

2006

After the 1991 Gulf War ended, the Shiite population in southern Iraq and the Kurdish population in northern Iraq revolted against the Iraqi government... : deliberate attacks, imams from these mosques were providing medical treatment and shelter to injured civilians and insurgents...

Emily J. Peters

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

Peters, Emily J., "After the 1991 Gulf War ended, the Shiite population in southern Iraq and the Kurdish population in northern Iraq revolted against the Iraqi government... : deliberate attacks, imams from these mosques were providing medical treatment and shelter to injured civilians and insurgents..." (2006). *War Crimes Memoranda*. 129.

https://scholarlycommons.law.case.edu/war_crimes_memos/129

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

**MEMORANDUM FOR THE
IRAQI HIGH TRIBUNAL**

ISSUE:

After the 1991 Gulf War ended, the Shiite population in southern Iraq and the Kurdish population in northern Iraq revolted against the Iraqi government. In response, the Iraqi Government committed or allegedly committed the following five acts against the Shiites and Kurds:

- 1) Iraqi government officials dropped pamphlets into major Iraqi cities in the south directing all non-combatants to leave the cities and travel north. Iraqi helicopter gunships repeatedly strafed, bombed, attacked and killed civilians who (as directed) travelled north.
- 2) Iraqi troops deliberately attacked mosques which were located in Karbala. At the time of these deliberate attacks, imams from these mosques were providing medical treatment and shelter to injured civilians and insurgents.
- 3) Iraqi troops entered hospitals in Basrah and Karbala and summarily murdered any males between the age of 12 and 70. Iraqi troops also murdered, tortured, and raped medical personnel who had provided treatment to insurgents.
- 4) Ali Hassan Al Majid rounded up male civilians (of fighting age) and ordered them to drink petrol. After these men drank the petrol, Al Majid ordered his troops to fire or personally fired himself tracer bullets into the victims so that the petrol would ignite and the victim would explode. This tactic was used to intimidate people into offering information about insurgent activities.
- 5) Taha Yassin Ramadan allegedly ordered the Iraqi Air Force to load planes with bombs containing sarin nerve gas. These planes allegedly flew to Karbala and released their payloads over the city. The bombs did not detonate and no sarin was released into the city.

Do any of these incidents constitute crimes within the jurisdiction of the Iraqi High Tribunal?

Prepared by Emily J. Peters
Spring 2006

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	1
I. INTRODUCTION AND SUMMARY OF CONCLUSIONS.....	9
i. Issues.....	9
ii. Summary of Conclusions.....	10
1. Members of the Former Regime Can Be Tried by the Iraqi High Tribunal under Article 11 of the IHT Statute for the Crime of Genocide.....	10
2. Members of the Former Regime Can Be Tried by the Iraqi High Tribunal under Article 12 of the IHT Statute for Crimes Against Humanity.....	11
3. Members of the Former Regime Can Be Tried by the Iraqi High Tribunal under Article 13 of the IHT Statute for War Crimes, if there is Proof that an ‘Armed Conflict’ was in Progress at the Time of the Attack.....	12
4. Members of the Former Regime Cannot Be Tried by the Iraqi High Tribunal under Article 14 of the IHT Statute for Violations of Stipulated Iraqi National Laws.....	13
5. Members of the Former Regime Can Be Tried by the Iraqi High Tribunal Under Article 15 of the IHT if They Committed, Ordered, Solicited, Induced, Aided, Abetted, Contributed to, or Attempted to Commit a Crime within the Jurisdiction of the IHT.....	14
II. FACTUAL BACKGROUND.....	14
i. Historical Context.....	14
ii. The 1991 Uprisings in Iraq.....	15
iii. Eyewitness Reports.....	18
III. DO ANY OF THE FIVE CASES CONSTITUTE CRIMES WITHIN THE JURISDICTION OF THE IHT?.....	21

i. Article 11 – Genocide.....	22
1. Did the perpetrators commit one or more prohibited acts?.....	23
2. Were the acts committed against members of a protected group?.....	25
3. Did the Perpetrators commit these acts with the intent to destroy, in whole or in part, the protected group?.....	28
ii. Article 12 – Crimes Against Humanity.....	31
1. Was there a prohibited act?.....	33
2. Was the perpetrator part of the act?.....	33
3. Was the prohibited act directed against a civilian population?.....	34
4. Was the prohibited act widespread or systematic?.....	35
5. Did the perpetrator know the acts constituted part of a pattern of widespread or systematic crimes against a civilian population?.....	35
iii. Article 13 – War Crimes.....	37
1. Was an armed conflict in progress at the time of the prohibited act?.....	38
2. Is there a nexus between the prohibited act and the armed conflict?.....	41
3. Was there an Internal or International Armed Conflict?.....	42
4. Did the perpetrator have the requisite <i>mens rea</i> ?.....	44
iv. Article 14 – Violations of Stipulated Iraqi National Laws.....	45
v. Article 15 – Who Can be Charged?.....	46
IV. CONCLUSION.....	47

INDEX OF AUTHORITIES

Legislation

1. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.
2. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950).
3. Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950).
4. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).
5. Law of Administration for the State of Iraq, available at <http://www.cpa-iraq.org/government/TAL.html>.
6. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature Dec. 12, 1977, 1125 U.N.T.S. 4, 16 I.L.M. 1391.
7. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol II), opened for signature Dec. 12, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442.
8. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, art. 126 at 87 (1998).
9. Statute of the International Criminal Tribunal for Rwanda, U.N.S.C. Res. 955, U.N. SCOR, 49th Sess., 3453th mtg., at art. 3, U.N. Doc. S/RES/955 (1994).
10. Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N.S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), amended by U.N.S.C. Res. 1166, U.N. SCOR, 53rd Sess., 3878th mtg., U.N. Doc. S/RES/1166 (1998).

11. Statute of the Iraqi High Tribunal, available at http://www.cpa-iraq.org/human_rights/Statute.htm.

Court and Tribunal Cases

12. *Abella v Argentina*, Case 11.137, Inter-Am. C.H.R., 55/97, OEA/Ser.L/V?II.98, doc. 6 rev. (Apr. 13 1998).
13. Judgment of the International Military Tribunal at Nuremberg (Oct. 1, 1946), in 1 International Military Tribunal, Trial of the Major War Criminals Before the International Military Tribunal 221 (English ed. 1947).
14. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (ICTR Trial Chamber Sept. 2, 1998).
15. *Prosecutor v. Jelusic*, Case No. IT-95-10, Judgment, (ICTY Trial Chamber Dec. 14, 1999).
16. *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgment (ICTR Trial Chamber, May 21, 1999).
17. *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment and Sentence (ICTR Trial Chamber Jan. 27, 2000).
18. *Prosecutor v. Pavo and Zenga*, Case No. ICTY-96-21, Judgment (ICTY Trial Chamber Nov. 16, 1998).
19. *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence (ICTR Trial Chamber Dec. 6, 1999).
20. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment (May 7, 1997).
21. *United States v. Yuniz*, 924 F.2d 1068 (1991).

Treatises, Books, and Other Non-Periodic Materials

22. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2003)
23. HANS-PETER-GASSER, "INTERNATIONAL HUMANITARIAN LAW", IN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW, M.K. BALACHANDRAN, ROSE VERGHESE (EDS. 1998)
24. HUMAN RIGHTS WATCH/MIDDLE EAST, REPORT ON IRAQ AND OCCUPIED KUWAIT (1992).

25. JEAN S. PICTET, GENEVA CONVENTIONS OF 12 AUGUST, 1949: COMMENTARY (GENEVA,1958)
26. JEAN S. PICTET, COMMENTAR FOR THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, 35 (1958)

Journals and Law Review Articles

27. Alexander Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge Based Interpretation*, 99 Colum. L. Review 2259 (1999).
28. 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).
29. David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 TEX. INT'L L.J. 231 (2002).
30. Harvard Law Review Association, *Defining Protected Groups Under the Genocide Convention*, 114 Harv. L. Rev. 2007 (2001).
31. M. Gandhi, Common Article 3 Of Geneva Conventions, 1949 In The Era Of International Criminal Tribunals, ISILYBIHRL 11, available at <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/11.html>.
32. Michael Scharf, *Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects*, 36 CASE W. RES. J. INT'L L. 359 (2004).
33. Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEXAS INT'L L. J. 1, 29-31 (1996).
34. Mohamed Elewa Badar, *From the Nuremburg Statute to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 SAN DIEGO INT'L L.J. 73 (2004).
35. Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT'L L. 307 (2000).

Miscellaneous/Websites

36. CBC News, Command, superior and ministerial responsibility, available at http://www.cbc.ca/news/background/iraq/abughraib_commandresponsibility.html.

37. Center for Justice & Accountability, Frequently Asked Questions - Cabello v. Fernández Larios, http://www.cja.org/cases/Cabello_Docs/CabelloFAQs.shtm.
38. Frederick K. Cox International Law Center War Crimes Research Portal, at <http://www.law.case.edu/war-crimes-research-portal>.
39. Grotian Moment Blog, at <http://www.law.case.edu/grotian-moment-blog>.
40. Jessica L. Doinidis, Case Western Reserve University School of Law International War Crimes Research Lab, *Whether the Anfal Operations Constitute Genocide*, Memorandum for the IST (Spring 2005), at <http://www.law.case.edu/war-crimes-research-portal/>.
41. 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?*, Memorandum for the ICTR (2001), at <http://www.law.case.edu/war-crimes-research-portal>.
42. New York Time, *Hussein Charged with Genocide in 50,000 Deaths*, at <http://select.nytimes.com/gst/abstract.html?res=F10716FC3B540C768CDDAD0894DE404482>.
43. Pratheep Sevanthinathan, Case Western Reserve University School of Law International War Crimes Research Lab, *Did the Execution of Baghdad Merchants in July of 1992 Amount to Any Crimes Within the Jurisdiction of the Iraqi Special Tribunal?*, Memorandum for the IST (2005), at <http://www.law.case.edu/war-crimes-research-portal>.
44. U.S. Department of State, Background Note: Iraq, available at <http://www.state.gov/r/pa/ei/bgn/6804.htm>.

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

i. Issue¹

The Iraqi High Tribunal (“IHT”) has jurisdiction over every natural person, whether Iraqi or non-Iraqi, who is a resident of Iraq and is accused of the crime of genocide, crimes against humanity, war crimes, or violations of certain Iraqi national laws committed between July 17, 1968 and May 1, 2003 in the Republic of Iraq or elsewhere.² After the 1991 Gulf War ended, the Shiite population in southern Iraq and the Kurdish population in northern Iraq revolted against the Iraqi government. In response, the Iraqi government unleashed a series of violent attacks against the Shiites and Kurds. This memorandum examines five specific attacks against the Shiite and Kurdish populations. Four of these attacks are confirmed to be true and one attack is alleged. The focus of analysis is on whether or not the former Iraqi Government’s actions against the Shiites and Kurds constitute crimes within the jurisdiction of the IHT.

¹ ISSUES: After the 1991 Gulf War ended, the Shiite population in southern Iraq and the Kurdish population in northern Iraq revolted against the Iraqi government. In response, the Iraqi Government committed or allegedly committed the following five acts against the Shiites and Kurds: (1) Iraqi government officials dropped pamphlets into major Iraqi cities in the south directing all non-combatants to leave the cities and travel north. Iraqi helicopter gunships repeatedly strafed, bombed, attacked and killed civilians who (as directed) travelled north; (2) Iraqi troops deliberately attacked mosques which were located in Karbala. At the time of these deliberate attacks, imams from these mosques were providing medical treatment and shelter to injured civilians and insurgents; (3) Iraqi troops entered hospitals in Basrah and Karbala and summarily murdered any males between the age of 12 and 70. Iraqi troops also murdered, tortured, and raped medical personnel who had provided treatment to insurgents; (4) Ali Hassan Al Majid rounded up male civilians (of fighting age) and ordered them to drink petrol. After these men drank the petrol, Al Majid ordered his troops to fire or personally fired himself tracer bullets into the victims so that the petrol would ignite and the victim would explode. This tactic was used to intimidate people into offering information about insurgent activities; and (5) Taha Yassin Ramadan allegedly ordered the Iraqi Air Force to load planes with bombs containing sarin nerve gas. These planes allegedly flew to Karbala and released their payloads over the city. The bombs did not detonate and no sarin was released into the city. Do any of these incidents constitute crimes within the jurisdiction of the Iraqi High Tribunal? (Issue sent via email from Eric Blinderman) [Reproduced in the accompanying notebook at Tab 1].

² See Statute of The Iraqi High Tribunal, August 11, 2005 [hereinafter IHT Statute] [reproduced in the accompanying notebook at Tab 2].

ii. Summary of Conclusions As A Result of the Above-Listed Acts:

1. Members of the former regime can be tried by the Iraqi High Tribunal under Article 11 of the IHT Statute for the crime of genocide.

The IHT has jurisdiction over the crime of genocide under Article 11 of the IHT Statute.³ For the purposes of the IHT and in accordance with the International Convention on the Prevention and Punishment of the crime of Genocide (“Genocide Convention”), “genocide” means a prohibited act committed with the intent to abolish, in whole or in part, a national, ethnic, racial or religious group.⁴ In order to prove the crime of genocide, three elements must be established: (1) a prohibited act listed in Article 11; (2) committed against a protected group; and (3) with the intent to abolish, in whole or in part, that protected group.

Four out of the five above-described episodes of violence against the Shiite and Kurdish populations clearly satisfy the elements of genocide. The exception is the fifth episode in which the Iraqi Air Force allegedly released sarin nerve gas into the city of Karbala. All four of the episodes that qualify as the crime of genocide contain the prohibited act of either killing or inflicting serious bodily harm. The second element of genocide is also satisfied because the Shiite and Kurdish populations qualify as ethnic groups. Finally, the facts support the intent to abolish these protected groups. The fact that the Iraqi government deliberately attacked cities dominated by Shiite and Kurdish civilians signifies intent to destroy these protected groups.

³ See IHT Statute, *supra* note 2, art. 11 [reproduced in the accompanying notebook at Tab 2].

⁴ *Id.*

2. Members of the former regime can be tried by the Iraqi High Tribunal under Article 12 of the IHT Statute for crimes against humanity.

The IHT has jurisdiction over crimes against humanity under Article 12 of the IHT Statute.⁵ For the purposes of the IHT, “crimes against humanity” means a prohibited act committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.⁶ In order to prove crimes against humanity, four elements must be established: (1) a prohibited act listed in Article 12; (2) committed against civilians; (3) as part of a widespread or systematic attack; and (4) the perpetrator must have knowledge of the attack.

Four of the five of the above-described cases against the Shiite and Kurdish populations qualify as crimes against humanity. Four of the attacks satisfy the first element of a prohibited act either in the form of murder, forcible transfer of population, torture, rape, or other inhumane acts causing great suffering to mental or physical health. The second element, that the prohibited acts be committed against civilians, is clearly satisfied as all of the attacks were committed against Shiite and Kurdish civilians. From a collective perspective, the fact that multiple attacks were directed against the Shiites and Kurds resulting in thousands of civilian deaths indicates that the attacks were widespread or systematic, thus satisfying the third element. Finally, the perpetrators likely had the mens rea required by the fourth element. The fact that Iraqi military resources were being used to perform these attacks against the Shiites and Kurds indicates that all persons who ordered or committed the attacks knew or should have

⁵ *Id.* at art. 12.

⁶ *Id.*

known of a plan to kill and harm the Shiite and Kurdish populations.

3. Members of the former regime can be tried by the Iraqi High Tribunal under Article 13 of the IHT Statute for war crimes, if there is proof that an ‘armed conflict’ was in progress at the time of the attack.

The IHT has jurisdiction over war crimes under Article 13 of the IHT Statute.⁷

For purposes of the IHT and in accordance with the Geneva Convention of 1949, “war crimes” means a prohibited act committed during an armed conflict with a nexus between the prohibited act and the armed conflict.⁸ In order to prove war crimes, three elements must be established: (1) a prohibited act listed in Article 13; (2) committed during an internal or international armed conflict; (3) with an obvious connection between the prohibited act and the armed conflict.

Only one of the five cases of violence against the Shiites and Kurds indicates that an armed conflict was taking place at the time of the prohibited act. In episode five, the Iraqi Air Force attempted to release sarin nerve gas into the city of Karbala. However, the sarin bombs did not detonate, so no gas was released into the city. This episode may qualify as a prohibited act intentionally directed against the civilian population during an internal armed conflict. The Iraqi government could argue; however, that no attack actually occurred since the bombs did not detonate. The other four episodes do not mention an internal armed conflict, and no international armed conflict was taking place at that time. The Gulf War ended prior to these attacks. If it can be proven in any of the five episodes of violence against the Shiites and Kurds that the prohibited acts were in

⁷ *Id.* at art. 13.

⁸ *Id.*

connection with an internal or international armed conflict, then the elements of war crimes could be proven.

4. Members of the former regime cannot be tried by the Iraqi High Tribunal under Article 14 of the IHT Statute for violations of stipulated Iraqi national laws.

The IHT has jurisdiction over violations of certain Iraqi national laws under Article 14 of the IHT Statute.⁹ For purposes of the IHT and in accordance with Iraqi national law, four crimes are stipulated as within the jurisdiction of the IHT. These crimes include: (1) tampering with the judiciary; (2) wasting national resources; (3) abuse of position and pursuit of policies that were about to lead to war with an Arab country; and (4) default in the elements of Articles 11-13 that are proved to constitute a crime punishable by the penal law of Iraq.¹⁰ The facts from the five specific cases of violence against the Shiite and Kurdish populations do not indicate any violations of the stipulated Iraqi national laws. Thus, no one involved in these five episodes of violence against the Shiites and Kurds should be tried for violations of Iraqi laws.

5. Members of the former regime can be tried by the Iraqi High Tribunal Under Article 15 of the IHT if they committed, ordered, solicited, induced, aided, abetted, contributed to, or attempted to commit a crime within the jurisdiction of the IHT.

The IHT has jurisdiction over the crimes outlined in Articles 11, 12, 13 and 14 of the IHT Statute; however, these articles do not specify *who* bears the criminal responsibility. Article 15 of the IHT Statute defines the individual criminal responsibility for crimes

⁹ *Id.* at art. 14.

¹⁰ *Id.*

committed within the jurisdiction of the IHT.¹¹ For purposes of the IHT, anyone who committed, ordered, solicited, induced, aided, abetted, contributed to, or attempted to commit a crime within the jurisdiction of the IHT shall be personally responsible and liable for punishment.¹² Furthermore, Article 15 states that any person in the Iraqi government, including leaders in official positions, can be held liable.¹³ Finally, Article 15 incorporates the doctrine of ‘superior responsibility’ into the IHT Statute, which makes superior government officials responsible for crimes committed by subordinates and vice versa.¹⁴

II. FACTUAL BACKGROUND¹⁵

i. Historical Context.

Throughout 1991, Iraq was under an international public microscope. A welcome result of this process was increased public awareness of the deplorable state of human rights in Iraq. Iraq was a seemingly impenetrable one-party state where, until its invasion of Kuwait in August 1990, human rights abuses largely escaped scrutiny and international condemnation. Early in 1991, world attention focused on the Iraqi government’s suppression of the Shiite revolt in the south and the Kurdish revolt in the north. This tragedy, when Saddam Hussein's forces massacred thousands in putting

¹¹ *Id.* at art. 15.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Human Rights Watch/Middle East, REPORT ON IRAQ AND OCCUPIED KUWAIT (1992) [reproduced in the accompanying notebook at Tab 3].

down the revolts and when nearly two million were forced to flee their homes, produced some of the most extensive and severe violations of human rights.

ii. The 1991 Uprisings In Iraq.

In the immediate wake of Iraq's withdrawal from Kuwait, a new human rights crisis unfolded, this time in war-ravaged Iraq itself. Residents of at least two dozen predominantly Shiite southern Iraqi cities rose up against the government in early March 1991, ousting government forces from nearly all of those cities. Similar rebellions broke out within days throughout the predominantly Kurdish north of the country.

In their counterattack, Iraqi government troops killed thousands of unarmed Shiite and Kurdish civilians by firing indiscriminately into residential areas; executing people on the streets and in homes and hospitals; rounding up persons, especially young men, during house-to-house searches, and arresting them without charge or shooting them in masses; and targeting fire from attack helicopters on unarmed civilians as they fled the cities.

No reliable figures are available concerning the number of persons killed or wounded by either side during the uprising, and Iraqi authorities have never released such statistics. However, one journalist reported from Iraq in early 1991 that the government "has forbidden Shiites from displaying traditional signs of mourning such as black flags and paper streamers printed with the names of the dead, because it would enable visitors to count the numbers of Shiite martyrs." Senior Arab diplomats told the London-based Arabic daily newspaper *al-Hayat* in October 1991 that Iraqi leaders were privately

acknowledging that 250,000 people were killed during the uprisings, with most of the casualties in the south.¹⁶ Independent investigation to verify this figure was not possible, nor was it possible to determine how many of the casualties were noncombatants.

The turmoil began in Basra on March 1, 1991 one day after the cease-fire in Kuwait, and spread within days to Karbala, Najaf, Hilla, Nasiriyya, al-Amara and other mostly Shiite cities of southern Iraq. The rebellion in the north began on or about March 5, 1991. By March 21, Kurdish insurgents controlled every major city in the north or Iraq.

The rebellions followed a general pattern. On the day of a city's uprising, rebels and masses of civilians ousted government forces from their headquarters, prisons and barracks, killing or capturing them or forcing them to flee. The revolts were aided by soldiers who either switched sides or deserted, as well as by some degree of planning during the preceding weeks and months by underground opposition groups.¹⁷ However, the outpouring of popular support for the uprising was largely spontaneous. It was fueled by anger at government repression and the devastation wrought by two wars in a decade, and a perception that Iraqi security forces were uniquely vulnerable after being crushed by the U.S.-led forces in Operation Desert Storm.

¹⁷ Jonathan Randal, *Kurdish Uprising Aided by Clandestine Army Contacts*, Wash. Post, March 23, 1991, at A1 [reproduced in the accompanying notebook at Tab 5].

The rebels then controlled the "liberated" cities for a number of days, while government troops, primarily the elite Republican Guard, regrouped outside the city limits and began shelling the city from tanks and firing missiles and automatic fire from helicopters. Although the fire was sometimes directed at suspected rebel strongholds, little effort was made to limit civilian casualties, and often civilians were directly targeted.

The rebels were unable to resist for long. The army, and particularly the Republican Guard, largely remained loyal to Saddam Hussein. Their counteroffensive was buoyed by the failure of the U.S.-led alliance to prevent Iraqi use of helicopter gunships. Meanwhile, the rebels had little experience defending captured territory and were armed only with rifles, rocket-propelled grenades and a few heavier weapons captured from government forces. As the government forces closed in on the uprisings, over 1.5 million Iraqis escaped from the strife-torn cities during March and April 1991, crossing into Turkey and Iran, or fleeing into zones controlled by Kurdish rebels in the north or into the marshes in the south, beyond the reach of government forces.

The Shiite and Kurdish exodus was sudden and chaotic, with thousands fleeing on foot, on donkeys, or crammed onto open-backed trucks and tractors. Many, including children, died or suffered injury along the way, primarily from adverse weather, unhygienic conditions, and insufficient food and medical care. Some were killed by army helicopters, which deliberately strafed columns of fleeing civilians in a number of incidents in both the north and south. Others were injured when they stepped on mines

that had been planted by Iraqi troops near the eastern border during the war with Iran, and in rural areas from which the government had forcibly relocated Kurds during the 1980s.

After bombarding a rebel-held city from afar, Iraqi tanks and infantrymen recaptured city after city, until they were back in control of all Shiite and Kurdish cities. Upon regaining control, Iraqi troops engaged in wide scale looting and atrocities against the civilian population. The violence was heaviest in the south, where a smaller portion of the local population had fled than in Kurdish areas, owing partly to the danger of escaping through the south's flat, exposed terrain. Those who remained in the south were at the mercy of advancing government troops, who went through neighborhoods, firing indiscriminately and summarily executing hundreds of young men.

Refugees alleged to Middle East Watch and others that Iraqi helicopters dropped a variety of chemical ordnance on civilians, including napalm and phosphorus bombs, chemical agents and sulfuric acid. Representatives of human rights and humanitarian organizations who saw refugees with burn injuries or photographs of such injuries were unable to confirm the source of these burns. However, doctors who examined wounded Iraqis said that some of their burns were consistent with the use of napalm.

iii. Eyewitness Reports.

What follows is a description of human rights abuses committed during March 1991 in the predominantly Shiite cities of Southern Iraq. This information was drawn primarily from interviews conducted by Middle East Watch with Iraqi refugees in Iran, Kuwait, Saudi Arabia and London, as well as from press accounts.

Karbala is the major Shiite city in southern Iraq which was most devastated during and after the uprisings. The rebellion in Karbala began on March 5, 1991 when lightly armed rebels, joined by thousands of civilians, attacked government buildings. The Shiite insurgents had achieved full control of the city by the next morning.

Within one day, Iraqi government tanks and helicopters began pounding the city with indiscriminate fire. When army troops entered the city they encountered fierce resistance by the insurgents. There were fierce battles at al-Husseini hospital, which was used to treat wounded rebels. A physician from Karbala who fled to Iran told Middle East Watch:

The hospital was run by the rebels. Doctors there treated the wounded; people donated blood and whatever medicine they had at home. The army, when it attacked, concentrated its artillery on the hospital. When they invaded, they rounded up doctors and nurses, tied their hands and blindfolded them. They were later released, only to be rounded up again later and killed. The rebels put up strong resistance in defending the hospital.

The shrines of Abbas and Hussein, which became the city's rebel headquarters, were heavily damaged by artillery fire and by rockets fired from helicopters between March 7 and 11, 1991. Further damage occurred when Iraqi troops burst into the shrines, in which rebels and civilian sympathizers had barricaded themselves. Hundreds of rebels and their supporters are said to have died during the siege, either from the artillery and rocket fire, or from the gunfire of the invading troops.

When Iraqi security forces established control of Karbala again on about March 19, they took vengeance on both rebels and civilians who had not fled the city. The troops

moved from district to district, rounding up young men suspected of being rebels, shooting some of them on the spot and executing others in large groups. In both Najaf and Karbala, there were reports that Shiite clerics who walked on the streets were shot on sight, and that young men were "systematically collected," taken to stadiums, and never seen again. Summary killings occurred "in a manner that made a point," one Iraqi Shiite told Middle East Watch. John Simpson, foreign affairs editor of the British Broadcasting Corporation, wrote about the Iraqi authorities' round-up of the clerics. He visited Najaf in late April 1991, and found the city's center deserted: "Thousands of Shiite clerics have been rounded up in Najaf and Karbala and disappeared," he wrote. "Normally the streets would be full of them. Not now."

Civilians fleeing Najaf and Karbala were strafed by helicopters as they traveled on the road between the two cities. A refugee from Najaf who was interviewed by Middle East Watch in Iran on March 17, 1991, stated that "People were told on the loudspeakers to evacuate the city, for their own safety, within 24 hours and head north, in the direction of Karbala. When thousands of people had gathered in the northern outskirts of the city...mostly women and children, helicopters opened fire from machine guns at them. Between 250 and 300 were killed."

Iraqis who fled to U.S.-controlled Safwan in southern Iraq came with reports of executions in Basra as late as May 1991. *The Washington Post* reported that, according to refugees, "Iraqi troops are still seizing rebels, and civilians with any rebel links, after extracting confessions from friends and neighbors."¹⁸ A teacher told *The Post*: "They

¹⁸ John Arundel, *Refugees Say Saddam Is Still Killing Foes*, Wash. Post, May 10, 1991, at A28. [Reproduced in the accompanying notebook at Tab 6].

shoot them and throw their bodies in the street to make people scared of doing anything." A truck driver claimed: "They used an execution squad right in the main square. They would blindfold their victims and then shoot them, just leaving the bodies there." One refugee said that the authorities were "torturing people into giving the names of people who are involved in rebel fighting."¹⁹ *The Post* reported from Baghdad in May 1991 that the city was "rife with talk that thousands of southern Shiite Muslims suspected of rebel sympathies during the anti-regime uprisings last March have been summarily tried and executed recently."²⁰

III. DO ANY OF THE FIVE INCIDENTS CONSTITUTE CRIMES WITHIN THE JURISDICTION OF THE IHT?

The IHT is an independent court with limited jurisdiction. It was established to try crimes committed by members of Saddam Hussein's former regime between 1968 and 2003.²¹ Specifically, IHT jurisdiction has been limited to cases involving (1) genocide,²² (2) crimes against humanity,²³ (3) war crimes,²⁴ and (4) stipulated national laws.²⁵ The IHT can hear a case only if it falls into one of these categories. Iraqi federal courts

¹⁹ *Id.*

²⁰ *Id.*

²¹ See IHT Statute, *supra* note 2, art. 1 [reproduced in the accompanying notebook at Tab 2].

²² *Id.* at art. 11.

²³ *Id.* at art. 12.

²⁴ *Id.* at art. 13.

²⁵ *Id.* at art. 14.

handle all other crimes occurring in Iraq which do not fall into one of these
aforementioned categories.²⁶

i. Article 11 – Genocide

The IHT has jurisdiction over the crime of genocide under Article 11 of the IHT
Statute. For the purposes of the IHT “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*
- 5. Forcibly transferring children of the group to another group.*²⁷

This definition of genocide is in accordance with the Convention on the
Prevention and Punishment of the Crime of Genocide, dated December 9, 1948
(“Genocide Convention”),²⁸ which was ratified by Iraq on January 20, 1959.²⁹ The IHT
has jurisdiction to hear cases involving genocide based on interpretations of the Genocide
Convention. According to the Genocide Convention, the crime of genocide has three
elements: (1) One or more prohibited acts, (2) against members of a protected group, (3)

²⁶ See Law of Administration for the State of Iraq, available at <http://www.cpa-iraq.org/government/TAL.html> [reproduced in the accompanying notebook at Tab 7].

²⁷ See IHT Statute, *supra* note 2, art. 11 [reproduced in the accompanying notebook at Tab 2].

²⁸ See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention] [reproduced in the accompanying notebook at Tab 8].

²⁹ See IHT Statute, *supra* note 2, art. 11 [reproduced in accompanying notebook at Tab 2].

committed with the intent to destroy, in whole or in part, the protected group.³⁰ The first two elements are the *actus reus*, or physical act of the crime.³¹ The third element is the *mens rea*, or requisite mental state of the crime.³² All three elements must be proved in order to establish the crime of genocide.

Since its ratification in 1948, the Genocide Convention had not been applied until the 1998 prosecution of Jean-Paul Akayesu at the International Criminal Tribunal for Rwanda (“ICTR”). The ICTR convicted Akayesu of genocide, marking the first genocide trial in an international tribunal.³³ Since the *Akayesu* case, the ICTR has successfully prosecuted others, to include Kayishema, Ruziindana, and Rutaganda, for the crime of genocide. While both the ICTR and ICTY have handed down convictions for genocide, very few courts have actually charged defendants with this crime. In fact, the recent charges that the IHT brought against Saddam Hussein marks the first time a Middle Eastern ruler has been charged with the crime of genocide.³⁴

1. Did the perpetrators commit one or more prohibited acts?

In four out of the five listed cases, the first element is easily satisfied. Article 11 of the IHT lists “killing members of the group” as the first prohibited act. There is

³⁰ See David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 TEX. INT’L L.J. 231 (2002) [reproduced in accompanying notebook at Tab 9].

³¹ See *Prosecutor v. Jelusic*, Case No. IT-95-10, Judgment, para. 60 n.71, (ICTY Trial Chamber Dec. 14, 1999), at <http://www.un.org/ictybrcko/trialc1/judgment/index/html> [Reproduced in accompanying notebook at Tab 10].

³² *Id.* at 62.

³³ The Harvard Law Review Association, *Defining Protected Groups Under the Genocide Convention*, 114 Harv. L. Rev. 2007 (2001) [reproduced in the accompanying notebook at Tab 11].

³⁴ Edward Wong, *Hussein Charged with Genocide in 50,000 Deaths*, N.Y. Times, April 5, 2006, at A1 [reproduced in the accompanying notebook at Tab 12].

evidence in the first four fact patterns that the Iraqi government murdered thousands of Shiite and Kurdish civilians. The first episode clearly satisfies the prohibited act of “killing members of the group.” Iraqi helicopters repeatedly attacked Shiites who, as directed by the Iraqi government, migrated north. The second episode likely satisfies the prohibited acts of “killing members of the group” and “causing serious bodily or mental harm to members of the group.” Iraqi troops deliberately attacked Shiite mosques, which were being used to shelter injured Shiite civilians and insurgents. It is reasonable to assume that Shiites hiding inside the mosques at the time of the attacks either died or suffered serious injuries. Further facts would likely confirm both injuries and casualties. The third episode clearly counts as the prohibited act of “killing members of the group.” When Iraqi soldiers retook the southern Shiite towns of Basrah and Karbala they entered hospitals and murdered Shiite men. The fourth episode also satisfies the prohibited act of “killing members of the group.” Ali Hassan Al Majid and his troops forced civilians of fighting age to drink petrol. Al Majid and his soldiers would then fire tracer bullets into the victims causing them to explode. The fifth and final episode is the only fact pattern that does not clearly satisfy the first element of genocide. The attempted use of chemical weapons over a large city during an internal armed conflict does not easily count as one of the prohibited acts listed under the first element of genocide, since no deaths occurred. However, an argument could be made that the attempted use of chemical weapons over a large city caused “serious mental harm to members of the group.” However, this argument is not a strong point in light of the convincing evidence in episodes one through four. In sum, four out of the five cases at hand clearly satisfy the first element of genocide.

2. Were the acts committed against members of a protected group?

The next element of genocide requires that the abovementioned prohibited acts be committed “against members of a protected group.”³⁵ Both the IHT Statute and the Genocide Convention clearly state that protected groups are “national, ethnical, racial or religious group[s].”³⁶ The Trial Chamber of International Criminal Tribunal for Rwanda (“ICTR”) was the first court to define protected group status: “It appears that the crime of genocide was allegedly perceived as targeting only ‘stable’ groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more ‘mobile’ groups which one joins through individual voluntary commitment.”³⁷ The ICTR created a fifth category of protected group: stable groups where membership is determined by birth. To reach this conclusion, the *Akayesu* court reasoned that according to the *travaux préparatoires* 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 (national, ethnical, racial, or religious).³⁸

The ICTR has most recently adopted a purely subjective approach, noting that an ethnic group could be “a group identified as such by others, including perpetrators of the

³⁵ See IHT Statute, *supra* note 2, art. 11 [reproduced in the accompanying notebook at Tab 2].

³⁶ See Genocide Convention, *supra* note 29, art. 2 [reproduced in the accompanying notebook at Tab 8].

³⁷ See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (ICTR Trial Chamber Sept. 2, 1998) at <http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/akay001.htm> [reproduced in the accompanying notebook at Tab 13].

³⁸ *Id.*

crimes."³⁹ In *Rutaganda*, the ICTR held that the “concepts of national, ethnical, racial and religious groups have been researched extensively and . . . at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social, and cultural context.”⁴⁰ According to *Rutaganda*, one must determine whether or not a group is protected by the Convention on a case-by-case analysis of the facts and circumstances. The ambiguity of the terms ethnic, racial, religious and national favors the cases at hand.

Shiites and Kurds will likely be considered protected under the Genocide Convention because the tribunal has the discretion to interpret what groups are protected. For example, in *Akeyesu*, the ICTR defined national groups as "a collection of people who are perceived to share a common legal bond based on common citizenship, coupled with reciprocity of rights and duties."⁴¹ Under this definition the Shiites and Kurds would be considered a national group as they are all Iraqi citizens. Furthermore, the Shiites and Kurds qualify for protected group status because they have many characteristics that distinguish them from the other Iraqis.

First, the Shiites, Kurds, and Iraqis do not share a common language. The Shiites speak Arabic and the Kurds speak Kurdish, while the Iraqis speak Iraqi Arabic which is a

³⁹ *Prosecutor v. Kayeshema and Ruzindana*, Case No. ICTR-95-1-T, Judgment, para. 98 (ICTR Trial Chamber May 21, 1999), at <http://69.94.11.53/ENGLISH/cases/KAYRUZ/judgement/index.htm> [reproduced in the accompanying notebook at Tab 14].

⁴⁰ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence (ICTR Trial Chamber Dec. 6, 1999), at <http://69.94.11.53/ENGLISH/cases/Rutaganda/judgement/1.htm> [reproduced in the accompanying notebook at Tab 15].

⁴¹ See *Akeyesu*, *supra* note 38 [reproduced in the accompanying notebook at Tab 13].

variation of the classical form of Arabic.⁴² In addition, most Shiites, Kurds and Iraqis are Muslim, but they belong to different religious branches of Islam.⁴³ Finally, the Shiites, Kurds and Iraqis do not share a common culture, as they differ especially in their traditional dress and customs.⁴⁴ Representatives of Iraq's Shiite and Kurdish communities reported to Middle East Watch in 1991 that the Iraqi regime intensified its deliberate targeting of their cultural and nonpolitical institutions in an attempt to destroy the fabric of Shiite and Kurdish societies. These attacks were part of what they called a broader campaign of post-uprising "revenge on a massive scale" in southern and northern Iraq.⁴⁵ The regime's retaliatory actions continued a pattern of discrimination by the Sunni-dominated government against the Shiite and Kurdish religious majorities in Iraq. Such discrimination includes violations of religious and cultural rights including bans on publishing contemporary or traditional Shiite and Kurdish written materials, transmitting radio or television broadcasts with Shiite or Kurdish content, as well as widespread employment discrimination in Iraq's public sector.⁴⁶ Considering the differences in religion and culture between the Shiites, Kurds and the ruling Iraqi population, the Prosecution can argue that the Shiites and Kurds have protected group status under the IHT Statute as a stable group whose membership is determined by birth.

⁴² 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 at Tab 16].

⁴³ U.S. Department of State at <http://www.state.gov/r/pa/ei/bgn/6804.htm> [reproduced in the accompanying notebook at Tab 17].

⁴⁴ *Id.*

⁴⁵ See Human Rights Watch/Middle East, *supra* note 15 [reproduced in the accompanying notebook at Tab 3].

⁴⁶ *Id.*

3. Did the perpetrators commit these acts with the intent to destroy, in whole or in part, the protected group?

To establish the crime of genocide under the Genocide Convention and the IHT Statute, the Prosecution must prove that the defendant intended “to destroy, in whole or in part, a protected group.”⁴⁷ Whether or not this third element of genocide is proven, will depend on how the IHT interprets the phrase “in whole or in part.” The Prosecutor will likely prove this element based on the numerosity of Shiite and Kurdish victims from the 1991 uprisings.

The ICTR has interpreted the ambiguous phrase “in whole or in part” to mean the destruction of a considerable number of individuals.⁴⁸ The ICTY also provides several cases that have interpreted the phrase “in whole or in part.” In *Jelusic*, the ICTY held that “in whole or in part” means “a very large number of the members of a group.”⁴⁹ While no accurate total count exists of the Iraqi Shiites and Kurds who died in the 1991 uprisings, estimates place this number around 250,000 dead.⁵⁰ The Prosecution has a strong argument that the numerosity of Shiite and Kurdish victims satisfies the “in whole or in part” language of the third element of genocide.

The Genocide Convention and the IHT Statute further require the Prosecution to prove that the defendants had the *intent* to destroy a group “in whole or in part.” In *Akayesu*, the ICTR held that the offender is only culpable for genocide “when he commits

⁴⁷ See IHT Statute, *supra* note 2, art. 11 [reproduced in the accompanying notebook at Tab 2].

⁴⁸ See Prosecutor v. Kayishema, *supra* note 40 [reproduced in the accompanying notebook at Tab 14].

⁴⁹ Prosecutor v. Jelusic, Judgment, Case No. IT-95-10-T P 102 (Dec. 14, 1999) [reproduced in the accompanying notebook at Tab 18].

⁵⁰ See Human Rights Watch/Middle East, *supra* note 15 [reproduced in the accompanying notebook at Tab 3].

a [prohibited act] with the clear intent to destroy, in whole or in part, a particular group."⁵¹ The International Criminal Court ("ICC") further strengthens this position, which states in its statute that a purposeful intent is required for the crime of genocide.⁵² While the facts show that the Iraqi Government actually did destroy the Shiites and Kurds "in whole or in part," it will be much harder to prove that the government *intended* to destroy these groups. Many of the Shiites and Kurds were destroyed when Iraqi troops suppressed their revolts against the Iraqi Government. The defendants can argue that they did not intend to destroy the Shiites and Kurds, but were merely protecting themselves against insurgents similar to the current U.S. and Iraqi treatment of insurgents in Iraq.

In order to show that the Iraqi Government had a genocidal intent in attacking the Shiites and Kurds the evidence should include: (1) a showing of the scale and general nature of the atrocities committed; (2) proof of the discriminatory targeting of the members or property of one group to the exclusion of other groups; (3) proof of methodical or systematic planning or killing; (4) the weapons employed and the extent of bodily injury; (5) documents reflecting participation in or knowledge of atrocities; (6) derogatory language toward the targeted population; (7) the destruction of a group's institutions; and proof of widespread and systematic violence.⁵³

Based on the facts of the 1991 uprisings, the Prosecutor can argue that the intent of the defendants was to destroy the Shiite and Kurdish populations in retaliation for their respective rebellions against the Iraqi Government. The previously mentioned discussion

⁵¹ See Akayesu, *supra* note 38 [Reproduced in the accompanying notebook at Tab 13].

⁵² Rome Statute of the International Criminal Court, U.N. DOC. A/CONF. 183/9, art. 30 at 87 (1998). [Hereinafter Rome Statute]. [Reproduced in the accompanying notebook at Tab 19].

⁵³ See Prosecutor v. Kayishema, *supra* note 40 [reproduced in the accompanying notebook at Tab 14].

of numerosity shows the scale of the attacks against the Shiites and Kurds. Furthermore, massive military operations were undertaken to wipe-out Shiite and Kurdish civilians, not just insurgents. For example, the helicopter attacks targeted Shiite civilians who were instructed to migrate north by the Iraqi Government. The use of weapons such as helicopter gunships, and the extent of killings and bodily injuries to the Shiite and Kurdish populations show the substantial measures taken to harm them. In addition, the Iraqi government targeted Shiite and Kurdish institutions in their attacks such as hospitals and mosques. All of these factors, according to the *Kayeshema* court, infer intent to destroy a group.

However, the intent of the defendants will remain shrouded in the lack of genocidal evidence and mixed motives for the suppression of the 1991 uprisings. There are many theories for why the Iraqi Government ordered the violent suppression of the Shiite and Kurdish rebellions to include punishing the rebels, protecting oil fields, and self-defense.⁵⁴ In its quest to bring a case of genocide against the Iraqi government before the International Court of Justice, Human Rights Watch has done extensive research.⁵⁵ The organization has found to date, no single master plan to exterminate the Shiites and Kurds. If the Prosecution has such evidence, it would be helpful in proving the other intent factors set forth by the *Kayeshema* court, such as proof of a plan to destroy the Shiites and Kurds or documents reflecting participation in or knowledge of

⁵⁴ Vera Beaudin Saeedpour, *Establishing State Motives for Genocide: Iraq and the Kurds*, in *Genocide Watch* (Helen Fein ed. 1991) [reproduced in the accompanying notebook at Tab 20].

⁵⁵ See Human Rights Watch/Middle East, *supra* note 15 [reproduced in the accompanying notebook at Tab 3].

such atrocities.⁵⁶ The lack of a formal, public campaign to destroy Shiites and Kurds will make the intent element of genocide difficult to prove for the Prosecution.

ii. Article 12 – Crimes Against Humanity

The IHT has jurisdiction over crimes against humanity under Article 12 of the IHT Statute.⁵⁷ For the purposes of the IHT, “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. Willful 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 as a form of sexual violence of comparable gravity*
- 9. Enforced disappearance of persons*
- 10. Other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.*⁵⁸

The IHT statutory language for crimes against humanity is largely based on the Rome Statute and customary international law. Therefore, precedent from the ICTY and ICTR may be useful in interpreting Article 12. The ICTY and ICTR provide the

⁵⁶ See Prosecutor v. Kayishema, *supra* note 40 [reproduced in the accompanying notebook at Tab 14].

⁵⁷ See IHT Statute, *supra* note 2, art. 12 [reproduced in the accompanying notebook at Tab 2].

⁵⁸ *Id.*

necessary elements to prosecute a person for crimes against humanity: (1) there must be an attack; (2) the acts of the perpetrator must be part of the attack; (3) the attack must be directed against any civilian population; (4) the attack must be widespread or systematic; (5) the perpetrator must know that the acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that the acts fit into such a pattern.⁵⁹ All of these elements must be satisfied in order for defendants to be convicted of crimes against humanity. Typically, crimes against humanity are easier for Prosecutors to prove than genocide. The difference in standards for genocide and crimes against humanity is described as follows: “The crime of genocide exists to protect certain groups from extermination or attempted extermination. The concept of crimes against humanity exists to protect civilian populations from persecutions.”⁶⁰ The crime of genocide is more difficult to prove than crimes against humanity, and it appears the same theory will hold true in the cases at hand.

1. Was there a prohibited act?

Out of the five cases at hand, three of the cases clearly fulfill the prohibited act element of crimes against humanity. First, the case in which the Iraqi helicopters attacked and killed migrating Shiites clearly satisfies the prohibited act of willful murder, as do the two cases in which Iraqi troops killed men of fighting age by shooting them. The other two cases do not clearly constitute a prohibited act. One can reasonably infer

⁵⁹Mohamed Elewa Badar, *From the Nuremburg Statute to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 SAN DIEGO INT’L L.J. 73 (2004) [reproduced in the accompanying notebook at Tab 21].

⁶⁰ Alexander Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 Colum. L. Review 2259 (1999) [reproduced in the accompanying notebook at Tab 22].

that individuals were killed when Iraqi troops attacked mosques, however, the fact pattern provided by the IHT does not specify casualties in this specific case. Furthermore, the case involving the attempted release of chemical warfare does not constitute a prohibited act since no attack actually occurred.

2. Was the perpetrator part of the act?

The second element for crimes against humanity, that the perpetrator be a part of the act, is satisfied by proving that a defendant's actions either caused or aided the prohibited act.⁶¹ Everyone who executed or planned the attacks on the Shiites and Kurds will satisfy this element. Based on the facts, Iraqi soldiers and officers, to include Ali Hassan Al Majid and Taha Yassin Ramadan, participated in the attacks on the Shiites and Kurds.

3. Was the prohibited act directed against a civilian population?

The third element of crimes against humanity requires that the attack be directed against a civilian population.⁶² This requirement is clearly satisfied in the cases at hand. The fact patterns provided by the IHT specifically state that Shiite and Kurdish civilians were attacked and killed by the Iraqi government.

Apparently, this element is intended to exclude attacks on soldiers as crimes against humanity. This requirement affords greater protection to civilians during wars by confining warfare to military combatants and insurgents. The IHT Statute states that

⁶¹ See IHT Statute, *supra* note 2, art. 12 [reproduced in the accompanying notebook at Tab 2].

⁶² *Id.*

crimes against humanity can be committed against “any civilian population,”⁶³ indicating that a State’s attack on its own citizens is covered by Article 12. In *Tadic*, the ICTY discussed the same language in its own statute: “the inclusion of the word ‘any’ makes it clear that crimes against humanity can be committed against civilians of the same nationality as the perpetrator.”⁶⁴ Therefore, even though the perpetrators, Shiites and Kurds were all Iraqi citizens, the attacks against them qualify as an attack on a civilian population.

4. Was the prohibited act widespread or systematic?

Article 12 of the IHT Statute states that crimes against humanity must be “widespread or systematic.”⁶⁵ The use of the word “or” means that either “widespread” or “systematic” actions would suffice, so the terms should be examined separately. “Widespread” refers to the number of victims, whereas “systematic” refers to the existence of a policy or plan.⁶⁶ The requirements for a widespread or systematic attack are alternative requirements, with each satisfied by the five cases involving violent attacks against the Shiites and Kurds. The sheer number of victims will likely establish that the attack was widespread; while the fact that attacks occurred on at least these five occasions shows that the killings were systematic. According to the facts provided,

⁶³ *Id.*

⁶⁴ *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, at par. 634 (May 7, 1997), at <http://www.un.org/icty/tadic/trialc2/judgement/tad-tj970507e.htm> [reproduced in the accompanying notebook at Tab 23].

⁶⁵ See IHT Statute, *supra* note 2, art. 12 [reproduced in the accompanying notebook at Tab 2].

⁶⁶ Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT’L L. 307 (2000) [reproduced in the accompanying notebook at Tab 24].

thousands of Shiite and Kurdish civilians died as a direct result of the attacks. In addition, when viewed collectively, the five episodes of violence against the Shiites and Kurds indicate that a military plan existed to quell rebellion and exterminate the Shiite and Kurdish populations in Iraq.

5. Did the perpetrator know the acts constituted part of a pattern of widespread or systematic crimes against a civilian population?

The final element of crimes against humanity is the requisite mental state, or mens rea. Article 12 of the IHT requires “knowledge of the attack.”⁶⁷ In other words, the perpetrator must know that his acts are part of larger-scale crimes against humanity. The only other international tribunal that has a similar mens rea provision in its statute is the International Criminal Court.⁶⁸ The IHT and ICC statutes create ambiguity by adding the mens rea provision. “Knowledge of the attack” could mean either the perpetrator of a crime against humanity must have knowledge that his conduct is either a crime or a prohibited act which is part of a widespread or systematic attack on a civilian population. For purposes of this memo, the latter interpretation will be used. Thus, the perpetrator of crimes against humanity under the IHT Statute must have (1) the requisite mens rea for the underlying offense and (2) knowledge that his acts make up a smaller part of a larger “attack” on a civilian population. This interpretation is supported by Professor Cassese, former president of the ICTY:

⁶⁷ See IHT Statute, *supra* note 2, art. 12 [reproduced in the accompanying notebook at Tab 2].

⁶⁸ See Rome Statute, *supra* note 52, art. 7(1) [reproduced in the accompanying notebook at Tab 19].

The requisite subjective element or mens rea in crimes against humanity is not simply limited to the criminal intent (or recklessness) required for the underlying offence (murder, extermination, deportation, rape torture, persecution, etc.). The viciousness of these crimes goes far beyond the underlying offence, however wicked or despicable it may be. This additional element – which helps to distinguish between crimes against humanity and war crimes – consists of awareness of the broader context into which this crime fits, that is knowledge that the offences are part of a systematic policy or of widespread and large-scale abuses.⁶⁹

In addition, both the ICTY and the ICTR support Professor Cassese's interpretation. In *Tadic*, the ICTY Trial Chamber held that "the perpetrator must know of the broader context in which his act occurs."⁷⁰ Similarly in *Kayishema*, the ICTR held that the mens rea contained two parts; (1) knowledge of the attack and its widespread or systematic character and (2) awareness of the fact that the criminal activity constitutes part of the attack.⁷¹

In order to successfully convict before the IHT, the prosecutors must prove that the perpetrators of the five separate attacks on the Shiites and Kurds had (1) purposefully intended to kill and injure the Shiites and Kurds and (2) had knowledge that the attacks were part of a systematic policy or of widespread abuses. While the mens rea will be the hardest element to prove, the prosecutors can draw on the scope of the attacks against the Shiites and Kurds to show that the Iraqi government knew of the larger plan to persecute their political opponents.

⁶⁹ See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2003) [Hereinafter Cassese] [reproduced in the accompanying notebook at Tab 25].

⁷⁰ See Prosecutor v. Tadic, *supra* note 64 [reproduced in the accompanying notebook at Tab 23].

⁷¹ See Prosecutor v. Kayishema, *supra* note 40 [reproduced in the accompanying notebook at Tab 14].

iii. Article 13 – War Crimes

Article 13 of the IHT Statute grants the Tribunal jurisdiction over war crimes. In general, war crimes are prohibited violent acts committed against civilians not involved in an armed conflict by those who are. War crimes are defined under the IHT Statute as:

1. *Grave breaches of the Geneva Convention of 12 August 1949;*⁷²
2. *Other serious violations of the laws and customs applicable in international armed conflict named in the statute;*⁷³
3. *Attacks on people not taking part in the hostilities during an armed conflict;*⁷⁴ and
4. *Serious violations of the laws and customs of war applicable in armed conflict not of an international character.*⁷⁵

⁷² See IHT Statute, *supra* note 2, art. 13(1) [reproduced in the accompanying notebook at Tab 2].

⁷³ *Id.* at art. 13(2).

⁷⁴ *Id.* at art. 13(3).

⁷⁵ *Id.* at art. 13(4).

The base requirement for war crimes is that the prohibited act must have occurred during an ‘armed conflict.’ Thus, the initial inquiry in determining if a war crime has taken place must focus on whether or not the prohibited act took place during an armed conflict.

1. Was an ‘armed conflict’ in progress at the time of the prohibited act?

The IHT Statute does not expressly define the term ‘armed conflict.’ Most war crime tribunals have not analyzed the meaning of “armed conflict,” because the armed conflict element of a war crime is often obvious and thus easily satisfied. In fact, the ICTR is one of the only tribunals to provide a working definition of ‘armed conflict.’ The ICTR held that ‘armed conflict’ means “the existence of open hostilities between armed forces, which are organized to a greater or lesser degree.”⁷⁶

A few situations have arisen, however, when the existence of an armed conflict has not been obvious. Under such circumstances, the states involved were responsible for determining whether or not an armed conflict existed.⁷⁷ In the event that the existence of an armed conflict is not obvious, courts must analyze the intensity of violence occurring in a country at the time of the alleged war crimes.⁷⁸ If the intensity of violence

⁷⁶ Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, para 248. (ICTR Trial Chamber Jan. 27, 2000), available at <http://69.94.11.53/ENGLISH/cases/Musema/judgement/index.htm> [reproduced in accompanying notebook at Tab 26].

⁷⁷ M. Gandhi, *Common Article 3 Of Geneva Conventions, 1949 In The Era Of International Criminal Tribunals*, ISILYBIHRL 11, available at <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/11.html> [reproduced in accompanying notebook at Tab 27].

⁷⁸ HANS-PETER-GASSER, “INTERNATIONAL HUMANITARIAN LAW”, IN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW (EDS.), M.K. BALACHANDRAN, ROSE VERGHESE (1998) [reproduced in accompanying notebook at Tab 28].

is very high, then the hostilities will likely be considered an armed conflict.⁷⁹ Under such a test, even acts of terrorism or small insurgent attacks could amount to an ‘armed conflict.’⁸⁰ For example, the Inter-American Commission on Human Rights held that the killing of 42 civilians by the Argentine military during peacetime was an armed conflict.⁸¹ In addition, a U.S. court held that the hijacking of an airplane during peacetime was sufficient to satisfy the armed conflict threshold.⁸²

Nor do the Geneva Conventions expressly define the term ‘armed conflict.’ However, the omission of such a definition seems to have been deliberate. At the Diplomatic Conference that resulted in the composition of the Geneva Conventions of 1949, the issue of what constituted a “case of armed conflict” proved vexing.⁸³ By the end of the conference, delegates chose not to define ‘armed conflict’ because they did not want to limit the scope of the term. The delegates deliberately left the term ambiguous so that “armed conflict” would be subject to multiple interpretations. Thus, an armed conflict can include hostility ranging from a formal war to a political insurgency.⁸⁴

⁷⁹ Michael P. Scharf, *Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects*, 36 CASE W. RES. J. INT’L L. 359, 367 (2003) [reproduced in the accompanying notebook at Tab 29.]

⁸⁰ *Id.*

⁸¹ *Abella v Argentina*, Case 11.137, Inter-Am. C.H.R., 55/97, OEA/Ser.L/V/II.98, doc. 6 rev. (Apr. 13 1998) [reproduced in the accompanying notebook at Tab 30].

⁸² *United States v. Yunis*, 924 F.2d 1068 (1991) [reproduced in the accompanying notebook at Tab 31].

⁸³ JEAN S. PICTET, COMMENTAR FOR THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, 35 (1958). [hereinafter Pictet] [reproduced in the accompanying notebook at Tab 32].

⁸⁴ See Scharf, *supra* note 79, at 364-369 [reproduced in the accompanying notebook at Tab 29].

The Additional Protocols to the Geneva Conventions do aid in defining ‘armed conflict.’⁸⁵ Article 51(2) of Protocol I (applicable to international armed conflicts) provides: “The civilian population as such, as well as individual civilians shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”⁸⁶ Article 4(d) of Additional Protocol II (applicable to internal armed conflicts) further provides: “the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever....”⁸⁷ Finally, Article 13 of Additional Protocol II states: “The Civilian population as such, as well as individual civilians shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”⁸⁸ The Additional Protocols to the Geneva Conventions infer that an armed conflict is widespread violence against civilians inflicted to spread terror.

In the absence of a firm, universally accepted definition of ‘armed conflict,’ scholars have attempted to define the scope of the term. Jean S. Pictet, in his commentary to the Geneva Conventions, argued that ‘armed conflict’ means “armed forces on either side engaged in hostilities – conflicts, in short, which are in many

⁸⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature Dec. 12, 1977, 1125 U.N.T.S. 4, 16 I.L.M. 1391 [hereinafter Protocol I] [reproduced in accompanying notebook at Tab 33].; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol II), opened for signature Dec. 12, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442. [hereinafter Protocol II] [reproduced in accompanying notebook at Tab 33].

⁸⁶ Protocol I, *supra* note 85, art. 51 [reproduced in the accompanying notebook at Tab 33].

⁸⁷ Protocol II, *supra* note 85, art. 4 [reproduced in the accompanying notebook at Tab 33].

⁸⁸ *Id.* at art. 13.

respects similar to an international war, but take place within the confines of a single country.”⁸⁹

In the cases at hand, facts are sufficient to make a determination regarding armed conflict status. At minimum, open hostilities existed between three groups of people – the Sunnis, Shiites, and Kurds. The Shiite and Kurdish rebellions against Saddam Hussein’s regime in 1991 were hostilities which are widely considered to have been an internal armed conflict by the rest of the world.

2. Is there a nexus between the prohibited acts and the armed conflict?

In order to prove war crimes, the next step requires an analysis of whether or not there is a nexus between the armed conflict and the prohibited acts. This requirement stems from customary international law. The purpose of such customary international law is to exclude crimes which are mutually exclusive from an armed conflict. For example, the International Military Tribunal at Nuremberg (“IMT”) held that the crimes committed against the European Jews prior to World War II could not be prosecuted by the IMT as war crimes because the prohibited acts were not related “in execution of, or in connection with... the war.”⁹⁰ The IMT held that these same crimes against the Jews which occurred after World War II commenced could be prosecuted as war crimes, because the crimes were then sufficiently related to an armed conflict.⁹¹

⁸⁹ See Pictet, *supra* note 83, at 36 [reproduced in the accompanying notebook at Tab 31].

⁹⁰ Judgment of the International Military Tribunal at Nuremberg (Oct. 1, 1946), in 1 International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal* (English ed. 1947), available at <http://www.yale.edu/lawweb/avalon/imt/proc/judcont.htm> [reproduced in accompanying notebook at Tab 34].

⁹¹ *Id.*

More recently, the ICTY held in *Tadic* that prosecution for war crimes requires that the “offence [was] closely related to the armed conflict as a whole.”⁹² In addition, the ICTY held in *Pavo and Zenga* that “[t]here must be an obvious link between the criminal act and the armed conflict.”⁹³ The ICTR further held:

*When the country is in a state of armed conflict, crimes committed in this period of time could be considered as having been committed in the context of armed conflict. However, it does not mean that all such crimes have a direct link with the armed conflict and all the victims of these crimes are victims of armed conflict.*⁹⁴

In summary, the fact that a prohibited act took place at the same time as an armed conflict does not automatically mean a war crime occurred. There must be a connection between the prohibited acts and hostilities that amount to an armed conflict for war crimes to exist. In the case at hand, the facts indicate that the Iraqi government had a plan to annihilate the Shiites and Kurds, which was directly linked to the intense hostilities surrounding the Shiite and Kurdish uprisings in 1991.

3. Was there an internal or international armed conflict?

Now that the existence of an armed conflict has been established, the next step in the analysis of war crimes is to determine whether or not the armed conflict was an international or internal conflict. The IHT Statute stipulates that certain acts are prohibited during international armed conflicts, while other stipulated acts are prohibited

⁹² See Prosecutor v. Tadic, *supra* note 64 [reproduced in the accompanying notebook at Tab 23].

⁹³ Prosecutor v. Pavo and Zenga, Case No. ICTY-96-21, Judgment (ICTY Trial Chamber Nov. 16, 1998). <http://www.un.org/icty/Supplement/supp1-e/celebici.htm> [reproduced in accompanying notebook at Tab 35].

⁹⁴ See Prosecutor v. Kayishema, *supra* note 40 [reproduced in the accompanying notebook at Tab 14].

during internal armed conflicts.⁹⁵ The existence of war crimes depends on the type of armed conflict, since sections (1)-(4) of Article 13 criminalize prohibited acts according to what type of armed conflict the acts coincide.⁹⁶ The IHT Statute does not define ‘international’ or ‘internal’ armed conflicts, nor does the Statute differentiate between the terms.

In 1977, the First Additional Protocol of the Geneva Conventions defined the terms at issue. Article 1(4) of the First Additional Protocol of the Geneva Conventions defines ‘international armed conflicts’ as “those between two or more States, or between a State and a national liberation movement.”⁹⁷ The Protocol goes on to define ‘internal armed conflicts’ as “large-scale armed hostilities, other than internal disturbances and tensions, or riots isolated or sporadic acts of armed violence, between State authorities and rebels, or between two or more organized armed groups within a State.”⁹⁸ In the case at hand, the armed conflict appears to be internal.

Article 13(4) of the IHT Statute stipulates prohibited acts that are exclusive to “armed conflict not of an international character.”⁹⁹ Under Article 13(4), the following acts constitute war crimes if committed during an internal armed conflict:

- A. *Intentionally directing attacks against the civilian population as such or against civilian individuals not taking direct part in hostilities;*
- B. *Intentionally directing attacks against buildings, materials, medical transportation units and means, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;*
- C. *Intentionally directing attacks against personnel, installations, materials, units, or vehicles used in humanitarian assistance or peacekeeping missions in*

⁹⁵ See IHT Statute, *supra* note 2, art. 13(1)-(2) [reproduced in the accompanying notebook at Tab 2].

⁹⁶ *Id.*

⁹⁷ See Cassese, *supra* note 69, at 54 [reproduced in the accompanying notebook at Tab 25].

⁹⁸ *Id.*

⁹⁹ See IHT Statute, *supra* note 2, art. 13(4) [reproduced in the accompanying notebook at Tab 2].

accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian targets under the international law of armed conflict;

- D. Intentionally directing attacks against buildings that are dedicated to religious, educational, artistic, scientific or charitable purposes, and historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;*
- E. Pillaging any town or place, even when taken over by assault;*
- F. Committing rape, sexual slavery, forced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity;*
- G. Conscripting or listing children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;*
- H. Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;*
- I. Killing or wounding treacherously a combatant adversary;*
- J. Declaring that no person is still alive;*
- K. Subjugation persons who are under the power of another party of the conflict to physical mutilation or to medical or scientific experiments of any kind that are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, causing death to such person or persons, or seriously endangering their health; and*
- L. Destroying or seizing the property of an adversary, unless such destruction or seizure is imperatively demanded by the necessities of the conflict.*

The case at hand concerns several of these acts, to include intentionally attacking persons and buildings. Thus, there was an internal armed conflict during the case at hand and the prohibited acts were linked to the conflict. Therefore, the actions of those responsible for the prohibited acts fall neatly into IHT jurisdiction under Article 13 of the IHT Statute.

4. Did the perpetrator have the requisite mens rea?

The final element of war crimes is the requisite mens rea for the underlying prohibited acts. The IHT Statute does not require knowledge of the circumstances for war crimes, unlike the mens rea requirement for crimes against humanity.

iv. Article 14 – Violations of Stipulated Iraqi National Laws

Unlike some other international tribunals, the IHT includes violations of certain national laws in its jurisdiction. Article 14 of the IHT Statute grants the IHT jurisdiction over violations of stipulated Iraqi laws.¹⁰⁰ Specifically, Article 14 empowers the IHT to prosecute persons for the following crimes: “First, intervention in the judiciary or the attempt to influence the functions of the judiciary.¹⁰¹ Second, the wastage and squander of national resources...¹⁰² Third, the abuse of position and the pursuit of policies that were about to lead to the threat of war or the use of the armed forces of Iraq against an Arab country...¹⁰³ Fourth, if the court finds a default in the elements of any of the crimes stipulated in Articles 11, 12, 13 of this law, and it is proved to the Court that the act constitutes a crime punishable by the penal law or any other criminal law at the time of its commitment, then the court shall have jurisdiction to adjudicate this case.”¹⁰⁴

Based on an analysis of the facts of the five attacks on the Shiites and Kurds, the court will not likely find a violation of Article 14. On the face of the facts at hand, there is no evidence that members of the former Iraqi government violated any of the stipulated Iraqi national laws.

v. Article 15 – Who Can be Charged?

The Iraqi High Tribunal has jurisdiction over every natural person whether Iraqi or non-Iraqi resident of Iraq and accused of the crime of genocide, crimes against

¹⁰⁰ See IHT Statute, *supra* note 2, art. 14 [reproduced in the accompanying notebook at Tab 2].

¹⁰¹ *Id.* at art. 14(a).

¹⁰² *Id.* at art. 14(b).

¹⁰³ *Id.* at art. 14(c).

¹⁰⁴ *Id.* at art. 14(d).

humanity, war crimes, and violations of certain Iraqi national laws committed between July 17, 1968 and May 1, 2003 in the Republic of Iraq or elsewhere.¹⁰⁵ Article 15 of the IHT Statute further defines who can be held individually responsible for crimes under IHT jurisdiction.¹⁰⁶ Cases before the IHT tend to involve a large number of people, not just the persons named in the five fact patterns. In order to prosecute all the perpetrators, the IHT Statute expressly identifies all persons who may be punishable under the jurisdiction of the IHT.

In addition to criminalizing genocide, crimes against humanity, war crimes, and certain Iraqi national offences, Article 15 makes it a crime to order, solicit, induce,¹⁰⁷ aid, abet,¹⁰⁸ contribute to,¹⁰⁹ or attempt to commit any of the above listed crimes.¹¹⁰ Additionally, Article 15 removes head-of-state immunity and any other special treatment regarding criminal responsibility for any member of the Iraqi government.¹¹¹ Article 15 adopts the doctrine of ‘superior responsibility’¹¹² and removes the ‘following orders’ defense.¹¹³ Thus, Article 15 prohibits passing off liability from superiors to subordinates and vice versa.

¹⁰⁵ *Id.* at art. 1.

¹⁰⁶ *Id.* at art. 15(a).

¹⁰⁷ *Id.* at art. 15(b)(2).

¹⁰⁸ *Id.* at art. 15(b)(3).

¹⁰⁹ *Id.* at art. 15(b)(4).

¹¹⁰ *Id.* at art. 15(b)(6).

¹¹¹ *Id.* at art. 15(c).

¹¹² *Id.* at art. 15(d).

¹¹³ CBC News, *Command, superior and ministerial responsibility*, available at http://www.cbc.ca/news/background/iraq/abughraib_commandresponsibility.html [reproduced in the accompanying notebook at Tab 36].

As a result, everyone involved in the crimes against Shiites and Kurds, ranging from the soldiers to the senior government officials, may be charged if their participation amounts to a crime under Articles 11 through 15.

IV. CONCLUSION

Of the crimes the IHT has jurisdiction over, the crime of genocide, crimes against humanity, and war crimes likely occurred in the five cases at hand. Genocide likely occurred because the Iraqi government targeted protected groups with the intent to destroy them, in whole or in part. Crimes against humanity likely occurred because the Iraqi government committed both systematic and widespread attacks on civilian populations. Additionally, war crimes likely occurred because the attempted use of chemical weapons over a large city during an internal armed conflict constitutes a war crime. Charges under Articles 11 through 13 of the IHT Statute should be sustainable against those who were involved in the attacks and attempted attacks against the Shiites and Kurds.

Crimes under Article 14 of the IHT Statute are least likely to have occurred during the five episodes. The five incidents do not fall under the specific crimes stipulated in Article 14. Thus, charges under Article 14 for violations of certain Iraqi national laws would probably not result in convictions.

Finally, everyone involved in the five acts of violence against the Shiites and Kurds, ranging from the military troops to the senior members of the regime, may be charged if their participation amounted to committing, ordering, soliciting, inducing,

aiding, abetting, contributing to, or attempting to commit a crime within the jurisdiction of the IHT.

In sum, the five cases at hand probably constitute crimes under Articles 11 (genocide), 12 (crimes against humanity), 13 (war crimes), and 15 (criminal liability) of the IST Statute, but probably not under Article 14 (certain Iraqi laws).

