


2005

Whether the Anfal operations constitute genocide

Jessica L. Doinidis

Follow this and additional works at: https://scholarlycommons.law.case.edu/war_crimes_memos

 Part of the [Criminal Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Doinidis, Jessica L., "Whether the Anfal operations constitute genocide" (2005). *War Crimes Memoranda*. 175.

https://scholarlycommons.law.case.edu/war_crimes_memos/175

This Memo is brought to you for free and open access by the War Crimes at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in War Crimes Memoranda by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

**CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
INTERNATIONAL WAR CRIMES RESEARCH LAB**

A

**MEMORANDUM FOR THE
IRAQI SPECIAL TRIBUNAL**

ISSUE: WHETHER THE ANFAL OPERATIONS CONSTITUTE GENOCIDE

**Prepared by Jessica L. Doinidis
Spring 2005**

TABLE OF CONTENTS

INDEX OF AUTHORITIES..... iii

INTRODUCTION AND SUMMARY OF CONCLUSIONS..... 1

A. Issues 1

B. Summary of Conclusions..... 2

1. The Iraqi Special Tribunal is likely to find that the protected group status element of genocide is satisfied in this case..... 2

2. The Iraqi Special Tribunal is likely to find that the numerosity element of genocide exists in this case..... 3

3. The Iraqi Special Tribunal is not likely to find the intent element of genocide in this case..... 3

4. Since genocide will be difficult to prove, the Prosecution should also attempt to convict Defendants for the lesser offense of crimes against humanity..... 4

FACTUAL BACKGROUND..... 4

A. Historical Context..... 4

B. Iraqi/Kurdish relations prior to 1987 5

C. The Anfal Operations 8

JURISDICTION 11

LEGAL ANALYSIS 12

A. Historical Background..... 12

B. The Elements of Genocide..... 17

1. Protected Group Status 18

2. Numerosity..... 21

3. Intent	26
TRIAL TACTICS	31
B. The Prosecution may want to use plea bargains in trying to convict Defendants of genocide.....	31
A. Since the Prosecution may not be able to establish the necessary elements of genocide, it should also try to convict Defendants for crimes against humanity	35
1. Jurisdiction	36
2. Legal Analysis.....	36
3. Procedural Recommendations.....	43
CONCLUSION	44

INDEX OF AUTHORITIES

UN RESOLUTIONS AND DOCUMENTS

1. Genocide Convention Participants, available at <http://www.ohchr.org/english/countries/ratification/1.htm>.
2. Convention on the Prevention and Punishment of the Crime of Genocide, Article 6, adopted Dec. 9, 1948, G.A. Res. 260A(III), 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).
3. G.A. Res. 96(I), U.N. GAOR, 1st Sess., U.N. Doc. A/RES/1/96 (1946).
4. Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, arts. 5-7, *reprinted in* 37 I.L.M. 999 (1998).
5. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, U.N. Commission on Hum. Rts., *available at* <http://www.ohchr.org/english/darfur.htm>.
6. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980).

COURT AND TRIBUNAL CASES

7. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia (Serbia and Montenegro)), 1996 I.C.J. 595 (July 11).
8. Attorney Gen. of Israel v. Eichmann, 36 Int'l L. Rep. 5 (Isr. Dist. Ct. - Jerusalem 1961), *aff'd*, 36 Int'l L. Rep. 277 (Isr. Sup. Ct. 1962).
9. France et al. v. Goering et al., (1946) 22 I.M.T. 203, 13 I.L.R. 203, 41 A.J.I.L. 172.
10. Prosecutor v. Kayishema, Case No. ICTR-95-1 (May 21, 1999).
11. Prosecutor v. Rutaganda, Case No. ICTR-96-3-T (Dec. 6, 1999).
12. Prosecutor v. Ruzindana, Case No. ICTR-95-1-T (May 21, 1999).
13. Beanal v. Freeport –McMoran, Inc., 197 F.3d 161 (5th Cir. 1999).
14. Prosecutor v. Kambanda, Case No. ICTR 97-23-S (Sept. 4, 1998).
15. Prosecutor v. Krstic, Case No. IT-98-33 (Aug. 2, 2001).
16. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T (Sept. 2, 1998).

17. Prosecutor v. Jelusic, Judgment, Case No. IT-95-10-T P 102 (Dec. 14, 1999).
18. Prosecutor v. Sikirica, Judgment, Case No. IT-95-8-T PP 86, 90 (Sept. 3, 2001).
19. Prosecutor v. Karadzic and Mladic, Review of the indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, Case Nos. IT-95-5-R61 and IT-95-18-R61.
20. Prosecutor v. Karadzic and Mladic, Judgment, Case Nos. IT-95-5-R61 and IT-95-18-R61.
21. Prosecutor v. Plavsic, Case No. IT-00-39&40/1 (Feb. 27, 2003).
22. Prosecutor v. Dusko Tadic, IT-95-1-AR72 (Oct. 2, 1995).
23. Black v. State, 586 So. 2d 968 (1991).
24. People v. Rood, 83 Mich. App. 350 (1978).

TREATISES, BOOKS, AND OTHER NON-PERIODIC MATERIALS

25. HUMAN RIGHTS WATCH/MIDDLE EAST, IRAQ'S CRIME OF GENOCIDE: THE ANFAL CAMPAIGN AGAINST THE KURDS (1995).
26. Martin van Bruinessen, *Genocide in Kurdistan?: The Suppression of the Dersim Rebellion in Turkey (1937-38) and the Chemical War Against the Iraqi Kurds (1988)*, in GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS (George J. Andreopoulos ed., 1994).
27. Vera Beaudin Saeedpour, *Establishing State Motives for Genocide: Iraq and the Kurds*, in GENOCIDE WATCH (Helen Fein ed. 1992).
28. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).
29. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW (2000).
30. VIRGINIA MORRIS AND MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1998).
31. William A. Schabas, BRINGING RWANDAN GENOCIDAIRES TO BOOK (Yale Ctr. For Int'l and Area Studies Paper Presented, Feb. 18, 1999).

JOURNALS AND LAW REVIEW ARTICLES

32. Lieutenant Commander Catherine S. Knowles, *Life and Human Dignity, the Birthright of All Human Beings: An Analysis of the Iraqi Genocide of the Kurds and Effective Enforcement of Human Rights*, 45 Naval L. Rev. 152 (1998).

33. Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations*, 39 Va. J. Int'l L. 425 (1999).
34. William A. Schabas, *International Law Weekend Proceedings: Groups Protected by the Genocide Convention: Conflicting Interpretations From the International Criminal Tribunal for Rwanda*, 6 ILSA J Int'l & Comp L 375 (2000).
35. The Harvard Law Review Association, *Developments in the Law – International Criminal Law: IV. Protected Groups Under the Genocide Convention*, 114 Harv. L. Rev. 2007 (2001).
36. Sonali B. Shah, Comment, *The Oversight of the Last Great International Institution of the Twentieth Century: The International Criminal Court's Definition of Genocide*, 16 Emory Int'l L. Rev. 351 (2002).
37. Jeffrey S. Morton, *International Law Weekend Proceedings: The International Legal Adjudication of the Crime of Genocide*, 7 ILSA J Int'l & Comp. L 329 (2001).
38. David Alonzo-Maizlish, Note, *In Whole or in Part: Group Rights, The Intent Element of Genocide, and the "Quantitative Criterion,"* 77 N.Y.U.L. Rev. 1369 (2002).
39. William A. Schabas, *Twelfth Annual Philip D. Reed Memorial Issue The Balkans Region: Legal Perspectives and Analyses Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal for the Former Yugoslavia*, 25 Fordham Int'l L. J. 23 (2001).
40. Fran Pilch, *The Prosecution of the Crime of Genocide in the ICTY: The Case of Radislav Krstic*, 12 USAFA J. Leg. Stud. 39 (2002-2003).
41. Lawrence J. LeBlanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding*, 78 A.J.I.L. 369 (1984).
42. Stefanie Ricarda Roos, *Development Genocide and Ethnocide: Does International Law Curtail Development-Induced Displacement Through the Prohibition of Genocide and Ethnocide?*, 9 Hum. Rts. Br. 14 (2002).
43. Kathleen Sarah Galbraith, Note, *Moving People: Forced Migration and International Law*, 13 Geo. Immigr. L. J. 597 (1999).
44. Thomas W. Simon, *Defining Genocide*, 15 Wis. Int'l L. J. 243 (1996) (book review).
45. Michael P. Scharf, *Trading Justice for Efficiency: Plea-Bargaining and International Tribunals*, *Journal of International Criminal Justice* 2 (2004), 1070-1081.
46. Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. Pa. L. Rev. 1 (2002).

47. Alexander Greenawalt, Note, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 Colum. L. Rev. 2259 (1999).

48. Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U. J. Int'l L. & Pol. 167 (1998).

MISCELLANEOUS

49. Coalition Provisional Authority, Statute of the Iraqi Special Tribunal (Dec. 10, 2003), arts 10-12, *available at* http://www.cpa-iraq.org/audio/20031210_Dec10_Special_Tribunal.htm.

50. U.S. Department of State, Background Note: Iraq, *available at* <http://www.state.gov/r/pa/ei/bgn/6804.htm>.

51. Executive Order: The International Convention on the Prevention and Punishment of the Crime of Genocide: Hearing Before a Subcomm. of the Senate Comm. on Foreign Relations, 81st Cong. 12 (1950).

52. Washington Kurdish Institute, *available at* <http://www.kurd.org/about/mrg.html>.

53. BLACK'S LAW DICTIONARY 1043, 1190 (8th ed. 2004).

54. MERRIAM WEBSTER ONLINE DICTIONARY *at* <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=inhuman+>.

55. Kathleen Cavanaugh, Case Western Reserve University School of Law International War Crimes Research Lab: *Is Evidence of Rape Relevant and Therefore Admissible Where Genocide, But Not Crimes Against Humanity (Rape), Has Been Charged in an Indictment?*, *available at* <http://www.law.case.edu/war-crimes-research-portal/>.

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issues

Article 11(a) of the Statute of the Iraqi Special Tribunal (“Statute of the IST”) gives the tribunal jurisdiction over the crime of genocide.¹ Taking its language directly from the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), the Statute defines genocide as certain enumerated acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” Since its ratification in 1948, the provisions of the Genocide Convention had not been applied until the prosecution of Jean-Paul Akayesu at the International Criminal Tribunal for Rwanda (“ICTR”) in 1998. As the ICTR and, subsequently, the International Criminal Tribunal for Yugoslavia (“ICTY”) discovered, the language of the Genocide Convention required practical interpretation. Thus, Article 11(a) raises several issues. First, this memorandum addresses issues of interpretation: 1) whether the Prosecution can establish that the Kurds may be classified as a

¹ Coalition Provisional Authority, Statute of the Iraqi Special Tribunal (Dec. 10, 2003), at http://www.cpa-iraq.org/audio/20031210_Dec10_Special_Tribunal.htm. [Reproduced in the accompanying notebook 2 at Tab 49]. Article 11 of the Statute of the IST reads:

- a) For the purposes of this Statute and in accordance with the Convention on the Prevention and Punishment of the Crime of Genocide, dated December 9, 1948, as ratified by Iraq on January 20, 1959, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 1. killing members of the group;
 2. causing serious bodily or mental harm to members of the group;
 3. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 4. imposing measures intended to prevent births within the group; and
 5. forcibly transferring children of the group to another group.

- b) The following acts shall be punishable:
 1. genocide;
 2. conspiracy to commit genocide;
 3. direct and public incitement to commit genocide;
 4. attempt to commit genocide; and
 5. complicity in genocide.

protected group under the Statute of the IST, 2) whether the Prosecution can establish that a sufficient number of Kurds were victimized to satisfy the threshold genocide element of numerosity, and 3) whether the Prosecution can establish the Iraqis' intent to commit genocide. Second, this memorandum addresses whether the Prosecution could succeed in prosecuting Defendants for the lesser offense of crimes against humanity in relation to the Anfal Operations.²

B. Summary of Conclusions

1. The Iraqi Special Tribunal is likely to find that the protected group status element of genocide is satisfied in this case

In order to establish the crime of genocide, the Prosecution must establish that Iraq's Kurdish population is a protected group under the Statute of the IST. Echoing the language of the Genocide Convention, the Statute of the IST defines a protected group as "a national, ethnical, racial or religious group." The Kurds are widely recognized as a separate ethnic group from the Iraqis; thus, the IST likely will find that the Iraq's Kurdish population is a protected group under the Statute of the IST.

² Issue of Memorandum as stated by the Prosecutor for the IST: It is important to understand whether the events of the various Anfal Operations constitute (either separately or collectively) the crime of genocide. When answering this question, please note that not all Kurdish population centers in Iraq were victimized during Anfal. Indeed, there is much evidence which tends to show that people initially placed into relocation centers were subsequently released to their families, and that others who complied with Iraqi Government orders were left unharmed. Indeed, the various Anfal Operations appear somewhat limited to the rural border regions between Iraq and Iran with major population centers remaining mostly unscathed. Given these facts, can any defendants before the Iraqi Special Tribunal be charged with genocide as a result of their participation in the Anfal Operations. More specifically, can the systematic and targeted destruction of a sub-portion of the Kurdish population of Iraq qualify as genocide under Article 11 of the Statute of the Iraqi Special Tribunal? What are the limitations on the crime of genocide found in the jurisprudence of the International Military Tribunal, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and other relevant domestic and international courts and how should this case law be applied to the Anfal Operations? When answering these questions, please explain (by reference to case law and the travaux preparatoires of the Genocide Convention and any other relevant documents) how the phrase "in whole or in part" (utilized in Article 11(a) of the Statute of the Iraqi Special Tribunal) should be interpreted.

2. The Iraqi Special Tribunal is likely to find that the numerosity element of genocide exists in this case.

In addition to protected group status, the Prosecution also must establish the actus reus of the crime: that genocide actually took place during the Anfal Operations. To distinguish genocide from murder, the ICTR and the ICTY used numerosity. While no exact figure exists to determine the threshold for genocide, a significant number of members of a protected group must be affected. In this case, over 100,000 Kurds were affected by the Anfal Operations. Because of the magnitude of this number, the IST is likely to find that the numerosity requirement is satisfied.

3. The Iraqi Special Tribunal may not find the intent element of genocide in this case.

Lastly, to establish the crime of genocide, the Prosecution must prove that Defendants intended to destroy Iraq's Kurdish population. In this particular offense, the Prosecution must prove special intent; negligence will not meet this high standard. When viewed in combination with genocidal conduct, evidence of prior campaigns that targeted a protected group helped prove intent at the ICTR and ICTY. However, the evidence in this case is not as clear as was the evidence in cases at past tribunals. Here, there are mixed motives that could explain Defendants' campaign against Iraq's Kurdish population. The Defendants may claim that the Iraqi government wanted to punish the Kurds for cooperating with the Iranian government or that the Iraqi government valued the precious oil on Kurdish land enough to take it by force. In addition, the Anfal Operations did not harm all Iraqi Kurds; those Kurds who cooperated with the Iraqi government and who agreed to relocation were not targeted. These facts will make it difficult for the IST to find that Defendants intended to commit genocide during the Anfal Operations. If the Prosecution can show evidence of disparate treatment of the Kurds compared to the

Sunni/Shi'ite population in northern Iraq, however, this could satisfy the high threshold needed to establish intent.

4. Since genocide will be difficult to prove, the Prosecution should also attempt to prosecute Defendants for the lesser offense of crimes against humanity.

Even if the Prosecution is unable to prove the charge of genocide, this does not mean the Defendants can escape liability for their atrocities committed during the Anfal Operations. While these atrocities may not rise to the level of genocide, “the crime of crimes,” they certainly constitute crimes against humanity. To prosecute Defendants for crimes against humanity, the Prosecution must prove that Defendants committed an act, with the following specifications: the act must have been part of a widespread or systematic attack; the act must have been directed against civilians; the Defendants must have had knowledge of the act. In this case, several acts committed during the Anfal Operations qualify as crimes against humanity. The Kurds were victims of mass killings, forcible transfers, ancillary acts of violence, enforced disappearance, and other inhumane acts. As such, the Prosecution can establish a strong case of crimes against humanity in relation to the Anfal Operations.

II. FACTUAL BACKGROUND

A. Historical Context

The Kurds have inhabited the mountains of northern Iraq, in addition to territories in adjoining states, for thousands of years. Since the twelfth century, this area has been known as Kurdistan.³ As P.J. Braidwood discovered, “Jarmo, in the valley of Chamchamal, at present in Iraq, is the most ancient village of the Middle East. Here, four thousand years before our era, humans cultivated diverse grains (such as wheat, barley, lentils, peas), plucked fruits (olives,

³ Human Rights Watch/Middle East, IRAQ'S CRIME OF GENOCIDE: THE ANFAL CAMPAIGN AGAINST THE KURDS (1995), *citing* P.J. Braidwood, PREHISTORIC INVESTIGATION IN IRAQI KURDISTAN (1960). [Reproduced in the accompanying notebook 1 at Tab 25].

almonds, pistachios, and figs), and raised sheep and goats.”⁴ Kurdistan has a natural separateness from its neighbors. Geographically, high mountains surround the territory. The culture and dress of its people are unique.⁵ Kurdish society is mainly agriculturally based due to abundant rainfall, a mild climate, and the presence of tributaries of the Tigris River that flow through Kurdistan. Lastly, the Kurdish language differs from Farsi, Persian, or Turkish, as it has Indo-European roots.⁶

For centuries, Kurdistan was part of the Ottoman and Persian empires.⁷ After the post-World War I collapse of the Ottoman Empire, the 1920 Treaty of Sevres granted Kurdistan independence. Kemal Ataturk, however, seized control of the portion of Kurdistan in modern Turkey, and thus ended this independence.⁸ Kurdistan then was divided among Iraq, the USSR, Syria, Persia, and Turkey.⁹

B. Iraqi/Kurdish relations prior to 1987

Since the division of Kurdistan in 1920, the Iraqi Kurds sporadically have staged revolts against the Iraqi government.¹⁰ From the 1940s onward, a charismatic tribal leader from the Barzan valley, named Mullah Mustafa Barzani, led several rebellions.¹¹ While the rebellions had

⁴ *Id.* at 17.

⁵ Lieutenant Commander Catherine S. Knowles, *Life and Human Dignity, the Birthright of All Human Beings: An Analysis of the Iraqi Genocide of the Kurds and Effective Enforcement of Human Rights*, 45 Naval L. Rev. 152 (1998). [Reproduced in the accompanying notebook 2 at Tab 32].

⁶ *Id.* at 154.

⁷ See Human Rights Watch/Middle East, *supra* note 3, at 17. [Reproduced in the accompanying notebook 1 at Tab 25].

⁸ *Id.* at 18.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

limited success, in 1946, Barzani led an uprising in which the Iraqi and Iranian Kurds united to found the Mahabad Republic, a quasi-independent entity. This success, however, was short-lived, as the united Mahabad Republic lasted only a year before it was crushed by Iranian troops.¹² Rebellion by the Kurdish fighters, known as *peshmerga*, or “those who face death,” continued after the Iraqi monarchy was overthrown in 1958. In consequent years, the Kurds and the Iraqi government repeatedly would enter into negotiations, the Kurds would demand autonomy, talks would break down, and violence would begin.¹³

In 1968, the Ba’ath Party took power in a coup, with Saddam Hussein acting as vice chairman of the Revolutionary Command Council (“the RCC”).¹⁴ He was the RCC member in charge of Kurdish affairs.¹⁵ In 1970, Hussein created a manifesto, offering limited autonomy to the Kurds. This document recognized the legitimacy of Kurdish nationalism and guaranteed Kurdish participation in government and the teaching of the Kurdish language in schools, but it did not articulate the boundaries of the territory of Kurdistan. The territorial determination was made dependent on a census, which the Iraqi government never conducted.¹⁶ In 1973, at a time when Iraq’s oil revenues were high due to the Arab-Israeli War, the Kurds laid claim to the

¹² *Id.*

¹³ *Id.* at 18-19.

¹⁴ Martin van Bruinessen, *Genocide in Kurdistan?: The Suppression of the Dersim Rebellion in Turkey (1937-38) and the Chemical War Against the Iraqi Kurds (1988)*, in GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS (George J. Andreopoulos ed., 1994). [Reproduced in the accompanying notebook 1 at Tab 26].

¹⁵ See Human Rights Watch/Middle East, *supra* note 3, at 22. [Reproduced in the accompanying notebook 1 at Tab 25].

¹⁶ See Van Bruinessen, *supra* note 14, at 157. [Reproduced in the accompanying notebook 1 at Tab 26].

Kirkuk oil fields in the north of Iraq. This angered the Iraqi government, which quickly passed an autonomy statute that excluded these oil-rich areas from the Kurdish manifesto of 1970.¹⁷

As the events of 1973 fueled tension between the Iraqi government and the Kurds, the Barzani Kurds sought assistance from outside sources, such as the U.S. Central Intelligence Agency, the Israeli government, and the Shah of Iran.¹⁸ This collaboration between the Kurds and Iraq's "enemies" outraged Hussein, who vowed, "[t]hose who have sold themselves to the foreigner will not escape punishment."¹⁹ In 1975, the Iraqi government began a campaign aimed at "Arabization" of northern Iraq. To accomplish this, the government encouraged Arab tribesmen from southern Iraq to move to northern Iraq, and then forcibly relocated thousands of Kurds to the desert of southern Iraq. The Kurds, traditionally an agrarian society, were not accustomed to life in a dry, desert climate, and many perished as a result.²⁰ Magnifying the hardships they faced, in 1975 the Kurds factionalized, with the Patriotic Union of Kurdistan ("the PUK"), led by current Iraqi President Jalal Talabani, splitting from Barzani's Kurdish Democratic Party ("the KDP"). In addition, other smaller Kurdish parties existed besides the PUK and the KDP, further dividing the Kurds.²¹

In 1977-78, the Iraqi government began to clear a cordon sanitaire along its northern borders, and as many as 200,000 Kurds were deported to resettlement camps.²² In 1979, Saddam

¹⁷ See Human Rights Watch/Middle East, *supra* note 3, at 22-23. [Reproduced in the accompanying notebook 1 at Tab 25].

¹⁸ See Van Bruinessen, *supra* note 14, at 158. [Reproduced in the accompanying notebook 1 at Tab 26].

¹⁹ See Knowles, *supra* note 5, at 156. [Reproduced in the accompanying notebook 2 at Tab 32].

²⁰ See Human Rights Watch/Middle East, *supra* note 3, at 24. [Reproduced in the accompanying notebook 1 at Tab 25].

²¹ *Id.* at 27.

²² Vera Beaudin Saeedpour, *Establishing State Motives for Genocide: Iraq and the Kurds*, in GENOCIDE WATCH (Helen Fein ed. 1992). [Reproduced in the accompanying notebook 1 at Tab 27].

Hussein was elected president of Iraq, and shortly thereafter, Iraq invaded Iran, beginning the Iraq-Iran war. During this war, the members of the KDP, who had allied with the Shah of Iran, now allied themselves with Iran's new clerical rulers. As had the prior actions of the Kurds, this infuriated Hussein and the Iraqi government.²³ As punishment, in 1983, the Barzani men and boys of the settlement camp of Qushtapa were taken and never heard from again.²⁴ In a speech, Hussein, without admitting what happened, described the fate of the Barzanis when he said, "[t]hey betrayed the country and they betrayed the covenant and we meted out a stern punishment to them, and they went to hell."²⁵

In 1985, the Iraqi government began to terrorize Iraqi Kurdistan. Troops regularly entered villages to arrest draft dodgers, army deserters, and suspected *peshmerga*. Suspects were taken away and executed by the troops.²⁶ Also, the Iraqi government began to isolate Iraqi Kurdistan from outside trade; thus, the Iraqi Kurds became self-sufficient. In 1986, the two main Kurdish parties, the KDP and PUK, united with the help of the Iranians, to attempt to topple Hussein. Because of this united effort, Hussein deemed the Kurds enemies of the state.²⁷

C. The Anfal Operations

Saddam Hussein delegated authority to his cousin, Ali Hassan al-Majid, known as "Chemical Ali," to direct the Anfal Operations. Literally, al-Anfal means "spoils," as in "the spoils of war." The first Anfal occurred in the Jafati Valley from February through March,

²³ See Human Rights Watch/Middle East, *supra* note 3, at 25. [Reproduced in the accompanying notebook 1 at Tab 25].

²⁴ See Saeedpour, *supra* note 22, at 63. [Reproduced in the accompanying notebook 1 at Tab 27].

²⁵ See Knowles, *supra* note 5, at 156-157. [Reproduced in the accompanying notebook 2 at Tab 32].

²⁶ See Human Rights Watch/Middle East, *supra* note 3, at 31. [Reproduced in the accompanying notebook 1 at Tab 25].

²⁷ *Id.* at 32-33.

1988.²⁸ The Iraqi government reportedly dropped chemical and conventional bombs, had troops bulldoze villages, and told survivors of the attacks were told to depart or die.²⁹ In addition to these atrocities, false amnesties were offered, in which Kurds surrendered to authorities, believing that they would be safe, and then were never heard from again. The second Anfal occurred from March 22, 1988 through April 1, 1988, on the edge of the Qara Dagh mountains.³⁰ Again, the Iraqi government reportedly used chemical weapons, offered false amnesty promises, and razed villages.³¹ The third Anfal occurred April 7-20, 1988, on Germian, a PUK stronghold to which many refugees from the first two Anfals had fled.³² Once again, the Iraqi government sent troops to cut off supplies, to imprison the people, to offer false amnesty promises, and to destroy homes and villages.³³ The fourth Anfal occurred May 3-8, 1988, in the Valley of the Lesser Zab River, where PUK refugees had fled after the third Anfal.³⁴ The Iraqi government reportedly used chemical weapons in strategic places to force the Kurds to flee along one corridor of escape.³⁵ Troops manned this corridor and shot the Kurds as they passed through. The troops then looted the villages. Those Kurds captured in the corridor were sent to processing centers and disappeared.

²⁸ *Id.* at 64.

²⁹ See Knowles, *supra* note 5, at 161. [Reproduced in the accompanying notebook 2 at Tab 32].

³⁰ See Human Rights Watch/Middle East, *supra* note 3, at 77. [Reproduced in the accompanying notebook 1 at Tab 25].

³¹ See Knowles, *supra* note 5, at 161. [Reproduced in the accompanying notebook 2 at Tab 32].

³² See Human Rights Watch/Middle East, *supra* note 3, at 88. [Reproduced in the accompanying notebook 1 at Tab 25].

³³ See Knowles, *supra* note 5, at 162. [Reproduced in the accompanying notebook 2 at Tab 32].

³⁴ See Human Rights Watch/Middle East, *supra* note 3, at 115. [Reproduced in the accompanying notebook 1 at Tab 25].

³⁵ See Knowles, *supra* note 5, at 163. [Reproduced in the accompanying notebook 2 at Tab 32].

The fifth, sixth, and seventh Anfal operations occurred from May 15, 1988, through August 26, 1988, in the Shaqlawa and Rawanduz valleys, where the surviving PUK forces had fled.³⁶ While some Iraqi Kurds escaped to Iran through the mountains, daily chemical attacks reportedly decimated the population.³⁷ The final Anfal began on August 25, 1988, in the northernmost edge of Kurdistan, where the KDP faction remained.³⁸ The Iraqi government reportedly launched massive chemical attacks, which were widespread due to wind conditions. Many Kurds who hid in the mountains died of cold and hunger. Others died of malnutrition and disease in the processing camps to which they were taken after capture. Still others fled to Turkey. The final Anfal ended on September 6, 1988, and amnesty was declared.³⁹ After the Revolutionary Command Council declared amnesty on the radio, the Iraqi government sought to return Kurdish refugees to Iraq from Turkey.⁴⁰ Once the Kurds reentered Iraq, however, they were subject to various decrees; in general, these decrees stated that Kurds would not be treated equally to other Iraqis.⁴¹ In addition, the prisoners captured by the Iraqi government during the Anfal Operations were either abandoned or resettled after amnesty was declared.⁴²

³⁶ See Human Rights Watch/Middle East, *supra* note 3, at 115. [Reproduced in the accompanying notebook 1 at Tab 25].

³⁷ See Knowles, *supra* note 5, at 164. [Reproduced in the accompanying notebook 2 at Tab 32].

³⁸ See Human Rights Watch/Middle East, *supra* note 3, at 177. [Reproduced in the accompanying notebook 1 at Tab 25].

³⁹ See Knowles, *supra* note 5, at 165. [Reproduced in the accompanying notebook 2 at Tab 32].

⁴⁰ See Human Rights Watch/Middle East, *supra* note 3, at 200. [Reproduced in the accompanying notebook 1 at Tab 25].

⁴¹ *Id.* at 201.

⁴² *Id.* at 203.

III. JURISDICTION

The Iraqi Special Tribunal has jurisdiction under three separate authorities to prosecute individuals found to have committed genocide. First, the Tribunal has jurisdiction under Article 10 of the Statute of the IST. Article 10 states, “The Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11-14, committed since July 17, 1968 and up until May 1, 2003, in the territory of Iraq or elsewhere.”⁴³ In addition, Article 10, section (a), specifically gives the IST jurisdiction over the crime of genocide.⁴⁴ Article 11 of the Statute of the IST describes genocide as an act punishable by the Tribunal.⁴⁵ The Anfal Operations, during which the alleged acts of genocide took place, occurred during the time period specified in Article 10. Also, the Anfal Operations took place in Iraq. Thus, under the Statute of the IST, the Tribunal has jurisdiction in this case.

The Iraqi Special Tribunal also has jurisdiction to prosecute individuals for genocide under the Genocide Convention, to which Iraq became a party on July 20, 1959.⁴⁶ Article 6 of the Genocide Convention states, “Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”⁴⁷ The Anfal

⁴³ See Statute of the Iraqi Special Tribunal, art. 10, *supra* note 1. [Reproduced in the accompanying notebook 2 at Tab 49].

⁴⁴ *Id.*

⁴⁵ *Id.* at art. 11.

⁴⁶ Genocide Convention Participants, available at <http://www.ohchr.org/english/countries/ratification/1.htm>. [Reproduced in the accompanying notebook 1 at Tab 1].

⁴⁷ Convention on the Prevention and Punishment of the Crime of Genocide, Article 6, adopted Dec. 9, 1948, G.A. Res. 260A(III), 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). [Reproduced in the accompanying notebook 1 at Tab 2].

Operations took place in Iraq and the parties responsible for them will stand trial in Iraq. Given this, under the Genocide Convention, the Iraqi Special Tribunal has jurisdiction to hear this case.

Lastly, the Iraqi Special Tribunal has jurisdiction to prosecute individuals for genocide as it is a crime under customary international law (“CIL”).⁴⁸ In 1946, the United Nations General Assembly stated in Resolution 96(I) that, “genocide is a crime under international law which the civilized world condemns.”⁴⁹ The Restatement of Foreign Relations declares that, “[a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.”⁵⁰ As genocide is such an offense, the Tribunal has universal jurisdiction to prosecute the Defendants for genocide in this case.⁵¹

IV. LEGAL ANALYSIS

A. Historical Background

While conduct fitting the modern definition of genocide certainly has occurred throughout history, the term “genocide” was not created until the twentieth century.⁵² The Polish

⁴⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia (Serbia and Montenegro)), 1996 I.C.J. 595 (July 11). [Reproduced in the accompanying notebook 1 at Tab 7].

⁴⁹ G.A. Res. 96(I), U.N. GAOR, 1st Sess., U.N. Doc. A/RES/1/96 (1946). [Reproduced in the accompanying notebook 1 at Tab 3].

⁵⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987). [Reproduced in the accompanying notebook 1 at Tab 28]; *see also* Attorney Gen. of Israel v. Eichmann, 36 Int'l L. Rep. 5 (Isr. Dist. Ct. - Jerusalem 1961), *aff'd*, 36 Int'l L. Rep. 277 (Isr. Sup. Ct. 1962). [Reproduced in the accompanying notebook 1 at Tab 8].

⁵¹ Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations*, 39 Va. J. Int'l L. 425 (1999). [Reproduced in the accompanying notebook 2 at Tab 33].

⁵² William A. Schabas, *International Law Weekend Proceedings: Groups Protected by the Genocide Convention: Conflicting Interpretations From the International Criminal Tribunal for Rwanda*, 6 ILSA J Int'l & Comp L 375 (2000). [Reproduced in the accompanying notebook 2 at Tab 34].

jurist Raphael Lemkin coined the term “genocide” in his 1944 work *Axis Rule in Occupied Europe*.⁵³ Lemkin’s inspiration for this word came from combining two ancient words: *genos*, ancient Greek for “race, nation, or tribe,” and *caedere*, Latin for “to kill.”⁵⁴ Lemkin defined his new term as:

[A] co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objective of such a plan would be disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of a national group.⁵⁵

Lemkin’s scope of genocide, however, was far broader than that later accepted by the parties to the Genocide Convention. Lemkin envisioned genocide encompassing destruction of political, economic, and cultural institutions, as well as destruction of the national group.

Shortly after Lemkin’s creation of the term “genocide,” prosecutors at the Nuremberg trials used the term to describe the destruction of the Jewish population of Europe by the Nazis in *France et al. v. Goering et al.*⁵⁶ By incorporating this new term into the indictments against the defendants, the prosecution at Nuremberg attempted to introduce and create a new type of international war crime.⁵⁷ The Nuremberg judges, however, did not use Lemkin’s term to

⁵³ William A. Schabas, *GENOCIDE IN INTERNATIONAL LAW* (2000), citing Raphael Lemkin, *AXIS RULE IN OCCUPIED EUROPE, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* (1944), p. 79. [Reproduced in the accompanying notebook 1 at Tab 29].

⁵⁴ *Id.* at 24.

⁵⁵ *Id.* at 25.

⁵⁶ *France et al. v. Goering et al.*, (1946) 22 I.M.T. 203, 13 I.L.R. 203, 41 A.J.I.L. 172. [Reproduced in the accompanying notebook 1 at Tab 9]. See also Schabas, *supra* note 52, at 377. [Reproduced in the accompanying notebook 2 at Tab 34].

⁵⁷ See Schabas, *supra* note 52, at 377. [Reproduced in the accompanying notebook 2 at Tab 34].

describe the atrocities at issue; rather, they characterized the events as crimes against humanity.⁵⁸

Shortly after the Nuremberg tribunal issued its final judgment in 1946, the United Nations General Assembly drafted Resolution 96(I) to address genocide.⁵⁹ The resolution reads as follows:

Genocide is the denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these groups, and is contrary to moral law and to the spirit and aims of the United Nations. Many instances of such crimes of genocide have occurred, when racial, religious, political and other groups have been destroyed, entirely or in part. The punishment of the crime of genocide is a matter of international concern.

The language in this resolution describing protected group status is nearly identical to that codified in the Genocide Convention two years later.⁶⁰

Despite the United Nations' acceptance of the term "genocide" in its 1946 resolution and the codification of a definition of genocide in the 1948 Genocide Convention, over the decades that followed, the term nearly became obsolete. In 1998, however, the ICTR charged, tried, and convicted Jean-Paul Akayesu of genocide, marking the first genocide trial in an independent international tribunal since the Genocide Convention entered into force in 1951.⁶¹ Since the successful prosecution of Akayesu, the ICTR has successfully indicted, prosecuted, and convicted several other individuals (Clement Kayishema, Obed Ruzindana, and Georges

⁵⁸ See France et al. v. Goering et al., *supra* note 56. [Reproduced in the accompanying notebook 1 at Tab 9].

⁵⁹ See G.A. Res. 96(I), *supra* note 49. [Reproduced in the accompanying notebook 1 at Tab 3].

⁶⁰ See Genocide Convention, *supra* note 47, at art. 2. [Reproduced in the accompanying notebook 1 at Tab 2].

⁶¹ The Harvard Law Review Association, *Defining Protected Groups Under the Genocide Convention*, 114 Harv. L. Rev. 2007 (2001). [Reproduced in the accompanying notebook 2 at Tab 35].

Rutaganda) for the crime of genocide.⁶² The ICTY has had limited success indicting and convicting individuals for genocide and genocide-related crimes.⁶³

As genocide evolved from Lemkin's conception in 1944 to the modern notion of the crime as applied by the ad hoc international tribunals, the concept of "cultural genocide" has been dropped from the definition. Despite substantial debate at the time of the drafting of the Genocide Convention, elements establishing the offense of cultural genocide were not included in the final version of the convention.⁶⁴ In addition, the United States Court of Appeals for the Fifth Circuit held that "a review of [international conventions, agreements, and declarations] reveals that the documents make pronouncements and proclamations of an amorphous right to 'enjoy culture,' or a right to 'freely pursue' culture, or a right to cultural development. They nonetheless fail to proscribe or identify conduct that would constitute an act of cultural genocide."⁶⁵ Thus, the current definition of the crime of genocide under international law encompasses only destruction that is physical in nature. Intangible harm, such as the destruction of a culture, while morally deplorable, does not constitute genocide according to its modern definition.

In addition to excluding cultural genocide, the Genocide Convention also rejects the concept of political genocide. While General Assembly Resolution 96(I) included political

⁶² Prosecutor v. Kayishema, Case No. ICTR-95-1 (May 21, 1999). [Reproduced in the accompanying notebook 1 at Tab 10]; *see also* Prosecutor v. Rutaganda, Case No. ICTR-96-3-T (Dec. 6, 1999). [Reproduced in the accompanying notebook 1 at Tab 11]; *see also* Prosecutor v. Ruzindana, Case No. ICTR-95-1-T (May 21, 1999). [Reproduced in the accompanying notebook 1 at Tab 12].

⁶³ While the ICTY has issued some genocide convictions (for example, Radislav Krstic), the ICTR has issued more genocide convictions than has the ICTY. *See* Schabas, *supra* note 52, at 378. [Reproduced in the accompanying notebook 2 at Tab 34].

⁶⁴ *See* Schabas, *supra* note 53, at 185. [Reproduced in the accompanying notebook 1 at Tab 29].

⁶⁵ *Beanal v. Freeport –McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999). [Reproduced in the accompanying notebook 1 at Tab 13].

groups in its list of protected groups, several states objected to that inclusion. During the drafting of the Genocide Convention, these states insisted that this category be left out.⁶⁶ Perhaps the most notable objector to including political genocide in the Genocide Convention, the Soviet Union insisted that genocide etymologically was tied to the concept of a racial, national, or religious group, not a political or economic group.⁶⁷ While not all states agreed with this interpretation, political groups were excluded from the final draft of the Genocide Convention.⁶⁸ As a result of this exclusion, several states (Bangladesh, Panama, Costa Rica, Peru, Slovenia, and Lithuania) compensated for this “blind spot” in the Genocide Convention by including political genocide in their domestic criminal codes.⁶⁹ Despite the debate during the drafting of the Genocide Convention, however, political genocide has not been included in the Rome Statute.⁷⁰ Also, the Genocide Convention has not been amended to include political genocide.⁷¹ Given its exclusion in instruments of international law, the modern definition of genocide does not include political genocide.

Despite the controversies surrounding the competing definitions of genocide, genocide has taken its place as “the crime of crimes.”⁷² The ICTY Appeals Chamber stated:

⁶⁶ See Schabas, *supra* note 53, at 135. [Reproduced in the accompanying notebook 1 at Tab 29].

⁶⁷ *Id.*

⁶⁸ *Id.* at 138.

⁶⁹ *Id.* at 141.

⁷⁰ Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, arts. 12-15 reprinted in 37 I.L.M. 999 (1998). [Reproduced in the accompanying notebook 1 at Tab 4].

⁷¹ See Schabas, *supra* note 53, at 143. [Reproduced in the accompanying notebook 1 at Tab 29].

⁷² Prosecutor v. Kambanda, Case No. ICTR 97-23-S (Sept. 4, 1998). [Reproduced in the accompanying notebook 1 at Tab 14].

Among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium. The crime is horrific in its scope; its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities, and religions provide. This is a crime against all of mankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.⁷³

In addition, the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General noted that, while some categories of crimes against humanity may be similarly atrocious and carry stigmas similar to that of genocide, it is indisputable that genocide bears a “special stigma.”⁷⁴ Thus, the evolution of international law has shown that charges of genocide should be reserved for the most heinous of cases.

B. The Elements of Genocide

Both the Genocide Convention and the Statute of the IST define genocide as:

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁷⁵

⁷³ Prosecutor v. Krstic, Case No. IT-98-33 (Aug. 2, 2001). [Reproduced in the accompanying notebook 1 at Tab 15].

⁷⁴ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, U.N. Commission on Hum. Rts., *available at* <http://www.ohchr.org/english/darfur.htm>. [Reproduced in the accompanying notebook 1 at Tab 5].

⁷⁵ *See* Genocide Convention, *supra* note 47 at art. 2 [Reproduced in the accompanying notebook 1 at Tab 2]; *see also* Statute of the Iraqi Special Tribunal, *supra* note 1 at art. 11. [Reproduced in the accompanying notebook 2 at Tab 49].

This definition contains three distinct elements of the crime that must be proved to convict a defendant of genocide.⁷⁶ First, the Prosecution must prove that genocide was committed against a group that fits the definition of a “national, ethnical, racial or religious” group. Second, the Prosecution must prove the extent of the destruction, or the numerosity of the victims. Third, and perhaps most difficult, the Prosecution must prove the intent on the part of the Defendants, that is that they intended to commit genocide. In this case, the Prosecution will likely be able to prove both that the Kurds have protected group status and that Defendants committed atrocities against a significant number of Kurds during the Anfal Operations. While these first two elements are easily satisfied, the Prosecution will have a much more difficult time proving the intent element. Thus, the Prosecution may not be able to establish the crime of genocide in relation to the Anfal Operations.

1. Protected Group Status

The court likely will find that the Prosecution can establish protected group status for the Kurds in accordance with the Genocide Convention. To establish that a group against which atrocities were committed is protected by the Genocide Convention and the Statute of the IST, the Prosecution must establish that the group is “national, ethnical, racial or religious” in nature. “National group” refers to a group which identifies itself with a specific state.⁷⁷ An “ethnic group” is a group which identifies itself based on its cultural or linguistic characteristics.⁷⁸ A “racial group” is a group identifiable by hereditary physical traits, irrespective of national,

⁷⁶ Sonali B. Shah, *Comment: The Oversight of the Last Great International Institution of the Twentieth Century: The International Criminal Court’s Definition of Genocide*, 16 *Emory Int’l L. Rev.* 351 (2002). [Reproduced in the accompanying notebook 2 at Tab 36].

⁷⁷ *Id.* at 357.

⁷⁸ *Id.*

cultural, linguistic or religious factors.⁷⁹ Finally, “religious group” refers to a group which adheres to the same spiritual beliefs.⁸⁰ None of these group definitions includes groups that are political, social, or economic in nature.⁸¹

Tribunals have found the definition of protected group to be too restrictive. For example, in *Prosecutor v. Akayesu*, the ICTR crafted a unique argument to solve the problem the tribunal had in distinguishing the Hutus from the Tutsis. Historically, the Tutsis, believed to be the descendents of Nilotic herders, first arrived in Rwanda in the 1500s and established themselves as the ruling aristocracy.⁸² The Hutus are believed to be of “Bantu” origin from South and Central Africa.⁸³ While economic barriers and genomic differences separated these two groups, they shared a language, religion, and culture.⁸⁴ Moreover, there was so much intermarriage between members of the two groups that ethnographers doubted whether they really were distinct.⁸⁵ The arrival of Europeans, however, helped accentuate these differences. Belgian colonists introduced a system of identity cards that labeled each individual based on the number of cattle owned by a family.⁸⁶ Later, these colonists began to support the majority Hutus as

⁷⁹ *Id.*

⁸⁰ *Id.* at 358.

⁸¹ Jeffrey S. Morton, *International Law Weekend Proceedings: The International Legal Adjudication of the Crime of Genocide*, 7 ILSA J Int'l & Comp. L 329 (2001). [Reproduced in the accompanying notebook 2 at Tab 37]. It is also significant that these three categories of groups were omitted from the Genocide Convention as a compromise due to competing interests of countries during the drafting process. See Shah, *supra* note 76, at 339. [Reproduced in the accompanying notebook 2 at Tab 36].

⁸² See Shah, *supra* note 76, at 366. [Reproduced in the accompanying notebook 2 at Tab 36]; see also Schabas, *supra* note 52, at 378. [Reproduced in the accompanying notebook 2 at Tab 34].

⁸³ See Schabas, *supra* note 52, at 378. [Reproduced in the accompanying notebook 2 at Tab 34].

⁸⁴ *Id.* at 378-379.

⁸⁵ Virginia Morris and Michael Scharf, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* (1998). [Reproduced in the accompanying notebook 1 at Tab 30].

⁸⁶ See Schabas, *supra* note 52, at 379. [Reproduced in the accompanying notebook 2 at Tab 34].

leaders. As the Hutus began to take power, years of resentment toward the wealthier, more powerful Tutsis boiled over and grew to genocidal proportions.

As the *Akayesu* court developed its reasoning for why the Tutsis qualified for protected group status under the Statute of the ICTR,⁸⁷ it found that the Tutsis did not quite fit any of the four protected groups listed in the statute; the closest, which still was not a good fit, was “ethnic group.”⁸⁸ To reach its holding, the court created a fifth, “shadow” category of protected group: stable groups where membership is determined by birth.⁸⁹ To reach this conclusion, the *Akayesu* court reasoned that according to the *travaux preparatoires* of the Genocide Convention, the intention of the drafters was to ensure the protection of any stable and permanent group, not just the four groups listed.⁹⁰ While this reasoning is open to the criticism that *travaux preparatoires* should help clarify confusing terms, not add elements to a crucial definition,⁹¹ the court ultimately held that the Tutsis were a protected group and found Akayesu guilty of genocide.

In this case, the Kurds undeniably have protected group status. Unlike the common language, religion and culture that made it so difficult for the ICTR to distinguish between the Hutus and Tutsis, the Kurds have many characteristics that plainly distinguish them from the Iraqis. First, the Kurds and the Iraqis do not share a common language. The Kurds speak Kurdish, while the Iraqis speak Arabic.⁹² Second, while both the Kurds and the Iraqis are

⁸⁷ Note that the Article 2 of the Statute of the ICTR echoes the language of Article 2 of the Genocide Convention.

⁸⁸ See Schabas, *supra* note 52, at 378. [Reproduced in the accompanying notebook 2 at Tab 34].

⁸⁹ *Id.* at 379; see also Shah, *supra* note 76, at 369. [Reproduced in the accompanying notebook 2 at Tab 36].

⁹⁰ Prosecutor v. Akayesu, Case No. ICTR 96-4-T (Sept. 2, 1998). [Reproduced in the accompanying notebook 1 at Tab 16].

⁹¹ Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980). [Reproduced in the accompanying notebook 1 at Tab 6].

⁹² See Knowles, *supra* note 5, at 154. [Reproduced in the accompanying notebook 2 at Tab 32].

Muslim, they belong to different sects. Most Kurds are Sunni Muslim, while most Iraqis are Shiite.⁹³ Lastly, the Kurds and the Iraqis do not share a common culture, as they differ especially in their traditional dress and customs.⁹⁴ Given these differences in language, religion, and culture between the Kurds and the majority Iraqi population, the Prosecution can claim that the Kurds have protected group status under the Genocide Convention and the Statute of the IST.

2. Numerosity

The court likely will find that the numerosity element required by the Genocide Convention is sufficient with respect to the Kurds killed in the Anfal Operations. To establish numerosity, or that the defendants intended to destroy the requisite number of members of a protected group, under the Genocide Convention and the Statute of the IST, the Prosecution must establish that Defendants intended to destroy, “in whole or in part,” the protected group.⁹⁵

The phrase “in whole or in part” has caused much confusion in the international legal realm. When U.S. President Harry S. Truman submitted the Genocide Convention to the U.S. Senate, Deputy Under Secretary of State Dean Rusk advanced a limited interpretation of this phrase. He suggested that the phrase should be limited to the “substantial number” interpretation, or situations in which the defendants intend to destroy a protected group as a whole, but only target a part of the group.⁹⁶ He put forth this suggestion to assuage senators’

⁹³ U.S. Department of State at <http://www.state.gov/r/pa/ei/bgn/6804.htm>. [Reproduced in the accompanying notebook 2 at Tab 50]. See also Human Rights Watch/Middle East, *supra* note 3, at 22. [Reproduced in the accompanying notebook 1 at Tab 25].

⁹⁴ See U.S. Department of State at <http://www.state.gov/r/pa/ei/bgn/6804.htm>, *supra* note 93. [Reproduced in the accompanying notebook 2 at Tab 50].

⁹⁵ See Genocide Convention, *supra* note 47 at art. 2. [Reproduced in the accompanying notebook 1 at Tab 2]; see also Statute of the Iraqi Special Tribunal, *supra* note 1. [Reproduced in the accompanying notebook 2 at Tab 49].

⁹⁶ Executive O: The International Convention on the Prevention and Punishment of the Crime of Genocide: Hearing Before a Subcomm. of the Senate Comm. on Foreign Relations, 81st Cong. 12 (1950). [Reproduced in the accompanying notebook 2 at Tab 51]; See also David Alonzo-Maizlish, Note, *In Whole or in Part: Group Rights*,

concerns that the Genocide Convention could apply to individual murders or lynchings if states interpreted the phrase too broadly.⁹⁷

The ICTR has interpreted the phrase “in whole or in part” somewhat differently than Rusk and the U.S. Senate. In *Prosecutor v. Kayishema*, the ICTR held that “‘in part’ requires the intention to destroy a considerable number of individuals.”⁹⁸ This vague definition allows skeptics to raise questions regarding “localized genocide,” or genocide occurring within a specific geographic area. They complain that such localized genocide may exist absent a national plan, in contravention of the spirit of the Genocide Convention.⁹⁹ In Rwanda, however, the prosecution curbed such criticism by beginning its case with presentations by expert witnesses of general evidence about the genocidal plan on a national scale.¹⁰⁰ This evidence of a large-scale genocidal plan satisfied the ambiguous “considerable number” requirement, thus enabling the prosecution to obtain genocide convictions at the ICTR.¹⁰¹

The ICTY has interpreted the phrase “in whole or in part” in several ways. First, the *Krstic* court, in analyzing whether the atrocities of July 1995 in Srebrenica, in which the Serbs massacred thousands of Muslim men and boys, qualified as genocidal acts, held that “in part means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated

The Intent Element of Genocide, and the “Quantitative Criterion,” 77 N.Y.U.L. Rev. 1369 (2002). [Reproduced in the accompanying notebook 2 at Tab 38].

⁹⁷ *Id.*

⁹⁸ See *Prosecutor v. Kayishema*, *supra* note 62. [Reproduced in the accompanying notebook 1 at Tab 10].

⁹⁹ William A. Schabas, Essay, *Twelfth Annual Philip D. Reed Memorial Issue The Balkans Region: Legal Perspectives and Analyses Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal for the Former Yugoslavia*, 25 Fordham Int’l L. J. 23 (2001). [Reproduced in the accompanying notebook 2 at Tab 39].

¹⁰⁰ *Id.* at 43.

¹⁰¹ *Id.*

individuals within it.”¹⁰² Thus, the targeting of Muslim males, a distinct part of the Muslim population of a specific territory, satisfied the numerosity requirement in this case. Regarding the destruction of a group contained within a geographic area, the court held that “the physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue.”¹⁰³ Thus, the targeting of Muslims in one geographic area, but not in all areas inhabited by Muslims, could satisfy the numerosity requirement. Ultimately, the ICTY found Krstic guilty of genocide, marking the first conviction for the crime of genocide by that tribunal.¹⁰⁴

Second, in *Prosecutor v. Jelusic*, the ICTY created yet another interpretation of the phrase “in whole or in part.” The ICTY considered whether the several dozen murders and tortures of Muslims committed by Jelusic, a man driven by hatred of Muslims, constituted genocide. The court first interpreted “in whole or in part” as “a very large number of the members of the group.” Later, the court gave a second interpretation of the phrase: “the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group.”¹⁰⁵ Ultimately, the ICTY found that Jelusic, a man who stated that he hated the Muslims, wanted to kill them all, and wanted to use any remaining Muslims as

¹⁰² See *Prosecutor v. Krstic*, note 73. [Reproduced in the accompanying notebook 1 at Tab 15].

¹⁰³ *Id.*

¹⁰⁴ Fran Pilch, *The Prosecution of the Crime of Genocide in the ICTY: The Case of Radislav Krstic*, 12 USAFA J. Leg. Stud. 39 (2002-2003). [Reproduced in the accompanying notebook 2 at Tab 40].

¹⁰⁵ See Alonzo-Maizlish, *supra* note 96, at 1392. [Reproduced in the accompanying notebook 2 at Tab 38].

slaves, did not have the requisite intent to commit genocide because he lacked a plan to destroy a large proportion of a protected group.¹⁰⁶

Third, the ICTY, in the *Sikirica* case, when determining whether atrocities committed at the Keraterm camp in Prijedor constituted genocide, created an arithmetic application to determine how to interpret the phrase “in whole or in part.” The ICTY held that “it is more appropriate to speak of a ‘reasonably substantial’ rather than a ‘reasonably significant’ number” and that “this part of the definition calls for evidence of an intention to destroy a reasonably substantial number relative to the total population of the group in the area at issue.”¹⁰⁷ The court then applied this reasoning to numerical values when it determined that out of the 49,351 Muslim people in the Prijedor municipality, 1000-1400 of those people were victimized at the detention camp. Thus, victimization of 2% - 2.8% of the Muslim population in the area would hardly qualify as a ‘reasonably substantial’ part of the Bosnian Muslim group in Prijedor. Ultimately, the ICTY held that this number weighed against a finding of intent to commit genocide.

Lastly, the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General combined the above definitions. It found that:

[a]s clarified by international case law, the intent to destroy a group “in part” requires the intention to destroy “a considerable number of individuals” or “a substantial part,” but not necessarily a “very important part” of the group. Instances mentioned in either case law or the legal literature include, for example, the intent to kill all Muslims of Bosnia-Herzegovina, or all Muslims living in a regions of that country, or, for example, to destroy all the Jews living in Italy or the Armenians living in France.¹⁰⁸

¹⁰⁶ Prosecutor v. Jelusic, Judgment, Case No. IT-95-10-T P 102 (Dec. 14, 1999). [Reproduced in the accompanying notebook 1 at Tab 17].

¹⁰⁷ Prosecutor v. Sikirica, Judgment, Case No. IT-95-8-T PP 86, 90 (Sept. 3, 2001). [Reproduced in the accompanying notebook 1 at Tab 18].

¹⁰⁸ See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, *supra* note 74, at ¶ 492. [Reproduced in the accompanying notebook 1 at Tab 5].

Ultimately, the commission found, based on a lack of evidence of intent, that the government of Sudan had not pursued a policy of genocide.¹⁰⁹

In determining whether the numerosity element of genocide is satisfied in the case of the Anfal Operations, it is important to note that only the Iraqi sect of the Kurdish population was affected. Turkey, Syria, Iran, and the former Soviet states in Central Asia all have sizeable Kurdish population that were not affected by the Anfal Operations.¹¹⁰ Thus, the Anfal Operations were directed only at the Iraqi Kurds, not Kurds in general. In addition, only part of the Iraqi Kurdish population was affected by the Anfal Operations. The deployment of chemical weapons against Iraqi Kurds took place over rural villages, not cities and other urban areas.¹¹¹ Lastly, Kurds who had cooperated with Iraqi officials during the government's relocation efforts of the 1970s and 1980s and who dissociated themselves from Kurdish nationalists were not harmed intentionally during the Anfal Operations.¹¹² Thus, not all Iraqi Kurds were affected by the Anfal Operations.

The element of numerosity in this case will center on how the IST chooses to interpret the phrase "in whole or in part." As a minority group in Iraq, the U.S. Department of State estimates that Kurds comprise 15% - 20% of the Iraqi population.¹¹³ The Washington Kurdish Institute estimates that out of Iraq's 19,300,000 people, 4,400,000, or 23%, are Kurdish.¹¹⁴ If the court

¹⁰⁹ *Id.* at ¶¶ 518-522.

¹¹⁰ Washington Kurdish Institute, <http://www.kurd.org/about/mrg.html>. [Reproduced in the accompanying notebook 2 at Tab 52].

¹¹¹ *See* Knowles, *supra* note 5, at 152. [Reproduced in the accompanying notebook 2 at Tab 32].

¹¹² *See* Van Bruinessen, *supra* note 14, at 162-163. [Reproduced in the accompanying notebook 1 at Tab 26].

¹¹³ *See* U.S. Department of State, <http://www.state.gov/r/pa/ei/bgn/6804.htm>, note 93. [Reproduced in the accompanying notebook 2 at Tab 50].

¹¹⁴ *See* Washington Kurdish Institute, <http://www.kurd.org/about/mrg.html>, note 110. [Reproduced in the accompanying notebook 2 at Tab 52].

chooses to apply a quantitative analysis, like the one used in the ICTY *Sikirica* case, then the prosecution may not be able to satisfy this element. It would be useful, however, to know the exact population of Kurds in northern Iraq, so as to ensure that this calculation is accurate with respect to the affected geographic area. If the court chooses to apply a standard similar to that employed by the ICTR in *Kayishema* or the ICTY in *Krstic* and *Jelusic*, for determining numerosity, the prosecution should be able to satisfy this element. While no accurate total count exists of the Iraqi Kurds who perished during the Anfal Operations, estimates place the number at over 100,000.¹¹⁵ This number, while perhaps not a large percentage of the Kurdish population of Iraq or of the entire world, is still a “significant” and “considerable” number. Thus, while success depends on the interpretation the court gives to the phrase “in whole or in part,” the Prosecution has a strong argument that the numerosity element of genocide is satisfied because the number of Kurds killed in the Anfal Operations is so high.

3. Intent

While the IST may find that the elements of protected group status and numerosity are satisfied in this case, it will be difficult for the prosecution to establish the intent element in this case, as required by the Genocide Convention and the Statute of the IST. To establish intent, or that the alleged genocidal acts were committed with intent to destroy, under the Genocide Convention and the Statute of the IST, the Prosecution must establish that Defendants engaged in the Anfal Operations with the intent to destroy the Kurds as such, or for no other reason than because they are Kurds.¹¹⁶

¹¹⁵ See Knowles, *supra* note 5, at 152. [Reproduced in the accompanying notebook 2 at Tab 32].

¹¹⁶ See Genocide Convention, *supra* note 47 at art. 2 [Reproduced in the accompanying notebook 1 at Tab 2]; see also Statute of the Iraqi Special Tribunal, *supra* note 1. [Reproduced in the accompanying notebook 2 at Tab 49].

During the drafting of the Genocide Convention, some states saw the requirement of “intent to destroy as such” as dangerous. France and the USSR, specifically, wanted to delete the words to prevent pleas of innocence due to absence of intent.¹¹⁷ Their concerns rang true in the case of the Ache population of Paraguay. Between 1962 and 1972, the Paraguayan government killed fifty percent of the Ache population in order to pursue development projects.¹¹⁸ The government denied genocidal intent for this killing, however, and thus it was not accused of genocide.¹¹⁹

In the *Kayishema and Ruzindana* case, the ICTR held that genocidal intent may be inferred from certain acts committed by the defendants. These acts included, “all acts or utterances of the accused, or from the general context in which other culpable acts were perpetrated systematically against the same group, regardless of whether such other acts were committed by the same perpetrator or even by other perpetrators.”¹²⁰ The ICTY also noted in the *Karadzic and Mladic* Rule 61 proceeding, confirming a prima facie case, that genocidal intent may be implied by certain facts; it need not be clearly expressed.¹²¹ In its analysis, the court used the following facts to determine implied genocidal intent: the general political doctrine that gave rise to the acts, the repetition of destructive and discriminatory acts, and acts that violate, or

¹¹⁷ Lawrence J. LeBlanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding*, 78 A.J.I.L. 369 (1984). [Reproduced in the accompanying notebook 2 at Tab 41].

¹¹⁸ Stefanie Ricarda Roos, *Development Genocide and Ethnocide: Does International Law Curtail Development-Induced Displacement Through the Prohibition of Genocide and Ethnocide?*, 9 Hum. Rts. Br. 14 (2002). [Reproduced in the accompanying notebook 2 at Tab 42].

¹¹⁹ *Id.* at 16.

¹²⁰ See Prosecutor v. Kayishema, note 62. [Reproduced in the accompanying notebook 1 at Tab 10]; See also Prosecutor and Ruzindana, note 62. [Reproduced in the accompanying notebook 1 at Tab 12].

¹²¹ Prosecutor v. Karadzic and Mladic, Review of the indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, Case Nos. IT-95-5-R61 and IT-95-18-R61. [Reproduced in the accompanying notebook 1 at Tab 19].

which the perpetrators themselves consider to violate, the very foundation of the group.¹²² Thus, the *Karadzic and Mladic* court found that the Serbian Democratic Party's plans in Bosnia and Herzegovina contained elements of genocide.

In the case of Iraq, intent, whether expressed or inferred, remains shrouded because of the Iraqi government's mixed motives for the Anfal Operations. As a result, a spectrum of intent exists in this case, and depending on the composition of the members of the court itself, the court could stop at any point on this spectrum. Thus, this case will turn on the sufficiency of the Prosecution's evidence of genocidal intent.

There are many theories, having nothing to do with ethnocentrism or xenophobia, for why Saddam Hussein and Ali Hassan al-Majid ordered the Anfal Operations to take place. First, Hussein and al-Majid may have wanted to punish the Kurds for their ongoing cooperation with the Shah and the Iranian government.¹²³ Tariq Aziz, who was to become the Iraqi foreign minister told PUK fighter Jalal Talabani, "If you help us, we will never forget it. But if you oppose us, we will never forget it. And after the [Iran – Iraq] war is over, we will destroy you and all your villages completely."¹²⁴ Second, parts of Kurdistan in northern Iraq contained vast quantities of oil that the Iraqi government valued.¹²⁵ Kurdish claims to the oil fields would have been perceived as a significant threat that required a response. While each of these reasons is despicable from a human rights perspective, a general awareness that an act will probably result

¹²² Prosecutor v. Karadzic and Mladic, Judgment, Case Nos. IT-95-5-R61 and IT-95-18-R61. [Reproduced in accompanying notebook 1 at Tab 20].

¹²³ See Saeedpour, *supra* note 22 at 66. [Reproduced in accompanying notebook 1 at Tab 27].

¹²⁴ See Knowles, note 5 at 157. [Reproduced in accompanying notebook 2 at Tab 32].

¹²⁵ See Saeedpour, *supra* note 22 at 67-68. [Reproduced in accompanying notebook 1 at Tab 27].

in the death of many people is not enough to satisfy the intent element of genocide.¹²⁶ The intent standard required to prove the crime of genocide is high; a defendant must have the requisite mens rea of specific intent. Thus, if the defense can prove that the Anfal Operations resulted from the Iraqi government's intent to kill the Kurds to retaliate against the Kurds for treason, to suppress insurgency, or to gain access to the oil, it would fatally wound the Prosecution's genocide case.

Several other factors exist that weaken a case of genocide against Defendants. First, the Kurds who cooperated with Iraqi officials, dissociated themselves from Kurdish nationalists, and accepted deportation to southern Iraq, were not otherwise persecuted.¹²⁷ Scholars have debated whether deportation can constitute genocide¹²⁸; however, as these deportations occurred prior to the Anfal Operations, they are not crucial to the issue of this memorandum. The Anfal Operations targeted a specific area: Kurdistan in northern Iraq. Thus, the fact that the Iraqi government only sought to harm the Kurds in one area of the country, known for its oil riches, is significant in determining intent. While the ICTY held in *Krstic* that localized genocide is a punishable offense,¹²⁹ the number of Kurds killed in the Anfal Operations is still relevant. To put this concept simply, "the higher the number of killings, the easier a prima facie case for

¹²⁶ See Schabas, *supra* note 99, at 49-50. [Reproduced in the accompanying notebook 2 at Tab 39].

¹²⁷ See Van Bruinessen, note 14 at 162-163. [Reproduced in the accompanying notebook 1 at Tab 26].

¹²⁸ Kathleen Sarah Galbraith, *Moving People: Forced Migration and International Law*, 13 Geo. Immigr. L. J. 597 (1999) (arguing that military action is committed with the intent to destroy a protected group if the action is committed with the objectives of forcing individuals from their homes and into refugee camps where mortality and morbidity rates are very high and completely foreseeable). [Reproduced in the accompanying notebook 2 at Tab 43]; *but see* Schabas, *supra* note 53, at 201 (drawing a distinction between ethnic cleansing, or deportation, and genocide by focusing on the different intent of each crime, but admitting that ethnic cleansing may be a sign of genocide in the foreseeable future). [Reproduced in the accompanying notebook 1 at Tab 29].

¹²⁹ See Alonzo-Maizlish, *supra* note 96 at 1389. [Reproduced in the accompanying notebook 2 at Tab 38].

genocide may be made.”¹³⁰ The lack of an assault on the Kurds elsewhere in Iraq, therefore, is significant in determining the weight of evidence of intent.

The second factor that weakens the genocide case against the Defendants is that the Iraqi government never launched a public campaign against the Kurds. In Rwanda, the Hutu government made public statements inciting violence against the Tutsis.¹³¹ No such propaganda existed in this case. This lack of a government-sponsored campaign, however, is not dispositive of the Iraqi government’s lack of intent to commit genocide against the Kurds. While in Rwanda, the government relied on the civilians to perpetrate the crime of genocide against the Tutsis¹³², in Iraq the government did not need the assistance of the masses. The Iraqi government could commit genocide via its strong military. When viewing evidence of intent as a whole, however, the lack of a public campaign weighs against a finding of intent.

If the Prosecution can produce evidence, however, that the Iraqi government wanted to destroy the Kurds as well as take their oil and get revenge for their cooperation with the Iranian governments, it may be able to establish intent. The mixed motives should not present a legal difficulty in this case. While motive is not a required element of genocide,

evidence of a hateful motive will constitute an integral part of the proof of existence of a genocidal plan, and therefore of genocidal intent. At the same time, individual participants may be motivated by a range of factors, including financial gain, jealousy and political ambition.¹³³

¹³⁰ Thomas W. Simon, Book Review, *Defining Genocide*, 15 Wis. Int’l L. J. 243 (1996). [Reproduced in the accompanying notebook 2 at Tab 44].

¹³¹ William A. Schabas, BRINGING RWANDAN GENOCIDAIRES TO BOOK (Yale Ctr. For Int’l and Area Studies Paper Presented, Feb. 18, 1999). [Reproduced in the accompanying notebook 1 at Tab 31].

¹³² *Id.* at 4.

¹³³ See Schabas, *supra* note 53, at 255. [Reproduced in the accompanying notebook 1 at Tab 29].

Thus, so long as a court finds genocidal intent, defendants' other motives for committing genocide are ancillary to the issue. Human Rights Watch/Middle East, in its quest to bring a case of genocide against the Iraqi government before the International Court of Justice, has done extensive research on the Anfal Operations.¹³⁴ While preparing the case, the organization has sorted through many documents and spoken with many eyewitnesses in an attempt to discern the Iraqi government's intent. Human Rights Watch has obtained useful documents from the offices of Iraq's internal intelligence agency, the secret police, the military intelligence agency, and the Ba'ath Party.¹³⁵ Significantly, the organization has found that "[t]o date, no single master plan to exterminate the Kurds has, however, emerged in the collection."¹³⁶ No source read and researched for this memorandum has uncovered evidence of such a master plan either. If the Prosecution has such evidence, it would be able to establish a strong case of genocide against the Defendants for the atrocities committed during the Anfal Operations. With the known evidence, however, the specific intent needed to establish a case for genocide is missing in this case because no definite proof exists that the Defendants intended to destroy Iraq's Kurdish population as such.

V. TRIAL TACTICS

A. The Prosecution may wish to use plea bargains in trying to convict Defendants of genocide.

If the Prosecution decides to attempt to prosecute Defendants of genocide, it may wish to utilize plea bargains to further this goal. A plea agreement, or plea bargain, is "[a] negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to

¹³⁴ See Human Rights Watch/Middle East, *supra* note 3, at 231. [Reproduced in the accompanying notebook 1 at Tab 25].

¹³⁵ *Id.*

¹³⁶ *Id.* at 234.

a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, usually a more lenient sentence or a dismissal of the other charges.”¹³⁷ Hypothetically, criminals who are guilty and who believe that if they go to trial, they stand a chance of being convicted, will accept a plea bargain in the hope that it would reduce their sentences. Thus, by offering plea bargains to Defendants in this case, the Prosecution may accomplish its goal of convicting more people of genocide than if it went to trial in each case and left the decision to the finder of fact.

The ICTY has used the plea agreement procedure with success. For example, the ICTY used a plea bargain in the case of *Prosecutor v. Plavsic*. The ICTY indicted Biljana Plavsic, or the “Serbian Iron Lady,” for genocide, complicity in genocide, and four separate crimes against humanity. Plavsic initially pled not guilty to all charges; however, twenty months later, she changed her mind and pleaded guilty to Count 3 of the indictment, crimes against humanity.¹³⁸ This change in plea occurred because of Plavsic’s agreement with the Prosecutor. She agreed to plead guilty in exchange for the Prosecutor dismissing the remaining counts of her indictment.¹³⁹ This particular form of plea bargaining is known as charge bargaining, as Plavsic’s charge was the subject at issue.¹⁴⁰ In addition to a reduction in charges, the trial chamber found that her guilty plea was a mitigating factor when determining her sentence.¹⁴¹ The ICTY ultimately sentenced Plavsic to 11 years, with full credit for time previously served, in a luxurious Swedish

¹³⁷ BLACK’S LAW DICTIONARY (8th ed. 2004). [Reproduced in the accompanying notebook 2 at Tab 53].

¹³⁸ *Prosecutor v. Plavsic*, Case No. IT-00-39&40/1 (Feb. 27, 2003). [Reproduced in the accompanying notebook 1 at Tab 21].

¹³⁹ *Id.* at ¶5.

¹⁴⁰ Michael P. Scharf, *Trading Justice for Efficiency: Plea-Bargaining and International Tribunals*, *Journal of International Criminal Justice* 2 (2004), 1070-1081. [Reproduced in the accompanying notebook 2 at Tab 45].

¹⁴¹ *See* *Prosecutor v. Plavsic*, *supra* note 138, at ¶110. [Reproduced in the accompanying notebook 1 at Tab 21].

prison.¹⁴² Despite being convicted for a lesser charge and given a relatively light sentence, Plavsic nonetheless refused to cooperate further with the ICTY and testify against other defendants.¹⁴³

The ICTR also has a more standardized procedure for plea agreements. If the accused confesses, he or she may receive a very substantial reduction in penalties. This form of plea bargaining is known as sentence bargaining.¹⁴⁴ Confessions must contain a detailed account of the defendant's crime at issue, as well as any information regarding accomplices and other ancillary facts.¹⁴⁵ The prosecutor then must confirm that the information in the confession is accurate. If the prosecution finds that the information in the confession is true, the confession becomes a guilty plea on behalf of the defendant and the court will sentence him or her accordingly.¹⁴⁶

Unlike the *Plavsic* case at the ICTY, however, the ICTR has not followed the Anglo-American tradition of bargaining to secure a guilty plea. In the *Kambanda* case, for example, Jean Kambanda pled guilty to genocide and crimes against humanity, expecting lenient sentencing in return.¹⁴⁷ He also provided the prosecution with nearly ninety hours of recorded testimony to use in prosecuting other war criminals at the ICTR. At Kambanda's sentencing, however, he received life imprisonment, the harshest sentence imposed by the ICTR.¹⁴⁸

¹⁴² See Scharf, *supra* note 140, at 1071. [Reproduced in the accompanying notebook 2 at Tab 45].

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1074.

¹⁴⁵ See Schabas, note 131, at 7. [Reproduced in the accompanying notebook 1 at Tab 31].

¹⁴⁶ *Id.*

¹⁴⁷ Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. Pa. L. Rev. 1 (2002). [Reproduced in the accompanying notebook 2 at Tab 46].

¹⁴⁸ *Id.* at 3.

In the case of Iraq, plea agreements may serve two strategic purposes. First, because plea agreements often include a reduction in charges or sentence, they serve as inducements for guilty defendants to come forward and cooperate with authorities. A defendant who believes he or she likely will be convicted if the case goes to trial may want to limit the damage caused to him or her. In the American criminal system, defendants who plead guilty often receive lower sentences than do defendants who proceed to trial and subsequently are convicted.¹⁴⁹ Similarly here, many defendants might gladly accept a dismissal of ancillary charges or a reduction in the amount of prison time served for coming forward. The success of this strategy, however, will depend on the IST and whether it chooses to follow the American approach to plea agreements or that of the ICTR.¹⁵⁰

Second, the Prosecution could include provisions in the plea agreements, as the ICTR has done, that requires the Defendants to provide information regarding accomplices, other defendants, etc. The Prosecution could obtain valuable information in this manner, in particular, evidence of intent. By the Prosecution agreeing to convict a Defendant for a lesser charge or to give a Defendant a lesser sentence, a Defendant could give the Prosecution well-concealed documents or personal knowledge regarding a genocidal plan to attack the Kurds in northern Iraq. In short, a defendant may be much more willing to cooperate with the Prosecution if he or she believes that there is a benefit to be had.

There are downsides to plea bargaining in the international legal arena. First, both charge and sentence bargaining may violate the spirit, if not the letter, of international treaty law. Certain treaties give universal jurisdiction to prosecute perpetrators, and in connection with this

¹⁴⁹ *Id.* at 5.

¹⁵⁰ *Id.* at 7.

jurisdiction, prosecuting states must prosecute and sentence defendants proportionate to the gravity of the crime.¹⁵¹ If the Prosecution offers Defendants either charge or sentencing bargains, Defendants' punishments may not be proportionate; however, as only the substantive provisions of these treaties apply to tribunals, the Iraqi Special Tribunal may not be under an obligation to follow the treaties' punishment provisions.¹⁵² Also, plea bargaining may distort the historical record created by the Iraqi Special Tribunal. While plea bargains provide judicial economy, they deny the historical record the detail revealed at a full trial.¹⁵³ In order for this historical record to be generally accepted by the people of Iraq as legitimate, however, a Defendant admitting guilt in a plea bargain may be more effective than a full trial.¹⁵⁴ Thus, while the Prosecution should consider the drawbacks of plea bargaining with Defendants for information, it may prove an effective approach to the prosecution of the Defendants associated with the Anfal Operations.

B. Since the Prosecution may not be able to establish all of the necessary elements of genocide, it also should try to prosecute Defendants for crimes against humanity

While the Prosecution certainly should attempt to prosecute the Defendants for genocide, as explained above, its efforts may not meet with much success. Genocide, as the "crime of crimes," requires a very high standard of proof of intent, and the Prosecution may not be able to meet this burden. The threshold of intent that must be reached can be described as follows: "[t]he crime of genocide exists to protect certain groups from extermination or attempted extermination. The concept of crimes against humanity exists to protect civilian populations

¹⁵¹ See Scharf, *supra* note 140, at 1074-1075. [Reproduced in the accompanying notebook 2 at Tab 45].

¹⁵² *Id.* at 1075.

¹⁵³ *Id.* at 1079-1080.

¹⁵⁴ *Id.* at 1079.

from persecution.”¹⁵⁵ Usually, it is easier for a prosecutor to prove crimes against humanity than it is for him or her to prove genocide.¹⁵⁶ In addition, genocide is generally acknowledged as a special form of crimes against humanity.¹⁵⁷ Thus, in this case the Prosecution may wish to attempt to convict Defendants for other related crimes, such as crimes against humanity, in addition to genocide.

1. Jurisdiction

The Iraqi Special Tribunal has jurisdiction under Articles 10 and 12 of the Statute of the IST over crimes against humanity. Article 10 states, “The Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11 - 14, committed since July 17, 1968 and up until May 1, 2003, in the territory of Iraq or elsewhere.”¹⁵⁸ Article 12 of the Statute of the IST describes crimes against humanity as acts punishable by the Tribunal.¹⁵⁹ As discussed in the previous jurisdiction section, the Anfal Operations meet the qualifications set forth in the Statute of the IST as they took place during the time period specified and on Iraqi territory, as specified in Article 10. Thus, the Tribunal has jurisdiction to prosecute Defendants for crimes against humanity in this case.

2. Legal Analysis

The Prosecution should attempt to convict Defendants of crimes against humanity because it should be able to establish the elements necessary to obtain these convictions. The

¹⁵⁵ Alexander Greenawalt, Note, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 Colum. L. Rev. 2259 (1999). [Reproduced in the accompanying notebook 2 at Tab 47].

¹⁵⁶ See Schabas, *supra* note 53, at 12. [Reproduced in the accompanying notebook 1 at Tab 29].

¹⁵⁷ *Id.* at 253.

¹⁵⁸ See Statute of the Iraqi Special Tribunal, *supra* note 1, at art. 10. [Reproduced in the accompanying notebook 2 at Tab 49].

¹⁵⁹ *Id.* at art. 12.

Statute of the IST defines crimes against humanity as an act committed as part of a widespread or systematic attack, directed against any civilian population, and committed with knowledge, on the perpetrator's part, of the attack.¹⁶⁰ The Statute of the IST lists the acts that fit this definition. Among the acts listed, at least five apply to the facts in this case: murder; deportation or forcible transfer of population; persecution of any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Tribunal; enforced disappearance of persons; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.¹⁶¹ By applying the Statute of the IST to the facts of the Anfal Operations, the Prosecution can establish a case for crimes against humanity.

¹⁶⁰ *Id.* Article 12, section a, states:

- a) For the purposes of this Statute, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
 1. Murder;
 2. Extermination;
 3. Enslavement;
 4. Deportation or forcible transfer of population;
 5. Imprisonment or other severe deprivation of physical liberty in violation of fundamental norms of international law;
 6. Torture;
 7. Rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity;
 8. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Tribunal;
 9. Enforced disappearance of persons; and
 10. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

¹⁶¹ *Id.* Article 12, section b, states:

- b) For the purposes of paragraph a):

First, the mass killings resulting from the various stages of the Anfal Operations constitute murder under Article 12 of the Statute of the IST. During the Anfal Operations, Iraqi planes dropped chemical warheads on Kurdish civilians multiple times from April 1987 through August 1988.¹⁶² Estimates place the number of Kurds killed in these attacks between 50,000 and 100,000. Black's Law Dictionary defines murder as "[t]he killing of a human being with malice aforethought."¹⁶³ The purpose of chemical weapons is to kill human beings. When Iraqi planes dropped mustard gas, cyanide, and nerve gases on civilians in Iraqi Kurdistan, Iraqi officials responsible for ordering these attacks clearly knew that casualties would result. This knowledge establishes malice aforethought, and with the actus reus of releasing these gases, is enough to establish the necessary elements of murder. In addition, the mass executions of Kurds, ordered by Ali Hasan al-Majid, constitute murder. The chemical attacks and the mass executions together resulted in the death of tens to hundreds of thousands of Iraqi Kurds; this staggering

-
1. "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in the above paragraph against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack;
 2. "Extermination" includes the intentional infliction of conditions of life, such as the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
 3. "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
 4. "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
 5. "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions;
 6. "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity; and
 7. "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, the State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time

¹⁶² See van Bruinessen, *supra* note 14, at 155. [Reproduced in the accompanying notebook 1 at Tab 26].

¹⁶³ See BLACK'S LAW DICTIONARY, *supra* note 137. [Reproduced in the accompanying notebook 2 at Tab 53].

number establishes that the attacks on the Kurds were widespread. Thus, the Prosecution theoretically could convict Defendants of murder as a crime against humanity.

Second, the deportation or forcible transfer of the Iraqi Kurdish population from their native land in northern Iraq to the desert in southern Iraq constitutes a crime against humanity for which the Prosecution may convict Defendants. While not part of the Anfal Operations of 1988, from the 1970s until the late 1980s, Iraq set forth a policy of deporting Kurds for various reasons, including military strategy and “Arabization.”¹⁶⁴ The Iraqi government then handed the Kurdish land to Arab settlers.¹⁶⁵ During and after this move from the cool climate of the mountains in northern Iraq to detention camps in the hot desert in the south, many Kurds perished.¹⁶⁶ Other Kurds escaped to join the Kurdish forces, while still others fled to Iran.¹⁶⁷ Under the definition in the Statute of the IST, deportation must remove the victims from land they lawfully can inhabit. As the Kurds had inhabited the northern mountains of Iraq since ancient times, and as no evidence exists that this habitation was illegal, the deportation of the Kurds satisfies this element of the offense. In addition, removal must be coercive and unlawful under international law. As Iraqi officials gave the Kurds no alternative to deportation and no legal authorization for this deportation, this element of the offense also is satisfied. Having satisfied the two elements of the offense as it is defined in the Statute of the IST, the deportation of the Kurds constitutes a crime against humanity. Lastly, as Iraqi officials subjected several hundred thousand Kurds to deportation, this number goes to the weight of the evidence that

¹⁶⁴ See van Bruinessen, *supra* note 14, at 159. [Reproduced in the accompanying notebook 1 at Tab 26].

¹⁶⁵ See Saeedpour, *supra* note 22, at 63. [Reproduced in the accompanying notebook 1 at Tab 27].

¹⁶⁶ See van Bruinessen, *supra* note 14, at 159. [Reproduced in the accompanying notebook 1 at Tab 26].

¹⁶⁷ See Saeedpour, *supra* note 22, at 63. [Reproduced in the accompanying notebook 1 at Tab 27].

deportation of Kurds was widespread. Given this evidence, the Prosecution may be able to convict Defendants of deportation as a crime against humanity.

Third, ancillary acts of violence during the Anfal Operations may constitute persecution against an identifiable group, as defined in full in Article 12 of the Statute of the IST. During the Anfal Operations, Iraqi Kurds were deprived of their fundamental rights when their villages were destroyed and possessions looted.¹⁶⁸ During this destruction, villages were razed, schools were closed, and mosques and churches were burned to the ground.¹⁶⁹ To reach the threshold and qualify as a crime against humanity, however, these acts of persecution must be aimed at the victims because of their group identity.¹⁷⁰ Thus, the Prosecution in this case must establish that these acts were committed against the Kurds because they are Kurds. Evidence exists that these measures were taken against the Kurds to force economic modernization on them, to repress Kurdish *peshmegas*, to assimilate the Kurdish minority into the Arab majority, to retaliate against the Kurds for their cooperation with Iran, etc.¹⁷¹ However, if the Prosecution can establish an ethnically discriminatory rationale behind any of the above pretexts, it may be able to successfully prosecute Defendants for the crime against humanity of persecution.

Fourth, the disappearance of the men of the Barzani community in Iraq may constitute enforced disappearance of persons under Article 12 of the Statute of the IST. Not part of the Anfal Operations of 1988, the disappearance of this large group of men occurred in 1983 in the

¹⁶⁸ See van Bruinessen, *supra* note 14, at 160-161. [Reproduced in the accompanying notebook 1 at Tab 26].

¹⁶⁹ See Saeedpour, *supra* note 22, at 63. [Reproduced in the accompanying notebook 1 at Tab 27]; see also van Bruinessen, note 47, at 161. [Reproduced in the accompanying notebook 1 at Tab 26].

¹⁷⁰ See Statute of the Iraqi Special Tribunal, *supra* note 1, at art. 12. [Reproduced in the accompanying notebook 2 at Tab 49].

¹⁷¹ See van Bruinessen, *supra* note 14, at 161-162. [Reproduced in the accompanying notebook 1 at Tab 26].

village of Qushtapa in the Barzan valley of Iraq.¹⁷² Allegedly because the Kurdistan Democratic Party had acted as scouts and guides for Iranian forces, the Iraqi government sent soldiers to surround Qushtapa.¹⁷³ As men left their houses, the soldiers captured them.¹⁷⁴ The soldiers did not discriminate in which men they captured. Eyewitnesses recall the soldiers capturing old men, young men, children, preachers, the sick, the mentally ill, and others.¹⁷⁵ In total, between five and eight thousand men from Qushtapa, and other camps where similar captures had taken place, were driven south; these men were never heard from again.¹⁷⁶

To establish enforced disappearance under Article 12 of the Statute of the IST, the Prosecution must prove that the victims' disappearance was state-sponsored.¹⁷⁷ In this case, as Iraqi soldiers surrounded Qushtapa and captured the victims, the state sponsorship is plain. In addition, Article 12 requires a refusal on the state's part to acknowledge the deprivation of the victim's freedom or to give information on the whereabouts of the victims.¹⁷⁸ In this case, women from Qushtapa and other camps have begged the state for information about their male relatives' fates, but never received responses.¹⁷⁹ This refusal to respond to the requests of Kurdish women regarding the location of their male relatives satisfies this second element.

¹⁷² See Human Rights Watch/Middle East, *supra* note 3, at 26-27. [Reproduced in the accompanying notebook 1 at Tab 25].

¹⁷³ *Id.* at 26.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See Statute of the Iraqi Special Tribunal, *supra* note 1, at art. 12. [Reproduced in the accompanying notebook 2 at Tab 49].

¹⁷⁸ See Human Rights Watch/Middle East, *supra* note 3, at 26-27. [Reproduced in the accompanying notebook 1 at Tab 25].

¹⁷⁹ *Id.*

Thus, the Prosecution should be able to prosecute Defendants for the crime against humanity of enforced disappearance of persons.

Fifth, other inhumane acts committed by the Iraqi government against the Kurds may qualify as crimes against humanity. Specifically, the atrocities committed at the internment camps to which Iraqi troops took captured Kurds during the Anfal Operations may count as “other inhumane acts” according to the Statute of the IST. First, in the army camp at Topzawa, prisoners suffered from starvation.¹⁸⁰ Some prisoners received soup, others received a meager portion of pita bread, and some received nothing to eat at all. Women and children were treated less harshly and were given small portions of more wholesome food. Many prisoners, of both sexes, suffered sickness from starvation; some of these prisoners died. In addition, male prisoners at the Topzawa camp, from the young to the elderly, were subjected to beatings.¹⁸¹ Lastly, at the Nugra Salman camp, a particularly harsh soldier named Hajjaj subjected his prisoners to inhumane acts of several types. Hajjaj forced prisoners to crawl on their bellies, he stomped on the small of prisoners’ backs, he exposed prisoners to the midday sun, and he tied prisoners, upside down, to metal poles.¹⁸² These brutal acts qualify under the definition of inhumane, or “not worthy of or conforming to the needs of human beings.”¹⁸³ Thus, the Prosecution should be able to prosecute Defendants for the crime against humanity of “other inhumane acts.”

¹⁸⁰ *Id.* at 144.

¹⁸¹ *Id.* at 146.

¹⁸² *Id.* at 158-159.

¹⁸³ MERRIAM WEBSTER ONLINE DICTIONARY at <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=inhuman+>. [Reproduced in the accompanying notebook 2 at Tab 54].

3. Procedural Recommendations

At the time of the drafting of this memorandum, no indictment had yet been filed in relation to the Anfal campaign. Assuming this is still the case, the Prosecution should include a charge of crimes against humanity in its indictment of Defendants for genocide. If an indictment has been filed since this memorandum's drafting, the Prosecution still could obtain convictions for crimes against humanity. In *Prosecutor v. Tadic*, the ICTY convicted Tadic of the murder of two non-Serb policemen.¹⁸⁴ Tadic's indictment at the ICTY, however, did not charge him with these murders.¹⁸⁵ Eyewitness testimony regarding the murders was used to convict Tadic, and this decision was upheld by the ICTY Court of Appeals for two reasons. First, the lower court gave Tadic's counsel an additional three weeks to prepare after the prosecution concluded its case.¹⁸⁶ Second, the murders for which Tadic was convicted were part of a general persecution charge.¹⁸⁷ The Tadic case demonstrates precedent from an international tribunal of conviction of a defendant for a crime not specified in the indictment.¹⁸⁸ Thus, regardless whether the Prosecution in this case has filed an indictment for crimes against humanities, it should pursue this charge in addition to genocide under the theory that it constitutes a lesser included offense.

¹⁸⁴ *Prosecutor v. Dusko Tadic*, IT-95-1-AR72 (Oct. 2, 1995). [Reproduced in the accompanying notebook 1 at Tab 22]. See also Kathleen Cavanaugh, Issue: *Is Evidence of Rape Relevant and Therefore Admissible Where Genocide, But Not Crimes Against Humanity (Rape), Has Been Charged in an Indictment?*, in Case Western Reserve University War Crimes Web Portal. [Reproduced in the accompanying notebook 2 at Tab 55].

¹⁸⁵ Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 NYU J. Int'l. Law. & Pol. 167 (1998). [Reproduced in the accompanying notebook 2 at Tab 48].

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ American domestic law also allows for conviction of a lesser included offense. A lesser offense is a lesser-included offense if proof of every fact necessary to show the lesser offense must be proven to show the greater, notwithstanding the greater offense may require proof of several additional elements. See *Black v. State*, 586 So. 2d 968 (1991). [Reproduced in the accompanying notebook 1 at Tab 23]. See also *People v. Rood*, 83 Mich. App. 350 (1978). [Reproduced in the accompanying notebook 1 at Tab 24].

VI. CONCLUSION

While the Prosecution may be able to establish the elements of numerosity and protected group status, it may not be able to establish specific intent and thus may not be able to establish a strong case for genocide. However, the Prosecution can establish a particularly strong case of crimes against humanity and may elect to pursue this avenue. Lastly, to aid in its goal of maximizing the number of Defendants convicted of genocide, the Prosecution may want to consider the use of plea bargains to encourage Defendants to come forward.