

POST-WAR IRAQ: PROSECUTING SADDAM HUSSEIN
by L. Elizabeth Chamblee

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¶1“Decades of lies and intimidation could not make the Iraqi people love their oppressors or desire their own enslavement.”[1]

-President George W. Bush, May 1, 2003

I. Introduction

¶2Although the Bush administration began Operation Iraqi Freedom with the pretext of searching for weapons of mass destruction,[2] the operation ultimately liberated a nation that spent decades under a dictatorial regime. For at least the past twenty to thirty years, the Iraqi people,[3] including the Kurds, lived as victims of their own government. Saddam Hussein and his regime victimized the Iraqi people through torture, execution, and deportation. As President Bush stated in his address on May 1, 2003, America is “pursuing and finding leaders of the old regime, who will be held to account for their crimes.”[4] After United States troops captured Hussein on December 13, 2003,[5] President Bush declared, “now the former director of Iraq will face the justice he denied to millions.”[6]

¶3On January 9, 2004, the United States officially declared Saddam Hussein a prisoner of war and indicated that it will turn him over to a special court established by the Iraqi Governing Council under the direction of the Coalition Provisional Authority.[7] Yet, prosecution in this forum fails to ensure proof of guilt beyond a reasonable doubt as required by Article 14 of the International Covenant on Civil and Political Rights and does not prohibit the death penalty. Further, such prosecution requires the application of Iraqi criminal law and procedure where otherwise unarticulated in the governing statute.[8] This might allow Hussein to twist the laws he implemented to his advantage. Consequently, this Article focuses on alternative fora for jurisdiction over Hussein, recommends an ad hoc international criminal tribunal that does not provide for the death penalty, and examines Hussein’s liability for genocide against the Kurds and crimes against humanity.

¶4This Article will explore and catalogue the international case against Hussein for injuries inflicted on the Iraqis and the Kurds before the war began. Although the focus will remain primarily on Saddam Hussein, much of the rationale also applies to other regime participants. Part II begins with a historical overview of the Iraqi peoples’ oppression and focuses on the consequences of Hussein’s decisions and orders. Part III reviews different jurisdictional options including a national trial by Iraq, prosecution in

the United States, the International Criminal Court, and an international ad hoc tribunal akin to those established in Rwanda and Yugoslavia. This Part ultimately recommends that Hussein's prosecution take place in an international ad hoc tribunal situated in Iraq. The Security Council, under its Chapter VII authority, may establish an ad hoc criminal tribunal to prosecute Hussein for committing or participating in crimes against humanity and genocide. Part IV discusses Iraq's international legal obligations including treaties and United Nations membership requirements. Part V examines the legal ramifications of Hussein's genocide campaign against the Kurds and applies the relevant elements to Hussein's actions. It also addresses the limited arguments that Hussein's defense counsel could raise. Part VI applies international principles concerning crimes against humanity to Saddam Hussein's most flagrant crimes against the Iraqi citizens.[9]

II. A History of Oppression

¶5 Formerly part of the Ottoman Empire, Iraq obtained its independence from British occupation in 1932. Several ethnic groups comprise Iraq's total population of 24,683,313: Arabs form 75% to 80% of the population; Kurds comprise 15% to 20% of the population, and Turkomans and Assyrians make up the remainder of the population.[10] The Kurds have occupied the northern mountainous regions of Iraq since the 12th century when the world referred to the region as "Kurdistan." [11] Because the Kurds lived in the mountains, separated from the main cities in Iraq, they developed their own distinct culture and language. Despite their geographical and cultural separation, the Kurds did not enjoy political independence. From the 16th to early 20th century, the Ottoman and Persian Empires ruled the Kurds.[12] Although the Kurds briefly experienced a year of independence in 1946 by forming their own republic, the Iraqi regime controlled Kurdish territory for the vast majority of the 20th century.[13] Since the 1920s, the Kurds have struggled for independence by staging various unsuccessful revolts.[14] These revolts led to Iraqi government attempts to quash the rebellion and ultimately exterminate the Kurds through the Anfal campaigns.

A. The Anfal Campaigns

¶6 Iraqis used the name Anfal, or "the spoils," to refer to a series of staged military actions against the Kurds of northern Iraq. The Ba'ath Party formed a complex power structure; full comprehension of Hussein's control of the anti-Kurdish campaigns requires a basic grasp of its components. The highest executive body was the RCC over which Hussein exercised ultimate power as Chairman.[15] The RCC controlled a number of regionally based committees including the Northern Affairs Committee where Hussein served as secretary until around 1970. He eventually delegated that power to his cousin Ali Hassan al-Majid.[16] Prior to Hussein's rise to dictator, he served as the RCC member in charge of "Kurdish affairs." [17] Before he went into hiding, Saddam Hussein also served as the commander-in-chief for the armed forces, President of the Republic of Iraq, and Secretary General of the Ba'ath Party.

¶7 In May of 1992 and March of 1993, Human Rights Watch, an international human rights organization, facilitated the shipment of eighteen tons of official Iraqi

government documents to the United States. The Kurds uncovered these documents during their 1991 uprising. The prosecutor in Saddam Hussein's trial may rely on these documents as evidence of Hussein's participation and oversight of the campaign against the Kurds. Other evidence might consist of eyewitness accounts and forensic evidence obtained by the Middle East Watch in collaboration with Physicians for Human Rights. The Kurds recovered the majority of the following accounts and documents from the offices of Iraq's internal intelligence agency, the General Security Directorate ("secret police").

¶8The plight of the Kurds at the hands of Hussein's regime began well before the first Gulf War. Beginning in 1985, Hussein's plan to address "Kurdish affairs" formed a systematic program of destruction for Kurdish villages through chemical weapons and military force, subsequent relocation of the Kurds in concentration camps, and summary executions upon arrival. In 1988, Iraqi forces killed as many as 182,000 Kurds and destroyed at least 4,000 Kurdish villages.[18]

¶9Until 1988, no government had ever used chemical weapons against its own people.[19] Under the Chemical Weapons Convention governments may not use chemical weapons under any circumstances.[20] Yet, Hussein's regime used mustard and nerve gas against at least sixty villages and the town Halabja. This offensive aimed to terrorize the Kurdish civilian population, flush villagers from their homes, and ultimately capture, relocate, and kill them.[21] The gas attack in Halabja alone killed 5,000 people and prompted approximately 80,000 people to flee to Iran.[22] One survivor of a chemical attack on Birjinni stated that he observed, "white, black and then yellow [clouds of smoke], rising about fifty or sixty yards into the air in a column. Then the column began to break up and drift. It drifted down into the valley and then passed through the village. Then we smelled the gas." [23] At first, "it smelled of apples and something sweet," but then "it became bitter." [24] As a result of the attacks, those exposed to the gases experienced vomiting, blindness, and painful swellings under their arms.[25]

¶10Once it finished using chemical and conventional bombing, the army and domestic militia dynamited and bulldozed Kurdish villages.[26] The Iraqi army destroyed at least 703 Kurdish villages in 1987 alone.[27] After the armies razed the village of Serkand Khailani, officials arrested most of the villagers and later subjected the leaders to beatings with cables, suspensions from ceiling hooks, and electric shocks to the earlobes.[28] Some of those arrested were executed.[29] Others were sent to the collective camps.[30] The Iraqi government painstakingly videotaped and documented a number of these events.[31]

¶11To serve as a lesson to others, President Hussein approved a special plan for dealing with Kurds in the Marsh areas.[32] The plan entailed poisoning, bombing, and burning the homes of friends and relatives of subversives in the Marsh areas.[33] It also included an economic blockade to more efficiently "limit provision of their daily living needs" by diminishing food supplies, banning fish sales, and banning goods.[34] To date, no official documents have been found concerning these camps. However, various

agencies recorded testimony of the incarcerated Kurdish people, and at least one letter from Amn Suleimaniyeh[35] to the director of security of the Autonomous Region exists.[36] This letter documents the execution of nineteen people for “being found in prohibited areas” and forty-seven for being “subversives sentenced to death by the Revolutionary Court.”[37] It also notes the deportation of 9,030 people sent to the “Popular Army camp in the governate of al-Ta’imim.”[38]

¶12 Interviews with survivors revealed the conditions and treatment at the camps. Upon arrival, guards divided men and women into separate camps and searched them.[39] One man, after being beaten with sticks and electric cables, was hung from a ceiling fan and scorched with hot steel.[40] Prisoners used cans for bowel movements, ate soup filled with leftover bones and oil, and often received no food at all.[41]

¶13 Convoys carried the Kurds from the camps out into the country for execution by firing squad.[42] At least six people survived.[43] One of the survivors stated: “[i]n place of the handcuffs, the guards used a length of string to tie the twenty-eight prisoners in a single line by their left hands. The men were ordered to stand facing a freshly dug trench, just long enough to accommodate the twenty-eight bodies as they fell.”[44] A gravedigger working in the Kurdish area of Northern Iraq stated, “I must have buried 600 or maybe up to 1,000 people—all killed by the secret police between 1985 and 1989. Sometimes they were peshmerga, sometimes women, sometimes children. Sometimes they’d been tortured.”[45]

¶14 A number of government documents prohibiting human life in designated areas of the Kurdish countryside confirm the truth behind these statements. Hussein’s cousin, Ali Hassan al-Majid signed one personal directive, numbered 28/3650, which stated “[w]ithin their jurisdiction, the armed forces must kill any human being or animal present within these areas. They are totally prohibited.”[46] Hussein also targeted Shi’a Muslims after the March 1991 uprising, where he publicly stated that the participating Shi’a Muslims should be shot for treason.[47] Even before these directives, guards shot around 150 men and boys at al-Mahawil Garrison.[48] Guards threw others from the top floor of a hospital, drowned them, dragged them through the streets, or left them hanging from electricity poles to terrorize the locals.[49] In their attempts to retake the cities involved in the 1991 uprising, loyalist forces used helicopters to attack unarmed civilians, arrested or shot civilians, and executed young men in the streets and in hospitals.[50]

¶15 In 1998, the *New York Times* reported that Hussein executed at least 1,500 people in one year for “political reasons.”[51] Hussein’s son, Qusay Hussein, ordered the executions as part of a prison-cleansing campaign. The Husseins then required the family members of the executed prisoners to pay for the bullets before they could claim and bury the bodies.[52] In many ways, the methodical calculation of costs and benefits without regard for human dignity resembles that of Adolph Hitler in ordering the extermination of the Jews. Hussein’s method of conducting the Anfal campaigns by defining the Kurds as the target, concentrating them in one area, and executing them fits the pattern used by the Nazis.[53]

B. Alternative “Justice”

1. A Lack of Judicial Process

¶16 Hussein did not, however, limit his disregard for human life to the Kurds. He established a court system for all Iraqis that provided few opportunities for fair hearings and multiple occasions for excessive punishment. Trials in Iraq were often conducted before “special courts” and were always conducted *in camera*.^[54] Hussein employed military officers and civil servants who lacked judicial training and the autonomy necessary to make impartial judgments.^[55] The regime sometimes restricted aid from attorneys or government-appointed lawyers until the actual trial date.^[56] In April of 2001, a “special court” sentenced four people to life in prison for simply “attempting to form a political grouping.”^[57]

¶17 The Iraqi government frequently arrested both the people suspected of anti-government activities *and* their families.^[58] Officials arrested a retired medical doctor and his brother-in-law in March of 2001 simply to pressure his wife, also a doctor, to return to Iraq.^[59] On July 26, 2002, several of the United Nations Special Rapporteurs addressed a letter to the Iraqi government requesting information on two individuals who reportedly engaged in “terrorist acts” inside Iraq.^[60] The letter stated, “it is feared that their confessions [on national television] may have been extracted under duress and that televised statements may have an impact upon the fairness of their trial.”^[61] The Rapporteurs expressed further concern that the men were “at risk of being sentenced to death and executed.”^[62] They received no response. The Report also stated that no positive developments occurred in relation to missing persons.^[63]

2. Punishments

¶18 On June 5, 1994, Iraq’s highest executive body, the RCC published a series of decrees in the official Iraqi newspaper, *Al-Jumhuriya*, which required amputations and brandings as punishments for at least 30 crimes.^[64] Saddam Hussein signed each of the decrees in his position as Chairman of the RCC.^[65] In 2000, Hussein and his officials reportedly began using tongue amputation to punish people who criticized him or his family.^[66] Guards allegedly performed such an amputation on July 17, 2000 in front of a large crowd.^[67] Hussein’s decrees prescribed the death penalty for car theft, counterfeiting, smuggling cars or drilling machines, organizing a group of two or more persons for procurement purposes, falsifying military service documents, and stealing (when committed by a member of the armed forces or government employee).^[68]

¶19 A report by the United Nations’ Special Rapporteur stated that the government executed forty-three prisoners on February 3, 2000.^[69] Thirty were reportedly executed for theft, two for drug trafficking, and eleven for affiliation with the political opposition.^[70] In this same report, the Special Rapporteur stated that he was:

of the opinion that Iraq continues to be in violation of its obligations under the International Covenant on Civil and Political Rights, if only because of

the sheer numbers of executions that are taking place and what appear to be extrajudicial executions on political grounds and in the absence of a due process of law.[71]

¶20 In December of 2000, the United Nations General Assembly issued a Resolution strongly condemning Saddam Hussein and his government for “systematic, widespread and extremely grave violations of human rights and of international humanitarian law.”[72] The condemnation extended to suppressions of fundamental freedoms, the widespread use of the death penalty in violation of the ICCPR (International Covenant on Civil and Political Rights), arbitrary executions, widespread and systematic torture, and the prescription of cruel and inhuman punishments.[73] In his “leadership” capacities, Hussein committed countless human rights violations.[74]

¶21 Numerous current reports continue to document human rights violations by Saddam Hussein and Iraqi officials.[75] Up until “Operation Iraqi Freedom,” the United Nations delegated a Special Rapporteur to report on the humanitarian situation in Iraq. Unfortunately, this did little to alleviate the situation.

III. Jurisdictional Options

¶22 Before reaching the merits of the case, one must consider which courts could validly exercise jurisdiction over Saddam Hussein’s prosecution. Four primary potential fora exist: (1) Iraqi national courts, (2) United States federal courts asserting universal jurisdiction, (3) the International Criminal Court through special appointment by the Security Council, or (4) an ad hoc tribunal set up by the United Nations Security Council. The jurisdictional decision will play a major role in determining both applicable law and procedural constraints.

A. Trial by the Iraqi Citizens

¶23 Since most of Hussein’s crimes occurred in Iraq and against the Iraqi people, Iraq retains territorial jurisdiction. The accessibility of physical evidence, victims, and witnesses makes Iraqi courts seem like a sensible jurisdiction. A trial in Iraq may promote healing and reconciliation for victims of the regime. However, heads of state, such as Saddam Hussein, may avoid rigorous prosecution in their own territories by scare tactics, force, and an ability to manipulate the law. Additionally, it could take a considerable amount of time for a viable government capable of running the national courts to emerge. As evidenced by the number of insurgencies in Iraq after the capture of Hussein, a number of his supporters still exist.

¶24 Even with the installation of a new Iraqi government, it could take years for the government to create a workable court system. Once the new regime begins, the likelihood of a fair trial by a new government attempting to purge the old leadership would be slim. Many proposed leaders of the new government lived in exile under Saddam Hussein’s rule and may view his trial as a unique opportunity for retaliation. For

Hussein to receive the “justice he denied to millions,”[76] a neutral judge, or panel of judges, should preside over his trial.

B. National Prosecution by the United States

¶25Theoretically, United States courts provide a second option for prosecution. Domestic courts can invoke universal jurisdiction to prosecute Iraqi officials.[77] Yet, according to the concept of immunity for acts committed by heads of state while in office, the United States court might find Hussein substantively liable but procedurally immune.

¶26Under the principle of universal jurisdiction,[78] any state, regardless of its direct involvement in the conflict or offense, may prosecute “certain offenses recognized by the community of nations as of universal concern, such as . . . genocide, war crimes, and perhaps certain acts of terrorism.”[79] Behind the principle of universal jurisdiction lies the theory that genocide, crimes against humanity, and war crimes not only violate international law but also offend the whole of humanity.[80] Ideally all states would work both collectively and individually to prosecute violators. Universal jurisdiction invoked by individual states furthers several important goals: attaining justice for victims,[81] deterring future human rights abuses through public prosecutions of senior officials,[82] demonstrating international concern and collective responses toward human rights violations,[83] and protecting the sanctity of ordered society.[84]

¶27A number of treaties concerning drug-trafficking,[85] hijacking,[86] aircraft terrorism,[87] hostages,[88] torture,[89] apartheid,[90] and attacks on diplomats[91] expressly include the right to invoke universal jurisdiction. Universal jurisdiction endows every state with jurisdiction over a limited category of crimes such as piracy and slave trading.[92] The list of crimes subject to universal jurisdiction continues to expand.[93] As one United States court observed, “nations have begun to extend jurisdiction to . . . crimes considered in the modern era to be as great a threat to the well-being of the international community as piracy.”[94]

¶28Despite an increasing willingness to invoke universal jurisdiction, the United States must overcome certain procedural hurdles before prosecuting. United States domestic law includes international law,[95] and international law recognizes universal jurisdiction for certain offenses such as piracy, war crimes, and genocide.[96] However, a person cannot be tried in a United States federal court for an international crime unless Congress first adopts a statute defining and punishing the offense.[97] For the United States to prosecute Hussein three things must occur: (1) Congress must have enacted statutes to punish genocide and crimes against humanity, (2) the prosecutor must avoid the obstacle of immunity for heads of state, and (3) Colin Powell must deflect international criticism that prosecution represents the victors’ “justice” for the vanquished.

¶29Congress banned genocide in 18 U.S.C. § 1091.[98] This codification simply recognized the accepted practice of using universal jurisdiction to punish genocide.[99]

Israel first used universal jurisdiction in the *Eichmann* case to prosecute Eichmann for executing Hitler's "final solution" during World War II.[100] In its opinion convicting him, the Nuremberg Tribunal stated that some offenses against the whole of humanity are so grave that "the judicial and legislative organs of every country [need] to give effect to its criminal interdictions and to bring the criminals to trial." [101]

¶30 The United States accepted this principle in approving Israel's request for the extradition of Demjanjuk.[102] The federal district court decided that Israel had jurisdiction to try Demjanjuk since "[i]nternational law provides that certain offenses may be punished by any state because the offenders are 'common enemies of all mankind and all nations have an equal interest in their apprehension and punishment.'" [103] As a party to the United Nations, which affirmed the Nuremberg Tribunal for punishing "persecutions on political, racial, or religious grounds" regardless of whether offenders acted "as individuals or as members of organizations," the United States implicitly recognizes genocide as a crime against all of mankind.[104]

¶31 Congress did not explicitly pass a statute forbidding crimes against humanity, but some statutes and court opinions indicate Congressional consent. Acquiescence may be inferred from the Alien Tort Claims Act[105] and the Torture Victim Protection Act of 1991.[106] The Alien Tort Claims Act provides that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." [107] As such, a victim of crimes against humanity could sue on claims of assault or battery arising from the incident. Federal courts held that this statute confers subject-matter jurisdiction when an alien sues for a tort committed in violation United States treaties or international law.[108]

¶32 The Torture Victim Protection Act reinforces the widely held view that customary international law forbids torture.[109] As a party to the United Nations Convention against Torture, which requires parties to facilitate the punishment of torture through their municipal law,[110] the United States has an obligation to bring violators of the Convention to justice.[111] Because the Convention adds to customary international law's prohibition on torture and requires parties to fulfill their obligations regardless of the perpetrator's nationality, the Convention essentially provides for universal jurisdiction.[112] Thus, the United States could legitimately exercise jurisdiction to prosecute genocide and crimes against humanity in federal court.

¶33 Impediments to American prosecution arise in light of conflicting views on immunity for heads of state such as Saddam Hussein.[113] Under the concept of state immunity, the offender may be substantively liable, but procedurally immune before the courts of other countries. Tensions between the *Pinochet* case,[114] authored by the House of Lords in London, and the more recent *Yerodia* case,[115] adjudicated by the International Court of Justice, illustrate two divergent approaches to state immunity.

¶34 In deciding to extradite Senator Pinochet to Spain for crimes committed while acting as the head of state in Chile, the House of Lords examined Pinochet's alleged immunity based on both the grave nature of the underlying crime, and on an implied

waiver of immunity within the United Nations Convention against Torture.[116] Six Law Lords reached the general conclusion that Pinochet's immunity dissipated because of torture's status as a "serious international crime," established by either *jus cogens* or international treaty.[117] Under this approach, United States courts could adjudicate Hussein's acts of genocide and crimes against humanity since those crimes would also amount to "serious international crimes."

¶35 Lord Saville employed a theory of implied waiver of immunity based on an assumption that the United Nations Convention against Torture abrogated Pinochet's immunity *per se*. [118] Although Iraq has not signed the Convention's treaty, it did sign the International Covenant on Civil and Political Rights (ICCPR), [119] which outlaws a number of crimes against humanity. In addition, Lord Phillips, in his opinion, decided that because national jurisdiction over universal crimes was such a new creation, traditional immunities did not apply. [120] Accordingly, the United States could attempt to prosecute Hussein under both of these rationales.

¶36 The legal bar to national jurisdiction arises in the *Yerodia* case, which examined the legality of an arrest warrant for Abdulaye Yerodia, the Minister of Foreign Affairs in the Congo. [121] The majority in the *Yerodia* case cast doubt on two major principles from the Pinochet case: (1) whether a customary international law norm actually emerged to abrogate immunity for "serious international crimes"; and (2) whether national courts could prosecute officials under circumstances similar to those in *Pinochet*. [122] In its opinion, the majority refused to waive immunity for incumbent officers, and stated that it could not "deduce . . . that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity." [123]

¶37 When the International Court of Justice subsequently listed four circumstances where courts could prosecute high officials internationally, it excluded the circumstances of the *Pinochet* prosecution. [124] Acceptable conditions for abrogating immunity for officials included the following circumstances: (1) when an official is charged in his or her own country and tried under the laws of that country, (2) when the official's own state waives sovereign immunity, (3) when the official commits the acts "prior or subsequent to his or her period of office," or "during that period of office in a private capacity," or, finally, (4) when the official is prosecuted before an international court such as the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), and the International Criminal Tribunal for Rwanda ("ICTR"), or the International Criminal Court ("ICC"). [125] Since Saddam Hussein committed genocide and crimes against humanity while acting as head of state and Iraq has not waived immunity, the only court with jurisdiction under this analysis would be the ICC or an ad hoc tribunal set up by the Security Council that would resemble the ICTR and the ICTY.

¶38 Although the Congress enacted legislation enabling United States federal courts to prosecute genocide and crimes against humanity based on universal jurisdiction, Hussein's immunity as head of state bars national prosecution. American courts could

focus on the *Pinochet* case rather than the *Yerodia* case; however, given the public nature of such a trial, this selective focus might compromise the legitimacy of a conviction. At the recommendation of the International Court of Justice, only an ad hoc tribunal set up by the United Nations Security Council, or the ICC could legitimately abrogate Hussein's official head of state immunity for acts committed while in office.

C. The International Criminal Court

¶39 In light of the *Yerodia* case, the ICC appears ideal for prosecution of Saddam Hussein.[126] However, jurisdictional limitations will foreclose this option unless the Security Council (1) fulfills its obligation to enforce its own resolutions through the ICC and (2) applies the enabling statute retroactively (as was done in the Nuremberg Tribunal). History and difficult negotiations surrounding the text of the Rome Statute, the ICC's enabling statute, indicate that an *ex post facto* application of the ICC is unlikely to occur.

¶40 On July 17, 1998, 120 countries adopted the text of the Rome Statute, which entered into force on July 1, 2002.[127] Article 11 of the statute limits the court's jurisdiction to crimes committed *after* it entered into force and applies *only* to states who acquiesce, or "sign-on," to the statute.[128] Although Hussein committed human rights violations throughout his dictatorship, many of his overt acts occurred during the 1980s, before the statute even existed. Additionally, but not surprisingly, Iraq has not signed the Rome Statute.[129] Article 13, however, allows the United Nation's Security Council, under its Chapter VII power, to refer crimes to the ICC.[130]

¶41 In reality, the Security Council's powers remain the same. The Council implemented tribunals in both Rwanda and Yugoslavia.[131] Theoretically, Iraq is no different. The difference lies in the forum as the ICC, rather than as an ad hoc tribunal. In 1991, the Security Council issued Resolution 688 that stated that it was "[g]ravelly concerned by the repression of the Iraqi civilian population" and "[d]eeply disturbed by the magnitude of human suffering."[132] Consequently, it insisted that Iraq "allow immediate access by international humanitarian organizations," and requested the Secretary-General "pursue his humanitarian efforts in Iraq" and "use *all* the resources at his disposal, *including those of the relevant United Nations agencies*, to address urgently the critical needs of the refugees and displaced Iraqi population."[133] Although the Council laid the groundwork for intervention, for the ICC to exercise jurisdiction, the Council would need to not only refer Saddam Hussein to the ICC for trial, but also undermine the key principle of non-retroactivity.

¶42 Because many states accepted the Rome Statute because of its non-retroactive stance, a retroactive application may cause these states to rethink their acquiescence to the ICC. Sensitive diplomatic issues may also arise since the United States refused to become a party to the ICC.[134] The ICC imposes no obligations on non-party states. As it currently stands, Iraq need not comply with ICC orders, extradite individuals, or supply evidence.[135] Tensions between the United States and the United Nations over the war

with Iraq could lead to a jurisdictional fight to prosecute. This would be particularly unfortunate in light of the necessity for unified international action.

¶43 Even though the ICC does not provide a viable forum for prosecution, its principles and law will likely influence those applied to Hussein's trial regardless of where it takes place.[136] The ICC's Statute of Rome is the most recent and widely accepted codification of international criminal law. These statutes assume individual responsibility for crimes against the entire international community.[137] In creating the Statute, its multi-national drafters relied on principles established in the ITCY, ITCR, Genocide Convention, Nuremberg Charter, and customary international law. As a result, any prosecution of Hussein should refer to this codification to conduct a trial that the majority of countries would view as fair and just.

D. Ad Hoc Tribunal

¶44 The ad hoc tribunal provides the fourth and best option for Hussein's prosecution. Under its Chapter VII powers, the United Nations Security Council may establish an ad hoc international criminal tribunal after it determines a threat to international peace and security.[138] The Security Council instituted ad hoc tribunals for Yugoslavia (ICTY)[139] and for Rwanda (ICTR).[140] The Council fashioned these tribunals after the International Military Tribunal, which was created by a treaty rather than by the United Nations. These tribunals survived challenges to the Security Council's power to create them under Articles 39 and 40 of the United Nations Charter.[141] The tribunals may exert subject-matter jurisdiction over both crimes against humanity, genocide, and war crimes. To ensure consistency, the same appellate body hears appeals from both the ICTY and the ICTR.

¶45 Tribunals simply apply existing law. The ICTY Statute requires that it apply only that "part of conventional international humanitarian law which has beyond all doubt become part of customary international law . . ."[142] If the Security Council creates a tribunal for Iraq, the law would not apply *ex post facto* since it already existed as customary law and would resemble the ICTY and ICTR statutes. A tribunal would also avoid the problem of retroactivity in the ICC. Accordingly, to avoid challenges to the legitimacy of the prosecution, the Council should establish an International Criminal Tribunal for Iraq (ICTI) that parallels those of the ICTY and the ICTR. The same appellate body hearing appeals from the ICTY and ICTR could handle appeals for the ICTI. Although the United States has demonstrated hostility toward ad hoc tribunals in the past,[143] diplomatic and legal impediments to prosecution of Hussein in other courts may encourage United States' agreement. The ICTI would allow the victims of the regime to attend and testify in Hussein's trial since it would occur in Iraq as well as provide the legal expertise for a trial of this magnitude. In fact, the Iraqi National Congress proposed and drafted a statute for this type of United Nations ad hoc tribunal to try Saddam Hussein and the Iraqi Ba'athist leadership.[144] Since many of Iraq's new leaders may come from this National Congress, the new leadership may also request an ad hoc tribunal.

¶46 Even though both the ICTY and the ICTR survived challenges to the Security Council's power to create them, Hussein could still attempt a jurisdictional argument to prevent prosecution. Because the judges employed by the tribunals also rule on the validity of the tribunal's establishment, Hussein could claim that the proceeding was not fair and impartial. Allowing judges to make appellate decisions concerning their own employment may be a conflict of interest.[145] Hussein's difficulty in asserting this defense would be the lack of any other court to hear his challenge. Alternatively, conducting the ad hoc tribunal in Iraq would provide for the close proximity of witnesses,[146] promote reconciliation by allowing victims to attend the trials, and would ensure a more impartial trial than would a trial by either the Iraqi citizens or the new regime. Therefore, the ad hoc tribunal presents the best forum for jurisdiction.

III. Iraq's International Obligations

¶47 Should the ICTI survive Hussein's jurisdictional challenge, it could enforce Iraq's treaty commitments as well as its commitments under current customary international law. Hussein's commission of genocide and crimes against humanity violated numerous human rights treaties signed by Iraq. As of December 9, 2002, Iraq accepted the terms of the following treaties: the International Covenant on Economic, Social and Cultural Rights (CESCR), which Iraq signed on January 25, 1971;[147] the International Covenant on Civil and Political Rights (ICCPR), which Iraq also signed on January 25, 1971;[148] the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), signed on January 14, 1970;[149] the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), signed on August 13, 1986;[150] and the Convention on the Rights of the Child, signed on June 15, 1994.[151] As a member of the United Nations, Iraq has an additional "obligation to promote and protect human rights and fundamental freedoms" and to abide by the "obligations [it has] undertaken" by signing human rights treaties.[152] Like other states, Iraq must comply with customary law regardless of treaty ratification status.[153]

¶48 The Restatement of Foreign Relations Law helps clarify obligations under customary international law. Iraq would violate customary international law if, as a matter of state policy, it practiced, encouraged or condoned:

- (a) genocide,
- (b) slavery or slave trade,
- (c) the murder or causing the disappearance of individuals,
- (d) torture or other cruel, inhuman, or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) a consistent pattern of gross violations of internationally recognized human rights.[154]

Sections (a)-(f) are considered *jus cogens*, or peremptory norms to which all countries must adhere.[155] According to the Vienna Convention on Treaty interpretation, an

international agreement or reservation that attempted to derogate from those norms would be void.[156]

IV. Genocide Against the Kurds

A. Evolution of Genocide from Customary International Law

¶49As a peremptory norm of international law, any act of genocide would be illegal regardless of Iraq's international obligations. Raphael Lemkin, a Polish law professor, first coined the term "genocide" in 1944, and intended it to signify "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves." [157] After World War II, the Allies formed the London Agreement, which included the Nuremberg Charter.[158] The Allies used this agreement to prosecute the Nazis for crimes against humanity, war crimes, and crimes against peace. Since the Nuremberg indictments did not specifically include genocide, prosecutors charged defendants with "deliberate and systematic genocide" under the larger heading of crimes against humanity.[159] The tribunal did not convict any defendants directly or solely on this charge.[160] The Nuremberg Tribunals applied charges of crimes against humanity retroactively since the drafters considered those crimes part of customary international law.[161]

¶50Allied Control Council Law No. 10 (Control Council Law) built on Nuremberg's first mention of genocide.[162] Becoming effective in 1945, it provided a broader definition of crimes against humanity that allowed for prosecutions of genocide under its opening phrase, "including, but not limited to." Two American courts, prosecuting crimes against humanity under their authority as an Allied occupation zone, applied this Control Council Law and convicted several defendants of genocide.[163] These trials of Josef Alstötter, Ulrich Greifelt, and others led to convictions based on participation "in the crime of genocide" and involvement in a systematic program of genocide[164] aimed at "the destruction of foreign nations and ethnic groups." [165] These American trials, along with genocide trials in Poland,[166] propelled and prompted the international community to adopt a multilateral treaty on genocide that entered into effect in 1951.[167]

¶51This multilateral treaty, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), to which Iraq acceded on January 20, 1959, defined genocide in Article II as:

- Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:
- (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group; [168]
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.[169]

To convict Hussein of genocide he must have “committed” one or more of the above forbidden acts against members of a protected group with the intent to destroy, in whole or in part, that group.[170] Hussein did not have to perform the acts himself. Instead, under Article III of the Genocide Convention, acts punishable under the treaty include “genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; [and] complicity in genocide.”[171] Thus, if Hussein specifically ordered or even turned a blind eye to any of these acts, his failure to act would constitute genocide under the Genocide Convention. The International Court of Justice, the ITCY and ITCR statutes, as well as the International Criminal Court statute all follow the Convention’s definition and its general elements.

¶52 Even if Iraq had not acceded to the Convention, as a party to the United Nations, it must uphold certain basic human rights found in the preamble to the United Nations Charter. The preamble states that members of the United Nations aim to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person.”[172] Genocide derogates from this general principle by disregarding the value of human life.

B. Genocide against The Kurds: The Anfal Campaigns

¶53 Rather than reaffirming human rights, a number of documents and testimonials show that Hussein, through his own acts and the acts of others, attempted to annihilate the Kurdish segment of the Iraqi population. Because Hussein served as the RCC’s member in charge of “Kurdish affairs,” President of the Republic of Iraq, and Secretary General of the Ba’th Party, he is liable under the principle of command responsibility for ordering official acts. He specifically ordered, directed, and appointed his cousin, Ali Hassan al-Majid, “Chemical Ali,” to implement a comprehensive campaign against the Kurds which resulted in: (1) concentration camps, (2) mass summary executions, (3) widespread use of chemical weapons against the city of Halabja and dozens of Kurdish villages, and (4) complete destruction of Kurdish villages, which government documents described as “burned, destroyed, demolished, and purified.”[173] In the words of Al-Majid, the Iraqi government took these steps “to solve the Kurdish problem and slaughter the saboteurs.”[174] “Saboteurs” refers to the Kurdish guerrillas and civilian sympathizers. When first ordered by Hussein to quiet the “Kurdish rebellion,” Al-Majid said “What am I supposed to do with them, these goats? . . . Take good care of them? No, I will bury them with bulldozers.”[175] This symbolized the beginning of the Anfal Campaigns.[176] Although initially believed dead, coalition forces captured Al-Majid, or “Chemical Ali,” on August 21, 2003.[177] Consequently, he may also face prosecution in an ad hoc tribunal.

¶54 Although President Hussein vested many of the powers for handling “Kurdish affairs” to his cousin, he involved himself personally in the operational aspects of Anfal through his position as president of the republic.[178] After “redrawing the map of Iraqi Kurdistan,” which demonstrated his premeditation to commit genocide, approximately

5,000 to 8,000 Barzani[179] males “disappeared.”[180] As President, Saddam Hussein stated, “[t]hey betrayed the country and they betrayed the covenant . . . we meted out stern punishment to them and they went to hell.”[181] Although these acts occurred over the past twenty years, genocide is not subject to a statute of limitations.[182] Any act of genocide violates Iraq’s obligations under the ICCPR to respect and promote the right to life.[183]

¶55To convict Hussein of genocide, the prosecutor must prove, beyond a reasonable doubt, that Hussein killed the Kurds, caused them serious bodily or mental harm, deliberately inflicted conditions of life calculated to bring about the their physical destruction, imposed measures intended to prevent Kurdish births, or forcibly transferred Kurdish children to another group.[184] The Kurds must also qualify as a national, ethnical, racial, or religious group, and the prosecutor must prove that Hussein intended to destroy them in whole or in part.[185]

1. Concentration Camps

¶56Hussein’s design of the Kurdish concentration camps inflicted conditions so severe that they would meet the Genocide Convention’s requirement that the perpetrator establish an environment “calculated to bring about [the group’s] physical destruction in whole or in part.”[186] In *Prosecutor v. Akayesu*, ICTR interpreted Article II(c) of the Genocide Convention as requiring the subjection of “a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services.”[187] Conditions in Kurdish camps met these requirements, as well as the Convention’s requirements for “causing serious bodily or mental harm to members of the group,” under Article II (b). In the *Eichmann* case, the District Court of Jerusalem stated that bodily or mental harm can be caused by “enslavement, starvation, deportation and persecution . . . and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture.”[188]

¶57It will be difficult to prosecute Hussein for this phase of the genocide without conclusive documentation of his knowledge of the camps.[189] The tribunal may infer Hussein’s intent, on a case-by-case basis from the material evidence so long as this evidence establishes a consistent pattern of conduct.[190] Although the ad hoc tribunal may impute the requisite knowledge from Hussein’s numerous official positions, he could argue that he lacked all knowledge because he designated both power and authority over the camps to Chemical Ali.

2. Summary Executions

¶58The Ba’ath Party itself established the principle of “collective implication” in the executions.[191] The Party insisted that its members form part of the firing squads.[192] For example, when Saddam Hussein assumed his presidency, he forced two dozen senior Ba’ath officials to confess to charges of treason.[193] He then ordered the

other senior officials to execute them on television to demonstrate their new loyalty to Hussein.[194] On June 20, 1987, another document issued by the Northern Bureau Command with the seal of the RCC (which Hussein chairs) endorsed a policy of mass murder and incitement to pillage. It directed:

4. The corps commanders shall carry out random bombardments using artillery, helicopters and aircraft, at all times of the day or night in order to kill the largest number of persons present in those prohibited zones, keeping us informed of the results.

5. All persons captured in those villages shall be detained and interrogated by the security services and those between the ages of 15 and 70 shall be executed after any useful information has been obtained from them, of which we should be duly notified.[195]

Al-Majid signed the document and forwarded it to numerous branches including the Chairmen of the Legislative and Executive Councils and Party Intelligence.[196] Under the Genocide Convention, summary and targeted executions constitute intentionally “killing members of the group” because they meet the ICTR requirement of “homicide with the intent to cause death.”[197] The prosecution could prove the requisite mens rea and premeditation by using documents exchanged between Al-Majid and Hussein, as well as government videotapes of massive executions.[198]

3. Widespread Use of Chemical Weapons

¶59The Iraqi regime kept meticulous records and routinely videotaped chemical weapons attacks on civilians as well as executions and village clearances.[199] Having cameras ready to videotape the attacks demonstrates premeditation.[200] Saddam Hussein murdered about 100,000 Kurds with chemical weapons.[201] Under Article II (b) of the Genocide Convention, acts of chemical destruction resulting in death constitute genocide in that they meet the definitions of “killing members of the group” and “causing serious bodily and mental harm to members of the group.”[202]

¶60As the ICTR noted in *Prosecutor v. Kayishema and Ruzindana*, the tribunal should interpret the meaning of “serious bodily harm” and “serious mental harm” on a “case-by-case basis, using a common sense approach.”[203] According to the ICTR, “causing serious bodily harm” “could be construed to mean harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses.”[204] Acts of “serious mental harm” likewise includes “acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution.”[205] The chemicals may have caused a lasting effect on the Kurds; however, the effects need not prove indelible or permanent for successful prosecution.[206]

4. Complete Destruction of Kurdish Villages

¶61 Destruction of Kurdish homes, crops, and livestock by the Iraqi government exhibited Hussein's desire to inflict conditions that would bring about the Kurds' physical destruction. The United Nations Special Rapporteur made numerous inquiries to Hussein asking for explanations of orders directing the execution of wounded civilians and the razing of certain neighborhoods.[207] He sent no response. A government document titled "Registry of Eliminated Villages" contained the names and locations of a large number of eliminated villages.[208] The ICTR Chamber reasoned that systematically expelling people from their homes would satisfy the requisite *actus reus* of Article II(c) of the Genocide Convention.[209]

C. The Kurds as an Ethnic Group and Hussein's Intent to Destroy

¶62 For Hussein's actions to qualify as genocide against the Kurds, the Kurds must qualify as a national, ethnic, racial, or religious group.[210] In addition, Saddam Hussein must have intended to destroy them in whole or in part.[211] The Kurds form a distinct ethnic group; they developed their own culture with a unique Kurdish style of dress and they speak their own language.[212] They lived in the northern mountainous region of Iraq for thousands of years—the region was even designated "Kurdistan" in the 12th century.[213] The ICTR, in *Prosecutor v. Akayesu*,[214] stated that the term "ethnic group" is "used to refer to a group whose members speak the same language and/or have the same culture." [215] The Kurds have both their own language and their own distinct culture, thus they qualify as an ethnic group for the purposes of the Genocide Convention.

¶63 When Saddam Hussein appointed his cousin, Ali Hassan al-Majid, to extinguish the Kurds, Hussein exhibited the requisite intent to annihilate this ethnic group. One observer stated of Al-Majid, "[h]e was stupid and only carrying out Saddam Hussein's orders." [216] Documented exchanges between Al-Majid and Saddam Hussein make it clear that Hussein knew and approved of Al-Majid's work.[217] Besides a jurisdictional challenge, claiming that Hussein did not act with the requisite intent may be his best defense to genocide. Accordingly, he could allege that he simply moved or deported the Kurds without intending to destroy them. Hussein's act of designating the power to Al-Majid works in Hussein's favor. He may claim that because he delegated all the power and authority for dealing with the Kurds to Al-Majid, Al-Majid acted without Hussein's approval or knowledge. Although the court could still infer knowledge through command responsibility, the prosecution may find it more difficult to establish intent through this theory.

¶64 Because Iraq acceded to the Genocide Convention on January 20, 1959, the crime of genocide existed in the form of a treaty and as customary international law during the 1980s when the majority of the above acts occurred. Accordingly, no significant legal barriers, such as an *ex post facto* application of the law, exist for prosecuting Saddam Hussein for genocide. Plentiful evidence exists to convict him for conspiracy to commit genocide,[218] direct and public incitement to commit genocide,[219] or complicity in genocide.[220]

¶65 Despite the mounting evidence against him, Hussein's defense attorneys may rely on a number of mitigating factors. Hussein did attempt to unite the Kurds and the Iraqi people to create a state with a unique national identity. To create this state, Hussein spent significant financial resources to recover artifacts and piece together Iraq's cultural history.[221] He was the first Iraqi leader to visit the Kurdish region.[222] In fact, not until the United States, Iran, and Israel contributed resources to promote the Kurdish insurgency in the 1970s did Hussein begin the Anfal campaigns. Not only did the United States help ignite the conflict, it removed sanctions from Iraq in 1982 and shared military intelligence with Iraq during the Iran-Iraq war.[223] This union culminated in 1984 when, despite Iraq's use of chemical weapons on Iranians, the Regan administration sent Donald Rumsfeld to Iraq to strengthen ties with Saddam Hussein and to offer additional intelligence and money. When the United States eventually incited Kurdish rebellion but failed to support it in 1991, Saddam Hussein squelched the rebellion with a widespread massacre of the Shi'ites. Consequently, Hussein's attorneys may try to bring the United States in as a co-conspirator and deflect attention away from Hussein's acts and toward discovering exactly what the United States knew.

V. Crimes against Humanity Committed in Iraq

¶66 Saddam Hussein did not end his struggle to maintain power with Anfal campaigns or the Kurdish people. As head of the RCC, Hussein personally signed decrees condoning torture, deportation, unfair trials, amputations, and branding against his own people. Because many of these actions qualify as crimes against humanity, the ICTI prosecutor may indicate and prosecute Hussein for these acts.

A. Evolution of Crimes against Humanity

¶67 Like genocide, as the name "crimes against humanity" suggests, these crimes offend the whole of humanity and, consequently, the ICTR and ICTY considers them international crimes. A Baptist minister first coined the phrase "crimes against humanity," in an 1890 letter to the United States Secretary of State.[224] However, the 1945 Nuremberg trials first defined and prosecuted defendants for crimes against humanity.[225] The Nuremberg Charter substantively removed state immunity for crimes against humanity, and described these crimes as:

Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.[226]

Hussein did not have to personally commit these acts since "[l]eaders, organizers, instigators, and accomplices, participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." [227] Approval by the United

Nation's General Assembly to use this definition to prosecute heads of state chipped away at traditional immunity and helped solidify the introduction of crimes against humanity into international law.[228]

¶68 Unlike genocide, definitions for crimes against humanity vary. The Tokyo Charter in Article 5(c) resembled the Nuremberg Charter, but did not include persecutions on religious grounds.[229] Allied Control Council Law No. 10, Article 2, broadened the concept of crimes against humanity in its definition by including the words "not limited to" and by specifically adding "imprisonment, torture, [and] rape." [230] Furthermore, the ICTR and ICTY defined crimes against humanity differently from both former definitions and from one another. A prosecutor in the ICTY may prosecute "murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, and other inhumane acts" only when committed in armed conflict and directed against a civilian population.[231] The ICTR, on the other hand, allows the prosecutor to prosecute when the accused "committed [acts] as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds." [232] Though the ICTY does not specify the need for a "widespread or systematic attack," it interpreted the phrase "civilian population" to include this requirement.[233]

¶69 In the International Criminal Court, relevant portions of Article 7 similarly define crimes against humanity to include murder, "[d]eportation or forcible transfer of [a] population," "[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious . . . or other grounds," "[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law," and torture. For any of these acts to qualify as crimes against humanity the perpetrator must commit them as "part of a widespread or systematic attack directed against a civilian population" and have knowledge of the attack's systematic nature. Crimes against humanity may occur during peacetime or war.[234] Like the ICTR, the Rome Statute employs the qualification "widespread or systematic attack" which broadens its jurisdiction and makes these requirements alternatives. This mirrors the most recent approach taken by the ICTY in *Prosecutor v. Tadić*. [235] The ICTR, while it does not use an either/or approach, defined the term "widespread" as "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims." [236] The court interpreted "systematic" as "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources." [237]

B. Basic Elements Pertinent To All Crimes against Humanity

¶70 Regardless of the precise language used in any one statute, the prosecution must establish the same five elements under Article 5 of the ICTY, Article 3 of the ICTR, and Article 7 of the ICC to prove Hussein's guilt. These elements include: (1) the occurrence of an "attack"; (2) a link or "nexus" between Saddam Hussein's action or inaction and the attack; (3) the attack's "widespread or systematic" nature; (4) the

attack's target as a civilian population; and finally, (5) that Hussein's knowledge of the attacks fulfills the requisite mens rea.[238]

¶71 Hussein conducted several "attacks" by deporting the Kurds, depriving Iraqi citizens of fundamental liberties, and by torturing Iraqi citizens.[239] These instances qualify as attacks because the term concerns the mistreatment of civilians including the state's own population.[240] The ICTY, in *Prosecutor v. Nikolic*, listed several factors relevant for determining whether an attack occurred against a civilian population.[241] In its list, the court examined "whether summary arrests, detention, torture and other crimes have been committed," and "whether massive transfers of civilians to camps have taken place." [242] Similarly, the ICTR, in *Prosecutor v. Akayesu*, stated, "the act must be inhumane in nature and character, causing great suffering or serious injury to body or to mental or to physical health." [243] These factors remain particularly relevant in the Iraqi situation where the government transferred Kurds to camps, summarily arrested them, [244] detained them, [245] and tortured Iraqi civilians. [246] Each of these actions constitutes an attack; thus, the first element is satisfied.

¶72 The second element, the nexus between the acts of Hussein and the attacks, is detailed in each specific act's section below. However, within each section two things must be established: (1) the "commission" of the act (deportation, deprivation, torture) that furthered the attack against the Iraqi people (including the Kurds), and (2) Saddam Hussein's knowledge that these orders/acts constituted part of the greater "attack." [247] A single act, such as issuing a decree, suffices so long as it is part of the larger attack. [248]

¶73 The Iraqi population satisfies the third requirement that Hussein carry out the attack on "a civilian population." As Iraqis living under Hussein's regime, they possess the requisite characteristic of a geographically self-contained group of people. [249] In some ways, the breadth of the Iraqi population as a target also satisfies the fourth element of a "widespread or systematic attack." To qualify as a widespread or systematic attack, the action "need not be committed at the same time and place as the attack or share all of the features of the attack," however, "it must, by its characteristics, aims, nature, or consequence objectively form part of the discriminatory attack." [250] Hussein's actions fulfill both requirements since the Iraqi population comprises a large number of victims and Hussein, [251] in his power as president, orchestrated a systematic governmental attack against them. [252]

¶74 Finally, the prosecutor must establish, beyond a reasonable doubt, that Saddam Hussein possessed mens rea that demonstrated he knew about the attack. [253] As interpreted by the ICTR, Hussein must have "actual or constructive knowledge of the broader context of the attack, meaning that [Hussein] must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan." [254] To establish intent for certain acts, the ICC requires the perpetrator to either "mean to cause that consequence," or be "aware that it will occur in the ordinary course of events." [255] "Knowledge" is similar, but for purposes of the Rome Statute, it means "awareness that a circumstance exists or a consequence will occur in the ordinary

course of events.”[256] Mental elements requiring that Hussein knew about the widespread or systematic attack, do not require proof that he knew *everything* about the attack, or even that he knew the precise details of plans.[257] The prosecutor may satisfy these elements by a simple indication that the Hussein intended to “further such an attack.”[258]

¶75The prosecutor may have the most difficulty proving the *mens rea* element. For the most part, crimes against humanity are not strict liability crimes. Article 28 of the ICC provides guidance by discussing a form of constructive knowledge for trying “superiors” such as Saddam Hussein. Hussein could be held criminally responsible for crimes against humanity committed by his subordinates. These subordinates would include the Iraqi military or any type of Iraqi security force. Hence, Hussein may be liable for failing to “exercise control properly over such subordinates” in three situations: (1) where Hussein either knew, or “consciously disregarded” information, such as United Nations or Human Rights reports indicating that his subordinates were either committing or about to commit such crimes; (2) where the crimes “concerned activities that were within [his] effective responsibility and control”; or (3) where Hussein failed to take all “necessary and reasonable measures” within his power to stop the acts from being committed, or alternatively, failed to “submit the matter to the competent authorities for investigation and prosecution.”[259] The ICC’s position, requiring that a superior knew or should have known, differs from an earlier position taken by the United States Supreme Court which applied a standard just short of strict liability to a Japanese Commanding General.[260]

C. Saddam Hussein’s Crimes against Humanity

1. Deportation or Forcible Transfer of the Kurdish Population

¶76The prosecutor may address the majority of Saddam Hussein’s actions against the Kurds under the Genocide Convention. However, the Convention does not address deportation, which constitutes a distinct crime against humanity. The United Nations General Assembly expressed concern over the “forced displacement of hundreds of thousands of Iraqi civilians,” “the destruction of Iraqi towns and villages,” and “the fact that tens of thousands of displaced Kurds have had to take refuge in camps and shelters in the north of Iraq.”[261]

¶77Customary international law recognizes deportation as a crime against humanity, as does Article 6(c) of the Nuremberg Charter, Article 5(d) of the ICTY, Article 3(d) of the ICTR, and in Allied Control Council Law No. 10. In addition, the ICCPR states, “no one shall be arbitrarily deprived of the right to enter his own country.”[262] To convict Hussein of deporting the Kurdish population, he must have used expulsion or other types of coercion to forcibly transfer or deport one or more persons into another State or place.[263] “Population,” as interpreted by the ICTY in the *Tadic* case, “impl[ies] crimes of a collective nature and thus exclude single or isolated acts which . . . do not rise to the level of crimes against humanity.”[264] The Iraqi regime’s displacement of hundreds of thousands of Iraqi civilians qualifies as more than a

single or isolated act. “Forcibly” does not denote only physical force, but may also encompass threats or types of coercion caused by creating a coercive environment or by using “fear of violence, duress, detention, psychological oppression or abuse of power.”[265] Hussein appears to have forcibly deported the Kurds. He issued an order concerning Kurdish villages that stated, “within their jurisdiction, the armed forces must kill any human being or animal present within these areas. They are totally prohibited.”[266]

¶78In addition to a forcible deportation, the displaced persons must have been “lawfully present” in the area prior to being moved.[267] “Lawful” probably refers first to national law, but where a national law severely contradicts an international law, as in the Iraqi situation, then “lawful” should refer to an international principle.[268] Otherwise, dictators such as Hussein could circumvent this element by enforcing self-interested laws like Iraqi directive 28/3650 that prohibited human life in over 1,000 Kurdish villages.[269] Prior to this directive, the Kurds lawfully inhabited these areas for more than a thousand years.[270] Strictly interpreting “lawful” as national law where it would allow dictators to legislate their way out of criminal conduct contradicts principles in the Nuremburg Charter.[271]

¶79As commander-in-chief of Iraq’s armed forces and as Chairman of the RCC, Hussein condoned the deportation of over 400,000 Iraqi citizens (including Kurds) holding valid Iraqi passports.[272] Hussein’s personal responsibility for the purges began with his accession to power in which he deported or executed several Shi’ite clerics.[273] Evidence exists to support Hussein’s knowledge, both actual and constructive, of the forced deportation of non-Arabs in Hussein’s Arabization campaign. United Nations Special Rapporteur Max van der Stoep submitted numerous reports to the United Nations that detailed instances of forced relocations and wrote various letters to Hussein and the Iraqi government requesting evidence of cessation.[274] If nothing else, these letters put Hussein on notice of violations by subordinates. Hence, his defense would have difficulty establishing his ignorance. The discovery phase of any prosecution may uncover additional documents actually signed by Hussein.

2. Arbitrary and Severe Deprivation of Physical Liberty

¶80The list of crimes against humanity does not end with Kurdish deportation. Hussein also imprisoned Iraqi citizens and deprived them of their physical liberty through arbitrary arrests, detentions, unfair trials, long prison sentences, branding, amputation, and excessive use of the death penalty. The ICTR, the ICTY, and the Allied Control Council Law No. 10 prohibit excessive and unjust imprisonment in their instruments. Previous statutes include the term “other severe deprivation of physical liberty.” This phrase has emerged as a “catch all” provision for borderline types of confinement that may not fit within other definitions but nonetheless rises to the level of a crime against humanity. Article 9 of the ICCPR requires government to ensure certain due process rights including prohibition against arbitrary arrests or detentions, prompt information concerning charges, timely trials, and court proceedings within a reasonable time.[275]

Similarly, Article 14 of the ICCPR entitles everyone to a “fair and public hearing by a competent, independent and impartial tribunal established by law.”[276]

¶81 The Rome Statute of the International Criminal Court and the ICTY require the prosecutor to establish three general elements before convicting Hussein for unlawfully imprisoning or severely depriving Iraqis of physical liberty.[277] First, the prosecutor must prove, beyond a reasonable doubt, that Hussein imprisoned or otherwise deprived one or more persons of their physical liberty.[278] Second, the prosecutor must establish that Hussein’s conduct was severe enough to breach the fundamental rules of international law by arbitrarily depriving the Kurds of their liberty.[279] “Fundamental” refers to the nature of the violation, not whether the accused complied with every procedure available in international law.[280] “Arbitrarily” means that no legal basis can be invoked to justify the deprivation of liberty and that the individual did not benefit from the due process of law.[281] Third, the prosecutor must prove that Hussein knew about the imprisonments and deprivations and was aware of their severity.[282] The ICTY interpreted this third element to mean “the accused, or a person or persons for whom the accused bears criminal responsibility [performed the act] with the intent to deprive the individual arbitrarily of his or her physical liberty or in the reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty.”[283]

¶82 Despite signing the ICCPR,[284] in which Iraq purports to guarantee its citizens “a fair and public hearing by a competent, independent and impartial tribunal established by law,”[285] Hussein deprived a number of Iraqi citizens of their due process rights in several ways. Little or no due process exists in Iraqi courts.[286] The government conducts trials *in camera*, before “special courts,”[287] allows military officers and even civil servants (all of whom lack judicial training and the necessary autonomy for impartial judgments) to preside over trials,[288] and often limits legal aid to the actual trial date.[289]

¶83 The prosecutor should be able to establish Hussein’s knowledge of the deprivations of due process and resulting imprisonments. The families of victims and officials from the United Nations sent letters directly to Saddam Hussein and the Iraqi Government.[290] These letters, combined with visits by the United Nations Special Rapporteur of the Commission on Human Rights provide evidence of Hussein’s knowledge. The Rapporteur may have based his visit to Iraq, in part, on allegations of the lack of fair trials and the suppression of freedom of expression and association.[291] His report stated that the Government of Iraq continued to disregard its obligations under Articles 9 and 14 of the ICCPR.[292] These articles prohibit arbitrary arrest and detention as well as entitle citizens to a fair and public hearing by a competent, independent and impartial tribunal.[293] The report expressed concern about long detentions without charges, the lack of access to lawyers, non-public trials, death sentences *in absentia*, and the lack of an appellate body to review decisions.[294]

3. “Other Inhumane Acts”: Excessive Punishments & Excessive Use of the Death Penalty

¶84The ICTR and ICTY prohibit acts that are inhumane in nature and character that are not specifically included in their particular instruments, but are “of comparable seriousness” and “comparable gravity” to the enumerated acts.[295] As the ICTR noted in *Prosecutor v. Kayishema and Ruzindana*, “[t]hese will be acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity.[296] The Prosecution must prove a nexus between the inhumane act and the great suffering or serious injury to mental or physical health of the victim.”[297] The ICTI should determine whether an act constitutes an inhumane act “on a case-by-case basis.”[298] In the ICTR, the inhumane act or omission must “(a) [b]e directed against member(s) of the civilian population; (b) [t]he perpetrator must have discriminated against the victim(s), on one or more of the enumerated discriminatory grounds; (c) [t]he perpetrator’s act or omission must form a part of a widespread or systematic attack and the perpetrator must have knowledge of this attack.”[299] In *Prosecutor v. Kayishema and Ruzindana*, the ICTR acknowledged, “a third party could suffer serious mental harm by witnessing acts committed against other, particularly against family or friends.”[300] The ICTR held that the defendant act of decapitation, castration, and piercing a skull with a spike constituted “other inhumane acts” in *Prosecutor v. Niyitegeka*. [301]

¶85The ICTY’s interpretation of “other inhumane acts” varies slightly from that of the ICTR. The tribunal in *Prosecutor v. Vasilijevic* required that the prosecutor establish the following elements for “other inhumane acts:”

- (i) the occurrence of an act or omission of similar seriousness to the other enumerated acts under the Article; (ii) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and (iii) the act or omission was performed deliberately by the accused or a person or persons for whose acts and omissions he bears criminal responsibility.[302]

To assess the seriousness of an act, the tribunal should consider the factual circumstances, the context in which the act or omission occurred, the personal circumstances of the victim including his or her age, sex, and health, as well as the physical, mental, and moral effects on the victim.[303] The tribunal may also consider the long-term effects of the act or omission on the victim.[304]

¶86Hussein signed a number of decrees mandating branding and amputations as punishments for Iraqi citizens.[305] The tribunal may need to consider each branding or amputation on a case-by-case basis, but may also take Iraq’s other international obligations into consideration when determining whether these acts constitute an inhumane act. Article 7 of the ICCPR, a “fundamental” rule of law to which Iraq is a party, states, “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”[306] Although the general comments to the ICCPR do not explicitly list the treatments considered degrading, the comments forbid acts that cause either mental or physical suffering. Branding and amputations would most likely qualify as “excessive chastisement ordered as a punishment for a crime or as an educative or

disciplinary measure.”[307] The ICCPR permits no derogation from Article 7. Hussein, as the primary sponsor and promulgator this punishment seems to have violated this treaty. Because Hussein signed the decrees, the prosecutor should have little difficulty establishing Hussein’s knowledge of the decrees and their potential effects on Iraqi citizens. Consequently, the ICTI may convict him of “other inhumane acts.”

¶87Saddam Hussein also signed an order instituting the death penalty for all deserters and draft evaders and gave it retroactive application.[308] This retroactive application even contravenes the Iraqi Penal Code, which states in Article 1, “[n]o act or omission shall be penalized except in accordance with a legislative provision under which the said act or omission is regarded as a criminal offense at the *time of its occurrence*.”[309] Article 6(2) of the ICCPR also forbids excessive use of the death penalty, and states “[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant.”[310]

¶88These decrees promoting widespread use of the death penalty not only conflict with fundamental rules of international law, but also violate Hussein’s agreement under the ICCPR. The deprivation of life for minor offenses such as theft, drug trafficking, and affiliation with political opposition, breach Article 6 of the ICCPR. Hussein’s signatures on the documents show that he not only consented to the decrees, but also ordered them himself. The Special Rapporteur’s reports and requests for additional information alerted Hussein to the severity of the situation, yet Hussein refused to provide additional information and actually issued more decrees. Although Hussein’s actions breached Iraq’s treaties, for the ICTI to hold Hussein personally liable, these breaches must constitute “other inhumane acts.” Like the analysis for branding and amputations, the ICTI would need to examine the circumstances for each instance in which Hussein’s officials actually carried out the death penalty for minor violations on a case-by-case basis. The families of the victims will most likely be able to fill in these details, and additional evidence may emerge during the trial.

4. Torture

¶89The ICTY,[311] ICTR,[312] and Allied Control Council Law No. 10 all expressly list torture as a crime against humanity.[313] Interestingly, neither the Nuremberg nor the Tokyo Charters specified torture as a crime against humanity, however, it would still have qualified as an “inhumane act.” Article 7(2)(e) of the Rome Statute defines “torture” as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.”[314] Furthermore, under the ICC, torture need not be carried out for a particular purpose to constitute a crime against humanity.[315] The absence of a need for a particular purpose differs from requirements in the Torture Convention.[316] Since Iraq is not a party to the Torture Convention, those principles would not strictly apply. However, Iraq is a party to the ICCPR which states in Article 7, “[n]o one shall be

subjected to torture or to cruel, inhuman or degrading treatment or punishment.”[317] The general comments to the ICCPR allow no derogations or justifications from this article, which seems to make government parties strictly liable.[318]

¶90 To convict Saddam Hussein of torture in a tribunal with a statute similar to the Rome Statute, ICTY, or ICTR the prosecutor must meet several elements. First, Hussein or his guards must have inflicted severe mental or physical suffering on a person or persons in Hussein’s control or custody.[319] Second, Hussein or his officials must have intended to inflict, by act or omission the mental or physical pain.[320] Finally, Hussein or his officials must have aimed their actions or omissions “at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating on any ground, against the victim or a third person.”[321] Torture cannot have occurred only as a result of “lawful sanctions.” No indication exists as to whether “lawful” refers to national or international law. However, in order for this element to make any sense when applied to a state actor such as Saddam Hussein, it must indicate international law.

¶91 The ICCPR’s 1992 general comments to Article 7 make clear Saddam Hussein’s duty to the Iraqi people. They state in part, “[i]t is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited in article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”[322] “The text of article 7 allows of no limitation.”[323] No justifications or extenuating circumstances may be used as an excuse for any reason. In this regard, the Committee noted that “it is not sufficient for the implementation of article 7 to prohibit such treatment or to make it a crime.”[324] The prohibition extends to acts that cause both physical and mental suffering.[325] It also extends to prolonged solitary confinement.[326] Amnesties for committing torture do not comport with the duties in the ICCPR, and contradict the duty of the States to investigate all such acts.[327]

¶92 By knowingly promoting and tolerating torture in Iraq, Hussein violated his duty under the ICCPR, and the prosecutor could convict him under the ICTY or ICTR statutes. In his official capacity, prisoners are effectively under his control, and, under the ICCPR, no sanctions allowing torture may be “lawful.” Thus, the ICTI may convict Hussein of torturing prisoners in an ad hoc tribunal. Iraq may also face sanctions in a proceeding, possibly in the International Court of Justice, that strictly determines Iraq’s compliance with the ICCPR treaty.

IV. Conclusion

¶93 For all of the Iraqi citizens to begin a peaceful new government, they should be allowed to participate in justice system that permits them to voice their collective experiences before a knowledgeable judge. An ad hoc tribunal, instituted by the United Nations Security Council’s Chapter VII power, provides the best option for prosecuting Saddam Hussein and for promoting reconciliation. Ensuring that Hussein receives a fair trial will set valuable legal precedent for both the international and the Iraqi community.

Justice brought about by the ICTI should play an integral role in rebuilding Iraqi sovereignty and in promoting a solid state of democracy after years of internal turmoil.

[1] President George W. Bush, Address to the Nation (May 1, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/05/iraq/20030501-15.html> (last visited April 7, 2004).

[2] The Bush administration has yet to find any weapons of mass destruction. *The Gospel According to George*, NEWSWEEK, Mar. 26, 2004, at 18. Nevertheless, a number of views emerged about Bush's policy even before that admission. See Ivan Eland, Symposium, *What Should the United States Do About Saddam Hussein?*, 50 EMORY L.J. 833, 853 (2001) ("Despite the conduct of a wise, restrained military policy during the first 165 years of the nation's history, the aberration of more than fifty years of Cold War and post-Cold War U.S. interventionism now seems like the norm and has led U.S. presidents to become arrogant in their exercise of U.S. military power overseas. George W. Bush has promised the American public a more "humble" foreign policy. Let it begin with U.S. policy toward Iraq."); Norman G. Printer, Jr., *Deterring Saddam Hussein: Between Iraq and a Hard Place*, 30 S.U. L. REV. 85, 97 (2003) (The current Bush Administration urged the Council to adopt smart sanctions that would have reduced the number of dual-use items and expanded the number of humanitarian items, while offering incentives and disincentives to Iraq's neighbors aimed at stifling smuggling.').

[3] An initial, but imperative distinction exists between "Iraq" as the Arab Ba'ath Socialist Party led by Saddam Hussein and "Iraq" as the Iraqi people. The Security Council's use of "Iraq" in Resolutions 1441 and 688 targeted only Saddam Hussein and his regime. In 2002, the United Nations Security Council issued Resolution 1441 which stipulated that Iraq "has been and remains in material breach of its obligations," but extended it a "final opportunity to comply with its disarmament obligations." S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg. at 3, 5, U.N. Doc. S/Res/1441 (2002). The Security Council referenced Resolution 688, S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg., U.N. Doc. S/RES/688v (1991), which demanded Iraq "immediately end" the "repression of the Iraqi civilian population, and allow organizations providing humanitarian relief to aid those needing help." *Id.* In closing, the Resolution warned Iraq that it would "face serious consequences" if it continued to violate its obligations. *Id.* For more information on the use of force under the authority of the United Nations Security Council, see Patrick McLain, Note, *Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force Against Iraq*, 13 Duke J. Comp. & Int'l L. 233, 241 (2003); Printer, *supra* note 2 .

[4] President George W. Bush, Address to the Nation (May 1, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/05/iraq/20030501-15.html> (last visited April 7, 2004).

[5] Prior to his capture, a number of scholars debated the merits of forcible abduction. See Louis R. Beres, *Why and How Saddam Must be Punished: A Jurisprudential/Philosophic Explanation*, 78 U. DET. MERCY L. REV. 667 (1998).

[6] President George W. Bush, Address to the Nation on the Capture of Saddam Hussein (Dec. 14, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/12/20031214-3.html> (last visited Jan. 19, 2004).

[7] *Saddam Hussein as a P.O.W.: Q & A on the Prisoner-of-War Status of Saddam Hussein*, Human Rights News, Jan. 22, 2004, *available at* <http://www.hrw.org/english/docs/2004/01/27/iraq7076.htm#5> (last visited Feb. 15, 2004).

[8] *Id.*

[9] Although evidence of war crimes also exists, any discussion of past or future war crimes is beyond the scope of this Article. Adjudication of these war crimes would require separate consideration of jurisdictional issues to address Iraq's counter-allegations against the United States. For more information about past war crimes committed by Iraq, see James S. Robbins, *War Crimes: The Case of Iraq*, 18 FLETCHER F. WORLD AFF. 45 (1994); Kenneth A. Williams, *The Iraq-Kuwait Crisis: An Analysis of the Unresolved Issue of War Crimes Liability*, 18 BROOK. J. INT'L L. 385 (1992).

[10] CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2003), *available at* <http://www.cia.gov/cia/publications/factbook/> (last visited Feb. 21, 2004). These groups speak Arabic, Kurdish, Assyrian, and Armenian.

[11] MIDDLE EAST WATCH, GENOCIDE IN IRAQ 23 (1993) (citing P. J. BRAIDWOOD, PREHISTORIC INVESTIGATION IN IRAQI KURDISTAN (1960)).

[12] *Id.* at 24.

[13] *Id.* at 24-26.

[14] *Id.* at 24. The Kurds have also fought against one another because of ideological and personal dissension. Although they united briefly after the first Gulf War, division and conflict quickly reappeared. Gavin A. Symes, Note, *Force Without Law: Seeking A Legal Justification for the September 1996 U.S. Military Intervention in Iraq*, 19 MICH. J. INT'L L. 581, 585 (1998).

[15] HUMAN RIGHTS WATCH, GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS 76 n.37 (1993). The RCC forcibly returned to power in 1968. The chairman of the RCC was the "president of the republic . . . the supreme organ of the state, charged with the mission of carrying out the popular will by removing from power the reactionary, the dictatorial, and the corrupt elements of society and by returning power to the people." Catherine S. Knowles, *Life and Human Dignity, the Birthright of All Human Beings: An*

Analysis of the Iraqi Genocide of the Kurds and Effective Enforcement of Human Rights, 45 NAVAL L. REV. 152, 152, 155-56 (1998) (citing MIDDLE EAST WATCH, *supra* note 11 , at 25).

[16] HUMAN RIGHTS WATCH, *supra* note 15 , at 76 n.37.

[17] *Id.* at 33.

[18] STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 102D CONG., 1ST SESS, STAFF REPORT ON KURDISTAN IN THE TIME OF SADDAM HUSSEIN 56 (Comm. Print 1991) (primarily authored by Peter W. Galbraith); *see also* GERARD CHALIAND, THE KURDISH TRAGEDY 3 (1994).

[19] HUMAN RIGHTS WATCH, *supra* note 15 , at 61.

[20] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction, opened for signature Jan. 13, 1993, U.N. GAOR, 47th Sess., Supp. No. 27, U.N. Doc. A/47/27, App. I (1992), *reprinted in* SHADOW AND SUBSTANCE: THE CHEMICAL WEAPONS CONVENTION 307 (Benoit Morel & Kyle Olson eds., 1993).

[21] The Human Rights Watch has cataloged the forty known attacks. HUMAN RIGHTS WATCH, *supra* note 15 , at 360-63.

[22] International Federation for Human Rights, *Report on Iraq: Continuous and Silent Ethnic Cleansing, Displaced Persons in Iraqi Kurdistan and Iraqi Refugees in Iran*, at 7 (January, 2003), *available at* <http://www.fidh.org/IMG/pdf/iq350a.pdf> (last visited April 7, 2004).

[23] HUMAN RIGHTS WATCH, *supra* note 15 , at 270.

[24] *Id.*; *see also* HUMAN RIGHTS WATCH, ENDLESS TORMENT: THE 1991 UPRISING IN IRAQ AND ITS AFTERMATH, at n.8 (1992), *available at* <http://www.hrw.org/reports/1992/Iraq926.htm> (last visited, Feb. 22, 2004).

[25] HUMAN RIGHTS WATCH, *supra* note 15 , at 62.

[26] *Id.* at 107.

[27] *Id.* at 73.

[28] *Id.* at 325.

[29] *Id.*

[30] International Federation for Human Rights, *supra* note 22 , at 6.

[31] *See, e.g.*, U.N. Special Rapporteur's Report, E/CN.4/1993/45 (Feb. 19, 1993). This report contains a document marked confidential and personal that gives instructions for carrying out the demolition of villages.

[32] IRAQI NATIONAL CONGRESS, *CRIMES AGAINST HUMANITY AND THE TRANSITION FROM DICTATORSHIP TO DEMOCRACY* 146 (1993); HUMAN RIGHTS WATCH, *ENDLESS TORMENT: THE 1991 UPRISING IN IRAQ AND ITS AFTERMATH* (1992), *available at* <http://www.hrw.org/reports/1992/Iraq926.htm> (last visited Feb. 22, 2004).

[33] IRAQI NATIONAL CONGRESS, *supra* note 32 , at 146.

[34] *Id.*

[35] Iraqi headquarters in the city of Suleimaniyeh.

[36] HUMAN RIGHTS WATCH/MIDDLE EAST, *supra* note, at 141-42.

[37] *Id.*

[38] *Id.*

[39] HUMAN RIGHTS WATCH, *supra* note 15 , at 213, *available at* <http://hrw.org/reports/1993/iraqanfal/ANFAL8.htm> (last visited February 17, 2004).

[40] HUMAN RIGHTS WATCH/MIDDLE EAST, *supra* note, at 145-47.

[41] *Id.* at 144.

[42] HUMAN RIGHTS WATCH/MIDDLE EAST, *supra* note, at 160-61.

[43] *Id.*

[44] *Id.* at 161.

[45] IRAQI NATIONAL CONGRESS, *supra* note 32 , at 30. Peshmerga are "those who face death," namely Kurdish fighters. HUMAN RIGHTS WATCH, *supra* note 15 , at 370.

[46] *Id.* at 79-80.

[47] Amnesty International, *Human Rights Committee Briefing*, AI Index MDE 14/08/97, at 7 (Oct. 8, 1997).

[48] *Id.*

[49] *Id.*

[50] HUMAN RIGHTS WATCH, *supra* note 32 .

[51] HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 14 (2d ed. 2000) (quoting Barbara Crossett, *1,500 Executions Cited for Iraq in Past Year, Mostly for Politics*, N.Y. Times, Apr. 14, 1998, at A1).

[52] *Id.*

[53] *See generally* RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* 267 (1985).

[54] Amnesty International Report 2002, *Iraq* 1-3 (2002).

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] Human Rights Questions: Human Rights Situations and Reports of and Representatives: Situation of Human Rights in Iraq, U.N. GAOR, 57th Sess., Agenda Item 111 (c), at 8, U.N. Doc. A/57/325 (2002). The reports came from the United Nations Special Rapporteur on the Commission on Human Rights, along with the Rapporteur on Torture and the Rapporteur on Extrajudicial, Summary, or Arbitrary Executions.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs and Representatives: Situation of Human Rights in Iraq, U.N. GAOR, 49th Sess., Annex, Agenda Item 100, at 44-59, U.N. Doc. A/49/651 (1994).

[65] *Id.* at 44-59.

[66] Bureau Of Democracy, Human Rights, and Labor, *Country Reports On Human Rights Practices-Iraq* (2002), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18277.htm> (last visited April 7, 2004).

[67] *Id.*

[68] *Id.* Hussein personally signed each decree.

[69] Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs and Representatives: Situation of Human Rights in Iraq, U.N. GAOR, 55th Sess., Annex, Agenda Item 116(c), at 12, U.N. Doc. A/55/294 (2000).

[70] *Id.*

[71] *Id.* at 20.

[72] G.A. Res. 55/115, U.N. GAOR, 81st Sess., at 3, U.N. Doc. A/RES/55/115 (2000).

[73] *Id.*

[74] This article will examine only the deportation, imprisonment, severe deprivation of physical liberties, and torture of the Kurdish population.

[75] *See, e.g.*, Amnesty International Report 2002, *supra* note 54 , at 1-3; A Decade Of Deception And Defiance: Saddam Hussein's Defiance Of The United Nations 11-17 (2002) (White House Background Paper) *available at* <http://www.state.gov/p/nea/rls/13456.htm> (last visited April 7, 2004).

[76] President George W. Bush, Address to the Nation on the Capture of Saddam Hussein (Dec. 14, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/12/20031214-3.html> (last visited Jan. 19, 2004).

[77] Until fairly recently, outside states struggled to find a legal justification for jurisdiction over diplomatic figures, particularly when the international community refused to act. The Introductory Comment to the Harvard Research Draft Convention on Jurisdiction with Respect to Crime 1935 listed five general principles, in order of jurisdiction consideration. The "territorial principle," determining jurisdiction by reference to the place where the offense was committed, was of primary importance; the "nationality principle," determining jurisdiction by reference to the nationality or national character of the person committing the offense, was also universally accepted; the "protective principle," determining jurisdiction by reference to the national interest injured by the offense, was recognized in most states; the "universality principle," determining jurisdiction by reference to the custody of the person committing the offense, was widely accepted, but not universal; and finally, the "passive personality principle," determining jurisdiction by reference to the nationality or national character of the person injured by the offense, was considered auxiliary in character and probably not essential if the ends were served by any other principle. D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 264-66 (5th ed. 1998).

The universality principal resembles *humani generis* theory. *Hostes humani generis* means “enemies of the human race.” BLACK’S LAW DICTIONARY, 742 (7th ed. 1999). Authorities could apprehend perpetrators who committed acts considered universally reprehensible wherever they went. The theory originally applied only to pirates. *See id.*; *see also* Edith Y. Wu, *Saddam Hussein as Hostes Humani Generis? Should the U.S. Intervene?*, 26 SYRACUSE J. INT’L L. & COM. 55, 56 (1998).

[78] The Harvard Research Draft Convention proposed universal jurisdiction in the following situations:

Article 10:

(a) When committed in a place not subject to its authority but subject to the authority of another state, if the act or omission which constitutes the crime is also an offence by the law of the place where it was committed, if surrender of the alien for prosecution has been offered to such other state or states and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of the place where the crime was committed. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of the place where the crime was committed.

(b) When committed in a place not subject to the authority of any state, if the act or omission which constitutes the crime is also an offence by the law of a state of which the alien is a national, if surrender of the alien for prosecution remains unaccepted, and if prosecution is not barred by lapse of time under the law of a state of which the alien is a national. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of a state of which the alien is a national.

(c) When committed in a place not subject to the authority of any state, if the crime was committed to the injury of the state assuming jurisdiction, or of one of its nationals, or of a corporation or juristic person having its national character.

(d) When committed in a place not subject to the authority of any state and the alien is not a national of any state.

Harris, *supra* note 77 , at 288-89 (internal citations omitted).

[79] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 404, 423 (1987).

[80] INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *HARD CASES: BRINGING HUMAN RIGHTS VIOLATORS TO JUSTICE ABROAD* 4-5 (1999).

[81] *Id.* at 9-10.

[82] *Id.* at 11-12.

[83] *Id.* at 16.

[84] *Id.*

[85] Single Convention on Narcotic Drugs, Art. 36(2)(iv), 520 U.N.T.S. 204 (1965); *see also* 1988 Convention against Illicit Traffic in Narcotic Drugs, Art. 4(2)(b), Misc. 14 (1989); *D.P.P. v. Doot*, [1973] A.C. 807, HL (Lord Wilberforce).

[86] Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970, Art. 4, 860 U.N.T.S. 105 (1971).

[87] Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, Art. 5, 10 I.L.M. 1151 (1974).

[88] 1979 International Convention against the Taking of Hostages, Art. 5, 18 I.L.M. 1456, *entered into force* 1983.

[89] 1984 United Nations Torture Convention, Art. 5(2), 23 I.L.M. 1027, *entered into force* 1987 [hereinafter Torture Convention]; *see also* Ahcene Boulesbaa, *An Analysis of the 1984 Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 4 DICK. J. INT'L L. 185 (1986).

[90] Convention on the Suppression and Punishment of the Crime of Apartheid 1973, Art. II-IV, 13 I.L.M. 50, *entered into force* 1976.

[91] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomats 1973, Art. 2, 1035 U.N.T.S. 167, *entered into force* 1977.

[92] For more information on piracy, *see* Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 335-39 (1925).

[93] The list of crimes considered eligible for universal jurisdiction in the United States constantly expands. *See* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781, 788 (D.C. Cir. 1984) (making several references to domestic jurisdiction over extraterritorial offenses under the universality principal but ultimately deciding to dismiss the action); *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (likening the defendant, a Paraguayan torturer to pirates and slave traders, the quintessential defendants eligible for universal jurisdiction); *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 254 (D.D.C. 1985) (mentioning the “concept of extraordinary judicial jurisdiction over acts in violation of significant international standards . . . embodied in the principle of ‘universal’ violations of international law”); *In re Demjanjuk*, 612 F. Supp. 544, 555

(N.D. Ohio 1985) (deciding that Israel’s jurisdiction to prosecute a guard from a concentration camp “conforms with the international law principle of universal jurisdiction”), *aff’d sub nom*, *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *United States v. Layton*, 509 F. Supp. 212, 223 (N.D. Cal. 1981) (recognizing universal jurisdiction to punish terrorist acts against internationally protected persons such as diplomats); William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT’L L.J. 729, 732 (discussing the trend toward regional international law enforcement).

[94] *Layton*, 509 F. Supp. at 223.

[95] *The Paquete Habana*, 175 U.S. 667, 712 (1900).

[96] *Demjanjuk*, 776 F.2d at 582.

[97] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 404 cmt. b(1) (1987).

[98] 18 U.S.C. § 1091 (2000):

(a) Basic offense.--Whoever, whether in time of peace or in time of war, in a circumstance described in subsection (d) and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such—

- (1) kills members of that group;
 - (2) causes serious bodily injury to members of that group;
 - (3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;
 - (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;
 - (5) imposes measures intended to prevent births within the group;
- or
- (6) transfers by force children of the group to another group;
- or attempts to do so, shall be punished as provided in subsection (b).

(b) Punishment for basic offense.--The punishment for an offense under subsection (a) is--

- (1) in the case of an offense under subsection (a)(1) where death results, by death or imprisonment for life and a fine of not more than \$1,000,000, or both; and
- (2) a fine of not more than \$1,000,000 or imprisonment for not more than twenty years, or both, in any other case.

(c) Incitement offense.--Whoever in a circumstance described in subsection (d) directly and publicly incites another to violate subsection (a) shall be fined not more than \$500,000 or imprisoned not more than five years, or both.

(d) Required circumstance for offenses.--The circumstance referred to in subsections (a) and (c) is that—

- (1) the offense is committed within the United States; or
- (2) the alleged offender is a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)).

(e) Non-applicability of certain limitations.--Notwithstanding section 3282 of this title, in the case of an offense under subsection (a)(1), an indictment may be found, or information instituted, at any time without limitation.

[99] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. b(1) (1987).

[100] *Attorney General of Israel v. Eichmann*, 36 Int'l L. Rep. 50 (Sup Ct. Israel 1962). Eichmann administered a policy that killed approximately 4,600,000 Jews. Harris, *supra* note 77, at 280 (quoting REITLINGER, *THE FINAL SOLUTION* (1953)).

[101] *Attorney-General of Israel v. Eichmann*, 36 I.L.R. 5 (D.C. Jm. 1961). For more information on the Eichmann trial and the use of the universality principle, see Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 810 (1988).

[102] *In re Extradition of Demjanjuk*, 603 F. Supp. 1468 (N.D. Ohio 1985), *affirmed* 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 457 U.S. 1016 (1986).

[103] *Id.*

[104] *See* G.A. Res. 95(I), 1 U.N.GAOR, U.N.Doc. A/64/Add.1, at 188 (1946); *see also* *Demjanjuk*, 612 F. Supp. at 555 n.11 (quoting Article 6).

[105] 28 U.S.C. § 1350 (2000); *see also* *Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002); Mark E. Wojcik et al., *International Human Rights*, 37 INT'L LAW. 597, 602 (2003).

[106] *Torture Victim Protection Act of 1991*, § 1 et seq., 28 U.S.C. § 1350 (2000).

[107] *Id.*

[108] *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980); *see also Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987), *rev'd on other grounds*, 488 U.S. 428 (1989).

[109] *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995); *see also Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980).

[110] Article 4 of the Convention states:

1. Each State Party shall ensure that all acts of torture are offenses under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Torture Convention, *supra* note 89 .

The United States recently opposed an Optional Protocol to the Convention. The Protocol established procedures for inspecting suspected torture detention facilities. Some credit this hesitation to the United States own treatment of prisoners from Operation Iraqi Freedom/the War on Terrorism. Wojcik, *supra* note 105 , at 598.

[111] See Torture Convention, *supra* note 89 .

[112] G.A. Res. 46, 39 U.N. GAOR Supp. No. 51, at 197 (providing for universal jurisdiction in its Introductory Note to Part VII).

[113] See Monica Hans, *Providing for Uniformity in the Exercise of Universal Jurisdiction: Can Either the Princeton Principles on Universal Jurisdiction or an International Criminal Court Accomplish This Goal?*, 15 *TRANSNAT'L LAW*. 357, 379 (2002).

[114] *Regina v. Bow Street Magistrate*, 1 A.C. 147 (H.L. 1999)..

[115] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 ICJ General List No. 121 (Feb. 14, 2002), *available at* http://212.153.43.18/icjwww/idocket/icobe/icobejudgment/icobe_ijudgment_20020214.PDF (last visited Apr. 21, 2004).

[116] *Regina v. Bow Street Magistrate, Ex parte Pinochet Ugarte (No.3)*, [2000] 1 A.C. 147 (House of Lords 1999).

[117] *Id.*

[118] *Id.*

[119] International Covenant on Civil and Political Rights, *entered into force* 1976, 999 U.N.T.S. 171. Article 6 states:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or prevent the abolition of capital punishment by any State Party to the present Covenant.

Id.

[120] Regina v. Bow Street Magistrate, Ex parte Pinochet Ugarte (No.3), [2000] 1 A.C. 284-90 (House of Lords 1999); see also Sarah C. Rispin, Development, *Implications of Democratic Republic of the Congo v. Belgium on the Pinochet Precedent: A Setback for International Human Rights Litigation?*, 3 CHI. J. INT'L L. 527, 531 (2002).

[121] See Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 ICJ General List No. 121 , at para. 58 (Feb. 14, 2002), *available at* http://212.153.43.18/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF; Mark A. Summers, *The International Court of Justice's Decision in Congo v. Belgium: How Has it Affected the Development of A Principle of Universal Jurisdiction That Would Obligate All States to Prosecute War Criminals?*, 21 B.U. INT'L L.J. 63 (2003).

[122] Rispin, *supra* note 120 , at 529.

[123] Regina v. Bow Street Magistrate, 1 A.C. 147 (H.L. 1999).

[124] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 ICJ General List No. 121, at para. 61 (Feb. 14, 2002), *available at* http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_toc.htm.

[125] Regina v. Bow Street Magistrate, 1 A.C. 147 (H.L. 1999).

[126] United Nations: Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999, 1003 (1998) [hereinafter International Criminal Court].

[127] See Damir Arnaut, *When in Rome . . . ? The International Criminal Court and Avenues for U.S. Participation*, 43 VA. J. INT'L L. 525, 526 (2003).

[128] The ICC may exercise its jurisdiction if an alleged crime occurred in a signatory state's territory or if the crime was committed by a national of a signatory state. Arnaut, *supra* note 127, at 538. Thus, if the United States signed the Rome Statute and could establish a link between Saddam Hussein and the bombings of the World Trade Center on September 11, 2000, then the ICC may have jurisdiction over the dispute. Otherwise, it initially seems that either a national citizen of that state party must commit the crime, or the crime must occur in a state party's territory. *Id.*

[129] The United States has not signed the Rome Statute either.

[130] Article 12(2), 13(b); Arnaut, *supra* note 127, at 538.

[131] See Statute of the International Tribunal of the Former Yugoslavia, Annex, art. 4, U.N. Doc. S/25704, *reprinted in* 32 I.L.M. 1159, 1193, adopted pursuant to S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 1-2, U.N. Doc. S/RES/827 (1993)[hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., Annex, art. 2, U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598, 1602 [hereinafter ICTR Statute].

[132] S.C. Res. 688, U.N. SCOR, 46th Sess., 2982nd mtg., at 31, U.N. Doc. S/RES/688v (1991).

[133] *Id.* at 31-32 (emphasis added). Since the International Criminal Court was not in existence when this Resolution was issued, the Security Council did not have this option in mind. This does not, however, preclude the Security Council from using the ICC as one of its resources today.

[134] Diane Marie Amann & M.N.S. Sellers, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section IV The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 381 (2002); *see also* Arnaut, *supra* note 127, at 538; Colonel M. Tia Johnson, *The American Servicemembers' Protection Act: Protecting*

Whom?, 43 VA. J. INT'L L. 405, 430-33 (2003). Mohamed El Zeidy, *The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422*, 35 VAND. J. TRANSNAT'L L. 1503, 1505-09 (2002).

[135] Arnaut, *supra* note 127 , at 542.

[136] *See generally* Jonathan M.H. Short, Note, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, 8 MICH. J. RACE & L. 503, 505 (2003) (using the Rome Statute as a guide).

[137] *See* Theodore Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L. L. 554 (1995); Mark A. Summers, *The International Court of Justice's Decision in Congo v. Belgium: How Has it Affected the Development of A Principle of Universal Jurisdiction that Would Obligate All States to Prosecute War Criminals?*, 21 B.U. INT'L L.J. 63, 65 (2003).

[138] *See supra* note 131 .

[139] ICTY Statute, *supra* note 131 , at introduction ¶ 10.

[140] ICTR Statute, *supra* note 131 , at chapeau (introduction).

[141] *See* Prosecutor v. Kanyabashi, Decision on the Defense Motion on Jurisdiction, Case No. ICTR-96-15-T, 19-29 (ICTR Trial Chamber June 18, 1997), *available at* <http://www.ictr.org/wwwroot/ENGLISH/cases/Kanyabashi/decisions/180697.pdf> (last visited February 16, 2004); Prosecutor v. Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, PP 14-48 (ICTY App. Chamber Oct. 2, 1995), *available at* <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm> (last visited February 16, 2004).

[142] Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808, P 29, U.N. Docs. S/25704, S/25704/Corr.1 (1993), reprinted in 2 VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 8 (1995), *available at* <http://www.un.org/icty/basic/statut/S25704.htm> (last visited February 16, 2004). The fluid nature of international law and the lack of agreement on points of customary law may make it difficult for the ICTY to apply this rough statutory guide that incorporates customary international law.

[143] William W. Burke-White, *A Community of Courts: Toward A System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 12-13 (2002).

[144] IRAQI NATIONAL CONGRESS, *supra* note 32 , at 115-29.

[145] Talks establishing the United Nations-sanctioned human rights tribunal for the Khmer Rouge failed after five years of discussion due to concerns that the tribunal would

not ensure impartiality, independence, or objectivity. Daniel K. Donovan, Recent Development, *Joint U.N.-Cambodia Efforts to Establish A Khmer Rouge Tribunal*, 44 HARV. INT'L L.J. 551, 551 (2003). In January of 2003, the United Nations and Cambodia reunited to renew discussions about creating a tribunal that would address human rights atrocities committed in Cambodia from 1975 to 1979. *Id.* During the initial discussions, a United Nations appointed panel considered establishing a domestic Cambodian tribunal, an ad hoc international tribunal, a hybrid Cambodian tribunal under United Nations administration, an international tribunal set up through a multilateral treaty, and trials in various states. *Id.* at 557. However, the panel ultimately decided that an ad hoc international tribunal best served the needs of Cambodians and the international community. They suggested that the prosecutor for the ICTR and the ICTY lead the Cambodian tribunal. *Id.* The same process should apply to Iraq.

[146] Critics have disparaged the ICTR for holding trials in Arusha, Tanzania because of its geographic distance from Rwanda. However, the proximity of Arusha to Kigali allows witnesses and victims to travel to the trials. Burke-White, *supra* note 93, at 736.

[147] International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3.

[148] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter ICCPR], *available at* <http://www1.umn.edu/humanrts/instreet/b3ccpr/htm> (last visited February 16, 2004).

[149] International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 165.

[150] Convention on the Elimination of All Forms of Discrimination against Women. *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13. Although Iraq signed CEDAW, it made numerous reservations for Islamic law. These reservations effectually nullify CEDAW. See L. Elizabeth Chamblee, *Rhetoric or Rights?: When Culture and Religion Bar Girls' Right to Education*, 44 VA. J. INT'L L. (forthcoming 2004) (manuscript at 14-15, on file with author).

[151] Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3. Iraq also made reservations to this treaty that prevented children from changing their religion. See International Obligations and Access to Remedies: Iraq, at http://www.right-to-education.org/content/rights_and_remedies/iraq.html (last visited Mar. 14, 2004). For current status of Iraq's treaty ratifications, see Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, Dec. 9, 2002.

[152] G.A. Res. 1994/203, U.N. Doc. A/RES/49/203, at 1 (1994), *available at* <http://www.un.org/documents/ga/res/49/a49r203.htm> (last visited February 16, 2004).

[153] The Vienna Convention, a multinational treaty prepared by the United Nations, codifies customary international law governing international agreements. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (*entered into force* Jan. 27, 1980)[hereinafter Vienna Convention]. For more information on the interrelation between treaties and customary international law, see Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431 (2004).

[154] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987). A number of courts have relied on this section of the Restatement. *See, e.g.*, Bigio v. Coca-Cola Co., 239 F.3d 440, 448 (2d Cir. 2000); Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995); Diderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992); De Sanchez v. Banco Central De Nicaragua, 770 F.2d 1385, 1397 (5th Cir. 1985); Chiminya Tachiona v. Mugabe, 216 F. Supp. 2d 262, 266 (S.D.N.Y. 2002); Mehinovic v. Vukovic, 198 F. Supp. 2d 1322, 1348 (N.D. Ga. 2002); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1152 (C.D. Cal. 2002); Bao Ge v. Li Peng, 201 F. Supp. 2d 14, 22 (D.D.C. 2000); Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1252 (S.D. Fla. 1997); Beanal v. Freeport-McMoRan, Inc., 696 F. Supp. 362, 371-73, 376 (E.D. La. 1997); Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1093 (S.D. Fla. 1997); Caballero v. Caplinger, 914 F. Supp. 1374, 1379 (E.D. La. 1996); Fernandez-Roque v. Smith, 622 F. Supp. 887, 903 (N.D. Ga. 1985).

[155] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (1987).

[156] A norm is fundamental to international law and permits no derogation if there is widespread consensus among the states that it cannot be disregarded for any reason. The Vienna Convention on the Law of Treaties codified the concept of jus cogens. Article 53 of the Vienna Convention states that a “treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.” It then defines “norm” as “a norm accepted and recognized by the international community of States as a whole a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention, *supra* note 153, at art. 53; *see also* Gordon A. Christenson, *The World Court and Jus Cogens*, 81 AM. J. INT'L L. 93, 95 n.9 (1987).

[157] RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 79 (H. Fertig 1944), *available at* <http://www.preventgenocide.org/lemkin/AxisRule1944-1.htm> (last visited February 16, 2004).

[158] Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 284, *reprinted in* 41 A.J.I.L. 172 (1947) [hereinafter Nuremberg Charter], *available at* <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm> (last visited February 16, 2004).

[159] 2 Trial of the Major War Criminals Before the International Military Tribunal 45-46 (1947) (indictment, Count Three), *available at* <http://www.yale.edu/lawweb/avalon/imt/proc/count3.htm> (last visited Apr. 21, 2004).

[160] 3 M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW* 127 (Transnational Publishers 1987) (summarizing dispositions and outcomes of the Nuremberg Trial).

[161] *See generally* Nuremberg Charter, *supra* note 158 ; *see also* Prosecutor v. Kayishema & Ruzindana, Case no. ICTR-95-1-T, para. 88, (ICTR Trial Chamber, May 21, 1999) (“The Genocide Convention is undeniably considered part of customary international law. . . .”); Prosecutor v. Musema, Case No. ICTR-96-13-A, para. 15 (ICTR Trial Chamber, Jan. 27, 2000).

[162] Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, *available at* <http://www.yale.edu/lawweb/avalon/imt/imt10.htm> (last visited February 16, 2004) [hereinafter Allied Control Council Law].

[163] *See, e.g.*, Case No. 35, Trial of Josef Alstötter and Others, 6 L. Rep. Trials War Crims., 1, 74-76 (1948); Case No. 73, Trial of Ulrich Greifelt and Others, 8 L. Rep. Trials War Crims., 1 (1949), *available at* <http://www.ess.uwe.ac.uk/WCC/greifelt1.htm> (last visited Apr. 21, 2004).

[164] *Alstötter*, 6 L. Rep. Trials War Crims. at 83 n.3.

[165] *Greifelt*, 8 L. Rep. Trials War Crims. at 3.

[166] *See* Trial of Gauleiter Artur Greiser, in 13 L. Rep. Trials War Crim. 70, 80-84 (1949); Case No. 37, Trial of Hauptsturmführer Amon Leopold Goeth, 7 L. Rep. Trials War Crims. 1 (1948); Case No. 38, Trial of Obersturmbannführer Rudolf Franz Ferdinand Hoess, 7 L. Rep. Trials War Crims. 11 (1948).

[167] *See* David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 TEX. INT’L L. J. 231, 254 (2002).

[168] Law in the United States adds to the offenses listed in the Genocide Convention, criminalizing an act behavior that “causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques.” 18 U.S.C. § 1091(a)(3) (2000).

[169] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (1951), adopted by G.A. Res. 260(A)(III), U.N. GAOR, 3d Sess., pt. 1, at 174, U.N. Doc. A/810 (1948) [hereinafter Genocide Convention], *available at* http://www.unhchr.ch/html/menu3/b/p_genoci.htm (last visited February 16, 2004).

[170] See Nersessian, *supra* note 169 at 256.

[171] Genocide Convention, *supra* note 169 , at Art. III.

[172] Harris, *supra* note 77 , at 1048 (providing the text of the United Nations Charter).

[173] HUMAN RIGHTS WATCH/MIDDLE EAST, *supra* note, at 1-2; *see also* IRAQI NATIONAL CONGRESS, *supra* note 32 , at 70-71.

[174] HUMAN RIGHTS WATCH/MIDDLE EAST, *supra* note, at 1. Ali Hassan Al-Majid, or “Chemical Ali”, recorded a number of meetings with senior Ba’ath officials in 1988 and 1989. In March 1991, a number of these tapes were found in Iraqi government offices and from al-Majid’s home in Kurkuk and given to Human Rights Watch. In one of these tapes, dated May 26, 1988, Chemical Ali stated:

We continued the deportations. I told the mustashars that they might say that they like their villages and that they won't leave. I said I cannot let your village stay because I will attack it with chemical weapons. Then you and your family will die. You must leave right now. Because I cannot tell you the same day that I am going to attack with chemical weapons. I will kill them all with chemical weapons! Who is going to say anything? The international community? Fuck them! The international community and those who listen to them.

... This is my intention, and I want you to take serious note of it. As soon as we complete the deportations, we will start attacking them everywhere according to a systematic military plan. Even their strongholds. In our attacks we will take back one third or one half of what is under their control. If we can try to take two-thirds, then we will surround them in a small pocket and attack them with chemical weapons. I will not attack them with chemicals just one day, but I will continue to attack them with chemicals for fifteen days. Then I will announce that anyone who wishes to surrender with his gun will be allowed to do so. Anyone willing to come back is welcome, and those who do not return will be attacked again with new, destructive chemicals. I will not mention the name of the chemical because that is classified information. But I will say with new destructive weapons that will destroy you. So I will threaten them and motivate them to surrender.

HUMAN RIGHTS WATCH, *supra* note 15 , at appendix A.

[175] HUMAN RIGHTS WATCH, *supra* note 15 , at 345, *available at* <http://hrw.org/reports/1993/iraqanfal/ANFAL13.htm> (last visited February 17, 2004).

[176] The Anfal Campaign was organized into eight stages, however for the purposes of this Article, similar genocidal acts will be examined collectively.

[177] Harry de Quetteville, *Iraqis Cheer as Troops Capture Chemical Ali*, TELEGRAPH, Aug. 22, 2003, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2003/08/22/wirq22.xml> (last visited Feb. 22, 2004).

[178] HUMAN RIGHTS WATCH/MIDDLE EAST, *supra* note, at 259.

[179] “Barzani” is the name of a charismatic Kurdish tribal leader who led an insurgence against Hussein.

[180] HUMAN RIGHTS WATCH, *supra* note 15, at 41, available at <http://hrw.org/reports/1993/iraqanfal/ANFAL1.htm> (last visited February 17, 2004).

[181] *Id.* (quoting Al-Iraq, September 13, 1983).

[182] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. A (1987).

[183] *See* ICCPR, *supra* note 148.

[184] *See* Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, para 5, (ICTR Trial Chamber, June 7, 2001).

[185] *See id.*

[186] Genocide Convention, *supra* note 169, at Article II (c).

[187] Case No. ICTR-96-4-T, Judgment, section 6.3.1 (ICTR Trial Chamber I, Sept. 2, 1998). The court favorably cites NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY 63 (1960).

[188] Attorney General of the Government of Israel v. Eichmann, 36 I.L.R. 340 (D.C. Jerusalem 1961).

[189] In *Prosecutor v. Akayesu*, the court stated:

Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constructive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus the special intent in the crime of genocide lies in “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” The Chamber found that “the offender is culpable only when he has committed one of the

offences charged under Article 2(2) . . . with the clear intent to destroy, in whole or in part, a particular group. The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.”

Case No. ICTR-96-4-T, para. 498, 517-22 (ICTR Trial Chamber I, Sept. 2, 1998); *see also* Prosecutor v. Musema, Case No. ICTR-96-13-A, para. 15 (ICTR Trial Chamber, Jan. 27, 2000).

[190] *See* Prosecutor v. Semanza, Case No. ICTR-97-20, para. 313 (ICTR Trial Chamber, May 15, 2003) (“A perpetrator’s mens rea may be inferred from his actions.”); Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, para. 63 (ICTR Trial Chamber, June 7, 2001) (“[E]vidence of the context of the alleged culpable acts may help the Chamber to determine the intention of the Accused, especially where the intention is not clear from what the person says or does. The Chamber notes, however, that the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the Accused. The Chamber is of the opinion that the Accused’s intent should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action.”); Prosecutor v. Rutaganda, Case No. ICTR-96-3, para. 61-63 (ICTR Trial Chamber, May 21, 1999);

[191] HUMAN RIGHTS WATCH, *supra* note 15 , at 78 n.40.

[192] *Id.*

[193] *Id.*

[194] *Id.**

[195] *Id.* at 81- 84.

[196] *Id.*

[197] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, section 6.3.1 (ICTR Trial Chamber I, Sept. 2, 1998).

[198] *See* IRAQI NATIONAL CONGRESS, *supra* note 32 , at 136-69 (displaying photocopies of the actual documents); HUMAN RIGHTS WATCH/MIDDLE EAST, *supra* note 15, at 62. In Prosecutor v. Akayesu, the court noted that because intent is a mental factor that is often difficult to determine, the prosecutor could use the following factors to prove intent “in the absence of a confession from the accused”:

· “the general context of the perpetration of other culpable acts systematically directed against that same group, whether . . . committed by the same offender or by others;”

- “the scale of atrocities committed;”
- the “general nature” of the atrocities committed “in a region or a country;”
- “the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups;”
- “the general political doctrine which gave rise to the acts;”
- “the reputation of destructive and discriminatory acts;” or
- “the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group—acts which are not in themselves covered by the list . . . but which are committed as part of the same pattern of conduct.”

Case No. ICTR-96-4-T, para. 523-24 (ICTR Trial Chamber I, Sept. 2, 1998). The tribunal in *Prosecutor v. Kayishema and Ruzindana* agreed with the tribunal in *Akayesu* and stated that the accused’s “action, including circumstantial evidence, however may provide sufficient evidence of intent,” and “intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action.” The tribunal included the following factors as relevant indicators of a pattern of purposeful action:

- “the number of group members affected;”
- “the physical targeting of the group or their property;”
- “the use of derogatory language toward members of the targeted group;”
- “the weapons employed and the extent of bodily injury;”
- “the methodical way of planning;”
- “the systematic manner of killing;” and
- “the relative proportionate scale of the actual or attempted destruction of a group.”

Case No. ICTR-95-1-T, para. 93, 527 (ICTR Trial Chamber, June 7, 2001).

[199] HUMAN RIGHTS WATCH, *supra* note 15 , at 61-62.

[200] However, premeditation is not a necessary element.

[201] Knowles, *supra* note 15 , at 152.

[202] Genocide Convention, *supra* note 169 , at Article II (b).

[203] Case No. ICTR-95-1-T, para. 108-13 (ICTR Trial Chamber, June 7, 2001).

[204] *Id.*

[205] Prosecutor v. Rutaganda, Case No. ICTR-96-3, para. 51 (ICTR Trial Chamber, May 21, 1999).

[206] *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, para. 502 (ICTR Trial Chamber I, Sept. 2, 1998).

[207] Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs and Representatives: Situation of Human Rights in Iraq, U.N. GAOR, 55th Sess., Annex, Agenda Item 116(c), at 3-7, U.N. Doc. A/55/294 (2000).

[208] IRAQI NATIONAL CONGRESS, *supra* note 32 , at 167.

[209] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, section 6.3.1 (ICTR Trial Chamber I, Sept. 2, 1998).

[210] Genocide Convention, *supra* note 169 , at Article II.

[211] *Id.*

[212] Knowles, *supra* note 15 , at 154.

[213] *Id.*

[214] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, section 3 (ICTR Trial Chamber I, Sept. 2, 1998).

[215] *Id.*

[216] HUMAN RIGHTS WATCH, *supra* note 15 , at 52-53.

[217] IRAQI NATIONAL CONGRESS, *supra* note 32 , at 136-69 (providing exact copies of the documents exchanged within the Iraqi government).

[218] “[C]onspiracy to commit genocide is to be defined as an agreement between two or more persons to commit the crime of genocide.” Prosecutor v. Musema, Case No. ICTR-96-13-A, para. 798 (ICTR Trial Chamber, Jan. 27, 2000). For a detailed analysis of the elements for conspiracy to commit genocide, see HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY: TOPICAL DIGESTS OF THE CASE LAW OF

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2004).

[219] The tribunal in *Prosecutor v. Akayesu* stated:

[D]irect and public incitement must be defined . . . as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.

Case No. ICTR-96-4-T, Judgment, para. 559 (ICTR Trial Chamber I, Sept. 2, 1998).

[220] In *Prosecutor v. Semanza*, the tribunal defined complicity in genocide. Case No. ICTR-97-20, para. 393 (ICTR Trial Chamber, May 15, 2003). It stated, “prior jurisprudence has defined the term complicity as adding and abetting, instigating, and procuring.” *Id.* “[C]omplicity to commit genocide in Article 2(3) refers to all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide.” *Id.* at para. 395.

[221] Knowles, *supra* note 15 , at 156.

[222] CHRISTINE MOSS HELMS, IRAQ: EASTERN FLANK OF THE ARAB WORLD 12 (1984).

[223] *See* Human Rights Watch World Report 1989, Human Rights Watch, *available at* <http://www.hrw.org/reports/1989/WR89/Iraq.htm#TopOfPage> (last visited Feb. 21, 2004).

[224] James D. Fry, Comment, *Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction*, 7 UCLA J. INT’L L. & FOREIGN AFF. 169, 183 (2002) (citing ADAM HOCHSCHILD, KING LEOPOLD’S GHOST 112, 317 n.112 (1998)).

[225] *Id.*

[226] Nuremberg Charter, *supra* note 158 .

[227] *Id.* at Art. 6 (c).

[228] *See* G.A. Res. 96, U.N. Doc. A/236 (1946); *see also* Fry, *supra* note 225 , at 184.

[229] Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, art. 5(c), T.I.A.S. No. 1589, 4 Bevens 20 (as amended, Apr. 26, 1946, 4 Bevens 27), reprinted in 2 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW 73 (Gabrielle Kirk McDonald et al. eds., 2000).

[230] Allied Control Council Law *supra* note 162 . The entire section reads:

Atrocities and Offences, including, but not limited to, murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population or persecutions on political, racial or religious grounds in execution or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic laws of the country where perpetrated.

[231] Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for the Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, Report by the Secretary-General, 48th Sess., Annex, U.N. Doc. S/25704 (1993), art. 5, reprinted in 32 I.L.M. 1159; *see also* ICTY Statute, *supra* note 131 .

[232] ICTR Statute, *supra* note 131 , at chapeau.

[233] Fry, *supra* note 225 , at 185.

[234] The International Criminal Court: Elements Of Crimes And Rules Of Procedure And Evidence 63 (Roy S. Lee et. al. eds., 2001)[hereinafter International Criminal Court Elements].

[235] Case No. IT-94-T, Opinion and Judgment, paras. 647-48 (ICTY Trial Chamber II, May 7, 1997).

[236] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 580 (ICTR Trial Chamber I, Sept. 2, 1998).

[237] *Id.*

[238] *See* Guenael Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L. J. 237, 244 (2002).

[239] *See infra* Part V.C.

[240] Mettraux, *supra* note 238 , at 245.

[241] Prosecutor v. Nikolic, Case No. IT-94-2, Review of Indictment Pursuant to Rule 61 of Rules of Procedure and Evidence, para. 27 (Oct. 20, 1995).

[242] *Id.*

[243] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, para. 578 (ICTR Trial Chamber, Sept. 2, 1998).

[244] *See infra* Part V.C.2.a.

[245] *See infra* Part V.C.2.a.

[246] *See infra* Part V.C.3.

[247] *See* Prosecutor v. Kunarac, Case No. IT-96-23, Judgment, para. 418 (Feb. 22, 2001). The ICTY adds the element that the crimes against humanity occur in an armed conflict, but does not require a nexus between the accused acts and the armed conflict.

[248] *See* Prosecutor v. Tadic, Case No. IT-94-1, Opinion and Judgment, para. 649 (May 7, 1997) (stating, “a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offenses to be held liable”); *see also* Prosecutor v. Mrksic, Case IT-95-13a, Review of the Indictment Pursuant to Rule 61 of Rules of Procedure and Evidence, para. 29-30 (April 3, 1996).

[249] *See* Mettraux, *supra* note 238, at 255.

[250] Prosecutor v. Semanza, Case No. ICTR-97-20, para. 326 (ICTR Trial Chamber, May 15, 2003). “The concept of ‘widespread’ may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.” Prosecutor v. Akayesu, Case No. ICTR-96-4-T, para. 580 (ICTR Trial Chamber, Sept. 2, 1998). “The concept of ‘systematic’ may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy.” *Id.*

[251] “Members of the civilian population are people who are not taking any active part in the hostilities including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause. *Id.* at para. 582. Yet, this requirement “does not mean that the entire population of a given State or territory must be victimised by these acts in order for the acts to constitute a crime against humanity.” Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, para 80, (ICTR Trial Chamber, June 7, 2001). “Instead the ‘population’ element is intended to imply crimes of a collective nature and thus excludes single or isolated acts which, although possibly constituting crimes under national penal legislation, do not rise to the level of crimes against humanity.” *Id.*

[252] *See* Prosecutor v. Blaskic, Case No. IT-95-14, Judgment, para. 207 (March 3, 2000); *see also* Prosecutor v. Jelusic, Case No. IT-95-10, Judgment, para. 53 (Dec. 14, 1999).

[253] *See, e.g.*, Regina v. Finta, Supreme Ct. of Canada, para. 293-94 (March 24, 1994) (La Forest, J., dissenting)

[254] Prosecutor v. Kayishema & Ruzindana, Case no. ICTR-95-1-T, para. 133-34 (ICTR Trial Chamber, May 21, 1999). Crimes against humanity covers both state and non-state actors. *Id.* at para. 125-26.

[255] International Criminal Court, *supra* note 126 , at Art. 30(2)(a), (b).

[256] *Id.* at Art. 30(3).

[257] INTERNATIONAL CRIMINAL COURT ELEMENTS, *supra* note 234 , at 61.

[258] *Id.*

[259] International Criminal Court, *supra* note 126 , at Art. 28(2)(a), (b), (c).

[260] *In re Yamishita*, 327 U.S. 1, 12 (1946) (affirming the conviction of the General where he did not take adequate measures to control his troops).

[261] G.A. Res. 203, U.N. Doc. A/RES/49/203, at 2 (1995).

[262] ICCPR, *supra* note 148 , at Art. 12(4).

[263] *See* INTERNATIONAL CRIMINAL COURT ELEMENTS, *supra* note 234 , at 742.

[264] Prosecutor v. Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, para. 644 (ICTY App. Chamber Oct. 2, 1995).

[265] INTERNATIONAL CRIMINAL COURT ELEMENTS, *supra* note 234 , at 742 n.12.

[266] HUMAN RIGHTS WATCH, *supra* note 15 , at 80.

[267] INTERNATIONAL CRIMINAL COURT ELEMENTS, *supra* note 234 , at 742.

[268] *Id.* at 87.

[269] HUMAN RIGHTS WATCH, *supra* note 15 , at 79.

[270] Knowles, *supra* note 15 , at 154.

[271] INTERNATIONAL CRIMINAL COURT ELEMENTS, *supra* note 234 , at 87.

[272] IRAQI NATIONAL CONGRESS, *supra* note 32 , at 68.

[273] *Id.* at 57.

[274] Human Rights Questions, *supra* note 207 , at 49.

[275] ICCPR, *supra* note 148 , at Art. 9.

[276] *Id.* at Art. 14.

[277] *See* INTERNATIONAL CRIMINAL COURT ELEMENTS, *supra* note 234 , at 743.

[278] INTERNATIONAL CRIMINAL COURT ELEMENTS, *supra* note 234 , at 743; Prosecutor v. Kronojelac, Case No. IT-97-25, para. 115 (ICTY Trial Chamber, Mar. 15, 2002).

[279] INTERNATIONAL CRIMINAL COURT ELEMENTS, *supra* note 234 , at 743; Prosecutor v. Kronojelac, Case No. IT-97-25, para. 115 (ICTY Trial Chamber, Mar. 15, 2002).

[280] INTERNATIONAL CRIMINAL COURT ELEMENTS, *supra* note 234 , at 89.

[281] Prosecutor v. Kronojelac, Case No. IT-97-25, para. 115, 302-03 (ICTY Trial Chamber, Mar. 15, 2002).

[282] *See* INTERNATIONAL CRIMINAL COURT ELEMENTS, *supra* note 234 , at 743.

[283] Prosecutor v. Kronojelac, Case No. IT-97-25, para. 115 (ICTY Trial Chamber, Mar. 15, 2002).

[284] *See* ICCPR, *supra* note 148 .

[285] *Id.* at Art. 14 (1).

[286] The specific deprivations are explained in Part II.B.1.

[287] Amnesty International Report 2002, *supra* note 54 , at 2.

[288] *Id.*

[289] *Id.*

[290] United Nations officials included Special Rapporteur of the Commission on Human Rights, along with the Rapporteur on Torture and the Rapporteur on Extrajudicial, Summary or Arbitrary Executions.

[291] *Id.* at 7.

[292] Human Rights Questions, *supra* note 272, at 24.

[293] *Id.*

[294] Human Rights Questions, *supra* note 274 , at 24-25.

[295] *See* Prosecutor v. Naletilic and Martinovic, Case No. IT-98-34, para. 247 (ICTY Trial Chamber, Mar. 31, 2003). “Article 5(i) of the Statute (other inhumane acts) is a residual clause, which applies to acts that do not fall within any of other sub-clause of Article 5 of the Statute but are sufficiently similar in gravity to the other enumerated crimes.” Inhumane acts are “acts or omissions intended to cause deliberate mental or physical suffering to the individual. As constituting crimes against humanity, these acts must also be widespread or systematic.” *Id.*

[296] Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, para. 148-151 (ICTR Trial Chamber, May 21, 1999).

[297] Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, para. 148-151 (ICTR Trial Chamber, May 21, 1999).

[298] *See* Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, para. 148-151 (ICTR Trial Chamber, May 21, 1999).

[299] Prosecutor v. Musema, Case No. ICTR-96-13-A, para. 232 (ICTR Trial Chamber, Jan. 27, 2000).

[300] Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, para. 153 (ICTR Trial Chamber, May 21, 1999). “[T]o find an accused responsible for [third party suffering] under crimes against humanity, it is incumbent on the Prosecutor to prove the *mens rea* on the part of the accused.” *Id.* “[I]nhumane acts are . . . those which *deliberately* cause serious mental suffering.” *Id.* The *mens rea* is “the intention to inflict serious mental suffering on the third party, or where the accused knew that his act was likely to cause serious mental suffering and was reckless as to whether such suffering would result.” *Id.* Consequently, “if at the time of the act, the accused was unaware of the third party bearing witness to his act, then he cannot be held responsible for the mental suffering of the third party.” *Id.*

[301] Case No. ICTR-96-14, para. 465, 467 (Trial Chamber, May 16, 2003).

[302] Case No. IT-98-32-T, para. 234 (ICTY Trial Chamber, Nov. 29, 2002).

[303] *Id.* at para. 235.

[304] *Id.*

[305] *See supra* Part II.B.2 (detailing the excessive punishment decrees).

[306] *See* ICCPR, *supra* note 148 , at Art. 7.

[307] Office of the High Commissioner for Human Rights, General Comment 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment, Art. 7, 44th Sess., at 5 (1992), *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CCPR+General+comment+20.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CCPR+General+comment+20.En?OpenDocument) [hereinafter Torture Convention Comment 20].

[308] Amnesty International, *supra* note 47 , at 3-4.

[309] *Id.* at 2 (emphasis added).

[310] *See* ICCPR, *supra* note 148 , at Art. 6(2).

[311] ICTY Statute, *supra* note 131 , art. 5(f).

[312] ICTR Statute, *supra* note 131 , art. 3(f).

[313] Allied Control Council Law *supra* note 162 , art. II(1)(c).

[314] International Criminal Court, *supra* note 126 , at Art. 7(2)(e).

[315] *Id.* (broadly defining torture as “intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused.”)

[316] Torture Convention, *supra* note 89 .

[317] ICCPR, *supra* note 148 .

[318] *See* Torture Convention Comment 20, *supra* note 307 .

[319] Prosecutor v. Kunarac, Kovac and Vokovic, Case No. IT-96-23 & IT-96-23/1, para. 142 (Appeals Chamber, June 12, 2002); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, para. 593-95 (ICTR Trial Chamber, Sept. 2, 1998). The Chamber, in *Prosecutor v. Semanza* noted that no “public official requirement exists.

In Akayesu, the Trial Chamber relied on the definition of torture found in the . . . Convention Against Torture The ICTY Appeals Chamber has since explained that while the definition contained in the Convention Against Torture is reflective of customary international law . . . , it is not identical to the definition of torture as a crime against humanity. [T]he ICTY Appeals Chamber has confirmed that, outside the framework of the Convention Against Torture, the ‘public official’ requirement is not a requirement under customary international law in relation to individual criminal responsibility for torture as a crime against humanity.

Case No. ICTR-97-20, para. 342-43 (ICTR Trial Chamber, May 15, 2003). Thus, the Chamber rejected the ‘public official’ requirement.

[320] Prosecutor v. Kunarac, Kovac and Vokovic, Case No. IT-96-23 & IT-96-23/1, para. 142 (Appeals Chamber, June 12, 2002); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, para. 593-95 (ICTR Trial Chamber, Sept. 2, 1998).

[321] Prosecutor v. Kunarac, Kovac and Vokovic, Case No. IT-96-23 & IT-96-23/1, para. 142 (Appeals Chamber, June 12, 2002); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, para. 593-95 (ICTR Trial Chamber, Sept. 2, 1998).

[322] Torture Convention Comment 20, *supra* note 307 , at 2.

[323] *Id.* at 3.

[324] *Id.* at 8.

[325] *Id.* at 5.

[326] *Id.* at 6.

[327] *Id.* at 15.