

2005

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### Recommended Citation

Brinkman, Shane A., "The Ma'dan (Marsh Arabs) and What Constitutes a Crime Against Humanity Through Environmental Attacks" (2005). *War Crimes Memoranda*. 168.

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**MEMORANDUM FOR  
THE IRAQI SPECIAL TRIBUNAL**

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ISSUE: The Ma'dan (Marsh Arabs) and What Constitutes a Crime Against  
Humanity Through Environmental Attacks

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Prepared by Shane A. Brinkman  
Spring 2005

# **The Ma'dan (Marsh Arabs) and What Constitutes a Crime Against Humanity Through Environmental Attacks**

## **I. INTRODUCTION AND SUMMARY OF CONCLUSIONS**

### **A. Issues**

The main issue with regards to the Ma'dan peoples is whether the act of intentionally draining the marshlands of Iraq constitutes a crime under international law, and, if so, what elements need to be proven to have a party to those crimes indicted and convicted. In looking at litigated crimes of the past, there is little direct caselaw on the issue, therefore, another issue will be whether international law will be convincing in forming a new area of customary international law to aid in the prosecution of this case. Finally, there is the issue of attaching the blame for this crime upon specific personages. Who, for the sake of this case, can and should be charged with these crimes? Is there evidence to show that a leader at any specific level had real or implied knowledge of the actions taking place such that they could have intervened prior to the actions or brought forth punishment to the actors after the offense?

### **B. Summary of Conclusions**

The Crime of Genocide as enunciated in Article 11 of the Statute of the Iraqi Special Tribunal is the intent to destroy, in whole or in part, a national, ethnical, racial or religious group by performing specific acts.<sup>1</sup> The subsections of this article that are pertinent to this case are 1. Killing members of the group;<sup>2</sup> 2. Causing serious bodily or

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<sup>1</sup> Coalition Provisional Authority. The Statute of the Iraqi Special Tribunal. Article 11. Reproduced at Tab #78

<sup>2</sup> Coalition Provisional Authority. The Statute of the Iraqi Special Tribunal. Article 11(1). Reproduced at Tab #78

mental harm to members of the group;<sup>3</sup> and 3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.<sup>4</sup>

Under subsection 1, causing the death of or deliberate killing of the members of the Ma'dan, the proof is in the statistics. The actions of the Iraqi government caused the people of the Iraqi marshlands to dwindle from 400,000 to merely 40,000.<sup>5</sup> While the vast majority of those are now refugees, hundreds or even thousands of those were killed due to infection, disease, and water contaminates.<sup>6</sup>

Under subsection 2, there is considerable difficulty in proving and substantiating claims in this area. It can be assumed, however, that anyone who has such dramatic circumstances thrust upon them would certainly have psychological, physical and emotional scars as a result.<sup>7</sup> However, decisions on this subject generally require more evidence than is present here. Without significant information and evidence to show the intent to harm in this area, this may be unprovable.

Under subsection 3, the claim is the most significant and proven. When looking at the damage done to the lifestyles, livelihood, and environment of the Ma'dan, it is obvious that these conditions were caused with the intent and full knowledge of the potential effects and repercussions thereof. Additionally, a document seized by Kurdish

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<sup>3</sup> Coalition Provisional Authority. The Statute of the Iraqi Special Tribunal. Article 11(2). Reproduced at Tab #78

<sup>4</sup> Coalition Provisional Authority. The Statute of the Iraqi Special Tribunal. Article 11(3). Reproduced at Tab #78

<sup>5</sup> Evans, Margaret. *In-depth Iraq: The Marsh Arabs*. CBC News (April 14, 2004) Available at <<http://cbc.ca/news/background/iraq/marsharabs.html>>. Reproduced at Tab #13

<sup>6</sup> North, Andrew. *Saddam's Water War*. Geographical Magazine. (July 1993, Volume 65, Issue 7) Available at <<http://web.macam.ac.il/~arnon/int-me/extra/saddam%20water%20wars.htm>>. Reproduced at Tab #27

<sup>7</sup> Human Rights Dialogue, Spring 2004. Series 2 Number 11. Reproduced at Tab #45

rebels during the 1991 uprising shows the specific plans of the Iraqi government.<sup>8</sup> Even though the Ba'ath party discounts those documents as fabrications, the United Nations has given them credence and they should be admissible in any hearing in this regard. When one compares the plans described in this document with the actual events that have taken place, it appears evident that this blueprint was followed.<sup>9</sup>

With statements made by the refugees along with the documentary evidence present, it appears that the charge of genocide is founded. Though the defense will state that without the documents obtained during the 1991 uprising there is no case whatsoever against Hussein himself, the facts in our case are somewhat simpler to prove.<sup>10</sup> It is evident that Saddam Hussein ordered the canals, dams, and sluices to be built and intentionally did not have any improvement made that would bring about the use of this water for improvements to land or person.<sup>11</sup> With this awareness along with the military actions taking place in the region, it is evident that the actions' intent is intertwined.

Article 12 of the Statute of the Iraqi Special Tribunal describes Crimes against Humanity as acts committed as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack.<sup>12</sup> The pertinent sections are 2. Extermination, 4. Deportation or forcible transfer of population, 8. Persecution against

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<sup>8</sup> Human Rights Watch. *Bureaucracy of Repression: The Iraqi Government in Their Own Words*. (1994) Available at <<http://www.hrw.org/reports/1994/iraq/text.htm>>. Reproduced at Tab #20

<sup>9</sup> Human Rights Watch. *Bureaucracy of Repression*. Reproduced at Tab #20

<sup>10</sup> Di Stefano, Giovanni. *In Defense of Saddam Hussein*. Lo Spettro (December 23, 2003) Available at <<http://www.lospettro.it/pagina748.htm>>. Reproduced at Tab #11

<sup>11</sup> Dabrowska, Karen. *The Iraqi Marshlands: Genocide, Ecocide and a Scandalous Catalog of Injustices*. KurdishMedia.Com (September 24, 2002) Available at <<http://www.kurdmedia.com/printarticles.asp?id=1062>>. Reproduced at Tab #9

<sup>12</sup> Coalition Provisional Authority. The Statute of the Iraqi Special Tribunal. Article 12. Reproduced at Tab #78

any identifiable group or collectivity, and 10. Other inhumane acts of similar character intentionally causing great suffering, or serious injury to the body or to the mental or physical health.<sup>13</sup>

Section 2 - Extermination is defined in Subsection 12(b) (2) as including the intentional infliction of conditions of life calculated to bring about destruction of a segment of population.<sup>14</sup> This definition is almost identical to that espoused in Subsection 11(a) (3) with regards to the crime of genocide.<sup>15</sup> The evidence provided to show the good cause of action under that crime will prove this allegation as well.

Section 4 has significant proof that the Ma'dan people were, in fact, forced to move to different areas without their willing consent. The important portion of any claim in this area will be to prove that the actions were to attack a protected class of people and that they were widespread and systematic.<sup>16</sup> It seems evident that these elements are proven here. The Ma'dan are the primary inhabitants of the marshlands of Iraq and during the course of twelve years, the government actively worked to deprive one group of people their livelihood, environment and lives.<sup>17</sup>

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<sup>13</sup> Coalition Provisional Authority. The Statute of the Iraqi Special Tribunal. Article 12(b)(2,4,8,10). Reproduced at Tab #78

<sup>14</sup> Coalition Provisional Authority. The Statute of the Iraqi Special Tribunal. Article 12(b)(2). Reproduced at Tab #78

<sup>15</sup> Coalition Provisional Authority. The Statute of the Iraqi Special Tribunal. Article 11(a)(3). Reproduced at Tab # 78

<sup>16</sup> Coalition Provisional Authority. The Statute of the Iraqi Special Tribunal. Article 12(b)(4). Reproduced at Tab #78

<sup>17</sup> Wetland Wire. DUWC Joins Iraqi Marsh Restoration Project. Autumn, 2003, Volume 6, Number 2. Reproduced at Tab #46

Section 8 will be proven with the acceptable evidence shown for Section 4. The Ma'dan is a specific, unique, and identifiable group that was targeted through systematic planning and implementation of a plan.<sup>18</sup>

Section 10 is an all encompassing provision intended to ensure that even with the proper defenses implemented, an egregious actor will be brought to justice. In this case, it will be once against affirmed the extent to which the marsh people were harmed.

## II. **Factual Background:**

For more than 5,000 years there has been civilization at the confluence of the Tigris and Euphrates Rivers in what is now Southeastern Iraq.<sup>19</sup> These people have subsisted in an isolated state, untouched by the destruction, advancement, and power struggles of the outside world.<sup>20</sup> The Ma'dan peoples lived in tribes throughout what was one of the most expansive marshlands in the world.<sup>21</sup> They became known for their harmonious relationship to the nature around them. The Iraqi Marshes, which at one point covered more than 20,000 kilometers of area,<sup>22</sup> were home to numerous life forms including hundreds of species of migratory birds, fish, and rare species of animals that

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<sup>18</sup> Danish Institute for International Studies. Adriansen, Hanne Kirsten. *What Happened to the Iraqi Marsh Arabs and Their Land? The Myth about Garden of Eden and the Noble Savage*. DIIS Working Paper 2004/26. Reproduced at Tab #42

<sup>19</sup> Schwabach, Aaron. Thomas Jefferson School of Law. *Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Conflicts*. 2003. Reproduced at Tab #56

<sup>20</sup> Grove City College Faculty Opinions. Kengor, Paul & Shreckengost, Cory L. *Saddam's Unnoticed Genocide*. February 5, 2003. Reproduced at Tab #44

<sup>21</sup> Human Rights Watch. *Iraq: Devastation of Marsh Arabs*. (January 25, 2003) Available at <<http://www.hrw.org/press/2003/01/iraq012503.htm>>. Reproduced at Tab #21

<sup>22</sup> Stutz, Bruce. *Water & Peace*. Audubon (September/October 1994) Available at <[http://sks.sirs.com/cgi-bin/hst-article-display?id=SOH3650-0-2545&artno=0000013643&type=ART&shfilter=U&key=WATER\\_PEACE\\_&res=Y&ren=Y&gov=Y&lnk=Y&ic=N](http://sks.sirs.com/cgi-bin/hst-article-display?id=SOH3650-0-2545&artno=0000013643&type=ART&shfilter=U&key=WATER_PEACE_&res=Y&ren=Y&gov=Y&lnk=Y&ic=N)>. Reproduced at Tab #32

could not be found anywhere else in the world.<sup>23</sup> The Ma'dan people's actions were special, in that they lived along side of these animals on manmade reed and mud islands, subsisting on the products of the area, using the natural filtration qualities of the marshes to improve their lives, aid in the growing of crops and the raising of water buffalo.<sup>24</sup> These peaceful, Shiite Muslims were largely content with their lifestyles, and this civilization likely would have continued in generally the same fashion had they remained as they were.

During the 1980's, this isolation and peace was interrupted by acts of aggression between the countries of Iraq and Iran.<sup>25</sup> During the Iran-Iraq War, numerous Marsh Iraqis joined the Iraqi military and were praised for their efforts.<sup>26</sup> However, this praise soon turned to scorn as an increasing number of dissidents, political enemies, and Iranian agents were known to have hidden in the remote expanses of the marshes.<sup>27</sup> Merely eleven years later, in 1991, many of these Ma'dan Arabs or Marsh Iraqis found themselves thrust into an unfamiliar world. Forced to leave behind the livelihood that they knew, only to flee from destruction, death and hardship delivered by their very own

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<sup>23</sup> Clark, Peter, *The Iraqi Marshlands: A Pre-War Perspective*. The Crimes of War Project (March 7, 2003) Available at <<http://www.crimesofwar.org/special/iraq/news-marsharabs.html>>. Reproduced at Tab #8

<sup>24</sup> Global Environment Outlook 3: Past Present and Future Prospectives. *Our Changing Environment: Mesopotamian Marshlands*. Available at <<http://www.unep.org/geo/geo3/english/137.htm>>. Reproduced at Tab #18

<sup>25</sup> Human Rights Watch. *Iraq: Devastation of Marsh Arabs*. Reproduced at Tab #21

<sup>26</sup> North, Andrew. *Saddam's Water War*. Reproduced at Tab #27

<sup>27</sup> United States House of Representatives, Committee on International Relations. *United States and the Iraqi Marshlands: An Environmental Response*. Second Session, February 24, 2004. Reproduced at Tab #66



government.<sup>28</sup>

A. **The Gulf War and the 1991 Uprising**

Since the time of the Shiite revolution in Iran, the leadership of Iraqi government had been worried about any significant buildup of Shia peoples or dissident forces within the country of Iraq.<sup>29</sup> Since the Iran-Iraq War, the Baathist leadership had made it clear that they were displeased with the fact that political enemies, army deserters and Shia leaders were taking asylum in the marshlands rather than face the repercussion from their government.<sup>30</sup> As the Gulf War drew to an end, there was a clear message from the allied forces. This message was that the country of Iraq was weak and that those who would wish to overthrow the current government should move quickly.<sup>31</sup> Unfortunately, many of the rebellious forces also took this to mean that they would receive military aid from the allies, but they were mistaken.<sup>32</sup>

On February 28, 1991, A Shiite commander of an Iraqi Tank Battalion set off a full revolt in the Southern city of Basra.<sup>33</sup> During the course of the next several weeks, hundreds of Baathist Officials, police personnel, and elected leaders were killed in the

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<sup>28</sup> The Brookings Institute-School of Advanced International Studies Project on Internal Displacement. *The Internally Displaced People of Iraq*. October, 2002. Reproduced at Tab #41

<sup>29</sup> Sharp, Heather. *Iraq's "Devastated" Marsh Arabs*. BBCNews UK Edition (March 3, 2003) Available at <[http://news.bbc.co.uk/1/hi/world/middle\\_east/2807821.stm](http://news.bbc.co.uk/1/hi/world/middle_east/2807821.stm)>. Reproduced at Tab #30

<sup>30</sup> Feanny, Camille & Porter, Kiesha. *Scientists Fight to Save Iraq's Marshes*. CNN.com (November 5, 2004) Available at <<http://www.cnn.com/2004/TECH/science/11/05/marsh.iraq/>>. Reproduced at Tab #14

<sup>31</sup> Dabrowska, Karen. *The Iraqi Marshlands: Genocide, Ecocide and a Scandalous Catalog of Injustices*. Reproduced at Tab #9

<sup>32</sup> Flint, Julie. *The Terror in Iraq*. World Press Review (December, 1993) Available at <[http://sks.sirs.com/cgi-bin/hst-article-display?id=SOH3650-0-2545&artno=0000011387&type=ART&shfilter=U&key=MARSH\\_ARABS\\_&res=Y&ren=Y&gov=Y&lnk=Y&ic=N](http://sks.sirs.com/cgi-bin/hst-article-display?id=SOH3650-0-2545&artno=0000011387&type=ART&shfilter=U&key=MARSH_ARABS_&res=Y&ren=Y&gov=Y&lnk=Y&ic=N)>. Reproduced at Tab #15

<sup>33</sup> Anderson, Jon Lee. *Letter From Iraq: No Place to Hide*. The New Yorker (November 25, 2002) Available at <[http://www.newyorker.com/printable/?fact/021125fa\\_fact1](http://www.newyorker.com/printable/?fact/021125fa_fact1)>. Reproduced at Tab #4

revolt.<sup>34</sup> Also, numerous offices were raided and documents seized.<sup>35</sup> At almost the same time, the Kurds in the North of Iraq began a revolt as well.<sup>36</sup> During the next few weeks, the warring parties of the South, aided by the Badr Battalion that crossed the marshes from Iran, took control of large areas of Iraq including many of the large southern cities.<sup>37</sup> By and large, the Marsh Arabs had little involvement in the uprising, though a small segment, mostly religious leaders, were heavily involved in the planning and implementation of the infida.<sup>38</sup> In March, the Iraqi central government finally began retaking control of the land and putting down the revolts.<sup>39</sup>

The methods used in the reclamation of the peace in Iraq were astonishing. There are reports of helicopter gunships firing indiscriminately into crowds of civilians,<sup>40</sup> the use of napalms and other chemical agents<sup>41</sup> and the mass capture, murder and forced relocation of tens of thousands of people.<sup>42</sup> Children and women were often used as

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<sup>34</sup> Anderson, Jon Lee. *The New Yorker*. November 25, 2002. Reproduced at Tab #4

<sup>35</sup> Human Rights Watch. *Bureaucracy of Repression*: Reproduced at Tab #20

<sup>36</sup> UN Office for Coordination of Humanitarian Affairs. *Iraq: Focus on the Marsh Arabs* (June 18, 2003) Available at <[http://irinnews.org/report.asp?ReportID=34838&SelectRegion=Middle\\_East&SelectCountry=IRAQ](http://irinnews.org/report.asp?ReportID=34838&SelectRegion=Middle_East&SelectCountry=IRAQ)>. Reproduced at Tab #37

<sup>37</sup> Anderson, Jon Lee. *The New Yorker*. November 25, 2002. Reproduced at Tab #4

<sup>38</sup> Anderson, Jon Lee. *The New Yorker*. November 25, 2002. Reproduced at Tab #4

<sup>39</sup> UN Office for Coordination of Humanitarian Affairs. *Iraq: Focus on the Marsh Arabs*. Reproduced at Tab #37

<sup>40</sup> Human Rights Watch. *Endless Torment: The 1991 Uprising in Iraq and its Aftermath*. June 1992. Reproduced at Tab #52

<sup>41</sup> Mylroie, Laurie. *Iraqi CW Attacks Against Marsh Arabs, LST*. London Sunday Times. (February 8, 2003) Available at <<http://www.mail-archive.com/sam11@erols.com/msg00045.html>>. Reproduced at Tab #26

<sup>42</sup> Human Rights Watch. *Endless Torment*: Reproduced at Tab #52

human shields to protect the military equipment from attack.<sup>43</sup> The military continued to advance, destroying entire cities and villages, capturing all that may remotely have been involved in the uprising, burning crops and homes, and attacking Shia Shrines.<sup>44</sup> Estimations of more than one hundred thousand casualties in the south alone are prominent.<sup>45</sup> More than one hundred Shiite clerics were arrested and disappeared while in Iraqi custody.<sup>46</sup> When the revolt was put down, as many as ten thousand people escaped to the marshes hoping that they would protect them from the wrath of Saddam Hussein.<sup>47</sup>

Once the tensions subsided and the Iraqi military was once again clearly in command, the attacks on the southern Shia population failed to stop.<sup>48</sup> From 1991 until the United States invaded in 2003, there continued to be a multi-pronged plan to not only prevent another overthrow attempt, but to systematically eliminate everything that the Marsh Arabs held dear.<sup>49</sup> This plan attacked their faith, their livelihoods, their homes, their land, their freedom, and their lives.<sup>50</sup> The military justification for these actions

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<sup>43</sup> Human Rights Watch. *Endless Torment*: Reproduced at Tab #52

<sup>44</sup> United States House of Representatives, Committee on International Relations. *United States and the Iraqi Marshlands*: Reproduced at Tab #66

<sup>45</sup> Sharp, Heather. *Iraq's "Devastated" Marsh Arabs*. Reproduced at Tab #30

<sup>46</sup> United Nations Economic and Social Council. *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World*. Commission of Human Rights, Fifty-Fifth Session, February 26, 1999. Reproduced at Tab #60

<sup>47</sup> Sharp, Heather. *Iraq's "Devastated" Marsh Arabs*. Reproduced at Tab #30

<sup>48</sup> United Nations Economic and Social Council. *Question of the Violation*. February 26, 1999. Reproduced at Tab #60

<sup>49</sup> United States Department of State. *1999 Country Reports of Human Rights Practices*. February 25, 2000. Reproduced at Tab #64

<sup>50</sup> Clark, Peter & Magee, Sean. *The Iraqi Marshlands: A Human and Environmental Study*. The AMAR International Charitable Foundation, 2001. Reproduced at Tab #76

were to bring the people to justice that had killed government officials during the revolt,<sup>51</sup> but the indiscriminate and violent means used to accomplish that goal makes it clear that the ultimate goal was much more severe.

B. **The Military Operations**

While the actions of the Iraqi government in putting down the revolt attempt were egregious, the fact that they continued military operations is telling with regards to their true intentions vis-à-vis the Marsh Arabs. The fact that the marshlands were drained, along with the fact that the military continued operations involving the violent apprehension and murder of Marsh Arabs may have a number of reasons; however, the most plausible one is merely that there was a direct intent to continue the attacks and destruction of the Ma'dan people.<sup>52</sup>

Despite the fact that the Iraqi infida had long since ended and the people involved had retreated to the marsh areas for safety, the Iraqi government failed to end their actions in the region.<sup>53</sup> In fact, up until the United States' invasion of the country of Iraq in 2003, there are reports of continued military action in the marshes.<sup>54</sup> Reports from Marsh Arab refugees along with pictures and imagery from the area seem to show a pattern of behavior in the region. The military would systematically shell each village and then use tanks, bulldozers and infantry personnel to go into the village.<sup>55</sup> All those that could have potentially been involved in any sort of plot against the government in the

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<sup>51</sup> Anderson, Jon Lee. The New Yorker. Reproduced at Tab #4

<sup>52</sup> Human Rights Watch. Endless Torment: Reproduced at Tab #52

<sup>53</sup> Danish Institute for International Studies. Reproduced at Tab #42

<sup>54</sup> Mylroie, Laurie. Iraqi CW Attacks Against Marsh Arabs, LST. Reproduced at Tab #26

<sup>55</sup> Scheffer, David. Ambassador-at-Large for War Crimes Issues. Dartmouth College. Human Rights and International Justice. October 23, 1998. Reproduced at Tab #86

present or past would either be arrested or sentenced to death on the spot, and the entire village would be burned and/or razed.<sup>56</sup> There are also reports from thousands of people that were forcibly relocated to the northern expanses of Iraq.<sup>57</sup> The extent of the destruction brought forth by these military operations was indicative of a scorched Earth philosophy.<sup>58</sup> The houses would be razed, the crops burned, the date palm trees would be decapitated to eliminate their production, food stuffs would be seized, and land taken for future military outposts.<sup>59</sup> Additionally, there are numerous reports of the use of poisons in the water system to destroy the fishing production, burning of the reed beds to destroy their main craft based monetary source, as well as the use of chemical weapons in the invasions.<sup>60</sup> The loss of the water system caused the transportation of goods that they could continue making nearly impossible, and impeded the escape from the hostile governmental forces.<sup>61</sup>

### C. **The Drainage Project-A Historical Prospective**

From the very dawn of man, the people of Iraq have strived to control the waters of the Tigris and Euphrates rivers for agricultural purposes. In the early 1950's, the country, then under English control, contracted for the production of the Haigh Report which detailed a system of dams, canals, locks and sluices that would enable the country

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<sup>56</sup> Clark, Peter & Magee, Sean. The Iraqi Marshlands: A Human and Environmental Study (2001). Reproduced at Tab #76

<sup>57</sup> Race, Poverty and the Urban Environment. *Plight of the Ma'dan: People of the Iraqi Marshlands*. San Francisco State University, Spring 2004. Reproduced at Tab #55

<sup>58</sup> ICE Case Studies. *Marsh Arabs, Water Diversion, and Cultural Survival*. January, 2001. Reproduced at Tab #54

<sup>59</sup> Schwabach, Aaron. *Ecocide and Genocide in Iraq*: Reproduced at Tab #56

<sup>60</sup> Human Rights Watch. *Endless Torment*: Reproduced at Tab #52

<sup>61</sup> Clark, Peter & Magee, Sean. *The Iraqi Marshlands: A Human and Environmental Study*. Reproduced at Tab #76

of Iraq to divert water from the two mighty rivers and produce thousands of hectares of farmland while desalinating the area.<sup>62</sup> Some minor work began in 1953 on the project but its great expense caused Iraq to abandon the project.<sup>63</sup> However, those plans were put fully into practice in the late 1970's and early 1980's.<sup>64</sup> During that time, the marshes of ancient Mesopotamia began to shrink. However, with the onset of the war with Iran, actions were halted.<sup>65</sup> The majority of the work performed on the intricate plan was done from 1991-1994.<sup>66</sup> Even in the 1990's, the intent of the plan, officially, was to regain marshland for crop production, irrigate other crop locations, and improve sanitation in the area.<sup>67</sup> The effect of the plan was that nearly all of the water that fed the three marshland areas of Iraq was held back or diverted away from the marshland area.<sup>68</sup> As a result of the implementation of this plan, at least ninety percent of the marshes were destroyed by 2003.<sup>69</sup>

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<sup>62</sup> Eden Again Project, The Iraq Foundation. *Building a Scientific Basis for Restoration of the Mesopotamian Marshlands*. February 2003. Reproduced at Tab #49

<sup>63</sup> Evans, Margaret. In-depth Iraq: Reproduced at Tab #13

<sup>64</sup> Dellappenna, Joseph. *The Iraqi Campaign Against the Marsh Arabs: Ecocide as Genocide*. Jurist: Legal Intelligence (January 31, 2003) Available at <<http://jurist.law.pitt.edu/forum/forumnews92.php>>. Reproduced at Tab #10

<sup>65</sup> Alliance Internationale pour la Justice, International Federation for Human Rights. *Iraq: Continuous and Silent Ethnic Cleansing*. January 2003. Reproduced at Tab #48

<sup>66</sup> Evans, Margaret. In-depth Iraq: Reproduced at Tab #13

<sup>67</sup> Dellappenna, Joseph. *The Iraqi Campaign Against the Marsh Arabs*: Reproduced at Tab #10

<sup>68</sup> Eden Again Project, The Iraq Foundation. Reproduced at Tab #49

<sup>69</sup> Silverman, Vickie. The Iraqi Foundation. Saddam Hussein Has Destroyed 90 Percent of Wetlands Heritage. January 27, 2003. Reproduced at Tab #31

In addition to military attacks in the area that killed thousands of civilians, the draining of the marshlands itself caused massive damage.<sup>70</sup> Reports have surfaced that perhaps thousands of people had died or become severely ill from water contamination and disease.<sup>71</sup> These issues were not as present prior to the drainage because the water movement through the marsh areas prevented much of the contaminants from settling and diseases from forming.<sup>72</sup> Also, with the elimination of the marsh environment, the crops, livestock, and reeds that were so vital to the livelihood of the Ma'dan were decimated. The people were forced to decide whether to stay and die from disease and warfare, or become refugee in other countries or in their own.<sup>73</sup>

While the official reason for the drainage program was to enhance productivity for the country, to date, these improvements have yet to be used for any such purpose.<sup>74</sup> Additionally, the military actions in this region, directed toward the Ma'dan people and other marsh dwellers from 1991-2003 provide more than adequate reason to believe that the actual intent for drainage of the marsh areas was for the destruction of the marsh Arabs, their livelihood and their culture, the repression of the Ma'dan as Shia Muslims, and the forced displacement of these peoples from their rightful homeland.<sup>75</sup>

#### D. **The Drainage Project-The Plan's Details**

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<sup>70</sup> United Nations Commission on Human Rights. Statement of Mr. Max Van Der Stoel, Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Iraq. March 31, 1999. Reproduced at Tab #59

<sup>71</sup> Race, Poverty and the Urban Environment. *Plight of the Ma'dan*: Reproduced at Tab #55

<sup>72</sup> Eden Again Project, The Iraq Foundation. Reproduced at Tab #49

<sup>73</sup> European Parliament. Report on the Situation in Iraq Eleven Years After the Gulf War. April 26, 2002. Reproduced at Tab #58

<sup>74</sup> North, Andrew. *Saddam's Water War*. Reproduced at Tab #27

<sup>75</sup> Clark, Peter & Magee, Sean. The Iraqi Marshlands: A Human and Environmental Study (2001). Reproduced at Tab #76

It is important to note the priority given to this project by the Iraqi government. This project cost more money than nearly all other single items in the Iraqi budget for the years of 1991-1994 when the bulk of the building took place.<sup>76</sup> However, with the importance given to a project purported to be the improvement of the economy and crop production of the country, there was never any significant money put into using the newly acquired water to produce viable crop producing areas.<sup>77</sup> Instead, the bulk of the water diverted from the marshes was put into canals that led directly into the Persian Gulf.<sup>78</sup> This by itself has significant evidentiary value in that it tends to negate arguments that the true intent of the actions were for the country's ultimate gain rather than to eliminate a people and their habitat.

This plan, which led to what the United Nations deemed to be, "One of the Earth's major and most thoughtless environmental disasters"<sup>79</sup>, was begun in earnest in 1991 and largely resembled the plan put forth in the 1950's with certain undeniable exceptions.<sup>80</sup>

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<sup>76</sup> Baram, Amatzia. *Between Impediment and Advantage: Saddam's Iraq*. United States Institute of Peace Special Report (June 1998) Available at <[http://sks.sirs.com/cgi-bin/hst-article-display?id=SOH3650-0-2545&artno=0000094680&type=ART&shfilter=U&key=MARSH\\_ARABS\\_&res=N&ren=N&gov=Y&lnk=N&ic=N](http://sks.sirs.com/cgi-bin/hst-article-display?id=SOH3650-0-2545&artno=0000094680&type=ART&shfilter=U&key=MARSH_ARABS_&res=N&ren=N&gov=Y&lnk=N&ic=N)>. Reproduced at Tab #5

<sup>77</sup> The Action Ukraine Report. *A Case of Famine-Genocide: The Decimation of the Marsh Arabs*. (January 30, 2004) Volume 7, Number 4. Available at [http://www.artukraine.com/famineart/marsh\\_arabs.htm](http://www.artukraine.com/famineart/marsh_arabs.htm)>. Reproduced at Tab #1

<sup>78</sup> EcoNews Service. *Environmental War: A Primer & FAQ*. Available at <<http://www.ecologynews.com/cuenews16.html>>. Reproduced at Tab #12

<sup>79</sup> United Nations Economic and Social Council. *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World*. Reproduced at Tab #60

<sup>80</sup> ICE Case Studies. *Marsh Arabs, Water Diversion, and Cultural Survival*. January, 2001. Reproduced at Tab #54



The prize part of this plan was the massive Third River.<sup>81</sup> This canal was intended to clean more than 1.5 million hectares of farmland.<sup>82</sup> This two kilometer wide,<sup>83</sup> 560 kilometer long marvel runs south from Al Mahmudiya, near Baghdad, and eventually joins with the Shatt al Basrah and goes into the Persian Gulf.<sup>84</sup> This project is largely the same as envisioned in the Haigh Report. This is one defense used to justify the actions of the government, however, the original plan made sure that the water leading to the canal was not so diverted as to prevent water from entering into the marshes.<sup>85</sup> That is not what the government of Iraq implemented however. Instead, a massive earth dam was placed some ten kilometers southeast of An Nasiriyah which diverts nearly all of the flow of the Euphrates into the canal and past the marshlands.<sup>86</sup> This addition, along with other changes to the plan, effectively diverts large segments of the river's water prior to entering the majority of the marshlands.<sup>87</sup>

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<sup>81</sup> United States Department of State. *Iraq: From Fear to Freedom*. (December 2002) Available at <[http://sks.sirs.com/cgi-bin/hst-article-display?id=SOH3650-0-2545&artno=0000163882&type=ART&shfilter=U&key=MARSH\\_ARABS\\_&res=Y&ren=Y&gov=Y&lnk=Y&ic=N](http://sks.sirs.com/cgi-bin/hst-article-display?id=SOH3650-0-2545&artno=0000163882&type=ART&shfilter=U&key=MARSH_ARABS_&res=Y&ren=Y&gov=Y&lnk=Y&ic=N)>. Reproduced at Tab #38

<sup>82</sup> UN Office for Coordination of Humanitarian Affairs. *Iraq*: Reproduced at Tab #37

<sup>83</sup> Stutz, Bruce. *Water & Peace*. Audubon (September/October 1994) Available at <[http://sks.sirs.com/cgi-bin/hst-article-display?id=SOH3650-0-2545&artno=0000013643&type=ART&shfilter=U&key=WATER\\_PEACE\\_&res=Y&ren=Y&gov=Y&lnk=Y&ic=N](http://sks.sirs.com/cgi-bin/hst-article-display?id=SOH3650-0-2545&artno=0000013643&type=ART&shfilter=U&key=WATER_PEACE_&res=Y&ren=Y&gov=Y&lnk=Y&ic=N)>. Reproduced at Tab #32

<sup>84</sup> Silverman, Vicki. *Saddam Hussein Has Destroyed 90 Percent of Wetlands Heritage*. Reproduced at Tab #31

<sup>85</sup> Stutz, Bruce. *Water & Peace*. Reproduced at Tab #32

<sup>86</sup> Sharp, Heather. *Iraq's "Devastated" Marsh Arabs*. Reproduced at Tab #30

<sup>87</sup> North, Andrew. *Saddam's Water War*. Reproduced at Tab #27

What the third river fails to divert, the Fourth River, or “Mother of all Battles” River does.<sup>88</sup> This canal takes river water from north of An Nasiriyah and diverts massive portions of the Euphrates into the Khawr az Zubayr and then into the Persian Gulf.<sup>89</sup>

The next phase of the plan is a massive double levee which runs from the Al Jandallah in Misan, thirty-five kilometers southeast to Abu Ajil where it joins up with the Al Amarah canal.<sup>90</sup> This levee effectively cuts off and diverts the water from more than forty rivers and streams which once fed the marshes.<sup>91</sup> In addition to these actions, more than thirty dykes were placed in the marshes to prevent the inflow of water.<sup>92</sup>

Finally, locks and sluices placed at the head of the Tigris distributaries in the Al Amarah area regulate and eliminate flow to the marshes. The effect is to reroute the majority of the water to massive depressions or ponds to evaporate.<sup>93</sup>

#### E. **The Drainage Project-Religious Attacks**

The final prong of this plan was the outright elimination of the leaders of the Shia faith in the marsh area. As stated before, more than one hundred clerics and religious scholars within the Shia faith were taken into custody during the times of the uprising in

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<sup>88</sup> Martin, Glen. *A Dream of Restoring Iraq's Great Marshes Wetlands Destroyed by Hussein Could Thrive Again*. San Francisco Chronicle (April 7, 2003) Available at <<http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/04/07/mn293104.dtl&type=science>>. Reproduced at Tab #25

<sup>89</sup> North, Andrew. *Saddam's Water War*. Reproduced at Tab #27

<sup>90</sup> Schwabach, Aaron. Thomas Jefferson School of Law. Ecocide and Genocide in Iraq: Reproduced at Tab #56

<sup>91</sup> North, Andrew. *Saddam's Water War*. Reproduced at Tab #27

<sup>92</sup> Schwabach, Aaron. Thomas Jefferson School of Law. Ecocide and Genocide in Iraq: Reproduced at Tab #56

<sup>93</sup> ICE Case Studies. Marsh Arabs. Reproduced at Tab #54

1991.<sup>94</sup> In addition to this, from 1991-2003, numerous repressive actions were done against the members of the Shia faith.<sup>95</sup> These actions included attacks on the offices of prominent Shia leaders, restriction on the rights of Shia followers to pray or attend ceremonies required under their faith, and the capture and murder of Shia Leaders.<sup>96</sup> The two leaders whose murders brought the most interest from the outside world were those of Grand Ayattolah Shaykh Mirza Al-Gharawi and Ayattolah Shaykh Murtada Al-Burujerdi.<sup>97</sup> These two were murdered because they performed services and rituals required under their religion, but banned by the Iraqi government. Many of their followers went to the streets to protest their capture and eventual murder, and were themselves the victims of gunfire.<sup>98</sup> This systematic attack on the Shiite faith and the marsh Arabs did not stop at mere actions by the government themselves. The government is reported to have used its propaganda machine to call for the destruction of the Ma'dan people whom they referred to as “subhuman”, “monkey-faced”, and “un-Iraqi”.<sup>99</sup> These actions also bring to light the motives of the Iraqi government, making it clear that their disdain for the people of the marshes was never hidden and quite clear in their words and actions.

F. **After Effects on Nature of the Plan's Implementation**

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<sup>94</sup> Schwabach, Aaron. Thomas Jefferson School of Law. Ecocide and Genocide in Iraq: Reproduced at Tab #56

<sup>95</sup> Anderson, Jon Lee. The New Yorker. Reproduced at Tab #4

<sup>96</sup> The Action Ukraine Report. *A Case of Famine-Genocide*: Reproduced at Tab #1

<sup>97</sup> Dabrowska, Karen. *The Iraqi Marshlands*: Reproduced at Tab #9

<sup>98</sup> Human Rights Watch. *Endless Torment*: Reproduced at Tab #52

<sup>99</sup> United States House of Representatives. *United States and the Iraqi Marshlands*: Reproduced at Tab #66

The environmental effects of these actions are considered, even today, to be largely irreversible.<sup>100</sup> Entire habitats were destroyed, water quality was decimated, and the local climate has been horribly affected.<sup>101</sup> It is believed that many species endemic to the area are now extinct as a result of the marshlands drainage as well as the destruction of grounds that were typically used by migratory birds and spawning areas used by fish and other wildlife.<sup>102</sup> The lack of water runoff from the marshes has allowed salt water into fisheries in the south destroying almost the entire industry.<sup>103</sup> Poisons and other contaminants in the water have destroyed much of the fish in the marshes themselves, causing a complete loss in the fishing industry that once produced sixty percent of the fish consumed by the country.<sup>104</sup> Additionally, because these fish fed on the larvae of mosquitoes that were in the marshland area, the population of mosquitoes has skyrocketed causing increases in diseases carried by the insect.<sup>105</sup> The date palm industry, that once was the world's largest exporter, was decimated mostly by conscious military action.<sup>106</sup> Because of the living conditions, lack of food and outright removal by the military, much of the livestock, eggs, crops and fish are no longer available in the

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<sup>100</sup> The Action Ukraine Report. *A Case of Famine-Genocide*: Reproduced at Tab #1

<sup>101</sup> Clark, Peter, The Iraqi Marshlands: A Pre-War Perspective Reproduced at Tab #8

<sup>102</sup> Dabrowska, Karen. *The Iraqi Marshlands*: Reproduced at Tab #9

<sup>103</sup> Office for Coordination of Humanitarian Affairs. *Iraq: Focus on the Marsh Arabs* Reproduced at Tab #37

<sup>104</sup> European Parliament. Report on the Situation in Iraq Eleven Years After the Gulf War Reproduced at Tab #58

<sup>105</sup> United Nations Environment Programme. Early Assessment and Technical Report. *The Mesopotamian Marshlands: Demise of an Ecosystem*. Reproduced at Tab #61

<sup>106</sup> Sharp, Heather. *Iraq's "Devastated" Marsh Arabs* Reproduced at Tab #30

marshlands.<sup>107</sup> When the military moved through an area, they typically destroyed the reed beds leading to a decrease in local reed production by nearly eighty percent.<sup>108</sup> Finally, the reduction of the water in the marshland area has caused a massive increase in the temperatures in the region, increased water evaporation and decreased precipitation in the region.<sup>109</sup> These phenomena are expected to only continue to worsen until the water levels are significantly increased.<sup>110</sup> Scientists have noted that had this water been used as it was intended, to irrigate other areas, some of the damage done would not have been as extensive,<sup>111</sup> but, as Max Van Der Stoel, Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Iraq stated, there is extremely little evidence of successful land reclamation and indisputable evidence of widespread destruction and human suffering.<sup>112</sup>

G. **After Effects on the Ma'dan People of the Plan's Implementation**

The effect on the habitat was such that it is believed that as many as tens of thousands of Ma'dan people died from the conditions that they were forced to endure.<sup>113</sup> In a statement by the United Nations General Assembly, "the sinking water level makes

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<sup>107</sup> Silverman, Vicki. *Saddam Hussein Has Destroyed 90 Percent of Wetlands Heritage*. Reproduced at Tab #31

<sup>108</sup> Stutz, Bruce. *Water & Peace*. Reproduced at Tab #32

<sup>109</sup> United Nations General Assembly. *General Assembly Concludes General Debate* Reproduced at Tab #35

<sup>110</sup> Stutz, Bruce. *Water & Peace*. Reproduced at Tab #32

<sup>111</sup> Evans, Margaret. *In-depth Iraq: The Marsh Arabs* Reproduced at Tab #13

<sup>112</sup> United Nations Commission on Human Rights. *Statement of Mr. Max Van Der Stoel* Reproduced at Tab #59

<sup>113</sup> Human Rights Watch. *Endless Torment*: Reproduced at Tab #52

survival in the marshlands....almost impossible...”<sup>114</sup> It is also believed that in order to escape the living conditions, more than 200,000 Marsh Arabs voluntarily became refugees within their own country or abroad,<sup>115</sup> and that tens of thousands more were forced against their will into rearabization projects or other forced resettlement programs.<sup>116</sup> In addition to the violent treatment at the hands of the military, the Ma’dan were forced to live with an enforced economic blockade to the area as well as an enforced ban on medical treatment of the wounded marsh dwellers.<sup>117</sup> Absent proper medical care, the people that chose to stay were forced to endure malnutrition, schistosomiasis, worms, cholera, bilharzias, dysentery, other water borne infections and diseases.<sup>118</sup> With the devastated economy in the region, those that were able to find someone to buy their goods were forced to trek through waist high mud to transport products.<sup>119</sup> This effectively eliminated any chance of commerce for the Ma’dan people.

In interviews with Ma’dan refugees in the country of Iran, Baroness Emma Nicholson noted that the psychological impact that this torment has had on the refugees

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<sup>114</sup> United Nations General Assembly. Press Release SC/7664. February 14, 2003. Reproduced at Tab #62

<sup>115</sup> Human Rights Watch. *Justice for Iraq: A Human Rights Watch Policy Paper*. (December 2002) Available at <<http://hrw.org/backgrounders/mena/iraq1217bg.htm>>. Reproduced at Tab #22

<sup>116</sup> Fuller, James. *Legal Expert Describes Iraqi Treatment of Marsh Arabs as Genocide*. Washington File Science Writer. U.S. Department of State (November 18, 2002) Available at <[http://www.ciaonet.org/special\\_section/iraq/papers/doc01/dos01.html](http://www.ciaonet.org/special_section/iraq/papers/doc01/dos01.html)>. Reproduced at Tab #16

<sup>117</sup> Global Environment Outlook 3: Past Present and Future Perspectives. *Our Changing Environment: Mesopotamian Marshlands*. Available at <<http://www.unep.org/geo/geo3/english/137.htm>>. Reproduced at Tab #18

<sup>118</sup> Komarow, Steven. *Iraq’s Marsh Arabs Long for Return of Wetlands*. USA Today (November 25, 2003) Available at <[http://sks.sirs.com/cgi-bin/hst-article-display?id=SOH3650-0-2545&artno=0000178897&type=ART&shfilter=U&key=MARSH\\_ARABS\\_&res=Y&ren=Y&gov=Y&lnk=Y&ic=N](http://sks.sirs.com/cgi-bin/hst-article-display?id=SOH3650-0-2545&artno=0000178897&type=ART&shfilter=U&key=MARSH_ARABS_&res=Y&ren=Y&gov=Y&lnk=Y&ic=N)>. Reproduced at Tab #24

<sup>119</sup> Human Rights Watch. *Iraq: Devastation of Marsh Arabs* Reproduced at Tab #21

was “total and devastating.”<sup>120</sup> She stated that many were in a state of desolation and utter hopelessness and held out little if any hope that they would ever be able to return to the sort of life that they had lived prior to 1991.<sup>121</sup> She stated that they often felt that their plight was unimportant to the outside world and that no change would ever occur in the Government of Iraq.<sup>122</sup>

### **III. INTERNATIONAL CONVENTIONS/CUSTOMARY INTERNATIONAL LAW**

The country of Iraq was subject to a number of treaties and conventions that they had either voluntarily become part of or had otherwise become customary international laws. The Martens Clause of the 1907 Hague Convention incorporated customary international law when it stated, “the inhabitants and belligerents remain under the protection and rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the law of humanity and the dictates of the public conscience.”<sup>123</sup> This allows for the use of customary international law in the absence of a specific rule affecting the area of law. Article 38(1) of the Statute for the International Court of Justice gives some insight as to what should be considered to be customary international law stating, “International Conventions...International Custom, as evidence of a general practice accepted a law,... the general principle of law recognized by civilized nations,...judicial decisions and the teachings of the most highly qualified publicists of

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<sup>120</sup> Human Rights Watch. *Justice for Iraq*: Reproduced at Tab #22

<sup>121</sup> Grove City College Faculty Opinions. Kengor, Paul & Shreckengost Reproduced at Tab #44

<sup>122</sup> World Institute for Development Economics Research. United Nations University. Discussion Paper No.2003/34. Iraqi Forced Migrants in Jordan. April 2003. Reproduced at Tab #47

<sup>123</sup> Schwabach, Aaron. Thomas Jefferson School of Law Reproduced at Tab #56

the various nations.”<sup>124</sup> There are numerous conventions and rulings that can bring insight as to whether these actions constitute a crime under international law.

**A. Conventions That Iraq is a Signatory of**

**1. 1948 Convention on the Prevention and Punishment of the Crime of Genocide**

This convention was convened in part due to the actions in the holocaust as well as some of the atrocities that took place on the eastern front of the Second World War.<sup>125</sup> As Iraq is a signatory of this convention, they are bound to the articles of it. Article 1 clearly states that genocide need not be in a time of war for it to be a crime.<sup>126</sup> The pertinent parts of the definition of the crime of genocide are found in Article 2 when it states that genocide is an act of killing a member of a group, causing serious bodily injury or mental harm to a member of a group, and deliberately inflicting conditions of life on a group that are calculated to bring about their demise in whole or in part, when the acts are intended to destroy in whole or in part a national, ethnic, racial or religious group.<sup>127</sup> This convention allows for the punishment of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity to commit genocide.<sup>128</sup> As a signatory of this convention, if there is sufficient

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<sup>124</sup> Schwabach, Aaron. Thomas Jefferson School of Law. Reproduced at Tab #56

<sup>125</sup> Ghoshray, Saby. Enforcing International Criminal Law in the Iraqi Special Tribunal: Reproduced at Tab #51

<sup>126</sup> United Nations. Convention on the Prevention and Punishment of the Crime of Genocide. December 9, 1948. Article 1. Reproduced at Tab #81

<sup>127</sup> United Nations. Convention on the Prevention and Punishment of the Crime of Genocide. December 9, 1948. Article 2. Reproduced at Tab #81

<sup>128</sup> United Nations. Convention on the Prevention and Punishment of the Crime of Genocide. December 9, 1948. Article 3. Reproduced at Tab #81



evidence to suggest that the leadership of Iraq acted with the intent to destroy the Ma'dan people, they would clearly be in violation of this convention.

Intent remains one of the most difficult hurdles to any criminal case. With the facts present in this case, it is important to note the extensively long timeframe of the criminal activity, which would allow for the correction of criminal action and the recuperation of the marshlands had the leadership desired to do so. In order to show that the specific intent was the murder or destruction of the Ma'dan, rather than merely their forcible removal from the area, one should only have to look towards the means used. Had the intent to be the moving of the people, the substantiated claims regarding mass murder of civilians would not have been necessary. Additionally, the blockade which prevented the Marsh Arabs from attaining medical care in their own country was wholly unnecessary if actions other than the destruction of the people were the true intent.

## **2. Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War**

This convention was signed by the country of Iraq and is therefore binding on them as international law.<sup>129</sup> Under the common Article 3 of this convention, the parties to this convention, in the case of a non-international armed conflict must treat persons who are not party to the conflict, even if they are not a party due to illness or injury, with humanity.<sup>130</sup> Additionally, treatment, whether it is ill or well, shall not be contingent on the race, color, religion or faith, sex, birth or wealth, or any other similar criteria of the

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<sup>129</sup> Ghoshray, Saby. Enforcing International Criminal Law in the Iraqi Special Tribunal: Reproduced at Tab #51

<sup>130</sup> Schwabach, Aaron. Thomas Jefferson School of Law. Reproduced at Tab #56

person or group.<sup>131</sup> Additionally, Article 147 states that it will be considered a grave breach of the convention if any of the following actions take place: “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”<sup>132</sup> If there is evidence that non-parties to the armed conflict were treated in an inhumane manner or any of the breaches spoken of in Article 147 have been committed, then Iraq is in breach of this convention.

Even if the intent was not solely to cause the death of the Ma’dan peoples, this convention shall grant them relief. As they were not a party to any armed conflict after the time of 1991, they would surely be covered by the protections of this convention. There seems to be substantial evidence to suggest that the Ma’dan people were treated inhumanely and that they were subject to willful killing, injury to body and mind, and destruction and appropriation of property. The government of Iraq does not dispute that they forcibly took land from the Ma’dan people by way of draining the marshlands and appropriating certain tracts of land for military outposts. This being the case, they knowingly committed a grave breach of Article 147. Additionally, evidence can be

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<sup>131</sup> Clark, Peter & Magee, Sean. The Iraqi Marshlands: A Human and Environmental Study. Reproduced at Tab #76

<sup>132</sup> Schwabach, Aaron. Thomas Jefferson School of Law. Reproduced at Tab #56

brought to bear to prove the existence of murderous intent with the destruction of the marshlands.

### **3. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques**

The ENMOD Convention is both signed by the country of Iraq and considered to be customary international law; therefore, Iraq is subject to its articles.<sup>133</sup> Article I states that each party will undertake to not use environmental manipulation or modification techniques to cause widespread, long-lasting, or severe harm to another state party.<sup>134</sup> The terms widespread, long-lasting and severe are intended, under this convention, to mean several hundred kilometers, a period of months, and involving serious or significant disruption or harm to human life, natural and economic resources and other assets respectively.<sup>135</sup> Environmental manipulation has two main categories.<sup>136</sup> First, those acts which involve massive and extended applications of disruptive techniques. Second, those acts which involve small disruptive actions but release massive amounts of destructive energy.<sup>137</sup> In the present case, the first type of category is present. The second category is most easily described as when a dam is destroyed. The energy necessary to cause the harm is short term and relatively small in size, but the destructive

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<sup>133</sup> Schwabach, Aaron. Thomas Jefferson School of Law. Reproduced at Tab #56

<sup>134</sup> United Nations. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. Geneva, Switzerland. May 18, 1977. Article 1. Reproduced at Tab #82

<sup>135</sup> United Nations. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. Geneva, Switzerland. May 18, 1977. Understanding to Article 1. Reproduced at Tab #82

<sup>136</sup> United Nations. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. Geneva, Switzerland. May 18, 1977. Understanding to Article 2. Reproduced at Tab #82

<sup>137</sup> Westing, Arthur. The Woodrow Wilson International Center for Scholars. *Environmental Warfare: Manipulating the Environment for Hostile Purposes*. Spring 1997. Reproduced at Tab #57

nature of the result is massive.<sup>138</sup> Article IV encourages countries who are a party to the convention to take measures that are appropriate to prevent environmental damage within their own jurisdiction.<sup>139</sup> Under the auspices of this convention, the state of Iraq will be liable for a breach of this convention if it can be effectively proven that the Ma'dan peoples are a state party under the convention.

While this convention is generally viewed to protect actions against foreign states, it may be important in the formation of an argument that such protections should be extended within their own boundaries.

#### **4. International Covenant on Economic, Social and Cultural Rights**

This convention was signed by the country of Iraq and is therefore binding upon the country as a voluntary signatory.<sup>140</sup> Subsection (2) of Article 1 States that all peoples may freely dispose of their natural wealth and resources without prejudice, but that in no case may a people be deprived of their means of subsistence.<sup>141</sup> As a signatory of this convention Iraq seems to be in breach if it can be proven that the Ma'dan people had their means of subsistence taken from them.

The question with regard to this convention is what particularly constitutes a people. Largely, international judiciaries have held that in this type of context, they mean

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<sup>138</sup> United Nations. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. Geneva, Switzerland. May 18, 1977. Understanding to Article 2. Reproduced at Tab #82

<sup>139</sup> United Nations. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. Geneva, Switzerland. May 18, 1977. Article 4. Reproduced at Tab #82

<sup>140</sup> Sullivan, Stacy. *Has the Prosecution Made the Case?* Foreign Policy in Focus (February 19, 2004) Available at <<http://observer.guardian.co.uk/international/story/0,6903,1158041,00.html>>. Reproduced at Tab #33

<sup>141</sup> Schwabach, Aaron. Thomas Jefferson School of Law Reproduced at Tab #56

a country or other large segment of society. It is unclear at this time whether an argument can be made that the Ma'dan people constitute a people under the auspices of this definition.

## **B. Customary International Law**

### **1. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)**

Protocol I of the Geneva Conventions is widely accepted as being customary international law and is therefore binding on all countries that have failed to blatantly refuse to accept the auspices of the law.<sup>142</sup> Since Iraq has failed in their obligations regarding refusal to accept, they are therefore bound under the auspices of this convention. While this convention is largely to protect the combatants in international conflict, Subsection (4) of Article One states that this protocol also affects, "armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."<sup>143</sup> In defining what would constitute a racist regime, the Commentary to Article one states that there should be at least a rift within a people which ensures hegemony of one section in accordance with racist ideas.<sup>144</sup> Article 35, Subsection (3) states that it is prohibited to employ methods or means of warfare intended or expected to cause widespread, long-

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<sup>142</sup> Schwabach, Aaron. Thomas Jefferson School of Law Reproduced at Tab #56

<sup>143</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1). June 8, 1977. Article 1(4). Reproduced at Tab #83

<sup>144</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1). June 8, 1977. Commentary to Article 1. Reproduced at Tab #83

term, and severe damage to the natural environment.<sup>145</sup> The definitions of widespread, long-term, and severe are not present in the commentary.<sup>146</sup> Article 54 prohibits the attacking, destroying, or rendering useless objects that are indispensable to the survival of the civilian population. These items are noted as including drinking water supplies and installations, food stuffs, and agricultural areas for the production of foodstuffs.<sup>147</sup> Article 55 states that due care should be taken to protect the natural environment against widespread, long-term, and severe damage which will prejudice the health and survival of the population.<sup>148</sup>

It seems evident from the propaganda put forth by the Iraqi government that there would certainly be a rift present that would satisfy the racist regime requirement. Additionally, while it is uncertainly what the convention means by the terms widespread, long-term, and severe, it can be inferred that the circumstances in this case would certainly qualify as this constitutes the destruction of more than 18,000 kilometers of marshlands over the course of twelve years, involving harm to hundreds of thousands of people. Additionally, the destruction of the Ma'dan people's ability to attain sustenance through the destruction of the marshes would constitute a breach of Article 54.

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<sup>145</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1). June 8, 1977. Article 35(3). Reproduced at Tab #83

<sup>146</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1). June 8, 1977. Commentary to Article 35. Reproduced at Tab #83

<sup>147</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1). June 8, 1977. Article 54. Reproduced at Tab #83

<sup>148</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1). June 8, 1977. Article 55. Reproduced at Tab #83

## **2. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)**

This convention has been widely accepted as customary international law, and, as such is binding upon the country of Iraq.<sup>149</sup> Article one states that this convention is intended to be for the protection of internal armed conflicts in which the dissidents or other armed groups are under reasonable command and exercise enough control over part of the territory as to enable the carrying out of military operations.<sup>150</sup> These conditions are important in that they delineate these instances from those in which there is a mere internal disturbance, riot, or other isolated or sporadic act of violence.<sup>151</sup> Article 2 states that those who have been deprived of liberty during or after the conflict will have the protections of Articles 5 and 6 until such time as their liberty is restored.<sup>152</sup> Article 3 says that the provisions of this convention do not limit the ways in which a sovereign power may legally reestablish law and order within their boundaries.<sup>153</sup> Article 4 states that those who are not a part of the hostilities or who have ceased to be a part of the hostilities are to be granted respect for their person, honor, convictions and religious

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<sup>149</sup> Schwabach, Aaron. Thomas Jefferson School of Law Reproduced at Tab #56

<sup>150</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). June 8, 1977. Article 1. Reproduced at Tab #84

<sup>151</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). June 8, 1977. Article 1(2). Reproduced at Tab #84

<sup>152</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). June 8, 1977. Article 2. Reproduced at Tab #84

<sup>153</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). June 8, 1977. Article 3. Reproduced at Tab #84

practices, and shall be treated humanely without adverse distinction.<sup>154</sup> Article 4 Subsection (2) states that collective punishments and acts of terrorism shall be prohibited.<sup>155</sup> Article 5 Subsection (3) states that if a party has their liberty restricted in any way, the party restricting said liberty must comply with the rules set forth in Article 4 and Article 5 Sub Subsections (1)(a,c,d) and (2)(b).<sup>156</sup> Sub Subsection 5 (1) (a) states that the wounded shall be given medical treatment.<sup>157</sup> Sub subsection 5 (1) (c) states that the group will be afforded collective relief.<sup>158</sup> Sub subsection 5 (1) (d) says that the restricted party will be allowed to fully practice their religion if possible.<sup>159</sup> Sub Subsection 5 (2) (b) allows for the restricted party to send and receive correspondence.<sup>160</sup> Article 6 Subsection (5) notes that at the end of the hostilities, the governing party will endeavor to grant broad amnesty to those who participated in the uprising and those

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<sup>154</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). June 8, 1977. Article 4. Reproduced at Tab #84

<sup>155</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). June 8, 1977. Article 4(2). Reproduced at Tab #84

<sup>156</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). June 8, 1977. Article 5(3). Reproduced at Tab #84

<sup>157</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). June 8, 1977. Article 5(1)(a). Reproduced at Tab #84

<sup>158</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). June 8, 1977. Article 5(1)(c). Reproduced at Tab #84

<sup>159</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). June 8, 1977. Article 5(1)(d). Reproduced at Tab #84

<sup>160</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). June 8, 1977. Article 5(2)(b). Reproduced at Tab #84



whom had their freedoms and liberty restricted or deprived.<sup>161</sup> Article 13 grants the greatest protection available to civilians from military operations.<sup>162</sup> Subsection 13 (2) states that the civilian population shall not be the target of military attack and that acts or threats of violence for the purpose of spreading fear amongst the people shall not be permitted in any way.<sup>163</sup> Article 14 notes that starvation is prohibited as well as any attempt to attack, destroy, remove or render useless objects which are indispensable for the survival of the civilian populations.<sup>164</sup> Such items are generally believed to be foodstuffs, agricultural areas, crops, livestock, and drinking water. Article 17 Subsection (1) states that there must be imperative military reasons for the displacement of a civilian population to be ordered.<sup>165</sup> Article 17 Subsection (2) states that civilians shall not be compelled to leave their own territory.<sup>166</sup>

The most important hurdle in this statute is to prove that the level of control that the rebelling parties had was sufficient to justify protection under this convention. There

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<sup>161</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). June 8, 1977. Article 6(5). Reproduced at Tab #84

<sup>162</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). June 8, 1977. Article 13. Reproduced at Tab #84

<sup>163</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). June 8, 1977. Article 13(2). Reproduced at Tab #84

<sup>164</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). June 8, 1977. Article 14. Reproduced at Tab #84

<sup>165</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). June 8, 1977. Article 17(1). Reproduced at Tab #84

<sup>166</sup> United Nations. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). June 8, 1977. Article 17(2). Reproduced at Tab #84

is reason to believe that the rebels held numerous cities in the south for no less than two full weeks. Therefore, it seems apparent that they would satisfy this prong of the test, thereby substantiating the bringing of charges for breaches of all of the above mentioned articles.

### **3. Rome Statute of the International Criminal Court**

While Iraq is not a party to this court, this statute has attained the level of customary international law, and is therefore enforceable upon the government of the country of Iraq.<sup>167</sup> The definition of the crime of Genocide noted in this statute is identical to those of the 1948 Genocide Convention; therefore, it need not be further discussed.<sup>168</sup> It is important to note Article 7 Crimes Against Humanity. According to this code, it constitutes a crime against humanity when an act is performed in coordination with a systematic and widespread attack on a civilian population and when the perpetrator has knowledge of the attack.<sup>169</sup> These acts are murder, extermination, enslavement, deportation or other forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred

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<sup>167</sup> Schwabach, Aaron. Thomas Jefferson School of Law. Reproduced at Tab #56

<sup>168</sup> Rome Statute of the International Criminal Court. July 12, 1999. Article 6. Reproduced at Tab #80

<sup>169</sup> Rome Statute of the International Criminal Court. July 12, 1999. Article 7. Reproduced at Tab #80

to in this paragraph or any crime within the jurisdiction of the Court, enforced disappearance of persons, the crime of apartheid, and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>170</sup>

By the International Criminal Court's Statute being a customary international law, its definitions, which are largely the same as in the Statute for the Iraqi Special Tribunal, bring increased credence of the requirements under the IST. It is important to note that an attack against a civilian population requires that the attack be within a course of conduct and that the action be in furtherance of governmental policy.<sup>171</sup> The term extermination includes the use of conditions of life to bring about the demise of part of the population. These conditions include the deprivation of access to food or medical care.<sup>172</sup> Forced transfer of population means the use of force or other coercive mean to displace a population from a location which they lawfully abide in.<sup>173</sup> Persecution means the intentional, severe, and unlawful deprivation of fundamental rights tied to identity within a group or collectivity.<sup>174</sup>

### **C. Potentially Customary International Law**

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<sup>170</sup> Rome Statute of the International Criminal Court. July 12, 1999. Article 7(1)(a,b,c,d,e,f,g,h,i,j,k). Reproduced at Tab #80

<sup>171</sup> Rome Statute of the International Criminal Court. July 12, 1999. Article 7(2)(a). Reproduced at Tab #80

<sup>172</sup> Rome Statute of the International Criminal Court. July 12, 1999. Article 7(2)(b). Reproduced at Tab #80

<sup>173</sup> Rome Statute of the International Criminal Court. July 12, 1999. Article 7(2)(d). Reproduced at Tab #80

<sup>174</sup> Rome Statute of the International Criminal Court. July 12, 1999. Article 7(2)(g). Reproduced at Tab #80

## **1. Convention Concerning the Protection of the World Cultural and Natural Heritage**

While this convention is not signed by the Country of Iraq, it could be deemed to customary international law and therefore would be enforceable if such a determination is made.<sup>175</sup> Additionally, at this juncture, the Iraqi marshlands have not been designated as a World Heritage Site because the country of Iraq failed to request that such an action take place. If the court finds that this law is applicable to the situation at bar, then the country would be bound by the Article which states that they are to ensure the identification, protection, conservation, presentation, and transmission to future generations of the cultural and natural heritage...situated on its territory.<sup>176</sup>

## **2. Universal Declaration of Human Rights**

This is another convention that may or may not be deemed to have reached the status of customary international law. If it has, then the country of Iraq would be bound by its articles. Article 3 states that all people have a right to life, liberty and security of their person. Article 5 decrees that no one should be subject to cruel or inhumane treatment. Article 9 says that no one should be forced into exile. Article 13 states that all persons should have the right to freedom of movement and residence. Article 17 says that no one should be arbitrarily deprived of their property.<sup>177</sup>

## **IV. THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL**

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<sup>175</sup> Sullivan, Stacy. *Has the Prosecution Made the Case*. Reproduced at Tab #33

<sup>176</sup> Schwabach, Aaron. Thomas Jefferson School of Law Reproduced at Tab #56

<sup>177</sup> United Nations General Assembly. Resolution 217 A (III) of 10, Universal Declaration of Human Rights. December 10, 1948. Reproduced at Tab #85

When the United States invaded Iraq in 2003, the international community declared that those within the governing body of Iraq, who had committed crimes under international law, should stand before a tribunal and be forced to defend their actions. In accordance with that declaration, the rules of law, under which these persons will be charged, have been set forth.<sup>178</sup> Many of the rules of law are identical to other criminal provisions discussed above. When reviewing the IST's Statute, we should evaluate the crimes and potential defenses that are prevalent among cases from the tribunals in the former Yugoslavia and in Rwanda.

**A. Criminal Responsibility, Criminal Participation, and Command Responsibility**

In order for a person to be held liable for any crime under international law, they must be first found to have knowingly been involved in the commission of the crime.<sup>179</sup> First of all, there is the concept of individual criminal responsibility. This responsibility extends as high as any officer within the chain of command who knew of the acts taking place.<sup>180</sup> In order to prove that the party should be held to have criminal responsibility, it

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<sup>178</sup> Coalition Provisional Authority. The Statute of the Iraqi Special Tribunal. Reproduced at Tab #78

<sup>179</sup> Di Stefano, Giovanni. *In Defense of Saddam Hussein*. Reproduced at Tab #11

<sup>180</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. Trial Chamber II. Judgment. Prosecutor v. Blagoje Simić, Miroslav Tadić, and Simo Zarić. October 17, 2003. Reproduced at Tab #71

must be shown that they participated in the planning or implementation of the plan with some knowledge of the plan's intent.<sup>181</sup>

Participation has been broken down into five elements; planning, incitement, ordering, commission, and aiding and abetting.<sup>182</sup> In order to be found liable for planning the criminal act, one or more parties must have contemplated the preparation and implementation phases of the plan.<sup>183</sup> For a finding of incitement participation, one must have investigated another, directly and publicly with the intent that they commit the offense.<sup>184</sup> Except for the case of genocide, this only constitutes a crime if the actual offense is committed.<sup>185</sup> Ordering participation requires a superior agent to demand the commission of the crime from a subordinate party. The Yugoslavian Tribunal held in *Blaskić* that a party who orders an act or omission must be aware of the substantial likelihood that a crime will be committed in the execution of the order in order to show the required *mens rea* to be deemed culpable.<sup>186</sup> Commission participation may take place through a direct inflicting of harm or through the intended omission of an act that is

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<sup>181</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. Appeals Chamber. Judgment. Prosecutor v. Tihomir Blaškić. July 29, 2004. Reproduced at Tab #69

<sup>182</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment and Sentence. The Prosecutor Versus Georges Rutaganda. December 6, 1999. Reproduced at Tab #75

<sup>183</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. Appeals Chamber. Judgment. Prosecutor v. Tihomir Blaškić. July 29, 2004. Reproduced at Tab #69

<sup>184</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment and Sentence. The Prosecutor Versus Georges Rutaganda. December 6, 1999. Reproduced at Tab #75

<sup>185</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment. The Prosecutor Versus Jean-Paul Akayesu. September 2, 1998. Reproduced at Tab #72

<sup>186</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. Appeals Chamber. Judgment. Prosecutor v. Tihomir Blaškić. July 29, 2004. Reproduced at Tab #69

required to prevent an offense from taking place.<sup>187</sup> Aiding and Abetting the commission of an act is a multifaceted act that takes place during the planning phase of the crime.<sup>188</sup> The party need not be present at the commission of the crime to be held liable. In fact, the assistance need not even be geographically or temporarily tied to that of the crime's commission.<sup>189</sup> The act must contribute substantially to the commission of the crime and may be in the form of physical assistance or moral support. The party must also demonstrate knowledge of the crime's broader intent.<sup>190</sup>

Command Responsibility is a very powerful concept that must be shown in order to convict leaders for acts tied to criminal activity. In order to show that the party held command responsibility, there must first be a showing that they held effective command and control over the parties that committed the act.<sup>191</sup> If they cannot be shown to hold said power, then they may not be held liable. Also, they must be shown to have had or should have had knowledge of the commission of the criminal act by their subordinates and failed to take action to prevent or mitigate the harm caused.<sup>192</sup> If the party was unable to halt or mitigate the commission of the acts, they must actively show that they

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<sup>187</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment and Sentence. The Prosecutor Versus Jean Kambanda. September 4, 1998. Reproduced at Tab #73

<sup>188</sup> United Nations International Criminal Tribunal for Rwanda. Appeals Chamber. Reasons for Judgement.. The Prosecutor Versus Omar Serushago. April 6, 2000. Reproduced at Tab #74

<sup>189</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. Appeals Chamber. Judgment. Prosecutor v. Tihomir Blaškić. July 29, 2004. Reproduced at Tab #69

<sup>190</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment and Sentence. The Prosecutor Versus Georges Rutaganda. December 6, 1999. Reproduced at Tab #75

<sup>191</sup> Van Schaack, Beth. *Command Responsibility-A Step Backwards*. The Advocacy Project (July 7, 1998) Available at <[http://advocacynet.org/news\\_view/news\\_119.html](http://advocacynet.org/news_view/news_119.html)>. Reproduced at Tab #39

<sup>192</sup> Bar-Yaacov, Nomi. *Command Responsibility*. The Crimes of War Book. Available at <<http://www.crimesofwar.org/thebook/command-respon.html>>. Reproduced at Tab #6

reported the crimes to the proper authorities and ensured that the parties that took part in the crimes were prosecuted for their actions.<sup>193</sup>

## **B. Evaluation of Elements of Crimes**

### **1. Genocide**

#### **a. General Standards**

Article 11 of the Statute for the Iraqi Special Tribunal delineates the requirements for the Crime of Genocide. Genocide is defined as the commission of one or more of a group of acts with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.<sup>194</sup> Since this crime can be prosecuted against those who directly committed the acts as well as those who planned and ordered the actions, the international courts have held prosecutors to a very high standard to prove the “crime of crimes.”<sup>195</sup>

Other than the specific crimes involved, the tribunals in Rwanda and the former Yugoslavia have noted the importance of the concepts of “in part”, “intent”, and “group”. They have defined and solidified the meanings of these portions and have shown the requirements burdening the prosecution under these rules.

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<sup>193</sup> Benesch, Susan. *Salvadoran Generals on Trial: Command Responsibility in a Florida Courtroom*. The Crime of War Project (August 19, 2002) Available at <<http://www.crimesofwar.org/print/onnews/elsalvador-print.html>>. Reproduced at Tab #7

<sup>194</sup> Coalition Provisional Authority. The Statute of the Iraqi Special Tribunal. Article 11. Reproduced at Tab #78

<sup>195</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment. The Prosecutor Versus Jean-Paul Akayesu. September 2, 1998. Reproduced at Tab #72



First of all, “in part” has been determined to require being a substantial portion of the group.<sup>196</sup> In order to be determined to be a substantial portion, the courts have reviewed the targeted group’s numeric size, their prominence within the whole of the group, and the area of the perpetrator’s activity and control in committing the crimes.<sup>197</sup>

The “intent” element of the crime of Genocide has been shown to be very important and illusory. International courts have grappled with the concept of *dolus specialis*, or special intent, which means that in order to be convicted of the crime of genocide one must show that they intended the specific crime to occur against a party because of the victim’s group affiliation.<sup>198</sup> The *Akayesu* court held that the victim must be chosen because of their membership in the protected group, therefore the victim can actually be said to have been the group, rather than the individual themselves.<sup>199</sup> The courts have notes that the intent is a mental aspect that cannot readily be proven without a confession, therefore they have allowed for circumstantial evidence to prove the specific intent.<sup>200</sup> The International Criminal Court has allowed for the evaluation of the nature of the orders given that led to the act in determining whether special intent was

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<sup>196</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment and Sentence. The Prosecutor Versus Georges Rutaganda. December 6, 1999. Reproduced at Tab #75

<sup>197</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment and Sentence. The Prosecutor Versus Georges Rutaganda. December 6, 1999. Reproduced at Tab #75

<sup>198</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment. The Prosecutor Versus Jean-Paul Akayesu. September 2, 1998. Reproduced at Tab #72

<sup>199</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment. The Prosecutor Versus Jean-Paul Akayesu. September 2, 1998. Reproduced at Tab #72

<sup>200</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment and Sentence. The Prosecutor Versus Georges Rutaganda. December 6, 1999. Reproduced at Tab #75

present.<sup>201</sup> The Rwanda and Yugoslavia tribunals have allowed for a number of factors to be reviewed such as presumptions of fact, the general context of other culpable acts, the scale of the atrocities, the deliberate and systematic nature of the acts, specific words or deeds used, and the direct targeting of a specific group while excluding other groups.<sup>202</sup>

The idea of a protected group is one that permeates the entirety of international law. In this case, the Rwanda tribunal has chosen to define each of the protected groups as well as expand on the notion of a protected group. First, they find a “national” group to be a collectivity of people who are perceived to share a legal bond based on citizenship, coupled with the interplay of rights and duties.<sup>203</sup> Next, they find an “ethnic” group to be one in which its members share a common language or culture.<sup>204</sup> A “racial” group is identified based on hereditary traits which are often specific to a geographical region, irrespective of linguistic, cultural, national, or religious factors.<sup>205</sup> Finally, a “religious” group is deemed to share the same religion, denomination or mode of worship.<sup>206</sup> Whether a particular group should be deemed to be within a protected class

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<sup>201</sup> Ghoshray, Saby. *Enforcing International Criminal Law*. Reproduced at Tab #51

<sup>202</sup> Sullivan, Stacy. *Has the Prosecution Made the Case?* Reproduced at Tab #33

<sup>203</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment. The Prosecutor Versus Jean-Paul Akayesu. September 2, 1998. Reproduced at Tab #72

<sup>204</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment. The Prosecutor Versus Jean-Paul Akayesu. September 2, 1998. Reproduced at Tab #72

<sup>205</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment. The Prosecutor Versus Jean-Paul Akayesu. September 2, 1998. Reproduced at Tab #72

<sup>206</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment. The Prosecutor Versus Jean-Paul Akayesu. September 2, 1998. Reproduced at Tab #72

has generally been reviewed on a case-by-case basis, but may also include any stable and identifiable group.<sup>207</sup>

b. **Killing**

While the definitions of killing differs from country to country, the international courts have deemed that it is important for to onus be on the prosecution in any case and that all protections should be afforded the accused in international cases. In that regard, they have held that the more stringent standard of killing with the specific intent to cause death should be proven in such cases.<sup>208</sup>

c. **Causing Serious Bodily or Mental Harm**

The court in Rwanda has held that this crime shall include, but not be limited to bodily and mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution.<sup>209</sup> The court notes that the harm caused need not be permanent for this to constitute a crime.<sup>210</sup> The crime of persecution also falls under the auspices of crimes against humanity.

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<sup>207</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment. The Prosecutor Versus Jean-Paul Akayesu. September 2, 1998. Reproduced at Tab #72

<sup>208</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment and Sentence. The Prosecutor Versus Georges Rutaganda. December 6, 1999. Reproduced at Tab #75

<sup>209</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. Trial Chamber II. Judgment. Prosecutor v. Blagoje Simić, Miroslav Tadić, and Simo Zarić. October 17, 2003. Reproduced at Tab #71

<sup>210</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. Trial Chamber II. Judgment. Prosecutor v. Blagoje Simić, Miroslav Tadić, and Simo Zarić. October 17, 2003. Reproduced at Tab #71

d. **Inflicting Conditions of Life Calculated to Bring About a Group's Destruction**

The *Rutaganda* court held that this crime includes all methods of destruction by which the perpetrator does not necessarily intend to immediately kill the members of the group, but which are ultimately aimed at the group's physical destruction.<sup>211</sup> These methods include subjecting the people to a subsistence diet, systematic expulsion of people from their homes, and deprivation of essential medical supplies.<sup>212</sup> This act does not require that the group actually be destroyed, but rather that an attempt be made through the implementation of these means.<sup>213</sup>

2. **Crimes Against Humanity**

a. **General Standards**

Crimes against humanity require four major elements be present to constitute a crime. In addition to these elements, the courts have held that the attack must be directed against the target population and that the perpetrator must know that his actions are in

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<sup>211</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment and Sentence. The Prosecutor Versus Georges Rutaganda. December 6, 1999. Reproduced at Tab #75

<sup>212</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment and Sentence. The Prosecutor Versus Georges Rutaganda. December 6, 1999. Reproduced at Tab #75

<sup>213</sup> Sullivan, Stacy. *Has the Prosecution Made the Case?* Reproduced at Tab #33

furtherance of this attack.<sup>214</sup> The targeted group includes not only the base group, but also those who are deemed by the perpetrator to be sympathetic to the target group.

The first element is that the action must be inhumane in nature and character, thereby causing great suffering to body or mind.<sup>215</sup>

Next, the act must be part of a widespread or systematic attack. The *Rutaganda* court held that “widespread” should be deemed to mean a massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.<sup>216</sup> That same court held “systematic” to mean a thoroughly organized action following a regular pattern on the basis of a common policy and involving substantial public or private resources.<sup>217</sup> The *Simic* court held that a tribunal may review factors such as the consequences on the targeted population, the number of victims, the nature of the attack, the participation of officials and authorities, or patterns of the crime when determining whether an act is widespread or systematic.<sup>218</sup>

Next, the act must be committed against a civilian population. A “civilian population” is broadly interpreted to include not only persons who are not directly party

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<sup>214</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. Trial Chamber II. Judgment. Prosecutor v. Blagoje Simić, Miroslav Tadić, and Simo Zarić. October 17, 2003. Reproduced at Tab #71

<sup>215</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment and Sentence. The Prosecutor Versus Georges Rutaganda. December 6, 1999. Reproduced at Tab #75

<sup>216</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment and Sentence. The Prosecutor Versus Georges Rutaganda. December 6, 1999. Reproduced at Tab #75

<sup>217</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment and Sentence. The Prosecutor Versus Georges Rutaganda. December 6, 1999. Reproduced at Tab # 75

<sup>218</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. Trial Chamber II. Judgment. Prosecutor v. Blagoje Simić, Miroslav Tadić, and Simo Zarić. October 17, 2003. Reproduced at Tab #71

to hostilities, but also to those who have been placed *hors de combat* due to illness, injury, detention, or other such reasons.<sup>219</sup> To take direct part in hostilities is defined as taking part in acts of war by which their nature or purpose is to cause actual harm to the personnel and equipment of the enemy forces.<sup>220</sup>

Finally, the actions must be committed on one or more discriminatory grounds. This element has been the brunt of numerous cases and has been found to vary from tribunal to tribunal. The Rwanda tribunal is similar to that of the IST in that it only specifically denotes discriminatory purpose for the crime of persecution, therefore, it can be inferred that this tribunal will only require it for this specific act.

b. **Murder**

Murder, as described for the “killing” act under the Genocide article, requires that the party commit or order an unlawful act or omission leading to the death of the victim, when, at the time of the crime, the perpetrator had the intent to cause grievous bodily harm.<sup>221</sup> Since the IST Statute does not speak to the requirement of discriminatory intent in the commission of this crime, it is uncertain whether it will be required.

c. **Extermination**

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<sup>219</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment and Sentence. The Prosecutor Versus Georges Rutaganda. December 6, 1999. Reproduced at Tab #75

<sup>220</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment. The Prosecutor Versus Jean-Paul Akayesu. September 2, 1998. Reproduced at Tab #72

<sup>221</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. Trial Chamber II. Sentencing Judgment. Prosecutor v. Dragan Nikolić. December 18, 2003. Reproduced at Tab #70

Extermination requires elements of mass destruction and by its nature seems to require an element of discriminatory purpose.<sup>222</sup> The essential elements are that the accused or an ordered subordinate were involved in the killing of a group of described people, that the act or omission was unlawful and intentional, part of a widespread or systematic attack against a civilian population, and the victims qualify as a protected group.<sup>223</sup> This crime does not require the direct act of killing, but may also include a group of underlying acts which lead to the death of the targeted group.<sup>224</sup>

d. **Deportation**

The IST Statute defines this as the forcible displacement of persons, who lawfully reside in an area, through direct expulsion or other coercive acts.<sup>225</sup> This displacement must not be justified under other international law. The displacement may take place within the country's borders or may extend to another country and must involve the intent of the perpetrator to force such a move and that displacement be permanent.<sup>226</sup> If there is a question as to the intention of the victim to move, the international courts have pushed for a full evaluation of the victim's circumstances at the time of the move to ensure that

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<sup>222</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment and Sentence. The Prosecutor Versus Georges Rutaganda. December 6, 1999. Reproduced at Tab #75

<sup>223</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment and Sentence. The Prosecutor Versus Georges Rutaganda. December 6, 1999. Reproduced at Tab #75

<sup>224</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment and Sentence. The Prosecutor Versus Georges Rutaganda. December 6, 1999. Reproduced at Tab #75

<sup>225</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. Trial Chamber II. Judgment. Prosecutor v. Blagoje Simić, Miroslav Tadić, and Simo Zarić. October 17, 2003. Reproduced at Tab #71

<sup>226</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. Trial Chamber II. Judgment. Prosecutor v. Blagoje Simić, Miroslav Tadić, and Simo Zarić. October 17, 2003. Reproduced at Tab #71

they were not subject to an inherently coercive environment when they chose to leave. A lack of true free will may be inferred from acts such as shelling of civilian locations, burning of civilian property, threats or acts of force, or other crimes intended to terrify the population.<sup>227</sup>

e. **Persecution of a Group or Collectivity**

The court has held that the crime of persecution requires a finding that the accused committed acts or omissions against a victim or victim population, violating their basic or fundamental rights, that the accused intended to commit the violation, that there was a discriminatory purpose, and that the acts were committed on political, racial, or religious grounds.<sup>228</sup> When determining cases of persecution where the elements are not spelled out in the statute, the courts must view the action in its context and its cumulative effect to see if it has the effect of persecuting the targeted victim population.<sup>229</sup>

**V. EVIDENCE CURRENTLY AVAILABLE TO THE PROSECUTION**

A. **Seized Documents**

The primary defense used by any accused party in an international case is merely that the prosecution failed to prove the elements of the offense. While a confession is the easiest form of evidence, it is also the least prevalent and brings with it a shadow of

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<sup>228</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. Trial Chamber II. Sentencing Judgment. Prosecutor v. Dragan Nikolić. December 18, 2003. Reproduced at Tab #70

<sup>229</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. Trial Chamber II. Judgment. Prosecutor v. Blagoje Simić, Miroslav Tadić, and Simo Zarić. October 17, 2003. Reproduced at Tab #71



cynicism because it is usually tied to a plea agreement. In the current instance, there are two physical pieces of evidence that have been seized which demonstrate that the actions extend beyond politically acceptable purposes. The former is a document that was seized from a water engineer in the marsh area in 1991 and the latter is a document sent from the Director of Security for the Governate of Arbil to the Shaqlawa Security Director in 1989.<sup>230</sup> The second letter describes in detail a plan of actions which it states was adopted and approved by the “president and commander-in-chief”.<sup>231</sup> This plan describes a number of objectives to disrupt the “subversive activity” in the marshes.<sup>232</sup> The plan allows for the directed ordering of poisonings, explosions, and house burning of suspected subversives, paid assassins, and controlled vehicle travel to the marshlands area.<sup>233</sup> The most severe steps are the call for the burning and destruction of homes if a marsh civilian is suspected of collaborating with the subversives, and the call for a full blockade against any village which harbors, knowingly or not, a subversive.<sup>234</sup> This blockade entails the withdrawal of all food supply agencies, a full ban on the sale of fish from the area, the “severest measures” against anyone who smuggles foodstuffs to the “deserters, outlaws or other hostile groups”, the prohibition of any goods traffic in the villages and areas, and the summoning of tribal chiefs and other prominent figures in the marsh community against their will and requiring them to cooperate in a campaign

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<sup>230</sup> The Iraq Foundation. Plan of Action for the Marshes. Available at <<http://www.fas-www.harvard.edu/~irdp/docs/doc06.0.jpg>> Reproduced at Tab#77

<sup>231</sup> The Iraq Foundation. Plan of Action for the Marshes. Reproduced at Tab #77

<sup>232</sup> The Iraq Foundation. Plan of Action for the Marshes. Reproduced at Tab #77

<sup>233</sup> The Iraq Foundation. Plan of Action for the Marshes. Reproduced at Tab #77

<sup>234</sup> The Iraq Foundation. Plan of Action for the Marshes. Reproduced at Tab #77

against deserters to prevent the imposition of sanctions against their tribe or to raise currently imposed sanctions.<sup>235</sup> The letter continues on to say that these actions will be controlled by the committee headed by the Secretary for the Bureau for the Organization of the South and describes the use of helicopters to maintain security in the area, and the potential for and eventual need to “regroup marsh villages on dry land” to open access deep into the marsh area.<sup>236</sup> It is evident that this subversive element was felt to be strong and dangerous because they state that the actions taken against such peoples should be commensurate with the threat posed as they are disrupting security and stability in the entire region.<sup>237</sup>

## **B. Circumstantial Evidence**

The international courts try to maintain a strong reliance on solely physical evidence and spoken testimony. However, they have determined that, in the interest of justice, they may rely solely on circumstantial evidence.<sup>238</sup> In numerous cases, the Yugoslavian tribunal held that the use of circumstantial evidence is important to point to the guilt of a party and will be accepted to prove culpability, intent, and other required elements of a crime.<sup>239</sup> The court held that the use of such evidence, taken in combination with one another, may point to the guilt of the accused party because they

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<sup>235</sup> The Iraq Foundation. Plan of Action for the Marshes. Reproduced at Tab #77

<sup>236</sup> The Iraq Foundation. Plan of Action for the Marshes. Reproduced at Tab #77

<sup>237</sup> The Iraq Foundation. Plan of Action for the Marshes. Reproduced at Tab #77

<sup>238</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment. The Prosecutor Versus Jean-Paul Akayesu. September 2, 1998. Reproduced at Tab #72

<sup>239</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment. The Prosecutor Versus Jean-Paul Akayesu. September 2, 1998. Reproduced at Tab #72

would not usually exist in combination unless the accused did what they are charged with.<sup>240</sup> Such a conclusion must be beyond a reasonable doubt and must be the only reasonable conclusion available under the circumstances as presented. If there is another viable explanation then they may not be found liable.<sup>241</sup>

In the present case, there are a number of pieces of circumstantial evidence that must be reviewed. First, there is the creation of the drainage project. While the official reason was to create viable land for farming, the effect was to take water that was to be used for irrigation, and drain it directly into the Persian Gulf.<sup>242</sup> It is necessary to review the act of creating this project as well as the omission by failing to implement any true irrigation plan for the newly acquired water.<sup>243</sup> The amount of money diverted from other necessary projects seems to indicate that the government felt a great need for this project to be completed.<sup>244</sup> Why then would they fail to use the water as they claim they planned to?

Next, there are the military operations in the marsh region. As of yet there have been no denials that there was a systematic procedure of attacking villages with artillery, raiding the villages, arresting people and then razing the entire village.<sup>245</sup> These

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<sup>240</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment. The Prosecutor Versus Jean-Paul Akayesu. September 2, 1998. Reproduced at Tab #72

<sup>241</sup> United Nations International Criminal Tribunal for Rwanda. Trial Chamber I. Judgment. The Prosecutor Versus Jean-Paul Akayesu. September 2, 1998. Reproduced at Tab #72

<sup>242</sup> Dabrowska, Karen. *The Iraqi Marshlands*: Reproduced at Tab #9

<sup>243</sup> Dellappenna, Joseph. *The Iraqi Campaign Against the Marsh Arabs*: Reproduced at Tab #10

<sup>244</sup> Komarow, Steven. *Iraq's Marsh Arabs Long for Return of Wetlands*. Reproduced at Tab #24

<sup>245</sup> Human Rights Watch. *Endless Torment*: Reproduced at Tab #52

assertions have been made by numerous refugees from the marshes.<sup>246</sup> If these actions are proven to have been taking place, they should be reviewed to determine if they were part of a broader scheme with the intent to violate the rights of the Ma'dan people.

Next, the use of numerous forms of propaganda against the marsh Arabs has been shown to have diminished their place in society and led them to be subjected to negative treatment by their fellow Iraqi people.<sup>247</sup> Were these actions intended to bring about the destruction of the Ma'dan people as described in the crime of genocide, or was it merely a systematic attack on their good name?

Finally, if the sole purpose of these actions were to gain land for the betterment of the country as a whole, what was the purpose of denying marsh peoples medical care and foodstuffs? Not only are these actions documented in reports from humanitarian organizations and refugees, the Iraqi government's own documents state that this is one of the imposed actions that they would affect.<sup>248</sup> Assuming a lack of culpable action, is there a plausible explanation for such actions or do they speak to a broader plan with a truly discriminatory purpose?

## V. CONCLUSION

With the evidence currently available to the prosecutor for the Iraqi Special Tribunal with regards to this matter, it should seem apparent that there is a justifiable cause to move forward. The leadership of the country of Iraq has violated numerous

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<sup>246</sup> Human Rights Watch. *Endless Torment*: Reproduced at Tab # 52

<sup>247</sup> North, Andrew. *Saddam's Water War*. Reproduced at Tab #27

<sup>248</sup> Anderson, Jon Lee. *The New Yorker*. Reproduced at Tab #4

conventions in which they are either signatories or have become customary international law. Due to these actions, it would be pertinent at this time for the prosecutor to bring formal charges against those who would likely be held culpable for ordering and performing the above mentioned breaches.