and foreign revolutions” as President Roosevelt had hoped back in 1941.¹⁷⁶

175. Louis Rene Beres, *Iraqi Crimes and International Law: The Imperative to Punish*, 21 *DENV. J. INT'L L. & POL'Y* 335, 339 (1992).

176. Roosevelt, *supra* note 8.

