

Chemical Warfare as Genocide and Crimes Against Humanity¹

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“... Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes ...”³

1. Introduction

Two national courts are currently examining the use of chemical weapons as a means of genocide, and one of them is additionally examining their use as a crime against humanity. Both genocide and crimes against humanity are international crimes. As we are reminded in the preamble of the Rome Statute of the International Criminal Court, every State is under the duty to prosecute, for which there should be no impunity.

For those who seek no impunity for all acts involving chemical weapons these cases are significant because, lamentably, only the *use in international armed conflict* has been included in the list of crimes falling within the jurisdiction of the International Criminal Court.⁴ Of course an increasing number of national justice systems are in a position to prosecute *any* activities related to chemical weapons. By the end of 2006, 62%

¹ In a slightly revised form this article has been published previously in the CBW Conventions Bulletin, issue 74 (December 2006).

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³ Preambular paragraph 7 of the Rome Statute of the International Criminal Court. As of 1 January 2007, there are 104 parties to the Statute which entered into force on 1 July 2002. The text, as corrected, is available at www.icc-cpi.int.

⁴ Article 8(2)(b) of the Rome Statute. Paragraph 1 of Article 8 specifies that “The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes”, which further limits the cases which could meet the criteria to be heard by the Court.

of the 181 States Parties to the Chemical Weapons Convention⁵ had adopted national implementing legislation criminalising acts prohibited by the Convention and 40% of them had criminalised *all* acts related to chemical weapons except, of course, destruction.⁶ For crimes that fall within the jurisdiction of the International Criminal Court there would be a certain amount of pressure to prosecute since the Court can seize jurisdiction if, *inter alia*, the national court is unwilling or genuinely unable to carry out the investigation or prosecution of the case.⁷

The two cases that are currently under consideration are, respectively, one by the Court of Appeals of The Hague and another by the Iraqi High Tribunal. Both cases concern, *inter alia*, the use of chemical weapons by Iraq in Iraqi Kurdistan in the 1980s. In the Dutch case, charges of complicity in genocide and complicity in war crimes were brought against the defendant. In the Iraqi case, charges of genocide were brought against two defendants and charges of war crimes and crimes against humanity were brought against all seven defendants.

The use of chemical weapons in international armed conflict has long been considered to be a war crime under customary and conventional international law.⁸ The scope of the present comment will be confined to discussing prosecution for the use of chemical weapons as a means of committing the international crimes of genocide and crimes against humanity – an unprecedented event. The definitions of the crimes will first be presented, followed by the facts of the two cases, the substantive law being applied to them and, finally, particular aspects of prosecuting international crimes in national courts. It will conclude by recommending that all States update their penal codes to incorporate international crimes, whether or not they have become party to the Rome Statute of the International Criminal Court.

2. Definitions

The internationally accepted definition of “genocide” has been codified in the Genocide Convention⁹:

⁵ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. As of 1 January 2007, there are 181 parties to the Convention which entered into force on 29 April 1997. The text, as corrected and amended, is available at www.opcw.org.

⁶ OPCW document C-11/DG.6, dated 23 November 2006. Available at www.opcw.org -> official documents -> C-11. The OPCW is continuing to vigorously pursue the adoption of comprehensive implementing legislation by all States Parties, as required by the Convention. See most recently the decision of the OPCW Conference of the States Parties on “Sustaining Follow-up to the Plan of Action Regarding Implementation of Article VII Obligations,” decision C-11/DEC.4, dated 6 December 2006, available at www.opcw.org -> official documents -> C-11.

⁷ Article 17(1) of the Rome Statute.

⁸ See L. Tabassi, ‘Impact of the CWC: Progressive Development of Customary International Law and Evolution of the Customary Norm against Chemical Weapons,’ *The CBW Conventions Bulletin* (March 2004) pp. 1-7.

⁹ Convention on the Prevention and Punishment of the Crime of Genocide, approved by the United Nations General Assembly resolution 260A (III) of 9 December 1948; entry into force 12 January 1951. As of 31 December 2006, there are 140 parties to the Convention. Text available at www.un.org.

“...[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group”.¹⁰

Both the Netherlands and Iraq are party to the Genocide Convention. The Netherlands incorporated the definition into national law in its Genocide Convention Implementation Act.¹¹ The Iraqi High Tribunal is applying the definition by virtue of its Statute and its adherence to the Genocide Convention.¹²

The internationally accepted definition of “Crime against Humanity” was originally codified in the Charter of the International Military Tribunal in 1945 and appears as follows in the Rome Statute of the International Criminal Court:

“[C]rime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination; ...
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; ...
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health...”¹³

The Iraqi High Tribunal is applying this definition by virtue of Article 12 of its Statute.

Genocide has been described as “the crime of crimes” and is considered to be the most difficult crime to prove due to the special intent that must be established in order to convict a perpetrator. For crimes against humanity the difficulty will fall in proving that the act(s) at issue fell within a broader pattern of attack. Both these crimes are “system crimes” for which “it is usually necessary to carefully reconstruct the functioning of the ‘criminal system’ in which the individual acted. The scale of criminal conduct implied in crimes such as crimes against humanity usually means that the ‘underlying acts’ of the crime – mass killing, forced displacement, mass arrests – will be difficult to deny. However, attributing individual criminal responsibility for these acts further up the chain

¹⁰ Article 2 of the Genocide Convention.

¹¹ Article 1 of the Genocide Convention Implementation Act.

¹² Article 11 of the Statute of the Iraqi Special Tribunal, issued 10 December 2003 by the Coalition Provisional Authority of Iraq and promulgated, as amended, as Law No. (10) 2005 by the Presidency Council, Official Gazette of the Republic of Iraq, no. 4006 dated 18 October 2005.

¹³ Article 7(1) of the Rome Statute.

of political and military responsibility can be complicated...”¹⁴ “System crimes ... are generally characterised by a division of labour between planners and executants, as well as arrangements in structure and execution that tend to make connections between these two levels difficult to establish. They are complicated by the fact that they are often (though not always) committed by official entities and frequently with the involvement of people who were, or may remain, politically powerful. The crimes usually affect large numbers of victims, and these issues of scale and context make investigations logistically more difficult.”¹⁵ In other words, establishing the knowledge and intent of the commanders will be more difficult than establishing the knowledge and intent of the low-level perpetrators who carried the orders out.

3. The Netherlands: the Van Anraat case

The Dutch case concerns the criminal prosecution of Mr Frans van Anraat, a Dutch businessman, who was charged with complicity in war crimes and complicity in genocide for his contribution towards realising the production and use of chemical weapons by Saddam Hussein and others during the period 1985-1988. The prosecution accused Mr van Anraat of supplying, to Iraqi State organisations, chemicals which were used to produce chemical weapons used by the former Iraqi regime to attack Iraqi Kurdistan and the Islamic Republic of Iran.

The Netherlands could be commended for the fact that criminal proceedings were initiated against a businessman for complicity in war crimes and genocide. Generally economic actors have been largely shielded from such criminal charges, even though their role with regard to gross violations of international human rights and humanitarian law has been raised repeatedly.¹⁶ The *Van Anraat* case has many similarities with the *Zyklon B* case in which German industrialists were charged, and convicted, for war crimes during World War II for the supply of poison gas, used for the extermination of allied nationals interned in concentration camps, knowing that the gas was to be used for that purpose.¹⁷

3.1 The indictment

¹⁴ Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Prosecution Initiatives*, United Nations (2006) 12. Available at www.ohchr.org.

¹⁵ Human Rights Watch, *Judging Dujail: The First Trial before the Iraqi High Tribunal* (November 2006) at 73. Available at www.hrw.org.

¹⁶ United Nations ‘Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (26 August 2003) UN Doc E/CN.4/Sub.2/2003/38/Rev.2 (‘Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.’).

¹⁷ *Zyklon B* Trial of Bruno Tesch *et al.* British Military Court Hamburg. March 1946. Law Reports of Trials of War Criminals, The United Nations War Crimes Commission, Vol I London HMSO (1947) at 93.

The amended indictment charged the accused with a violation of Article 1 of the Genocide Convention Implementation Act as well as violations of the laws and customs of war under Article 8 of the Wartime Offences Act, both in conjunction with Article 48 of the Netherlands Criminal Code (complicity).¹⁸

Before Mr van Anraat's complicity in genocide could be examined, the Prosecutor first had to prove that a genocidal campaign had occurred. The indictment declared that Saddam Hussein, Ali Hassan Al-Majid, Hussein Kamal Hassan Al-Majid and/or other person(s) who so far have remained unknown¹⁹ repeatedly acted in conspiracy in Zewa, Halabja, Goktapa and Birginni in Iraq during 1986-1988 with the view to completely or partially wipe out a national or ethnic group as such, by intentionally using chemical weapons against persons belonging to part of the Kurdish population group in northern Iraq. As a result persons died or suffered grievous bodily or mental harm, among other things, and the population group found itself in a permanent state of serious fear.

Mr van Anraat was accused of intentionally providing opportunity, information, or means to do so by supplying thiodiglycol and/or phosphoroxychloride and other precursors intended for the production of chemical weapons to Iraq and by supplying materials to Iraq in order to construct a chemical weapons production facility.

3.2 The judgement

On 23 December 2005, the District Court of The Hague handed down the judgement in the case.²⁰ In the judgement the court distinguished genocide from other international crimes because of the special intent that must be established. It described genocide as a unique crime, the "crime of crimes", as distinct from crimes against humanity, war crimes and other international crimes. In order to establish whether a genocidal campaign occurred, the court examined whether prohibited acts took place, whether the acts were directed against a protected group and whether there was a specific intent to destroy, in whole or in part, the protected group. After examining documentary evidence and testimony, the court:

- established that Kurds constituted an ethnic group on the basis that they shared a common language and culture, members of the group consider themselves to be a distinct ethnic group, and that others, including those who would commit genocide, perceived the Kurds as an ethnic group.²¹

¹⁸ The Genocide Convention Implementation Act (1964) Staatsblad No 243. The Wartime Offences Act (1952) Staatsblad No 408. Criminal Code (as Amended) (1881).

¹⁹ The indictment refers to Saddam Hussein Al-Tikriti (former President of Iraq), Ali Hasan Al-Majid Al-Tikriti (member of the revolutionary council and leader of the Anfal operations against the Kurds), Hussein Kamal Hassan Al-Majid (son-in-law of the former President of Iraq and senior military leader) and others as the principal offenders of genocide. These persons were not indicted by the Dutch Court and the Court would in any event not have jurisdiction under the Genocide Convention Implementation Act which restricted jurisdiction to the active personality principle in terms of its extraterritorial application.

²⁰ Judgement LJN: AX6406, Rechtbank 's-Gravenhage, 09/ 751003-04, available in Dutch and English at <http://www.haguejusticeportal.net/eCache/DEF/4/497.html>.

²¹ The Court used both objective and subjective elements to determine the group and based itself on criteria enunciated by the ICTR in *Prosecutor v. Kayishema et al*, Case No. ICTR-95-1-T, Judgement (21 May

- considered that the prohibited acts of killing members of a group as well as causing serious bodily harm to a group took place between 1985 and 1988.²²

In the absence of direct evidence such as a confession by the alleged perpetrators, the Court relied upon case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to find that the special intent of the alleged perpetrators could be deduced from a number of facts:

- the general framework in which the acts were committed;
- the fact that the protected group systematically became the victim of other wrongful acts;
- the scale on which the criminal offences were committed;
- the systematic strike against victims because of their membership in a special group;
- the repetition of destructive and discriminating acts;
- the number of victims;
- the way in which the criminal offences were committed;
- the territory where the perpetrator was operating;
- the obvious intent of the perpetrator to take the life of his victims;
- the seriousness of the committed genocidal acts;
- the frequency of the genocidal acts in a certain region;
- the general political framework in which the crimes were committed;
- comments made by the perpetrator with respect to the position or fate of the protected group.²³

For the judicial finding of genocidal intent, the Court made a distinction between the systematic oppression and discrimination of the Kurdish population in Iraq and the systematic “campaign of violence” of the Iraqi government against the Kurds in northern Iraq.²⁴ As evidence, the Court relied on reports prepared by the Special Rapporteur of the Commission on Human Rights in 1993 and 1994, which provided a historical account of the human rights situation there. It also considered testimony taken from former Iraqi senior government officials and military commanders who testified that Saddam Hussein either ordered or was aware of and approved the use of chemical weapons against the civilian population.

As a result, the Court held that there had been the intention to partially destroy the Kurdish population in northern Iraq based on:

- the systematic oppression;
- the large number of deaths, estimated in the tens of thousands, due to attacks and mass executions;

1999) at 98. The Court did not consider the Kurds a national group but provided no additional arguments for this determination.

²² Judgement, subparagraphs 6.5.1 to 7.2.

²³ Judgement, subparagraph 7.2(3)

²⁴ *Ibid.*

- the large-scale use of chemical weapons which make no distinction between civilians and combatants, which cause severe suffering and spread terror and render villages uninhabitable for a prolonged period of time;
- the large-scale destruction of villages in northern Iraq and the subsequent deportations of the civilian population; and
- statements by representatives of the former Iraqi government which indicated a contempt for the Kurdish population.

The Court referred to the ruling that the specific intent to partially destroy a group can be inferred from the circumstances.²⁵ However, the judgement only provided a short reasoning on the ruling of the Court that genocide had been committed against the Kurdish population in northern Iraq. Although the evidence established the result — that horrendous crimes were committed against the Kurdish population — the Court could have elaborated more on why it considered that a special intent existed to (partially) destroy the Kurdish population, and not be satisfied by merely referring to the evidence used to reach that conclusion. Even though the evidence presented before the Court included official correspondence from the Iraqi (military) authorities with regard to the Anfal campaign,²⁶ it is not so conclusive with regard to the intent to commit genocide that it would not merit a further analysis or reasoning by the Court. Some of the testimonies of victims and witnesses indeed referred to the intent to destroy the Kurdish population, although one of the witnesses also mentioned that he was of the opinion that “the object of the chemical attack was to punish and frighten the Kurdish population, which was regarded by Saddam Hussein as allies of Iran.”²⁷

The Court also held that the genocide was not directed against the whole Kurdish population but against part of it, and stated that this was a substantial part of the group as demonstrated by the numbers of victims as well as the impact of certain elements of the genocidal campaign on the Kurdish group as a whole.²⁸ The defence argued that the attacks did not target the Kurdish population as such but were part of a military campaign against Kurdish armed opposition groups. However, this was disregarded as the Court stated that the campaign of violence largely surpassed what would have been required by military necessity.

The Court found the need to interpret “complicity in genocide”. The requirement of the *mens rea* (the mental element) with regard to complicity in genocide has been a point of discussion, both among legal scholars and before the international criminal tribunals. It has been widely held that complicity in genocide does not require specific intent (*dolus specialis*) and that mere knowledge of the intent is sufficient. For example the ICTR Trial Chamber ruled that:

“As far as genocide is concerned, the intent of the accomplice is thus to knowingly aid or abet one or more persons to commit the crime of genocide. Therefore, the Chamber is of the opinion that an accomplice to genocide need not necessarily

²⁵ See the ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement (2 September 1998) at 522-523.

²⁶ See further, Section 4 *infra*.

²⁷ Judgment, subparagraph 7.3 (g).

²⁸ See the ICTY, *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement (19 April 2004) at 12.

possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.”²⁹

Under municipal law in the Netherlands, complicity in a crime is regulated by Article 48 of the Criminal Code. If that provision had been applied, it would have resulted in a much broader criminal responsibility for Mr van Anraat, since, in contrast to the rulings of the international criminal tribunals, there is no requirement that the accused know that there was intent to commit genocide. Under Article 48 it would have been sufficient, in order to secure a conviction for complicity to genocide under the domestic criminal code, “if the accomplice had been aware of the considerable chance that the principal would plan to commit genocide and that his assistance would be helpful in accomplishing this dismal goal,” implying that *dolus eventualis* would have been sufficient as intent.³⁰ There is therefore a speculative element which is generally considered to be absent with regard to actual knowledge. To avoid such a broader criminal responsibility, and in line with the government directives to adhere to the *actus reus* and *mens rea* as established under international criminal law if there is a significant difference with municipal law, the Court followed the definition of complicity as generally established before the international criminal tribunals.³¹

Consequently, the Court acquitted Mr van Anraat of the charge of complicity in genocide, as it had not been sufficiently proven that he had knowledge of the perpetrators’ intent to commit genocide. The supply of chemicals to the former Iraqi government by Mr van Anraat took place prior to the attack against the Kurds in Halabja in March 1988. The Court considered that it was only after that attack took place, due to the widespread media coverage, that the desperate situation of the Kurds in Iraq became widely known. The question whether Mr van Anraat would have been convicted of complicity in genocide if deliveries had continued after the attack against Kurdish civilians in Halabja remains unanswered. Neither is it clear from the trial whether Mr van Anraat consciously stopped supplying chemicals after he had learned of the attack against the Kurdish population in Halabja. In this respect the Court pointed to evidence that Mr van Anraat was present in Iraq in July 1988, several months after the widely publicized attacks against Halabja, which could have indicated his intention to continue supplying chemicals.

The Court did, however, find Mr van Anraat guilty of complicity in war crimes and sentenced him, under Dutch law, to 15 years’ imprisonment.³² Mr van Anraat is appealing that conviction. The Dutch Prosecutor is appealing the acquittal of the charge of complicity in genocide. The defence requested the Court to call for the testimony of former Iraqi president Saddam Hussein,³³ which the Court did, requesting an examining judge to find

²⁹ *Akayesu*, *ibid.* at 540.

³⁰ HG Van der Wilt, “Genocide, Complicity in Genocide and International v. Domestic Jurisdiction,” 4 *Journal of International Criminal Justice* (2006) 239 at 249.

³¹ *Ibid* 239. The author considers that the *mens rea* in complicity in genocide is not clearly defined and therefore argues that “[i]n situations of ambiguity where international case law offers insufficient guidance, domestic courts would better resort to their own criminal law.”

³² See further, S. Oñate, B. Exterkate, L. Tabassi, and E. van den Borgh, “Lessons Learned: Chemicals Trade Convicted of War Crimes”, 4 *Chemical Disarmament Quarterly* (December 2006) pp. 19-31.

³³ ‘Dutch Businessman Seeks Saddam Hussein’s Testimony in Appeal of War Crimes Conviction,’ Associated Press (9 October 2006).

out whether it would be possible to take the testimony of Saddam Hussein and a number of other witnesses, including two former government officials, two former ambassadors to Iraq, a United Nations human rights official, and a senior figure from Iraq's former chemical weapons programme. The examining judge had determined that it would not be possible to question five witnesses.³⁴ Regarding testimony from Saddam Hussein, in view of the normally lengthy procedural process to obtain the cooperation of a foreign judiciary with a prosecution, it is unlikely that much progress had been made on the request before his execution was carried out on 30 December 2006. The hearings started before the Hague Court of Appeal on 2 April 2007.³⁵

4. Iraq: the Anfal case

In April 2006, the Iraqi High Tribunal announced the referral of the second case to the trial chamber, charging seven defendants³⁶ with crimes against humanity and war crimes, and two of them (former Iraqi president Saddam Hussein and his cousin and former military commander in the region, Ali Hassan Al-Majid) with the additional charge of genocide.³⁷ The case concerns the Iraqi military campaign, called the Anfal Operation, which took place from February through September 1988 in Iraqi Kurdistan, in the final phase of the Iran-Iraq war. Investigative Judge Raid Juhi indicated that the Halabja gas attack would be prosecuted separately and was not considered part of the charges.³⁸

The Iraqi High Tribunal was originally created by the Coalition Provisional Authority in December 2003, as the Iraqi Special Tribunal. Following the handover to the transitional government of Iraq, the amended statute of the Tribunal (among other things renaming the Tribunal) was promulgated by the Presidency Council.³⁹ The Tribunal is an internationalised national court, limited in jurisdiction. It can only try Iraqi nationals or residents for specific crimes (genocide, crimes against humanity, war crimes and, under certain circumstances, violations of other Iraqi laws) committed during the period 17 July 1968 to 1 May 2003. Its Rules of Procedure and Evidence were appended to the statute. The defences of immunity and superior orders are explicitly ruled out, and command responsibility will be incurred even though the crimes were committed by a subordinate. Specific penal codes of Iraq are to be applied in the event of any lacunae in the Statute and

³⁴ 'Dutch Court Seeks Saddam Testimony on Chemical Sale,' Reuters (23 October 2006).

³⁵ The Appeals Judgement has subsequently been delivered, 9 May 2007. The judgement is available at <http://www.haguejusticeportal.net/eCache/DEF/7/548.html>.

³⁶ Saddam Hussein Majid Al-Tikriti, Ali Hassan Al-Majid Al-Tikriti, Sultan Hashem Ahmed, Sabir Abdul-Aziz Al-Douri, Hussein Rashid Al-Tikriti, Tahir Tawfiq al-A'ni, Farhan Mutlak Al-Joubori.

³⁷ Press releases of the Iraqi High Tribunal, available at www.iraq.iht.org/; 'Saddam Accused of Genocide in New Charges', Associated Press (4 April 2006) available at http://news.bbc.co.uk/2/hi/middle_east/4875678.stm.

³⁸ *Ibid.*

³⁹ Article 11 of the Statute of the Iraqi Special Tribunal, issued 10 December 2003 by the Coalition Provisional Authority of Iraq and promulgated, as amended, as Law No. (10) 2005 by the presidency Council, Official Gazette of the Republic of Iraq, no. 4006 dated 18 October 2005.

the statutory crimes can be interpreted by reference to relevant decisions of the international criminal courts, thus internationalising this national court.

The legitimacy of the Tribunal, its administration and the question of whether international standards of due process are being met to the extent that it can be said that the accused are receiving a fair trial by the Tribunal have been raised by various observers.⁴⁰ The publication of the Tribunal's lengthy (300 page), detailed and reasoned Opinion⁴¹ in the first trial, the *Dujail* case, put to rest many of the concerns about substantive aspects of the proceedings. However, the relatively swift decision by the Appeals Chamber on 26 December to uphold the death sentences of three of the convicted and the commencement of the executions on 30 December raised fresh criticism.

The *Anfal* trial opened on 21 August 2006. The prosecution began setting out its case, stating that 182,000 people lost their lives in the Anfal campaign, entire villages were razed, mass executions were carried out with the dead buried in mass graves, survivors were forcibly relocated to detention camps elsewhere, and chemical weapons were used repeatedly. The testimony of numerous witnesses and victims of the chemical attacks were heard.⁴² The Chief Judge then indicated that the oral testimony of over 70 state witnesses was concluded. The prosecution's presentation of the documentary evidence and film footage linking the defendants to the chemical weapons attacks began on 19 December.⁴³

In defence, both Saddam Hussein and his cousin asserted that the Anfal Operation was a counter-insurgency campaign aimed at rebels siding with the Islamic Republic of Iran during the Iran-Iraq war;⁴⁴ deciding that issue is key to a conviction for genocide. If the defence can establish that the Anfal campaign was purely political in nature—to quell an insurgency or address treason—or of military necessity—to clear the border areas as defensive moves in the Iran-Iraq war—the charge of genocide must fail. The drafters of the Genocide Convention, negotiating during the Cold War period, deliberately excluded acts directed against “political groups” or “opponents of the regime”.⁴⁵ If, however, only the underlying motives were political and the intent was to (partially) destroy a people, the charge must succeed. The test is subjective, not objective, as it is the perpetrator who defines or identifies the group for destruction.⁴⁶ If the special intent cannot be proven, the

⁴⁰ See, notably, Human Rights Watch, *Judging Dujail: The First Trial before the Iraqi High Tribunal*, (November 2006) www.hrw.org; Amnesty International, *Iraq, Iraqi Special Tribunal – Fair Trial not guaranteed* (14 July 2005 <http://web.amnesty.org/library/Index/ENGMDE140072005?open&of=ENG-IRQ>); International Center for Transitional Justice, *Briefing Paper: Dujail: Trial and Error?* (November 2006) <http://www.ictj.org/static/MENA/Iraq/ICTJDujailBrief.eng.pdf>; M. Scharf and M. Newton, *ASIL Insight: The Iraq High Tribunal's Dujail Trial Opinion*, www.asil.org/insights/2006/12/insights061218.html; R. Clark and C Doubbler, *The Iraqi Special Tribunal: A Corruption of Justice* (13 September 2006) <http://www.justiceonline.org/site/PageServer?pagename=IST>.

⁴¹ English Translation available

http://www.haguejusticeportal.net/Docs/NLP/Iraq/Saddam_Hussein_Judgement_5-11-2006.pdf.

⁴² 'Timeline: Saddam Hussein Anfal Trial', BBC News (21 August to 4 December 2006)

http://news.bbc.co.uk/2/hi/middle_east/5272224.stm.

⁴³ 'Saddam Trial Sees Graphic footage', BBC News (19 December 2006),

www.news.bbc.co.uk/2/hi/middle_east/6193863.stm.

⁴⁴ R. Colvin, "Saddam Accuser Targets Foreign Arms Merchants," Reuters (11 September 2006).

⁴⁵ M. Scharf, "An Ambitious but Risky Move," Grotian Moment Blog: Anfal Issue #1 – the Significance of the Anfal Campaign Indictment, Case Western University School of Law.

⁴⁶ W. Schabas, 'The Genocide Convention at Fifty', United States Institute of Peace (7 January 1999) www.usip.org.

more general charge of crimes against humanity may succeed given that there would appear to be ample documentation of the breadth of the attacks⁴⁷ and the evidence may also be sufficient to prove the systematicity.

Iraq's legal system follows the civil law tradition, with the presiding judge playing a leading role in questioning and drawing out the evidence in the case. Although the Tribunal's Statute (Article 118) requires that the indictment be issued prior to the trial commencing, if the *Dujail* trial serves as the example, the detailed report of the charges and the roles of the defendants in relation to those charges ("the charging document") will only be issued once the prosecution rests its case. The defence will have the opportunity to examine that report before addressing the charges and evidence presented.⁴⁸

At this stage it is of course unclear what effect, if any, the Dutch Court finding in *Van Anraat* that a genocidal campaign had occurred in Iraq may have on the *Anfal* case. The body of evidence gathered by the Dutch prosecutor from at least eight countries, and police investigations in 15 countries,⁴⁹ could be valuable to the *Anfal* proceedings. It is not publicly known whether the Iraqi authorities have made a request to the Netherlands to cooperate in the prosecution of the *Anfal* case. However, in view of the possibility of the death penalty being applied in the event of a conviction, the Netherlands would be barred from cooperating on the case. In any event, by the nature of instituting proceedings in national courts, it is even possible that the courts from different jurisdictions could come to different conclusions on whether genocide has occurred against the Kurdish population.

The execution of Saddam Hussein on 30 December 2006 means that proceedings against him in the *Anfal* trial were discontinued. The Tribunal's proceedings concerning the charge of genocide against his cousin have continued, as has its consideration of the charges of crimes against humanity and war crimes against all six remaining defendants.

5. Prosecuting international crimes in national courts

'International crimes are breaches of international rules entailing the personal criminal liability of the individuals concerned.'⁵⁰ Some of the crimes under international law are considered to be violations of *jus cogens*, peremptory norms that 'have a rank and status superior to those of all the other rules of the international community' and which cannot be set aside by states, through, for example, a treaty.⁵¹ Although there is not necessarily a consensus on a definite list of crimes under international law, it is widely accepted that it would certainly include genocide and crimes against humanity.

⁴⁷ Human Rights Watch, 'genocide in Iraq: the Anfal Campaign Against the Kurds, (July 1993) <http://www.hrw.org/reports/1993/iraqanfal>.

⁴⁸ Human Rights Watch, *Judging Dujail: The First Trial before the Iraqi High Tribunal*, (November 2006) 44-48.

⁴⁹ See S. Oñate, B. Exterkate, L. Tabassi, and E. van den Borgh, "Lessons Learned: Chemical Trader Convicted for War Crimes", 4 *Chemical Disarmament Quarterly* (December 2006) pp. 19-31 at 30.

⁵⁰ A. Cassese, *International Criminal Law* (Oxford University Press; Oxford 2003) 23.

⁵¹ A. Cassese, *International Law* (2nd edn Oxford university Press; Oxford 2005) 199. Article 53 of the 1969 Vienna Convention on the Laws of Treaties.

5.1 Jurisdiction

Individuals responsible for crimes under international law can be prosecuted once the jurisdiction of the state, which initiates the prosecution, has been asserted. A number of principles exist under international law to determine the legal grounds for jurisdiction. These include primarily the principle of territoriality (the crime has been committed on the territory of the state which intends to prosecute); the principle of active nationality (the perpetrator of the crime is a national of the state which is initiating prosecution); the principle of passive nationality (the victim of the crime is a national of the state which is initiating prosecution); the principle of protection (fundamental (security) interests of the state are affected) and the universality principle (no specific connection exists between the state which is initiating the prosecution and the offender).

In the Dutch case, none of the crimes were committed in the Netherlands as Mr van Anraat was living and working abroad. The Netherlands exercised jurisdiction in the case under the principle of active nationality, based on the Dutch nationality of the accused.

Mr van Anraat challenged the jurisdiction of the court for a number of reasons, namely that as the court had no jurisdiction to prosecute the principle offences it could not prosecute accomplices to those crimes; that the court would provide an opinion with regard to the culpability of the government of another country; and that Iraq would be the most suitable jurisdiction to prosecute the war crimes and genocide charges. The court rejected all of these challenges to its jurisdiction and stated that complicity to a crime constitutes an independent criminal act and that the Dutch Court had jurisdiction under the active personality principle as stated in Article 5 of the Criminal Code. Moreover, with regard to international crimes, the court mentioned that it would often happen that different jurisdictions are involved in the prosecution of the various defendants. Although the court would indeed provide an opinion on the acts of a foreign government it would not be involved in holding government officials criminally responsible and therefore the question of immunity was not an issue. In addition the court re-iterated the fact that former government officials could not invoke immunity under international law for crimes committed during the performance of their duties. Finally, the court held that under international law Iraq did not have exclusive jurisdiction and that therefore the accused could be tried in the Netherlands. The accused also challenged the admissibility of the case before the Dutch court on different grounds, but these were also dismissed by the court.

The exercise of jurisdiction by the Iraqi High Tribunal is limited to that stipulated in its statute: to Iraqi nationals or residents of Iraq, for acts committed in Iraq or elsewhere between 17 July 1968 and 1 May 2003, whether or not committed in armed conflict.

5.2 Applicable law and internationalised interpretation

The Dutch government, in its Explanatory Memorandum to the International Crimes Act, confirmed that general principles of criminal law, as stipulated in the Rome Statute, would be applicable if these principles were significantly different from what

exists under municipal law.⁵² In the same Memorandum the government clearly indicated that courts in the Netherlands should base themselves, with regard to the *actus reus* and *mens rea* of the crimes, on international law and jurisprudence.⁵³ The court therefore referred extensively to the jurisprudence of the ICTR and the ICTY, once more underlining the importance of the jurisprudence of both International Criminal Tribunals in relation to (international) criminal law.

The Iraqi High Tribunal, by virtue of its Statute, may also have recourse to criteria and reasoning enunciated in relevant decisions of international criminal courts in interpreting the statutory crimes. If there is a lacunae in the Statute, general principles of Iraqi criminal law are to be applied.⁵⁴ In the *Dujail* trial opinion, numerous references are made to decisions of the ICTR and the ICTY.

5.3 The principle of legality

Of primary importance is the principle of legality, based on the maxims *nullum crimen sine lege* and *nulla poena sine lege*: that no one can be punished for a crime that was not proscribed by law at the time it was committed, or punished unless a penalty was established by law at that time for the crime. Criminal law cannot be applied retroactively. The principle of legality was enshrined in the 1948 Universal Declaration of Human Rights (Article 11) and the 1966 International Covenant on Civil and Political Rights (Article 15).

In some States ascribing to the monist legal tradition, international law is directly applicable in the State's jurisdiction and generally does not need to be adopted in the form of a domestic law. Although genocide and crimes against humanity are prohibited by customary international law, the nature of the formation of custom (the practice of States coupled with *opinio juris*) would ordinarily not meet the criteria to constitute law applicable in criminal proceedings. The Dutch Supreme Court recently overturned a Court of Appeal decision in this regard. "Despite the country's monist legal tradition, the Dutch Supreme Court was not willing to accept that customary international law could serve as an independent basis for criminal prosecution in the Netherlands. Instead, the application of such norms remains dependent on implementing legislation. This hesitant approach to customary law in the context of criminal law is based on the assumption that customary international law is too imprecise and unknown for direct application in criminal proceedings and that this imprecision could result in a violation of the principles of legality and non-retroactivity."⁵⁵

The crime of genocide was codified by the 1948 Genocide Convention, which requires that States Parties enact the necessary legislation to give effect to the provisions of

⁵² Tweede Kamer der Staten Generaal 'Explanatory memorandum to the International Crimes Act' (2001-2002) 28337 No 3 at 29.

⁵³ *Ibid* at 27.

⁵⁴ Statute, Article 17(1) and (2).

⁵⁵ *In Re Bouterse*, 18 September 2001, LJN No. AB1471, Case No. 00749/01 CW 2323, at paras 4.4-4.6 and 6.4, cited in E. de Wet, "The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law," 15 *European Journal of International Law* (2004) 71-96 at 117-118.

the Convention, in particular to provide effective penalties. The Netherlands has done so. Iraq did not, until it adopted the 2003 Statute of the Tribunal with its limited jurisdiction.

The 1945 Charter of the Nuremberg Tribunal codified “crimes against humanity” to describe a concept that only concretely emerged in reaction to acts committed during World War II. In rejecting the assertion that it was applying law retroactively, the Tribunal declared:

“In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.”⁵⁶

In deciding the *Van Anraat* case, provisions of the Genocide Convention Implementation Act, the Criminal Law in Wartime Act, in conjunction with Article 48 Penal Code, and the Penal Code, were applied by the Court, all of which were in force at the time the acts were committed. The Court had recourse to decisions of the international criminal tribunals only when international criminal law was significantly different to domestic criminal law. In explaining this, it referred to the Dutch government’s Explanatory Memorandum to the International Crimes Act, and declared that:

“A proper application of important rules of international criminal law by the national criminal court judge serves two purposes. In the first place he has to meet with the requirements and expectations of international criminal law regarding the penalization and prosecution of international crimes, which entails that liability under Dutch law should not fall short as opposed to liability under international law. Apart from that however, the Dutch judge must also respect the limits of liability according to international law. The court considers both elements to be of importance.

With respect to the second element the public prosecution service holds the view that conventional-law obligations to penalization represent minimum obligations and therefore the Netherlands are always allowed to go beyond those limits and exceed the bounds of international liability. In the opinion of the court the prosecution service does not acknowledge the place of these conventions and crimes within an international system of standards of criminal law. By assuming a larger liability under national law than customary under international law, in some cases based on national law a crime could be considered as an offence pertaining to international law, whereas the international community does not consider it as such. In this respect an important argument for the court concerning international crimes to give preference to the bounds of international liability instead of national liability, refers to universal jurisdiction connected with international crimes.

⁵⁶ Trials of War Criminals before the Nuernburg Tribunals under Control Council law No. 10, Volume III, USGPO (April 1949) section 974, <http://www.mazal.org/archive/nmt/03/NMT03-T0971.htm>

Exceeding the liability limits of international criminal law, when a case is brought to trial under national law, could cancel the international basis for universal jurisdiction, while the latter can only be applied to practices that are indictable as criminal offences under international law. In relation to this subject the prosecution argued that in the present proceedings there is no question of excessive jurisdiction from an international law point of view, seen that the accused is prosecuted based on the active nationality principle. The necessary consequence resulting from these considerations that, within the framework of starting proceedings against international crimes committed abroad, different standards of liability can be applied to Dutch nationals and foreign nationals, is considered by the court to be unacceptable, in any event when it concerns the crime of committing genocide.”⁵⁷

In deciding the *Anfal* case, the Iraqi High Tribunal is applying its Statute, supplemented by the 1969 Penal law no. 111 and the 1940 Military Penal Law no. 13. In the *Dujail* trial opinion, the Tribunal dismissed the assertion that it was applying law retroactively. It referred to Iraq’s obligations under international law, in particular Iraq’s adherence to the Genocide Convention in 1956, as well as the reasoning of the Nuremburg Tribunal. It recognised that “crimes against humanity” did not exist as an independent offence in an Iraqi statute at the time the acts were committed, nevertheless, it pointed out that the underlying acts which form “crimes against humanity” already existed as criminal offences in Iraq at the time. In this respect the Tribunal reasoned:

“...whereas the accusations attributed to the accused in the case are categorised as crimes against humanity, the Court is satisfied that most if not all of the acts or omissions forming crimes against humanity are nothing but ordinary crimes subject to conviction and punishment in all countries such as Iraq. In this respect there wasn’t any modification except to transfer them from internal scope to international scope, with the necessity of additional elements for establishing them due to the generality and quality and protected interests therein not limited to life, safety, freedom, dignity or property etc. in a specific country.

“However this protection comprises all the mentioned elements of each individual in all countries forming the international community worldwide. These are crimes against humans and humanity in every part of this universe ...

“Whoever is convicted of an international crime, whether genocide or crimes against humanity or war crimes, [such] as the crime of murder or torture or unlawful confinement or rape or theft or sabotage or destruction of property or hostile acts against prisoners, the wounded or dead, also commits a crime under Iraqi law and is convicted only additionally under international customary or conventional law.

“In fact most convictions for international crimes are in parallel convictions under the national laws of most, if not all, countries of the world since there is no country in which the penal code doesn’t proscribe the crime of murder or torture or kidnapping or unlawful imprisonment.

⁵⁷ *Van Anraat* Judgement, subparagraph 6.3.

“The actions attributed to the accused in the Dujail case, upon conviction, are simultaneously international and internal crimes. The commission of such crimes is considered to be a violation of international criminal law, international humanitarian law, Iraqi law (1969 Penal Code no. 111 and 1940 Military Penal Code no. 13) as well as a violation of the Statute of the Iraqi High Tribunal.”⁵⁸

In this respect, consideration could also be given to the distinction made between “retroactivity” and “retrospectivity” made by the Canadian High Court in 1989:

“The distinction between a ‘retroactive’ statute, as opposed to one with a ‘retrospective’ application, is significant. According to the definition contained in 44 Hals., 4th ed., p. 572, a retroactive penal statute is one which is ‘intended to render criminal an act which was innocent when it was committed.’ ... Justice Doherty ... defines both ‘retroactive’ and ‘retrospective’ statutes as follows: ...

A retroactive statute is one which is proclaimed to have effect as of a time prior to its enactment. The statute operates backward and changes the law as of some date prior to proclamation ...

A retrospective statute is one which proclaims that the consequences of an act done prior to proclamation are to be given a different legal effect after proclamation as a result of the enactment of the statute. It operates only in the future, after proclamation, but changes the legal effect of an event which occurred prior to proclamation.

Keeping these definitions in mind, there is clearly a difference between a retroactive and a retrospective application. A retroactive application takes an act or omission that was not previously criminal, and retroactively deems that act or omission to be criminal as at a later date. A retrospective statute, on the other hand, does not create new offences. Rather, as in this case, it merely operates to retrospectively give Canadian courts jurisdiction over criminal offences committed outside of Canada.”⁵⁹

Due to the fact that the acts underlying the crime of genocide and crimes against humanity already clearly constituted offences under the Iraqi Penal Code, the assertion that the principle of legality is being violated in case of a conviction is hardly valid. Such an assertion would be important and would warrant further examination in the *Anfal* trial if it comes to light that the war crimes charges are being brought for the use of chemical weapons in the Kurdish villages or if, in an eventual trial concerning the use of chemical weapons in Halabja in 1988, charges of war crimes are brought. One court has considered the Halabja chemical weapons attack, by way of *obiter dictum*, as crystallisation of the

⁵⁸ *Dujail Trial Opinion*, Part I, page 41.

⁵⁹ *Regina v. Finta*, Decision of the High Court of Canada (10 July 1989), 82 International Law Reports 425 at 432-433.

customary international law ban on the use of chemical weapons in non-international armed conflict.⁶⁰ It would be difficult to argue that the persons responsible for that attack could be held criminally liable *now* under a rule which was in formation up until the moment the attack was committed.

It is noted that the definition of “war crimes” contained in Article 13 of the Statute of the Iraqi High Tribunal is limited to use in *international* armed conflict. Thus, to convict the persons responsible for the chemical weapons attacks in Iraqi Kurdistan of war crimes, the Tribunal would need to determine that the conflict there had acquired the character of an international armed conflict in order to act retrospectively, not retroactively. To classify that conflict as international it would have to be established (all of which would be difficult to argue) that:

- there was a sufficient degree of cross-border intervention by Iranian forces in that conflict; or
- it was internationalised by a state of dependency and effective control constituting an agency relationship between the Kurdish insurgents and the Iranian government; or
- there was at least an adequate degree of external support of the Kurdish insurgents; or
- it was internationalised as a struggle against a racist regime in order to exercise the right of self-determination.⁶¹

6. Conclusion

It is with a sense of relief that charges of genocide and crimes against humanity have been formally instituted for the use of chemical weapons and that trials are underway. This is a landmark event in the development of jurisprudence related to chemical weapons. It also diminishes the question mark that was hovering over the Rome Statute on how such an event, should it arise, might be treated by the prosecutor of that court.

Recalling the finding of the Dutch Supreme Court in the *Bouterse* case in 2001, and reviewing the various criticism published by observers of the Iraqi trials, the importance of appropriately and comprehensively creating the offences in domestic law cannot be overemphasized. Regardless of whether a State is party to the Rome Statute or not, it is the

⁶⁰ *Prosecutor v. Tadić*, Case No. IT-94-1-AR72. Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (2 October 1995), para. 124.

⁶¹ See the criteria contained in Article I of Additional Protocol I to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts; the tests considered by respective courts: the International Criminal Tribunal for the former Yugoslavia in the *Tadić* appeals Chamber Decision (ibid, para 72). And the International Court of Justice in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. USA, 27 June 1986, ICJ Reports 1986, paras 115, 116, 219) and the *Case Concerning United States Diplomatic and Consular Staff in Tehran* (USA v. Iran), 24 May 1980, ICJ Reports 1980, para58). See also, A-L Sjölund. “Criteria for Establishing an International Armed Conflict in Bosnia and Herzegovina: An Analysis of the Tadić Judgment in the International Criminal Tribunal for the Former Yugoslavia,” VIII *The Finnish Yearbook of International Law* (1997) 285-306.

duty of every State to prosecute international crimes so as to prevent impunity for such crimes. Adequately defining the crime in domestic law will preclude any criticism being raised concerning violations of the principle of legality or retroactive application of the law.

Regrettably, as it stands now, the only international crime explicitly related to chemical weapons which has been recognised by the international community is the war crime of the use of asphyxiating gas in international armed conflict. Given the nearly universal adherence to the 1993 Chemical Weapons Convention, this limitation, which dates back to the 1925 Geneva Protocol, is outdated and needs to be addressed. Both the jurisprudence of the ICTY⁶² and the comprehensive study published by the International Committee of the Red Cross⁶³ have concluded that the customary international law prohibition, binding on all States, on the use of chemical weapons in international armed conflict now extends to the use in non-international armed conflict as well. There is an opportunity to formally address this issue if timely action is taken. Article 123 of the Rome Statute of the International Criminal Court provides that seven years after entry into force of the Statute (i.e., in July 2009) a Review Conference will be convened to consider any amendments to the Statute, including the list of crimes. It would certainly seem appropriate to add the crime of the use of chemical weapons in non-international armed conflict, if not the crime of developing, producing, stockpiling and transferring chemical weapons as well.

As States Parties to the Chemical Weapons Convention pursue their fulfilment of their action plan on national implementation, the full gamut of criminal offences relating to chemical weapons are being proscribed by national law. It would serve the goal of enforcement to have these categorised as international crimes in order to more vigorously underscore the need to prevent impunity for such crimes and to meet the object and purpose of eliminating this category of weapon entirely and universally.

⁶² *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (2 October 1995), para. 124.

⁶³ J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Volume I: Rules, Cambridge University Press (2005), pp. 261-263.