



# Lebanon Oil Spill

## Legal Assessment



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# **Lebanon Oil Spill Legal Assessment**

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## 1 – Introduction

After the Israeli attacks on the Jiyeh power plant in Lebanon on 13 and 15 July 2006 during the hostilities between Lebanon and Israel from 12 July till 8 September 2006<sup>1</sup> an estimated amount of 15,000 tons of heavy IFO 150 (number 6 fuel) spilled into the Mediterranean Sea and 20,000 tons of fuels is thought to have been burnt. The legal assessment of these bombardments focuses on two questions, namely whether or not Israel may be held responsible under public international law for the environmental damage resulting from the bombardments (*infra* section 2), and whether or not those who ordered the bombardments may be held individually responsible under public international law (*infra* section 3). The former will be discussed by Dr. Koppe; the latter will be discussed by Mr. Bronkhorst.

## 2 – State Responsibility

### 2.1 Introduction

The responsibility of states for wrongful acts under public international law is inherent in the international legal order and has been shaped in the course of time by a general practice accepted as law.<sup>2</sup> The potential responsibility of Israel under public international law depends on two conditions. Firstly, it needs to be established whether or not the bombardments constituted a breach of an international obligation. Secondly, it needs to be established whether or not the bombardments can be attributed to the State of Israel. Both conditions are generally recognized under customary international law and are laid down in Article 2 of the 2001 Draft Articles on State Responsibility<sup>3</sup> as established by the International Law Commission of the

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<sup>1</sup> Please note that a cease fire had already gone into effect on 14 August 2006.

<sup>2</sup> Case Concerning the Factory at Chorzów (Claim for Indemnity), 13 September 1928, Publications of the Permanent Court of International Justice, Collection of Judgments, Series A – No. 17, A.W. Sijthoff's Publishing Company, 1928.

<sup>3</sup> A/56/10, Draft Articles on Responsibility of States for Internationally Wrongful Acts, including Commentaries, adopted by the International Law Commission at its fifty-third session, November 2001; Yearbook of the International Law Commission, 2001; Volume II, Part Two, forthcoming. Through <<http://www.un.org/law/ilc/>>.

United Nations.<sup>4</sup> Only then is it possible to establish which remedies Lebanon may invoke under public international law (*infra* section 2.5).

Since the attacks were carried out by the Israeli Defense Force, more specifically its Air Force, which can undeniably be regarded as an organ of the state,<sup>5</sup> emphasis will lie on the question whether or not the bombardments of the Jiyeh power plant resulting in environmental damage constituted a breach of an international legal obligation. This question must be assessed by reference to three sources of rights and obligations under public international law, namely the law of war or armed conflict – *ius in bello* (*infra* section 2.2); the law on the use of force – *ius ad bellum* (*infra* section 2.3); and the law of peace, more specifically international environment law – *ius pacis* (*infra* section 2.4).<sup>6</sup> The law of armed conflict is primarily intended to regulate international relations in times of armed conflict and therefore provides primary protection to the environment during armed conflict; the law on the use of force and international environmental law only provide subsidiary protection.

## **2.2 The protection of the environment during international armed conflict under *ius in bello***

### **2.2.1 Introduction**

20 The protection of the environment during international armed conflict<sup>7</sup> under *ius in bello*, or the laws of war, is relatively young and is provided under conventional law and arguably under customary international law. Conventional protection is

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<sup>4</sup> The International Law Commission was established by the General Assembly under Article 13(1)(a) of the Charter of the United Nations by A/Res/174 (II), adopted on 21 November 1947, by 44 to 0, with 6 abstentions; establishment of an international law commission. In 1948, the Commission was asked to “study the desirability and possibility of establishing an international judicial organ” upon the adoption and approval of the Genocide Convention by A/Res/260A (III), adopted on 9 December 1948, by 56 to 0; prevention and punishment of the crime of genocide; Annex: Convention on the Prevention and Punishment of the Crime of Genocide.

<sup>5</sup> Compare Article 4 Draft Articles on State Responsibility: “The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.”

<sup>6</sup> Compare E.V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment during International Armed Conflict*, Doctoral Thesis, University of Groningen, 2006, pp. 89-291.

<sup>7</sup> It is safe to say that the war between Israel and Lebanon constitutes an international armed conflict since the hostilities are cross-border and between two sovereign entities, despite the fact that much of the actual fighting on the Lebanese side was carried out by a non-state military organization called Hezbollah.

provided by the Environmental Modification Convention (ENMOD) of 1977,<sup>8</sup> Additional Protocol I of 1977,<sup>9</sup> the Incendiary Weapons Protocol of 1981<sup>10</sup> and the Statute of the International Criminal Court of 1998.<sup>11</sup> Customary protection is arguably provided under three relatively new rules of customary international law that may have emerged in the course of the 1990s.

### **2.2.2 Treaty Law**

The Environmental Modification Convention was negotiated within the framework of the Conference of the Committee on Disarmament<sup>12</sup> in Geneva between 10 1974 and 1977 and prohibits States Parties the use of so-called environmental modification techniques. Environmental modification techniques are defined in Article II of the Convention as “any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.” ENMOD does not seem to be relevant since the bombardment of a power plant can under these circumstances not be regarded as the deliberate manipulation of natural processes and is furthermore not applicable since neither Israel nor Lebanon have become party to the Convention,<sup>13</sup> while its provisions are generally not believed to reflect customary international law.<sup>14</sup>

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<sup>8</sup> Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, opened for signature on 18 May 1977, entered into force on, 5 October 1978, UNTS, Vol. 1108, No. 17119.

<sup>9</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature on 12 December 1977, entered into force on 7 December 1978, UNTS, Vol. 1125, No. 17512.

<sup>10</sup> Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects, opened for signature on 10 April 1981, entered into force on 2 December 1983, UNTS, Vol. 1342, No. 22495.

<sup>11</sup> Rome Statute of the International Criminal Court, opened for signature on 17 July 1998, entered into force 1 July 2002, UNTS, Vol. 2187, No. 38544.

<sup>12</sup> The Conference of the Committee on Disarmament was the ultimate successors of the Ten-Nation Disarmament Committee, established in 1959, to provide for a negotiation forum for arms control and disarmament measures outside the framework of the United Nations.

<sup>13</sup> See <<http://disarmament2.un.org/TreatyStatus.nsf>>.

<sup>14</sup> Compare Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, pp. 181, 193; E.V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, Doctoral Dissertation, University of Groningen, pp. 173-177. The International Committee of the Red Cross concluded in its 2005 Study on Customary International Humanitarian Law that it is unclear whether the provisions had already developed into customary law. J.-M. Henckaerts, L. Doswald-Beck (Eds.), *Customary International Humanitarian Law; Volume I: Rules*, International Committee of the Red Cross, Cambridge University Press, Cambridge, 2005, p. 155.



Additional Protocol I was negotiated in Geneva between 1974 and 1977 and was intended to reaffirm and develop international humanitarian law. Additional Protocol I is the latest comprehensive codification of the laws of war, merging the classic means and methods law of The Hague with the humanitarian law of Geneva, while elaborating the protection of civilians during armed conflict.<sup>15</sup> The term Hague law primarily relates to the 1899 and 1907 Hague Regulations on Land Warfare; the term Geneva law primarily relates to the 1949 Geneva Conventions and a number of other conventions dating from the 19<sup>th</sup> century, and focuses on the protection of the victims of armed conflict.

10           Among the Protocol's 102 Articles, two provisions are directly related to the protection of the environment: Articles 35 and 55. The former is included in Section I, Part III of the Protocol dealing with "Basic Rules" of Methods and Means of Warfare and provides: "It is prohibited to employ methods or means of warfare which are intended or may be expected, to cause widespread, long-term and severe damage to the natural environment." The latter deals with the "Protection of the Environment" in the context of Chapter II ("Civilian Objects") of Section I ("General Protection Against the Effects of Hostilities") of Part IV dealing with the "Civilian Population" and provides in paragraph 1: "Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection  
20 includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population."

Both provisions were proposed during the Diplomatic Conference, as a response to environmental damage during the Vietnam War but were not intended to prohibit ordinary battlefield damage. Both provisions contain a significant damage threshold – widespread, long-term and severe – which means that a breach of either provision can only be established under exceptional circumstances. During the Conference, the United Kingdom commented briefly on the damage threshold in relation to Article 55 stating that the Article struck the necessary balance between  
30 environmental protection against severe damage, "while not making for instance, a

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<sup>15</sup> F. Kalshoven, L. Zegveld, *Constraints on the Waging of War; An Introduction to International Humanitarian Law*, International Committee of the Red Cross, Geneva, 2001, pp. 19-36.



tank commander whose tank flattened a clump of tree liable as a war criminal.”<sup>16</sup> And the general Report of the Second Session of Committee III stated: “The time or duration required (...) was considered by some to be measured in decades. References to twenty or thirty years were made by some representatives as being a minimum. Others referred to battlefield destruction in France in the First World War as being outside the scope of the prohibition.” The Report also stated that “it is impossible to say with certainty what period of time might be involved. It appeared to be a widely shared assumption that battlefield damage incidental to conventional warfare would not normally be proscribed by this provision.”<sup>17</sup>

10           It is important to note however, that these statements stem from the preparatory works of the Protocol and are therefore only useful as supplementary means of interpretation according to Article 32 of the Vienna Convention on the Law of Treaties,<sup>18</sup> *i.e.* when the textual, contextual and teleological means of interpretation of Article 31 leave the meaning of the treaty ambiguous or obscure, or when they lead to results that are manifestly absurd or unreasonable.<sup>19</sup> It is therefore not inconceivable that the interpretation of the triple standard in Articles 35(3) and 55 changes over time. After all, *tempora mutantur, nos et mutamur in illis*: times change and we change with them. Our knowledge of and our appreciation for the environment had increased significantly over the last thirty years and it is arguable  
20           that the literal meaning of the words widespread, long-term and severe in an environmental context has changed accordingly.

As far as the damage to the environment after the Israeli bombardments of the Jiyeh power plant is concerned, it is difficult to establish whether this damage will meet the damage threshold of Articles 35(3) and 55. Opinion is divided in any case. Steiner concluded in his study of September 2006 that despite the fact that “[t]he extent of ecological impact of the spill remains speculative at this point” and despite the fact that “there were few large dead organisms washed up on beaches due to the

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<sup>16</sup> H.S. Levie, *Protection of War Victims: Protocol I to the 1949 Geneva Conventions; Volume 3*, Oceana Publications, Dobbs Ferry, NY, 1980, p. 272.

<sup>17</sup> Report of Committee III, Second Session (CDDH/215/Rev.1), in: Levie, *Protection of War Victims: Protocol I to the 1949 Geneva Conventions; Volume 2*, pp. 276-277.

<sup>18</sup> Vienna Convention on the Law of Treaties, signed on 23 May 1969, entered into force on 27 January 1980, UNTS, Vol. 1155, No. 18232.

<sup>19</sup> Although the Vienna Convention on the Law of Treaties is not in itself applicable to Additional Protocol I since the Convention only entered into force for States Parties on 27 January 1980 (Article 4), the rules of treaty interpretation as laid down in Articles 31 and 32 of the Convention are considered to reflect customary international law.

spill”, “this should not be taken to mean that ecological impact has been negligible. Whenever 15,000 tons of a highly toxic fluid is spilled into a coastal or marine ecosystem we should expect the damage to be extensive.” Population-level impacts may have occurred and “ecological injury can often take time to manifest as sub-lethal, chronic effects. For instance, in the Exxon Valdez Oil Spill in Alaska, some fish population collapses did not occur until 3 years after the initial spill.” Furthermore, “much of the shoreline ecosystem that was contaminated was heavily impacted” and “the seabed impact is significant, but also indeterminate as yet.”<sup>20</sup>

10 The Post-Conflict Environmental Assessment by the United Nations Environment Program of January 2007 concluded that the hostilities in general and the bombardments of the Jiyeh power plant have had a detrimental impact on the environment as far as solid and hazardous waste management; contamination of the soil and fresh water resources; weapons used; air pollution; and marine and coastal environment are concerned. Pollution had occurred in each of these categories with potentially serious health risks for the population. As far as the damage to the marine environment resulting from the oil spill is concerned, the Task Force concluded that the coastline had been contaminated and that the oil spill had had “a severe impact on coastal communities”; that a large quantity of oil had been contained and cleaned; that still a large quantity had sunk to the seabed where it most likely has smothered the  
20 biota in the sediment; that the hydrocarbons in fish and oyster tissue were low to normal; and that the oil in the water column had disappeared.<sup>21</sup> According to a BBC newsflash, UNEP Executive Director Achim Steiner had stated that “[t]he marine environment appears to have largely escaped serious long-term damage linked with the oil spill”.<sup>22</sup>

And finally, the United Nations Development Program concluded in a study of February 2007 that 7 of 46 environmental issues investigated had had a “severe” and “medium-term (1-10 years)” or “long-term (10-50 years)” impact on the environment. These were: “Littoral pollution from oil spill” (impact considered “catastrophic”); “Impact on marine biodiversity from oil spill from Jiyeh (*sic*) power plant”; “Impact  
30 on natural resources from quarrying”; “Soil erosion from forest fires”; “Loss of flora,

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<sup>20</sup> R. Steiner, *Lebanon Oil Spill Rapid Assessment/Response Mission; Final Report*, September 2006, pp. 6-7.

<sup>21</sup> United Nations Environment Programme, *Lebanon; Post-Conflict Environmental Assessment*, UNEP, Kenya-Geneva, 2007, pp. 162-167. Available through: <<http://postconflict.unep.ch/>>.

<sup>22</sup> At <<http://news.bbc.co.uk/2/hi/science/nature/6296057.stm>>.

fauna and degradation of ecosystems due to fires”; “Impact on ecosystems, habitats, flora and fauna from military activities”; “Degradation of floral base and ecosystems from demolition waste disposal”. And another 10 issues were considered “critical-significant” with “short-term (<1 year)” to “long-term” impact.<sup>23</sup>

10 Considering, however, that Israel has not become party to Additional Protocol I, neither Article 35(3) nor Article 55 is applicable to the bombing by Israel of the Jiyeh power plant in Lebanon on 13 and 15 July 2006. Although the International Committee of the Red Cross (ICRC) argues in its 2005 Study on Customary International Humanitarian Law<sup>24</sup> that both provisions have already developed into  
10 rules of customary international law,<sup>25</sup> which would mean that also non-States Parties would be bound by the prohibition to use means or methods of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment, it is questionable whether that is actually the case. The evidence that the ICRC provides is not always relevant in terms of customary law development,<sup>26</sup> and there is significant evidence to the contrary. For example, three of the largest military powers in the world adamantly deny that both provisions reflect customary international law,<sup>27</sup> the International Court of Justice concluded in 1996 that both provisions provided “powerful constraints for all the States having subscribed to these provisions”,<sup>28</sup> and in literature there is general agreement that  
20 there is no customary equivalent of Articles 35(3) and 55.<sup>29</sup> It is not impossible,

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<sup>23</sup> United Nations Development Programme, *Lebanon; Rapid Environmental Assessment for Greening Recovery, Reconstruction, and Reform 2006*, UNDP, Beirut, 2007, pp. xviii-xxi.

<sup>24</sup> J.-M. Henckaerts, L. Doswald-Beck (Eds.), *Customary International Humanitarian Law; Volume I: Rules*, International Committee of the Red Cross, Cambridge University Press, Cambridge, 2005.

<sup>25</sup> Henckaerts, Doswald-Beck (Eds.), *Customary International Humanitarian Law; Volume I: Rules*, Rule 45, pp. 151-154.

<sup>26</sup> The ICRC refers to the military manuals of nineteen states with references to the prohibition concerned, but fifteen of those states were already bound to observe both obligations when they included them in their manuals because they had become party to the Protocol. See Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, pp. 182-183.

<sup>27</sup> France, the United Kingdom, and the United States have repeatedly denied the customary status of Articles 35(3) and 55 on various occasions. See, for example, their statements made before the International Court of Justice within the framework of both Nuclear Weapons Opinions in 1996: CR 95/34, Oral Plea of the Government of the United Kingdom, of 15 November 1995 (WHO and GA), pp. 36-37; CR 95/34, Oral Plea of the Government of the United States of America, of 15 November 1995 (WHO and GA), p. 73; Written Statement of the Government of Republic of France of 20 June 1995 (GA), p. 41. Through: <<http://www.icj-cij.org/>>.

<sup>28</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, I.C.J Reports 1996, p. 226, paragraph 31, p. 242.

<sup>29</sup> See, for example, M. Bothe, *The Protection of the Environment in Times of Armed Conflict; Legal Rules, Uncertainty, Deficiencies, and Possible Developments*, German Yearbook of International Law, Vol. 34, 1991, p. 56; Dinstein, *The Conduct of Hostilities under the Law of International Armed*

however, that both provisions are developing into rules of customary international law.<sup>30</sup>

10 The Incendiary Weapons Protocol was negotiated within the framework of a Diplomatic Conference that met in 1979 and 1980 on Conventional Weapons and falls under the framework Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to have Indiscriminate Effects. In the preamble of the Convention, the High Contracting Parties recall “that it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”, which is a reference to Additional Protocol I but which in itself does not entail substantive obligations. And under the Incendiary Weapons Protocol it is prohibited to use incendiary weapons and in Article 2(4) it is specifically prohibited “to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.” It is unknown whether or not the attacks were carried out with incendiary weapons, but from an environmental perspective, the Protocol does not seem to be relevant since the attacks were carried out on a power plant and not on forests or other plant cover. Besides, neither Lebanon nor Israel has become party to the Incendiary  
20 Weapons Protocol.<sup>31</sup>

The 1998 Rome Statute, finally, provides for the establishment of an International Criminal Court in The Hague which has supplementary jurisdiction over individuals that are suspected of war crimes, among other things, including “Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage

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*Conflict*, pp. 185, 193; Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, pp. 177-197.

<sup>30</sup> Compare, for example, ST/SGB/1999/13, 6 August 1999, Secretary-General’s Bulletin, on the observance by United Nations forces of international humanitarian law and the discussions within the International Law Commission on the Draft Code on Crimes against the Peace and Security of Mankind of 1996, in: A/51/10, Report of the International Law Commission to the General Assembly on the work of its forty-eighth session (6 May – 26 July 1996); Yearbook of the International Law Commission, 1996; Vol. II, Part II, United Nations, Geneva, 1998. Also through <<http://www.un.org/law/ilc/>>. Generally, see: Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, pp. 189-194.

<sup>31</sup> Through <<http://www.icrc.org/ihl.nsf/>>.

anticipated”.<sup>32</sup> Since this provision leads to individual criminal responsibility rather than state responsibility, it will be discussed further below by Mr. Bronkhorst.

### 2.2.3 Customary International Law

In addition to the written provisions referred to above, the environment is also protected by three unwritten rules of customary international that have arguably emerged in the course of the 1990s as a result of a general practice accepted as law. These are firstly, a duty of care or an obligation to show due regard for the environment during international armed conflict; secondly, a prohibition to cause  
10 wanton destruction to the environment during international armed conflict; and thirdly, a prohibition to cause excessive collateral damage to the environment during international armed conflict.<sup>33</sup>

The customary duty of care would stem from the principle of environmental protection that has emerged as a third fundamental principle of *ius in bello* in the 1970s.<sup>34</sup> The prohibition of wanton destruction of the environment would be a new reflection of the fundamental principle of necessity under *ius in bello*; and the prohibition of excessive collateral damage would be a new reflection of the fundamental principle of proportionality which is also a fundamental principle of the laws of war. The latter two customary rules are strongly related to the generally  
20 acknowledged customary prohibitions to cause wanton destruction or excessive collateral damage to property or civilian objects under *ius in bello*.<sup>35</sup>

Evidence of an environmental duty of care can be found, among other places, in the first sentence of Article 55(1) of Additional Protocol I, in a number of non-binding international instruments,<sup>36</sup> and in a number of military manuals.<sup>37</sup> Also the ICRC concluded in its 2005 Study on Customary International Humanitarian Law

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<sup>32</sup> Article 8(2)(b)(iv) Rome Statute.

<sup>33</sup> For a detailed discussion and analysis, see: Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, pp. 198-221.

<sup>34</sup> Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, p. 99.

<sup>35</sup> Compare Articles 23(g) of the Hague Regulations of 1899 and 1907 and Articles 48 and 51(5)(b) of Additional Protocol I of 1977.

<sup>36</sup> See, for example, principle 26 of the 1972 Stockholm Declaration, paragraph 5 of the 1982 World Charter for Nature, principle 24 of the 1992 Rio Declaration, paragraph 39.6 of Rio’s Agenda 21, and indirectly paragraph 14 of the 2002 Johannesburg Declaration.

<sup>37</sup> See, for example, the United States Commander’s Handbook on the Law of Naval Operations, p. 8-2; the British Military Manual in the context of air operations, para. 12.24; and the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, paras. 44, 11, 46(c) and 13(c).

that: “[m]ethods and means of warfare must be employed with due regard to the protection and preservation of the natural environment.”<sup>38</sup> Evidence of a customary prohibition of wanton destruction and excessive collateral damage of the environment can be found, among other places, in the *chapeau* to Article 8(2)(b)(iv) or the Rome Statute, General Assembly Resolution 47/37 of 25 November 1992,<sup>39</sup> and various military manuals.<sup>40</sup> Also a Committee that was established by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia to review the NATO bombing campaign over Yugoslavia in 1999 stated that “military objectives should not be targeted if the attack is likely to cause collateral environmental damage which would be excessive in relation to the direct military advantage which the attack is expected to produce.”<sup>41</sup> And the ICRC concluded in Rule 43 of its customary humanitarian law study that “(...) B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity. C. Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.”<sup>42</sup>

Since these three unwritten rules are rules of customary international law they are binding on all states and were therefore applicable during the hostilities between Israel and Lebanon in the summer of 2006, including the bombardment of the Jiyeh power plant on 13 and 15 July 2006. Although, it is unlikely that the customary prohibition of wanton destruction of the environment will be relevant in this context, since Israel did not intend to damage the environment *per se* by attacking the power plant, the other two customary rules could very well be relevant in this context. The oil spill resulting from the attack on the power plant must be regarded as collateral damage and could be considered excessive if the destruction of the power plant did not provide a distinct military advantage. And the attack of the power plant could be

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<sup>38</sup> Henckaerts, Doswald-Beck (Eds.), *Customary International Humanitarian Law; Volume I: Rules*, Rule 44, p. 147.

<sup>39</sup> A/Res/47/37, adopted without a vote on 25 November 1992, on the protection of the environment in times of armed conflict.

<sup>40</sup> These include the United States’ Commander’s Handbook on the Law of Naval Operations, p. 8-2; the British Military Manual, para. 12.24; the San Remo Manual on Naval Warfare, para. 44 and 46(d) with 13(c).

<sup>41</sup> International Criminal Tribunal for the Former Yugoslavia (ICTY), Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, *International Legal Materials*, Vol. 39, 2000, paras. 15 and 18, pp. 1262-1263.

<sup>42</sup> Henckaerts, Doswald-Beck (Eds.), *Customary International Humanitarian Law; Volume I: Rules*, p. 143.

contrary to the customary obligation to show due regard for the environment, since widespread environmental damage was foreseeable and warranted a thorough investigation into the possible effectiveness of alternative actions. Also it is noteworthy that there is disagreement as to the extent to which Israel allowed aid access to the area for assistance offered with respect to the oil spill.<sup>43</sup> It is important to note, however, that both rules depend in principle on the appreciation of the circumstances by the warring parties, which means that under these two customary rules Israel's actions can only be marginally reviewed.

10 **2.3 *The protection of the environment during international armed conflict under ius ad bellum***

In addition to the protection provided by written and unwritten rules of *ius in bello* during international armed conflict, the environment also seems to be protected under *ius ad bellum*, or the law on the use of force. Protection of the environment under this set of rules is on the one hand arguable in view of the scope an aggressor state's responsibility for violating conventional and customary prohibition of the use of force as laid down in Article 2(4) UN Charter.<sup>44</sup> It has been maintained in literature that an aggressor state should be held liable for all damage resulting from its unlawful use of force under public international law even if acts were not contrary to the laws  
20 of war,<sup>45</sup> and in 1991 Iraq was held liable by the Security Council under international law "for any direct loss, damage, including environmental damage and the depletion of natural resources, (...), as a result of Iraq's unlawful invasion and occupation of Kuwait".<sup>46</sup>

On the other hand it is arguable that the environment is protected in view of the applicability of the customary requirements of necessity and proportionality in the

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<sup>43</sup> R. Steiner, *Lebanon Oil Spill Rapid Assessment/Response Mission; Final Report*, September 2006, pp. 8-9; Israeli Ministry of Justice, Department for International Agreements and International Litigation, Letter No. 2575 of 6 December 2006, on file with the author.

<sup>44</sup> United Nations Charter, signed on 26 June 1945, entered into force on 24 October 1945, AJIL, Vol. 39, No.3, Supplement: Official Documents, 1945, p. 190.

<sup>45</sup> Compare, for example, G. Schwarzenberger, *International Law; As Applied by International Courts and Tribunals; Volume II; The Law of Armed Conflict*, Stevens & Sons, London, 1968, p. 767; C. Greenwood, *International Humanitarian Law (Laws of War); Revised Report for the Centennial Commemoration of the First Hague Peace Conference 1899*, London School of Economics and Political Science, London, 1999, p. 19. For a general discussion of the relationship between *ius ad bellum* and *ius in bello*, see: Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, pp. 253-265.

<sup>46</sup> S/Res/687 (1991), adopted on 3 April 1991, by 12 to 1, with 2 abstentions, on the situation between Iraq and Kuwait, paragraph 16.



overall conduct of hostilities, for states exercising their right of self-defense as laid down in Article 51 of the Charter. This means that a state that is using force in self-defense may not resort to measures that are either unnecessary or disproportionate to repel an armed attack, even if those measures are in conformity with the laws of war.

With regard to the hostilities between Israel and Lebanon from 12 July till 8 September 2006, it is difficult to establish which state should be regarded as the aggressor and which as the defending state and if so, to which extent. This is difficult not only because of the complexity of the events that led to Israel's operations as from 12 July 2006, but also because of the historic and violent relationship between Israel and Lebanon, and between Israel and other states in the region.

If Israel should be seen as a state using force in self-defense then it is arguable that the bombardment of the Jiyeh power plant was either unnecessary or disproportionate to repel the missile attacks by Hezbollah from Lebanese territory on Northern Israel. If Israel, on the other hand, should be seen as an aggressor state then it is possible that it can be held liable for all damage resulting from its breach of the prohibition of the use of force, including the environmental damage resulting from its bombardment of the Jiyeh power plant.

#### 2.4 *The protection of the environment during international armed conflict under ius pacis*

A third set of rules that may provide protection for the environment during international armed conflict is the law of peace, *ius pacis*, in this context peacetime international environmental law. In order to assess the level of protection during international armed conflict under international environmental law it is necessary to distinguish between two relationships, namely the relationship between belligerents *inter se*, and the relationship between belligerents and non-belligerents.

In the latter relationship it is generally acknowledged that peacetime international law remains fully applicable, which means that belligerents need to observe their obligations under peacetime international environmental law with respect to non-belligerents and since many of those rules are multilateral in character this could have a significant impact on the freedom of action of belligerents.

In the former relationship, the impact of peacetime international environmental law depends on the applicability of these rules in times of armed

conflict. In the past, all treaty or legal relations were in principle terminated or suspended between belligerents when war broke out. Nowadays, states have adopted a more pragmatic approach in which it depends on the objects and purpose or the intention of the parties whether or not a treaty or rule remains applicable during armed conflict, although this is still surrounded by uncertainty.<sup>47</sup> It is generally agreed that a number of treaty categories always remain applicable during international armed conflict, including rules on the law of armed conflict, treaties establishing intergovernmental organizations, rules on diplomatic relations, law-making treaties, peremptory norms of international law, and fundamental human rights. There is no such agreement on peacetime international environmental law.<sup>48</sup>

However, even if rules of peacetime international environmental law would remain applicable during international armed conflict, then it is still doubtful whether their impact would be significant. On various occasions, the International Court of Justice has discussed the relationship between human rights law and the law of armed conflict in times of armed conflict and it has concluded that the particular human rights provisions involved had to be interpreted by reference to the applicable *lex specialis*, namely the law of armed conflict.<sup>49</sup> This means that in fact, the law of armed conflict prevails over or at least strongly colors the human rights provisions involved, in conformity with the maxim *lex specialis derogat legi generali*. Therefore, if human rights provisions will not have a significant impact during international armed conflict, then it is not likely that the impact of peacetime international environmental law will be much stronger.

With regard to the war between Israel and Lebanon, it is thus unlikely that peacetime international environmental law plays a major role in their mutual relationship. In the relationship between both belligerents and non-belligerent states, however, this impact may be significant. The oil spill that resulted from the

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<sup>47</sup> Compare, for example, Article 73 of the Vienna Convention on the Law of Treaties which provides: “The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from (...) the outbreak of hostilities between States.” The International Law Commission did not want to include this topic in its draft articles for a number of reasons.

<sup>48</sup> Compare two recent reports from the Secretariat of the United Nations and the International Law Commission: A/CN.4/550, The effect of armed conflict on treaties: an examination of practice and doctrine; Memorandum by the Secretariat, pp. 35-40; A/CN.4/552, First Report on the Effects of Armed Conflicts on Treaties, by Mr. Ian Brownlie, Special Rapporteur, of 21 April 2005; International Law Commission, fifty-seventh session, Geneva, 2 May – 3 June and 4 July – 5 August 2005. At: <<http://www.un.org/law/ilc/sessions/57/57sess.htm>>, pp. 29-30.

<sup>49</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, I.C.J Reports 1996, paragraph 25, p. 240; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, I.C.J Reports 2004, pp. 41-42.

bombardments drifted north along the coast and reached Syrian territorial waters a few weeks later and subsequently threatened Turkey and Cyprus, each of which should in this context be regarded as non-belligerents. And since the oil spill caused damage to the biosphere, both at sea and on the coast, it should be regarded as transboundary pollution which is contrary to customary international law. The protection of the marine environment is regulated in more detail by Part XII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS),<sup>50</sup> but neither Israel, nor Syria, or Turkey is a party to the Convention.<sup>51</sup> If Israel could be held responsible for the transboundary pollution from the oil spill, it could only escape international responsibility under the circumstances precluding wrongfulness as laid down in the Draft Articles on State Responsibility presented by the International Law Commission in 2001,<sup>52</sup> in particular the circumstance of ‘self-defense’. Article 21 of the Draft Articles provides: “[t]he wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.” Therefore, only if Israel establishes that it resorted to armed force in self-defense last summer it may be able to avoid liability.

## 2.5 Conclusion and Remedies

The general protection provided to the environment during international armed conflict, is relatively young and based on rules of *ius in bello*, *ius ad bellum*, and *ius pacis*. Of the protection provided to the environment by rules of *ius in bello*, only two relatively new rules of customary international law seem to be relevant in this case, namely the prohibition to cause excessive collateral damage to the environment, and the customary duty of care that states need to observe during international armed conflict. Firstly, it is possible that Israel violated the former prohibition if the destruction of the power plant did not provide a distinct military advantage. And secondly, it is possible that Israel did not show due regard for the environment by attacking the power plant, since significant damage to the environment was

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<sup>50</sup> United Nations Convention on the Law of the Sea, signed on 10 December 1982, entered into force on 16 November 1994, UNTS, Vol. 1833, No. 31363.

<sup>51</sup> Through <<http://untreaty.un.org/>>

<sup>52</sup> A/56/10, Draft Articles on Responsibility of States for Internationally Wrongful Acts, including Commentaries, adopted by the International Law Commission at its fifty-third session, November 2001; Yearbook of the International Law Commission, 2001; Volume II, Part Two, forthcoming. Through <<http://www.un.org/law/ilc/>>.

foreseeable and it is possible that it could have used alternative means to attack the facility.

The protection provided by the law on the use of force is based on the one hand on the applicability of the unwritten customary conditions of necessity and proportionality in the exercise of the right of self-defense; and on the other hand on the scope a state's responsibility for a violation of the prohibition of the use of force. In view of the complexity of the circumstances, it is difficult to ascertain which state uses force in self-defense and to what extent.

10 And finally, with respect to the protection provided during international armed conflict by peacetime international environmental law it is important to distinguish between the impact of international environmental law in the relationship between belligerents *inter se* and between belligerents and non-belligerents. In the latter relationship, international environmental law remains fully applicable; in the former relationship, the impact of peacetime norms of international environmental law is dependent on the applicability of these rules in times of armed conflict. If it does remain applicable, its impact does not seem to be significant.

20 If it can be established that the bombardments constituted a breach of public international law, the bombardments must be attributed to the State of Israel in order to be regarded as an internationally wrongful act. Attribution will not be difficult, since the bombardments were carried out by the Israeli Defense Force, more specifically its Air Force, and the Air Force can undeniably be regarded as an organ of the state.<sup>53</sup>

Finally, if Israel can indeed be held responsible for an internationally wrongful act, and if it cannot invoke any circumstances precluding wrongfulness,<sup>54</sup> then those states that have been injured by the bombardments of 13 and 15 July,<sup>55</sup> namely Lebanon, and Syria, and perhaps also other states, may invoke Israel's

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<sup>53</sup> Compare Article 4 Draft Articles on State Responsibility: "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State."

<sup>54</sup> Compare Articles 20-27 Draft Articles on State Responsibility: consent, self-defense, countermeasures in respect of an internationally wrongful act, force majeure, distress, necessity, and compliance with peremptory norms.

<sup>55</sup> This would be primarily Lebanon, but may also include states that have been affected by environmental pollution.

responsibility,<sup>56</sup> which has various consequences under public international law. These are the obligation to offer assurances and guarantees of non-repetition<sup>57</sup> and the obligation “to make full reparation for the injury caused by the internationally wrongful act”,<sup>58</sup> either by means of restitution, *i.e.* “to re-establish the situation which existed before the wrongful act was committed”,<sup>59</sup> or by means of compensation, “insofar as such damage is not made good by restitution.”<sup>60</sup> If Israel refuses to pay compensation and the injured states and Israel cannot solve their dispute through diplomatic channels or by judicial means,<sup>61</sup> then the injured states may resort to countermeasures “in order to induce that State to comply with its obligations”.<sup>62</sup>

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### 3 – Individual Responsibility

#### 3.1 Introduction

Individual criminal responsibility under public international law is relatively young and was first accepted by the international community of states after the Second World War by the establishment of the International Military Tribunals of Nuremberg and the Far East as well as separate military tribunals in the various occupation zones in Germany. More recently the Security Council established *Ad Hoc* International Criminal Tribunals for the Former Yugoslavia in The Hague in 1993,<sup>63</sup> for Rwanda in Arusha in 1994,<sup>64</sup> and the international community of states established a permanent International Criminal Court in The Hague in 1998.<sup>65</sup> Additionally, various so-called mixed tribunals have been established in Sierra Leone, Cambodia,

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<sup>56</sup> Articles 42 and 48 Draft Articles on State Responsibility.

<sup>57</sup> Article 30(2) Draft Articles on State Responsibility.

<sup>58</sup> Article 31(1) Draft Articles on State Responsibility.

<sup>59</sup> Article 35 Draft Articles on State Responsibility.

<sup>60</sup> Article 36 Draft Articles on State Responsibility.

<sup>61</sup> Disputes can be settled judicially through arbitration or adjudication but requires the prior consent of all parties involved. Adjudication by the International Court of Justice is not likely since none of the states involved has submitted a declaration under Article 36(2) of the Statute of the International Court of Justice accepting the jurisdiction of the Court in advance; there is no compromissory clause to which both states are a party and a *compromis* is not likely. Adjudication by the International Tribunal for the Law of the Sea is impossible since Israel is not party to the United Nations Convention on the Law of the Sea.

<sup>62</sup> Articles 49-53 Draft Articles on State Responsibility.

<sup>63</sup> S/Res/827 (1993), adopted unanimously on 25 May 1993, on the establishment of an international tribunal for the Former Yugoslavia. For more information on the ICTY, see: <<http://www.icty.org/>>.

<sup>64</sup> S/Res/955 (1994), adopted on 8 November 1994, by 13 to 0, with 1 abstention, on the establishment of an international tribunal for Rwanda and the adoption of the statute of the tribunal. For more information on the ICTR, see: <<http://www.ictcr.org/>>.

<sup>65</sup> Statute of the International Criminal Court, opened for signature on 17 July 1998, entered into force on 1 July 2002, UNTS, Vol. 2187, No. 38544.

East-Timor, and Iraq. These tribunals are tribunals established under national law, but in cooperation with the United Nations or at least with international elements.

Individual criminal responsibility can be established not only under the statutes of the various courts and tribunals, but also under some of the treaties on the law of armed conflict, including the Geneva Conventions of 1949 and its Protocols of 1977. The difference, however, with responsibility under the statutes of the various courts and tribunals is that in these cases, individuals will in principle be prosecuted before the courts of their own national states.

10 Considering the fact that only Lebanon is a party to Additional Protocol I,<sup>66</sup>  
the potential individual criminal responsibility of Israeli officials under public  
international law will have to be assessed by reference to the Statute of the  
International Criminal Court, also known as the Rome Statute. This will be discussed  
further below by Mr. Bronkhorst.<sup>67</sup>

### ***3.2 The Rome Statute of the International Criminal Court***

20 International law not only entails rights and duties for States, it also imposes  
rights and obligations on individuals. After dealing with the question whether Israel as  
a State can be held responsible for the bombardments of the Jiyeh power plant in  
Lebanon, this paragraph will address the issue of criminal responsibility under  
international law for individual military commanders for committing war crimes  
during the mentioned bombardments.

The jurisdiction of national courts based on universal jurisdiction or emanating  
from treaties on the law of armed conflict will be left aside here. This paragraph deals  
solely with the individual criminal responsibility under the Rome Statute of the  
International Criminal Court.<sup>68</sup> Under the Rome Statute, individuals can be prosecuted  
for committing certain international crimes such as genocide, crimes against humanity  
and war crimes. This individual person shall be criminal responsible and liable for  
punishment for such a crime if that person commits, orders, solicits a crime or aids,  
abets, or otherwise assists in its commission.<sup>69</sup> The Court has jurisdiction over

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<sup>66</sup> Lebanon acceded to Additional Protocol I on 23 July 1997. Through <<http://www.icrc.org/ihl.nsf/>>.

<sup>67</sup> Serge Bronkhorst, Bronkhorst International Law Services.

<sup>68</sup> Statute of the International Criminal Court, opened for signature on 17 July 1998, entered into force on 1 July 2002, UNTS, Vol. 2187, No. 38544.

<sup>69</sup> Ibid, Article 25.

soldiers and other military personnel irrelevant of their official capacity. Even a Head of State or Government falls within the jurisdiction of the Court and immunities shall not bar the Court from exercising its jurisdiction.<sup>70</sup>

The question whether the bombardments of the Jiyeh power plant is a case for the International Criminal Court in The Hague depends on a number of issues.

### **3.3 Jurisdiction of the Court**

According to Article 12(2) of the Rome Statute, the jurisdiction of the Court must be accepted by a State Party on the territory of which the conduct in question occurred (Lebanon) or the State Party of which the person accused of the crime is a national (Israel). All States becoming a Party to the Statute thereby accept the jurisdiction of the Court.<sup>71</sup> Since both Israel and Lebanon are not State Parties to the Rome Statute, at first instance it may seem that the Court lacks jurisdiction. However, Non-Party States may also accept the Court's jurisdiction on a case-by case basis. The Court may exercise its jurisdiction if one of the States mentioned in paragraph 2 accepts, by declaration lodged with the Registrar, the exercise of jurisdiction by the Court with respect to the crime in question.<sup>72</sup> Thus, Lebanon may accept the jurisdiction of the International Criminal Court for the oil spill disaster by sending a declaration to that extent to the Registrar of the Court. Without such a declaration from Lebanon, the Court has no jurisdiction in this case. However, a State which is not a Party cannot pick and choose one particular incident within a given situation (the conflict between Israel and Hezbollah), but should refer – in accordance with Rule 44 of the ICC Rules of Procedure and Evidence, which specifies the broad terms of Article 12(3) – the situation as such to the Court.<sup>73</sup> Additionally, it is up to the Prosecutor to determine whether to exercise jurisdiction in a given situation and to

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<sup>70</sup> Ibid, Article 27.

<sup>71</sup> Ibid, Article 12(1).

<sup>72</sup> Ibid, Article 12(3).

<sup>73</sup> Rule 44 of the ICC Rules of Procedure and Evidence; Declaration provided for in article 12, paragraph 3: [1]. The Registrar, at the request of the Prosecutor, may inquire of a State that is not a Party to the Statute or that has become a Party to the Statute after its entry into force, on a confidential basis, whether it intends to make the declaration provided for in article 12, paragraph 3. [2]. When a State lodges, or declares to the Registrar its intent to lodge, a declaration with the Registrar pursuant to article 12, paragraph 3, or when the Registrar acts pursuant to sub-rule 1, the Registrar shall inform the State concerned that the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply.



select the appropriate cases against individuals in accordance with the law of the Court (Article 21, Rome Statute) and in line with his prosecutorial policy.

*The exercise of jurisdiction: referring a case to the Prosecutor*

The International Criminal Court may exercise its jurisdiction if the committed crimes in question are referred to the Prosecutor by a State Party.<sup>74</sup> Since Lebanon is not a Party to the Rome Statute, it can not refer a situation to the Prosecutor by itself, but other State Parties can.<sup>75</sup> The Court may also exercise its jurisdiction when the Prosecutor has initiated an investigation by himself.<sup>76</sup> Lebanese victims can assist in triggering the investigation by informing the Prosecutor of the crimes committed against them.<sup>77</sup>

In conclusion, once Lebanon has accepted the Court's *ad hoc* jurisdiction concerning the 2006 conflict, the Court may exercise its jurisdiction when a State Party refers the oil spill case to the Prosecutor or when the Prosecutor himself initiates an investigation for instance on the basis of information received from Lebanese victims or nongovernmental organizations.<sup>78</sup> Only if Lebanon chooses to become a Member State to the Rome Statute and deposit the relevant declaration under Article 12(3) Rome Statute and Rule 44, Rules of Procedure and Evidence, they themselves may refer a situation to the Prosecutor.<sup>79</sup>

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<sup>74</sup> Ibid, Article 13(a).

<sup>75</sup> Other States only can refer a situation to the Prosecutor if the pre-conditions for the exercise of the Court's jurisdiction are met under art. 12 Rome Statute. Thus, their referral would be meaningless in a situation on Lebanon territories or involving Israeli nationals, unless there is an art. 12(3) declaration.

<sup>76</sup> Ibid, Article 13(c).

<sup>77</sup> Ibid, Article 15(2). Note 1: also in these two trigger mechanisms of article 13(c) and 15(2) the preconditions for the exercise of the Court's jurisdiction must be met before any procedure can be triggered. Note 2: The Court must also exercise its jurisdiction over cases referred to the Prosecutor by the Security Council whether or not the State concerned is a Party to the Rome Statute: See Article 13(b).

<sup>78</sup> In addition, the Court must exercise its jurisdiction when the Security Council refers this situation to the Prosecutor. The Security Council only may refer a case to the Court when acting under Chapter VII, meaning that the Lebanon Oil Spill must constitute a threat to the peace, breach of the peace, or act of aggression under article 39 UN Charter.

<sup>79</sup> The Prosecutor has the monopoly over the opening of cases, while States can refer situations to the Prosecutor.

### 3.4 Environmental war crime?

In accordance with Article 5 of its Statute the International Criminal Court has jurisdiction with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.<sup>80</sup>

Causing environmental damage is only criminalized in the Rome Statute under Article 8 which identifies various war crimes. For the oil spill resulting from the Israeli air strikes to be a war crime under the Rome Statute the following conditions must be fulfilled. Only in Article 8(2)(b)(iv) is damage to the environment under certain conditions regarded a crime within the jurisdiction of the Court: *Intentionally*  
10 *launching an attack in the knowledge that such attack will cause ... widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.*

To prosecute this crime, the act must have taken place in the context of an international armed conflict.<sup>81</sup> Thus, only if it can be established that there exists an international armed conflict between Israel and Lebanon, the oil spill resulting from the Israeli bombing of the power station in Lebanon could qualify a war crime under the Rome Statute.

The question is then whether the Israeli attack on the Lebanese power station triggers the individual criminal responsibility under Article 8(2)(b)(iv) of the Rome  
20 Statute.

#### A. *The attack was intentional.*

In the case of the bombardments of the Lebanon power station it must be demonstrated that the Israeli air strikes were intentional. If it could be proven that the attack was indeed intentional – negligence cannot be regarded an excuse – the Israeli bombardments could meet this requirement.

In its statement of 25 July 2006, the Israel Ministry of Foreign Affairs explained that with respect to fuel reserves “terrorist activity is dependent, inter alia, on a regular supply of fuel without which the terrorists cannot operate. For this reason  
30 a number of fuel depots which primarily serve the terrorist operations were targeted. From intelligence Israel has obtained, it appears that this step has had a significant

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<sup>80</sup> The Court has no jurisdiction over the crime of aggression until a definition of ‘aggression’ is agreed upon.

<sup>81</sup> See Rome Statute, Article 8(2): For the purpose of this Statute, “war crimes” means: (b) Other serious violations of the laws and customs applicable in international armed conflict (...)

effect on reducing the capability of the terrorist organizations.”<sup>82</sup> If this statement could be regarded as also referring to the bombardments of the Jiyeh power plant, it could indicate that the Israeli attack was intentional.<sup>83</sup>

*B. Widespread, long-term and severe damage.*

Although there is no clear definition of ‘widespread, long-term and severe damage to the natural environment’, some earlier international legal instruments may offer some guidance, in particular Protocol I Additional to the Geneva Conventions.<sup>84</sup> In view of the similarities in wording, it seems that Article 8(2)(b)(iv) was strongly  
10 influenced by Articles 35(3) and 55 of Additional Protocol I.

If one then assumes that the triple standard of Article 8(2)(b)(iv) should be interpreted in conformity with Articles 35(3) and 55, this could mean that the threshold will be significant and violation will not easily be assumed. As has been explained above, in section 2.2.2, the drafters believed that the term ‘long-term’ should be measured in decades and believed that ordinary battlefield damage resulting from conventional warfare should not be proscribed by these provisions. This would require either waiting years to see if the environmental damage persists or accepting long-range forecasts of impacts before deciding whether the standard has been  
violated.<sup>85</sup>

20 If, however, one assumes that the triple standard of Article 8(2)(b)(iv) should be interpreted independently from Additional Protocol I and in view of its own object and purpose, one could interpret them more in conformity with present standards and values. Few would argue, for example, that the damage of the oil spill resulting from the bombardments of the Jiyeh power plant is not widespread, since it severely fouled over more than 100 km of Lebanon’s shoreline environment and even spread north to Syrian waters contaminating areas of the seabed.

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<sup>82</sup> See ‘Responding to Hezbollah attacks from Lebanon: Issues of proportionality’, Israel Ministry of Foreign Affairs, 25 July 2006.

<sup>83</sup> See also Annex: Letter of December 6, 2006, Response from Boaz Oren, Deputy Director of the Israeli Ministry of Justice to letter from Prof. Steiner; paragraph 1.1 seems to stipulate that the power plant was seen as a legitimate target and therefore the attack intentional.

<sup>84</sup> See also Article I(1) and the Understanding to Article I of the Environmental Modification Convention of 1977.

<sup>85</sup> AC/UNU Millennium Project: “Environmental Security: United Nations Doctrine for Managing Environmental Issues in Military Actions, Chapter 1. UN Role: Environmental Effects of Conflict. See also: Tara Weinstein, Prosecuting attacks that destroy the environment, Georgetown International Law Review, Summer 2005.

Finally, it should be noted that in the first paragraph of Article 8 it is stated that the Court shall have jurisdiction in respect of war crimes *in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes*. If it cannot be proven that the crime described in Article 8(2)(b)(iv) is part of a plan or policy or part of a large-scale commission of such crimes, it is for the Prosecutor to decide whether s/he considers the crime grave enough to start an investigation or not.<sup>86</sup> In this respect one should notice that the Prosecutor's policy is to select the gravest crime for investigation and prosecution.<sup>87</sup>

10           C. *The perpetrator had the knowledge that the damage would be clearly excessive in relation to concrete and direct overall military advantage anticipated.*

It is not easy at this moment and from this place, to adequately assess this requirement without having investigated the bombardments of the Jiyeh power plant in greater detail. This provision requires a balancing of environmental damage as against military advantage. According to the Preparatory Commission for the International Criminal Court, in its 'Elements of Crimes', this phrase reflects the proportionality requirement inherent in determining the legality of any military activity in armed conflict. Additionally, the Commission explains that the knowledge element requires that the perpetrator makes a valuable judgment.

20           Awaiting further investigations on the reasoning behind the military decision to destroy the Jiyeh power station, and the military's notion of the overall military advantage, it remains rather speculative whether the air strikes were executed in the knowledge that the damage would be clearly excessive in relation to concrete and direct overall military advantage anticipated. Therefore, only if it can be proven that the environmental damage is excessive to the military advantages that the Israeli military was aiming for, this condition may be fulfilled.

### **3.5 Conclusion**

30           The case of the Israeli air strike at the Lebanon power plant in Jiyeh can be brought before the International Criminal Court if Lebanon accepts the Court's

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<sup>86</sup> See article 17 (1)(d) Rome Statute

<sup>87</sup> Other less grave crimes can be prosecuted by national courts according to the principle of complementarity. For the principle of complementarity: See article 1 Rome Statute and paragraph 10 of the Preamble.

jurisdiction under Article 12(3). The Prosecutor may start an investigation which can be triggered by a State Party or the Security Council or if the Prosecutor is informed about this act by Lebanon victims or nongovernmental organizations. If Lebanon itself wants to trigger such an investigation by the Prosecutor, Lebanon should first become a State Party to the Rome Statute.

10 The estimated amount of 15,000 tons of heavy fuel oil spilled into the Mediterranean Sea were the result of the bombardments of the Jiyeh power plant which leads to the largest oil spill in Lebanon's history. The oil spill severely fouled over 100 km of Lebanon's shoreline environment and spread north to Syrian waters, contaminated areas of the seabed and injured the nation's tourism and fishing business. The bombardments of the Lebanon power station could fall within the limits of Article 8(2)(b)(iv) of the Rome Statute constituting it as a war crime if it can be proven that there exists an international armed conflict and that the acts amount to intentionally launching an attack in the knowledge that such attack will cause ... widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

#### **4 – Conclusion**

20 The assessment of the responsibility under public international law for the environmental damage resulting from the bombardments of the Jiyeh power plant in July 2006 in the context of the hostilities between Israel and Lebanon can be addressed from two perspectives. Firstly, the State of Israel may be held responsible for violations of provisions under *ius in bello*, *ius ad bellum*, and *ius pacis* that protect the environment during international armed conflict, provided that it cannot invoke so-called circumstances precluding wrongfulness. And secondly, individual officials may be held individually and criminally responsible under public international law, in particular under the Rome Statute. The former perspective was addressed in section 2; the latter perspective was addressed in section 3.

30 As far as the responsibility of the State of Israel is concerned, it is arguable that Israel violated specific rules under *ius in bello*, *ius ad bellum*, and *ius pacis*. Under *ius in bello*, it is arguable that Israel acted contrary to the customary prohibition of excessive collateral damage to the environment and did not observe the customary

obligation to show due regard for the environment during international armed conflict. Under *ius ad bellum*, Israel may have acted contrary to the customary principles of necessity and proportionality under the law of self-defense, if it can be established that it used force in order to repel and armed attack; and may be held liable for damages, if it acted in contravention of the prohibition on the use of force. And, finally, under *ius pacis*, Israel may have violated rules of international environmental law for environmental damage caused to non-belligerent states, in particular the customary prohibition to cause transboundary pollution, and could only escape international responsibility if it could invoke so-called circumstances precluding wrongfulness.

As far as the individual criminal responsibility of Israeli officials is concerned, the only possibility seems prosecution under the 1998 Rome Statute. If Lebanon accepts the *ad hoc* jurisdiction under Article 12(3) Statute, and the Prosecutors starts an investigation upon a referral from a State Party or by virtue of his office, Israeli officials may be prosecuted under Article 8(2)(b)(iv) of the Statute.