A Critical Guide to the Iraqi High Tribunal's Anfal Judgement: Genocide Against the Kurds

Jennifer Trahan

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A CRITICAL GUIDE TO THE IRAQI HIGH TRIBUNAL’S ANFAL JUDGMENT:
GENOCIDE AGAINST THE KURDS

Jennifer Trahan*

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In the Anfal trial, the Iraqi High Tribunal (IHT or the Tribunal) in Baghdad convicted former Iraqi high officials of genocide, crimes against humanity, and war crimes. Unlike its predecessor—the Dujail trial— the Anfal trial included the presentation of a high volume of documentary and eye-witness evidence. This evidence clearly revealed the existence of a genocidal campaign by the former Iraqi government and military that eliminated an estimated 182,000\textsuperscript{2} Iraqi Kurds in 1988, as part of the eight-phased "Anfal campaign" (the Anfal). Relying on this and other evidence, judges in the Anfal Trial Chamber explained fairly persuasively how genocide, crimes against humanity, and war crimes were committed against the Iraqi Kurds. However, the Trial Chamber judgment has its weaknesses, in particular: (i) individual criminal responsibility is at times not fully examined; and (ii) the judgment does not address fair trial problems, such as insufficiently detailed charges and government interference. Furthermore, on appeal, the IHT's Cassation Chamber judges did not seriously grapple with the merits of the

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\footnote{2. The Tribunal found that more than 3,000 villages were destroyed, leaving "tens of thousands of victims." Al Anfal, Case No. 1/CSecond/2006, Judgment, 501 (Iraqi High Trib., 2007), available at http://law.case.edu/grotian-moment-blog/anfal/opinion.asp [hereinafter Al Anfal Trial Chamber Judgment]. The Tribunal also noted that some fatality estimates were as high as 182,000. Id.}
case. This Article will address some of these problems, in order to evaluate the Tribunal’s effectiveness and role on the international stage.

Part I of this Article provides background on the Iraqi High Tribunal and an overview of the Anfal trial. Specifically, Part I.A discusses the formation of the Tribunal and the earlier Dujail trial; Part I.B provides an overview of the phases of the Anfal trial; and Part I.C contains a brief discussion of the applicable fair trial standards and the fair trial problems that arose. Next, Part II, which constitutes the main body of this Article, evaluates the merits of the Anfal Trial Chamber judgment. It first summarizes the key evidence against each of the five convicted defendants, then evaluates whether, based on the Trial Chamber’s findings, each defendant was appropriately convicted of each charge. Specifically, Part II.A provides an overview of the merits of the convictions, while the remainder of Part II examines the Trial Chamber’s conclusions as to each of the defendants. Finally, Part III briefly evaluates the Cassation Chamber judgment. A summary of this Article’s conclusions as to the merits of the convictions as to each defendant is available in the appendix.

The Article concludes that due to the fair trial problems and lack of serious appellate review, the Iraqi High Tribunal does not operate at the level of an international or hybrid tribunal such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), or the Special Court for Sierra Leone. This is particularly worrying given the extreme seriousness of the crimes being addressed by the Tribunal and the fact that the death penalty is an available punishment. However, observers should also appreciate the extremely difficult task that the Tribunal judges faced, and should not forget that the Tribunal afforded its defendants many fair trial protections certainly not accorded to criminal defendants during Saddam Hussein’s regime. The IHT’s well-reasoned Trial Chamber verdict is a notable achievement (despite its flaws), and, for it, the judges involved deserve a fair measure of praise.

3. See, e.g., Human Rights Watch, Justice for Iraq: A Human Rights Watch Policy Paper (Dec. 2002), http://www.hrw.org/backgrounder/mbina/iraq1217bg.htm [hereinafter HRW, Justice for Iraq] (concluding that the judiciary in Iraq was “deeply compromised” during Ba’ath Party rule and that the Revolutionary Court, State Security Court, and Special Provisional Court, in particular, were “instruments of repression”).
I. BACKGROUND TO THE ANFAL TRIAL

A. Formation of the Iraqi High Tribunal and the Dujail Trial

Despite lobbying from at least one human rights group that Ba'ath Party officials should be tried before an international or hybrid tribunal, the United States announced in the spring of 2003 that justice in Iraq would be pursued through an "Iraqi-led" process. On December 10, 2003, "[t]he U.S.-appointed Iraqi Governing Council approved a statute establishing the Iraqi Special Tribunal for Crimes Against Humanity . . ." Ambassador L. Paul Bremer signed the statute into law on behalf of the Coalition Provisional Authority. In early August 2005, Iraq's Transitional National Assembly revoked the first statute and replaced it with an amended statute, which the Iraqi Government re-enacted in September 2005. It was this amended statute that officially created the Iraqi High Tribunal. The new law was promulgated in the Official Gazette on October 18, 2005, one day before the start of the Dujail trial. The IHT has jurisdiction to try Iraqis and Iraqi residents for genocide, crimes against humanity, war crimes, and certain offenses under Iraqi law committed between July 17, 1968, and May 1, 2003. The IHT is "staffed by Iraqis, [and was] assisted technically and logistically by internationals (primarily [U.S. nationals]) via the Regime Crimes

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4. See, e.g., id.
7. Id.
8. JUDGING DUJAIL, supra note 1, at 8.
9. Id.
10. Id.
11. Id.
Liaison Office, which is based out of the U.S. Embassy in Baghdad.\textsuperscript{14} The IHT courthouse is located in Baghdad's International Zone.\textsuperscript{15}

The Tribunal's first trial, the Dujail trial, commenced on October 19, 2005.\textsuperscript{16} Trial Chamber One\textsuperscript{17} rendered its judgment on November 5, 2006, finding former Iraqi President Saddam Hussein and six other defendants guilty of "crimes against humanity based on torture, forced deportation, imprisonment, willful killing, and other inhumane acts committed against hundreds of villagers in southern Iraq after an assassination attempt against Saddam Hussein in 1982."\textsuperscript{18} On December 26, 2006, the Cassation Chamber announced its decision and issued a written judgment the next day.\textsuperscript{19} Saddam Hussein was executed on December 30, 2006, in a hanging that drew "widespread international condemnation."\textsuperscript{20} On January 15, 2007, two other defendants, Barzan Ibrahim al-Hassan and Awad Hamad al-Bandar, were also executed.\textsuperscript{21} A fourth defendant, Tahan Yassin Ramadan, was executed on March 20, 2007, after the Cassation Chamber ordered the Trial Chamber to commute his sentence of life in prison to a death sentence.\textsuperscript{22} Two non-governmental organization (NGO) observers of the trial have been highly critical of how it was conducted,\textsuperscript{23} although others have been less critical.\textsuperscript{24}

\begin{enumerate}
\item \footnotesize{UPDATE I, supra note 13, at 2–3.}
\item \footnotesize{Id. at 3.}
\item \footnotesize{Id. The account of the trial process contained in this Article is taken from descriptions of a non-governmental organization (NGO) observer at the trial, the International Center for Transitional Justice (ICTJ).}
\item \footnotesize{Trial Chamber One was composed solely of Iraqi judges. Human Rights Watch has explained:}
\begin{quote}
The . . . [IHT] Statute as originally promulgated permitted the appointment of non-Iraqi judges with expertise in international criminal proceedings to the trial chamber. The amended version . . . provides that non-Iraqi judges may be appointed only if a foreign [S]tate is a party to proceedings before the IHT. To date, no non-Iraqi judges have been appointed to any chamber of the IHT.
\end{quote}
\item \footnotesize{JUDGING DUJAIL, supra note 1, at 11.}
\item \footnotesize{UPDATE I, supra note 13, at 3.}
\item \footnotesize{UPDATE I, supra note 13, at 3; see, e.g., Romesh Ratnesar, Saddam's Botched Trial, TIME, Jan. 5, 2007, available at http://www.time.com/time/world/article/0,8599,1574349,00.html.}
\item \footnotesize{UPDATE I, supra note 13, at 3.}
\item \footnotesize{Id.}
\item \footnotesize{See, e.g., DUJAIL: TRIAL AND ERROR, supra note 1; JUDGING DUJAIL, supra note 1.}
\item \footnotesize{See generally MICHAEL A. NEWTON & MICHAEL P. SCHARF, ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN (2008).}
\end{enumerate}
B. Overview of the Anfal Trial

The Anfal trial began on August 21, 2006. The defendants were "referred to trial based on their alleged roles in planning, authorizing and executing the 1988 Anfal campaign." According to the chief prosecutor, Iraqi forces killed up to 182,000 civilians during the campaign, forcibly displaced hundreds of thousands more, repeatedly used chemical weapons, and almost completely destroyed local infrastructure. The Anfal campaign was well-documented by human rights groups. Indeed, in the 1990s, Human Rights Watch unsuccessfully urged States to bring Iraq before the International Court of Justice for breach of the Genocide Convention.

The Anfal trial was conducted before five judges. The defendants, all of whom pled not guilty on all counts, were: (i) Saddam Hussein, former President of Iraq (1979–2003); (ii) Ali Hassan al-Majid (Majid or Chemical Ali), the alleged architect of the Anfal campaign and cousin of Saddam Hussein, who served as Secretary General of the Ba’ath Party’s Northern Bureau from March 1987 to April 1989, with authority in the Kurdish region during this period; (iii) Sultan Hashim Ahmad (Sultan Ahmad), former commander of the 1st Corps, based in northern Iraq and involved in several, but not all, of the eight Anfal operations; (iv) Hussein Rashid al-Tikriti (Hussein Rashid), Army Deputy Chief of Staff for Operations during the Anfal campaign; (v) Sabir Abd al-Aziz al-Douri (al-Douri), former general director of Iraq’s Military Intelligence Service; (vi) Farhan Mutlaq al-Jaburi (al-Jaburi), former director of the Military Intelligence Service of the northern and later eastern regions; and (vii) Tahir Tawfiq al-‘Aani (al-‘Aani), Governor of Mosul during the Anfal campaign.

25. Id.
26. Id. at 3. According to the ICTJ, “Iraq’s Code of Criminal Procedure (Law 23 of 1971) stipulates a two-step charging process. Defendants are first referred to trial (article 131), and a charging instrument is drawn up by the court after [the] prosecution has presented its evidence (article 181).” Id. at 3 n.10.
27. Id. at 3 (citing Prosecutor’s Opening Statement, Aug. 21, 2006 (ICTJ Observer Notes)).
30. UPDATE I, supra note 13, at 4.
1. The Trial Phases

The "'complainant' phase of the Anfal trial spanned [twenty-three] sessions, from August 21 to November 27, 2006." During this time, the IHT heard the testimony of seventy-seven complainants—most, but not all, identified in court—as to their harrowing experiences during the Anfal campaign.

Complainants' testimony generally described one or more of the following three aspects of what happened to them:

*Attacks on Kurdish towns with chemical and conventional weapons.* According to the International Center for Transitional Justice (an NGO observer at the trial), complainants' testimony established that: "civilians and villages suffered unprovoked artillery and aerial bombardments with chemical and conventional weapons, after which virtually all buildings were completely destroyed by bulldozers or explosives." Complainants also testified that "[m]osques were leveled, water sources destroyed, and livestock that survived the first attacks was killed or stolen." Complainants recalled the "rotten apple smell of chemical weapons, and the aftermath of vomiting, burns, choking, blindness and death." "Some escaped from attacks on one village, only to be bombed again after fleeing to another," and "[s]urvivors hid in caves or mountains, but most fell into the hands of the Iraqi authorities." Most complainants testified that "Kurdish Peshmerga or other armed groups were not active in these areas."

*Imprisonment and mistreatment in detention camps.* Complainants testified that, "of those who escaped execution, many were sent to concentration camps, where inmates were tortured, beaten, raped, and died of hunger and disease." They were "[l]eft for months with little food or water, inadequate shelter, and no medical care[;] complainants testified to burying family members and other inmates . . . ." Complainants testified that

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31. *Id.* at 5. For a more detailed description of the complainant phase, see *id.* at 5–13.
32. *Al Anfal Trial Chamber Judgment,* supra note 2, at 146–212.
33. *UPDATE I,* supra note 13, at 5.
34. *Id.* at 8.
35. *Id.* at 8–9.
36. *Id.* at 8.
37. *Id.*
38. *Id.*
39. *Id.* at 9. The Peshmerga were the Kurdish insurgents, aligned with Iran.
40. *Id.* at 8.
41. *Id.* at 9.
“Iraqi soldiers separated the men from the women and children, after which many complainants never saw their relatives again.”

Executions and burial in mass graves. A few of the complainants testified that they were “blindfolded and driven to isolated desert sites, where they somehow survived mass executions and escaped.” Many stated “that close relatives, and in some cases their entire families, had been ‘Anfalized’; their fates were known only once their identity cards were found in mass graves after the fall of the regime.”

From November 28 to December 7, 2006, “[d]uring the prosecution witness phase of the trial, nine witnesses were heard over the course of five trial sessions.” These fact witnesses gave testimony similar to that of the complainants. In addition, a forensic experts testified, for example, to the existence of mass graves and to finding traces of chemical weapons, including mustard and sarin gas, on the bodies of the deceased.

The documentary evidence phase spanned nine sessions, from December 18, 2006, to January 29, 2007. During this phase, some 4,935 documents in the dossier were presented. The prosecution introduced these documents in two stages. “The first phase involved the introduction of evidence designed to prove the general existence of the Anfal campaign, [and] the use of chemical weapons against the Kurdish civilian population . . . . The second phase involved the introduction of documentary evidence specifically targeted to prove the responsibility of the individual defendants.” The prosecution also introduced audio and video evidence. The defendants were then provided with an opportunity to respond to the evidence introduced against them.

42. Id.
43. Id.
44. Id.
46. Id. (testimony of “Witness One”).
47. Id. (testimony of forensic anthropologist Dr. Clyde Snow).
48. Id. at 9.
49. Id.
50. Id. at 10.
51. Id. at 11. The audiotapes implicating defendant Majid are discussed below. See infra Part II.B.1. For further discussion of the prosecution witness and documentary evidence phases of the trial, see UPDATE II, supra note 45, at 6–19.
52. UPDATE II, supra note 45, at 10.
The defense phase commenced with statements by each defendant, followed by questioning by the presiding judge, the prosecution, and complainants’ lawyers. This questioning concerned the defendants’ statements, their prior testimony before the Investigative Judge, and details from the witness testimony and documentary evidence presented against them. The presiding judge concluded by asking the defendants whether they were satisfied with or regretted what happened during the Anfal campaign. The Tribunal formally charged all six remaining defendants with genocide, crimes against humanity, and war crimes on February 20, 2007. Each defendant pled not guilty to all charges. During the remainder of the defense phase, “only five witnesses appeared, none of whom could speak specifically to the substance of the crimes alleged.” The defense opened with four character witnesses on February 26, 2007. The fifth and final defense witness to testify was Tariq Aziz, former Deputy Prime Minister, who appeared as a general defense witness.

The prosecution presented its closing statement to the Tribunal over two sessions on April 2–3, 2007. The prosecution “asked for the death penalty for five of the six defendants, and requested that defendant al-‘Aani be released for insufficient evidence.” The prosecution also asked that the IHT “show leniency towards defendant al-Douri because of the outpouring of support he had received from the people of Karbala.” As part of the closing, the prosecution also requested that the judges find the

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53. See ICTJ, The Anfal Trial and the Iraqi High Tribunal Update Number Three: The Defense Phase and Closing Stages of the Anfal Trial, available at http://www.ictj.org/images/content/7/2/726.pdf (last visited Feb. 18, 2009) [hereinafter UPDATE III]. For details of the defendants’ statements, see id. at 6–9. See also infra Part II (discussing the defendants’ arguments).

54. UPDATE III, supra note 53, at 6.

55. Id.

56. As noted above, Saddam Hussein was executed on December 30, 2006. See, e.g., Ratnesar, supra note 20.

57. UPDATE III, supra note 53, at 10 (citing Trial Session No. 46, Feb. 20, 2007 (ICTJ Observer Notes)).

58. Id. The defendants originally pleaded not guilty to the charges during the trial’s first session. UPDATE I supra note 13, at 5.

59. Id. at 11.

60. Id.

61. Id. at 12. Tariq Aziz testified that “the Halabja chemical attacks were beyond the capability of the Iraqi army, and pointed to U.S. military intelligence reports from the late 1980s (since discredited) that blamed Iran for the attack.” Id. (citations omitted).


63. Id.

64. Id. (citing Trial Session No. 53, Apr. 2, 2007 (ICTJ Observer Notes)).
defendants guilty of rape under Article 12(1)(g) of the IHT Statute.\footnote{65} Rape had not been formally charged previously during the trial.\footnote{66}

Defense closing statements spanned five sessions from May 6–10, 2007.\footnote{67} The defendants presented legal and factual arguments. Some of the legal arguments included: (i) the Tribunal’s wrongful exclusion of exculpatory evidence; (ii) the insufficiency of the charging instruments; (iii) the inclusion of international crimes that had not previously been incorporated into Iraqi criminal law, thereby violating the principle of \textit{nullum crimen sine lege, nulla poena sine lege} (no crime without law, no punishment without law); (iv) the Tribunal’s failure to facilitate defense witness testimony; (v) the Tribunal’s failure to appoint a military expert witness to illuminate the structure and function of the Iraqi military; (vi) the illegitimacy of the proceedings; (vii) the excessive redaction of transcripts; (viii) the defense’s lack of sufficient time and resources to review all the necessary documents; and (ix) the failure to recognize that “following orders” was a defense under Iraqi law.\footnote{68}

The Tribunal delivered its verdicts on June 24, 2007.\footnote{69} It sentenced defendants Majid, Sultan Ahmad, and Hussein Rashid to death, and defendants al-Douri and al-Jaburi to multiple life sentences.\footnote{70} Charges against al-'Aani were dismissed for lack of evidence.\footnote{71} Defendants were provided thirty days from the trial verdict to file their appeals.\footnote{72} On September 4, 2007, the Cassation Chamber affirmed the Anfal verdict.\footnote{73} To date, the death sentences have not been carried out.\footnote{74}

\begin{itemize}
\item \footnote{65}{Id. (citing Prosecution Closing Statement, Apr. 2–3, 2007); see IHT Statute, supra note 12, art. 12(1)(g).}
\item \footnote{66}{UPDATE III, supra note 53, at 13.}
\item \footnote{67}{Id.}
\item \footnote{68}{Id. at 13–16 (summarizing the defense counsel’s closing arguments).}
\item \footnote{69}{Id. at 18.}
\item \footnote{70}{Id.}
\item \footnote{71}{Id.}
\item \footnote{72}{See IHT Statute, supra note 12, art. 16 (“The Tribunal shall follow the rules of procedure provided for in the Criminal Procedure Law 23 of 1971 and the Rules of Procedures and Evidence appended to this Law”); Rules of Procedure and Gathering of Evidence with Regard to the Supreme Iraqi Criminal Tribunal, Oct. 18, 2005, AL-WAQ'I AL-IRAQIYA [OFFICIAL GAZETTE OF THE REPUBLIC OF IRAQ], Rule 68(b) [hereinafter IHT Rules of Procedure and Gathering of Evidence] (similar); Code of Criminal Procedure (Law 23 of 1971) (Iraq), art. 252(A) [hereinafter Iraq Code of Criminal Procedure] (stating that a petition for appeal must be presented “within a period of thirty days, starting from the day after the judgement was issued”).}
\item \footnote{73}{For a discussion of the Cassation Chamber judgment, see infra Part III.}
\item \footnote{74}{There appears to be political disagreement as to whether the death sentences should be carried out, particularly as regarding Sultan Ahmad, who appears to have strong political support among Sunni Arabs. See, e.g., Ross Colvin, \textit{U.S. Rebuffs Iraq Demand for Handover of Prisoners}, \textsl{REUTERS}, Nov. 12, 2007, http://www.reuters.com/article/middleeastCrisis/idUSL12601515.}
\end{itemize}
C. Fair Trial Issues

It is extremely difficult to establish a tribunal, particularly where a domestic judiciary has been cut off from legal developments and is then asked to adjudicate complex crimes pursuant to international fair trial standards. Yet, that was what was required of the IHT judges. Some might argue that a nascent tribunal established in a country facing these circumstances and undergoing civil war should not be expected to adhere vigilantly to all of the fair trial standards of, for example, Article 14 of the International Covenant on Civil and Political Rights (ICCPR). Nevertheless, most of those standards were directly incorporated into Article 19 of the IHT Statute, making it clear that the IHT was indeed obligated to adhere at least to those benchmarks.

Article 19 of the IHT Statute provides:

First: All persons shall be equal before the Tribunal.

Second: The accused shall be presumed innocent until proven guilty before the Tribunal in accordance with this law.

Third: Every accused shall be entitled to a public hearing, in accordance with the provisions of this law and the rules of procedure made hereunder.

Fourth: When bringing charges against the accused pursuant to this Law, the accused shall be entitled to a fair impartial trial in accordance with the following minimum guarantees:

A. To be informed promptly and in detail of the content, nature and cause of the charge against him;

B. To have adequate time and facilities for the preparation of his defense and to communicate freely with counsel of his own choosing and to meet with him in private. The accused is entitled to have non-Iraqi legal representation so long as the principal lawyer of such accused is Iraqi;

75. It was for such reasons that Human Rights Watch argued for the creation of an international or mixed-tribunal for Iraq. See HRW, Justice for Iraq, supra note 3.


77. See IHT Statute, supra note 12, art. 19. Iraq, of course, was also legally obligated to adhere to these standards by virtue of having ratified the ICCPR.
C. To be tried without undue delay;

D. To be tried in his presence, and to be assisted by counsel of his own choosing, or to be informed of his right to request legal assistance if he cannot afford it; and to have the right to seek such assistance that will allow him to appoint a lawyer without paying the fees;

E. To have the right to call and examine defense and prosecution witnesses, and to present any evidence in his defense in accordance with the law;

F. Not to be compelled to confess guilt, and to have the right to remain silent and not to testify without such silence being interpreted as evidence of guilt or innocence.

It is not the focus of this Article to provide an in-depth analysis of the fair trial problems associated with the Anfal trial, but, at minimum, they should be acknowledged. Briefly, these problems included: (i) government interference with the judicial panel (the Government removed Presiding Judge Abdallah al-Amiri near the start of the trial and replaced him with Judge Muhammad Uraybi al-Khalifa after Judge Amiri commented that Saddam Hussein was "not a dictator"); (ii) the framing of charges (both times they were presented) in very general terms that did not detail the individual roles that the defendants allegedly played; (iii) investigation and flight of two private defense counsel involved in the trial, which may have had a chilling effect on defense representation.

78. Id. (emphasis added).

79. These issues are anticipated to be more fully addressed in a forthcoming report by the ICTJ. The details provided in this Article are based on the ICTJ’s analysis.

80. See UPDATE I, supra note 13, at 13. Governmental interference would violate the IHT Statute’s guarantee of a “fair and impartial trial.” See IHT Statute, supra note 12, art. 19/Fourth.

81. Charges are presented at two stages under Iraqi law: the “qirar al ihala,” before proceedings open, and then the “qirar al tuhm,” at the close of the prosecution’s case. Iraq Code of Criminal Procedure, supra note 72, arts. 131, 181.

82. A failure to charge with appropriate specificity would violate the right “[t]o be informed . . . in detail of the content, nature and cause of the charge against [the defendant].” IHT Statute, supra note 12, art. 19/Fourth.

83. On March 15, 2007 (Trial Session No. 49), defense attorney Badia Aref was cited for contempt of court and taken into detention. UPDATE III, supra note 53, at 17. Aref wanted to introduce as evidence a CD indicating that Iranians had used chemical weapons during the period of Anfal, as well as evidence that U.S. researchers had confirmed that fact. Id. The Presiding Judge also cited media comments Aref had made on December 28, 2006, to al-Arabiya Television comparing the Tribunal to a “slaughterhouse.” Id. He later left the country. Counsel for another defendant was also referred for investigation for allegedly forging his Iraqi Bar Association credentials, and has also left the country. Id.
generally;\(^{84}\) (iv) the defendants’ relative inability to introduce any defense witnesses because potential witnesses located outside of Iraq were afraid to return to Baghdad to testify and the Tribunal judges refused to hear testimony by video-link (though such testimony was allowed under the IHT’s rules);\(^{85}\) (v) the extreme passivity of the assigned defense counsel who filled in when private counsel walked out of the proceedings;\(^{86}\) (vi) the apparent failure of the Trial Chamber to provide reasoned, articulate responses to the defendants’ many motions;\(^{87}\) (vii) the requirement that appeal papers be filed within thirty days of the Trial Chamber verdict despite the length and complexity of the Anfal proceedings;\(^{88}\) and (viii) as described in more detail below,\(^{89}\) the Cassation Chamber’s apparent lack of analysis of the legal and factual issues.\(^{90}\)

As best as can be determined, no adequate response to these issues has been articulated. Certainly, there is no discussion of them in the Trial Chamber judgment. Nor do they appear to have received reasoned responses during motion practice. It is possible that some of the issues mentioned above may not have amounted to fair trial violations. However, the lack of reasoned discussion of the issues was a lost opportunity for the Trial Chamber to demonstrate that at least some of them were

\(^{84}\) It is unclear whether the investigations of defense counsel were properly opened or done simply to send a chilling message to the defense. The latter could undermine both the right to a “fair impartial trial,” and the right “to be assisted by counsel of [the defendant’s] own choosing.” IHT Statute, supra note 12, art. 19/Fourth/D.

\(^{85}\) See IHT Rules of Procedure and Gathering of Evidence, supra note 72, Rule 57 (stating that the Trial Chamber has the power to hear evidence submitted “via such media communications, including video or satellite channels, and as the Tribunal may order”). The lack of witnesses potentially undermines the defendants’ “right to call and examine defense and prosecution witnesses,” IHT Statute, supra note 12, art. 19/Fourth/E, and contradicts the principle of “equality of arms” see id. art. 19/First (“All persons shall be equal before the Tribunal.”).

\(^{86}\) This lack of zealous representation potentially violates the right “to be assisted by counsel.” See IHT Statute, supra note 12, art. 19/Fourth/D. It is unclear whether (a) the passivity of assigned counsel was a result of being unprepared; (b) assigned counsel were afraid to provide more effective representation, due, for example, to threats by Saddam Hussein (while he was still alive), to a fear of being seen as publicly defending the defendants; or (c) counsel’s silence was due to instructions from their clients.

\(^{87}\) The lack of reasoned rulings, which particularly affected the defense, potentially frustrates both the right to a “fair impartial trial,” see id. art. 19/Fourth, and the defendant’s right to appeal his conviction, see ICCPR, supra note 76, art. 14.5 (“Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”).

\(^{88}\) This timeframe potentially violates the right “[t]o have adequate time and facilities for the preparation of [the] defense.” IHT Statute, supra note 12, art. 19/Fourth/B.

\(^{89}\) See infra Part III.

\(^{90}\) The lack of a reasoned appellate ruling potentially frustrates the right to an appeal. See IHT Statute, supra note 12, art. 25 (providing for appeals); see also ICCPR, supra note 76, art. 14.5 (providing for the right to an appeal).
duly considered and resolved. This of course leads to the critical question of whether the Anfal convictions ought to stand. For example, if the charges were never adequately presented, and if the defects were not cured, then some (or even potentially all) of the convictions should be vacated. A second opportunity to resolve these fair trial issues lay in the appeal. However, because the Cassation Chamber never seriously addressed fair trial issues, the Tribunal once again missed an opportunity to demonstrate that the Anfal trial was fairly adjudicated. Thus, the aforementioned fair trial issues cast a long shadow over the IHT’s work.

II. THE ANFAL TRIAL CHAMBER JUDGMENT

A. Overview of the Convictions

Despite these significant fair trial issues, it cannot be denied that the Anfal trial revealed, through a large volume of solid documentary evidence and eye-witness and expert testimony, how Iraqi armed forces, security, and intelligence units perpetrated the Anfal campaign against the Iraqi Kurds. The remaining sections of this Part describe the key evidence against each of the five convicted defendants. Then, as to

91. Both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have recognized, for example, that a defect in the specificity of the indictment can potentially be cured through subsequent timely, clear, and consistent information, set forth in the prosecution’s opening statement and pre-trial brief. See Prosecutor v. Simić, Case No. IT-95-9-A, Appeals Judgment, ¶ 24 (Nov. 28, 2006); Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Appeals Judgment, ¶¶ 44–46 (Feb. 28, 2005) [hereinafter Kvočka Appeals Judgment] (considering the pre-trial brief and the prosecutor’s opening statement); Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-A, Appeals Judgment, ¶ 140 (Dec. 17, 2004) [hereinafter Kordić and Čerkez Appeals Judgment] (indictment supplemented by the prosecution’s pre-trial brief); id. ¶ 169 (presenting information in an opening statement of the prosecution may cure a defective indictment).

92. Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Trial Judgment, ¶ 47 (June 10, 2007) (“If insufficient notice has violated the accused’s right to a fair trial, no conviction may result.” (citations omitted)); see also Kordić and Čerkez Appeals Judgment, supra note 91, ¶ 142 (“If an indictment is insufficiently specific, such a defect ‘may, in certain circumstances cause the Appeals Chamber to reverse a conviction.’ ”); Prosecutor v. Kupreškić et al., Case No. IT-95-16-A, Appeals Judgment, ¶ 114 (Oct. 23, 2001).

93. See infra Part III.

94. This Article discusses only the key evidence. It does not attempt to summarize all of the evidence cited in the Tribunal’s 963-page decision. In writing this Article, the author did not reexamine the underlying evidence, but rather relied on the evidence relied on by the judges to support their conclusions.

95. When this Article argues that a conviction of a defendant sentenced to death appears sound, the author does not suggest that the sentence given—the death penalty—is appropriate. Iraq should join the growing number of States that have abolished the death penalty. See Amnesty Int’l, Abolitionist and Retentionist Countries, http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries (last visited Feb. 20, 2009) (noting that
each defendant, this Part contains a detailed legal analysis of whether the convictions as to each crime were warranted based on the evidence as found by the Tribunal. This Article does not examine the charges against Tahir Tawfiq Yusif al-'Aani, who was acquitted, or Saddam Hussein al-Majid (Saddam Hussein), who was executed following his conviction by the IHT after the conclusion of the Dujail trial.

In general, a fair number of the convictions appear to have been warranted, with certain caveats. The IHT's judgment, however, is frequently unclear in its logic, rambling in its analysis, disorganized, and occasionally lacking discussion of the elements of some of the crimes. The IHT's analysis of "individual criminal responsibility" is generally its weakest part. Specifically, the IHT sometimes insufficiently analyzed each defendant's "intent" or mental state (at least under international standards). The lack of analysis often appears to be harmless error, however, because the factual conclusions required for finding individual criminal responsibility were nonetheless present in the judgment. Ultimately, it appears that the judges operated in good faith, and that many of the convictions were well-supported by the evidence. However, the unresolved fair trial problems mentioned above and the lack of serious appellate review prevent this Article from concluding that the convictions should stand, even where all elements of the crime were shown.

"[m]ore than half of the countries in the world have now abolished the death penalty in law or practice").

96. A summary of the conclusions as to each convicted defendant can be found in the appendix to this Article.
97. The execution occurred during the course of the Anfal trial.
98. Specifically, this Article does not conclude that the convictions should ultimately stand, due to the unresolved fair trial problems, see supra Part I.C, and lack of serious appellate review, see infra Part III.
99. In compiling this Article, the author used an English translation of the Trial Chamber Judgment, which in places appears to be quite rough. Accordingly, it is possible that where the Article quotes the Judgment, the translation may not be entirely accurate. In addition, the author's conclusion that the elements of crimes appear "roughly" shown arguably gives too much leeway to the IHT because the Tribunal's findings in many instances only approximate the correct legal standards. Therefore, the author is hesitant to conclude that any of the convictions are necessarily valid.
100. It is possible that, in analyzing individual criminal responsibility, the judges were drawing on Iraqi law. However, their work should have been governed by the IHT Statute, which sets forth the international standards regarding individual criminal responsibility. See IHT Statute, supra note 12, art. 15. And, in fact, the trial judgment made frequent references to the forms of responsibility under Article 15. Thus, it appears that the judges were applying that article.
101. See supra Part I.C.
102. See infra Part III.
103. Some of the fair trial issues discussed above suggest that some or all of the convictions should be vacated. See supra Part I.C.
This Article analyzes the findings made by the Trial Chamber, but does not mean to suggest that those findings were necessarily correct. While the Trial Chamber judges do, throughout their judgment, point to specific evidence to support their conclusions, there may have been exculpatory documents or testimony that should have negated those findings. It is beyond the scope of this Article to determine whether the facts as found by the Trial Chamber were warranted. Nonetheless, given this acknowledged limitation to the methodology employed—taking the Tribunal’s factual findings as true—it is possible both to explain the IHT’s holdings and deduce certain legal errors.

B. Ali Hassan al-Majid

The Tribunal found defendant Majid “was the absolute leader in the northern area” at the time of the Anfal campaign. He was the author of arguably the two most incriminating documents presented at trial—Document Nos. 4008 and 3650—which essentially laid out the plan to commit genocide against the Iraqi Kurds, including explicit orders to use chemical weapons and to “kill every person whose age is between 15 and 70 years included.” The IHT also found that Majid ordered members of the Iraqi military and others to implement those plans. The evidence against Majid also included audiotapes, played at trial, in which he discussed using chemical weapons against the Iraqi Kurds.

As detailed below, this Article concludes that the facts found by the IHT clearly suggest that genocide was committed. Majid’s convictions for committing genocide, as a participant in a joint criminal enterprise, and for ordering genocide appear warranted. His crimes against humanity and four of the five war crimes convictions also appear well-founded.

1. The Tribunal’s Conclusions as to Majid’s Role in the Anfal

Some of the key evidence that the IHT relied on include documents authored by Majid that, in effect, lay out the plans for the Anfal campaign. The Tribunal found that Majid served as a member of the Revolutionary Command Council, State Command of the Ba’ath Party,

104. Al Anfal Trial Chamber Judgment, supra note 2, at 478 (relying on Decree No. 160, Mar. 29, 1987).

105. As to Document Nos. 4008 and 3650, the IHT stated: “These two letters are considered the pillars upon which all attacks after [April 6, 1987] were based.” Id. at 512.

106. Id. at 481.

107. See id. at 492.

108. Id. at 483.

109. See caveats supra note 98.

110. See caveats supra note 98.

111. The Revolutionary Command Council was the “top decision-making body” in Iraq. IRAQ: A COUNTRY STUDY (Helen Chapin Metz ed., Fed. Res. Div., Libr. of Cong. 1988),
and head of the Northern Organization Office for the period 1987–1989. The Revolutionary Command Council gave Majid wide authority to implement policies in northern Iraq and to command all of the “[S]tate’s civil, military, security and party[] systems.” Later, Majid, through the Northern Organization Office, directed that “supplies of food and medicine to the Kurdish villages [be] prohibited in addition to agriculture, gas, human beings and animals . . . .” More explicitly, Majid ordered military commanders to “prohibit human and animal existence” in certain areas, and to “kill every person whose age is between 15 and 70 years included.” He also requested “the Corps Commanders to carry on special strikes (using chemical weapons).” He also stated that “[w]e have no objection [to] beheading the traitors . . . but it is better to send them first to the security [directorates] and interrogate them[,] they may find . . . more useful information before their execution.”

A telegram issued by Irbil Security Directorate stated that “Comrade ‘Ali Hassan Al-Majid has ordered [us] to destroy all [the Kurds’] houses and dislocate them to the residential compounds and [they] will never be compensated . . . .” The telegram also included Majid’s “instructions [that] . . . all plowing or planting [of] winter crops within the prohibited villages are [sic] prohibited.” Another document accepted into evidence by the Tribunal stated: “[B]ased on Comrade ‘Ali Hassan Al’Majid[‘s] request, [the] First Corps’ Commander issued an order of execution

available at http://countrystudies.us/iraq/71.htm. “It was first formed in July 1968, and since then it has exercised both executive and legislative powers.” Id. The chairman of the Revolutionary Command Council was Saddam Hussein.

112. See Al Anfal Trial Chamber Judgment, supra note 2, at 481.
113. Id. at 481, 511 (relying on Doc. No. 160, Mar. 29, 1987). The IHT provided some of the background behind this grant of authority:

In light of correspondence[] between [the] Presidency of the Republic and [the] General Military Intelligence Director, dated [March 1987], including the provision of an intelligence report to [the] Presidency, regarding Kurdish fighters’ activities and the impact of air strikes against them, . . . Saddam Hussein replied by forming a committee of specialists to strike with special ammunition. The General Military Intelligence Directorate [GMID] specified targets in Balisan basin including Balisan village, Tutma, Khati and Shaykh Wasanan, and Qara Dagh basin including Takya, Balak Jar and Siwsinan. It also reviewed the [possibility] of [using] 3 different agents Mustard, Sarin, and Tabun . . . . Saddam Hussein[‘s] approval had been granted [as to] using chemical weapons. [Then] the . . . Revolutionary[ary] Command Council met with [Ba‘ath] Party State Command to discuss the Kurds situation in [the Northern] area in order to draw [a] . . . policy or plan targeting [the] Kurds . . . .

Id. at 511.

114. Id. at 481, 610 (quoting Doc. No. 3650, June 3, 1987) (emphasis added).
115. Id. at 481, 623 (quoting Doc. No. 4008, June 20, 1987) (emphasis added).
117. Id. at 482 (quoting Doc. No. 5083, July 22, 1987) (emphasis added). But see id. at 611 (attributing the comments to Saddam Hussein).
118. Id. at 483 (emphasis added).
119. Id. (emphasis added).
against wounded civilians, after that Party Organization, as well as [the] Police and Security Directorates affirmed the hostility of the . . . wounded to the regime. [The order] also included the devastation of Kani-Ashqani neighborhood via bulldozers.\textsuperscript{120}

The prosecution supplemented the documentary evidence against Majid with several audiotaped recordings of his plans for bulldozing Kurdish victims into mass graves,\textsuperscript{121} striking the Kurds with chemical weapons,\textsuperscript{122} and offering false amnesties.\textsuperscript{123} Below are some of the striking words heard on recordings at Trial Session No. 36:

- "[A]lright . . . where [can] I put them? All those people? I tried to distribute them among the governorates . . . . I will send [bulldozers] and [shovels] to them.” (The IHT then explained: “[t]he accused is describing how to transport the victims to the other governorates, and sending the [bulldozer and shovels] from the northern region to the other governorates for burying the victims in the mass graves.”)\textsuperscript{124}
- "I went to Al-Sulaymaniyyah on [sic] 7:30 and I bombarded them with the special ammunitions.”\textsuperscript{125}
- "[W]hen I strike them with the chemical I will cause them high casualties . . . and I will not strike them with chemical . . . only one day, but (15) days, two days, ten, five and so on . . . .”\textsuperscript{126}
- "I will tell them there is an amnesty . . . . I will print a million pamphlet[s] and spread them in the north . . . . and I will not mention that it is from the [S]tate of Iraq.”\textsuperscript{127}
- "I will tell [sic] them with the new weapon which will eradicate you, God willing; all God’s vehicles are not enough to carry them; I told the specialists, I need gangs . . . . the good ones in Europe to kill them wherever they catch them.”\textsuperscript{128}
- "Strike them chemically and eradicate them all . . . . They thought the International community will rescue them . . . .

\textsuperscript{120} Id. at 512 (quoting Doc. No. 3329, May 14, 1987).
\textsuperscript{121} Id. at 483.
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 484.
\textsuperscript{124} Id. at 483.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 484.
\textsuperscript{128} Id.
Damn this International community . . . and any of God's States who back them."129

In addition to the documentary and audio evidence, Majid testified at trial. At one point, he stated, "I do not regret what I did and I did not mean to harm any human being if it was not for defending Iraq."130 According to Majid, the northern area was facing a state of emergency, and he "therefore reacted and declared a state of emergency."131 Majid confirmed that he ordered military commanders to prohibit "human and animal existence" in certain areas and to "kill every person whose age is between 15 and 70 years included."132 He also confessed several times to the Tribunal that all of the military, security, civil, and party organizations in northern Iraq were under his command. Majid further confessed "that he ordered the security organizations to dislocate the residents to the residential compounds" and that "he gave instructions to the military units to destroy what was left of the villages."133 Finally, Majid also "admitted to the court, that executions were carried [out] without trial."134

In his defense, Majid argued: (i) the deeds committed were not crimes at the time that they were committed;135 (ii) he had no knowledge about the "mass graves," or the "detention camps, ravishment, torture, indignity, death from starvation, [and lack] of medical care and [cleanliness] that the victims were subject[ed] to";136 (iii) families were moved from the restricted areas for "security reasons";137 and (iv) he "did not [personally] take part [in] Al-Anfal Operations."138 Majid's attorney argued that his client had no intention to commit genocide, was not aware of the detention of civilians or the use of chemical weapons (the audiotape speeches were a form of "psychological war"), and was "not involved in what occurred [at] mass graves."139 Although the Tribunal did not appear to respond to each of Majid's arguments, it

129. Id. at 514.
130. Id. at 479.
131. Id.
132. Id. at 481.
133. Id. at 487.
134. Id. at 513. He also "admitted to the court, that executions were carried [out] without trial since he was authorized [to do] so by [the] Revolution[ary] Command Council." Id.
135. Id. at 478.
136. Id.
137. Id.
138. Id. at 479.
139. Id. at 480.
is fairly clear from the facts discussed below that these arguments were either contradicted by the evidence\textsuperscript{140} or legally not controlling.\textsuperscript{141}

2. Majid's Genocide Convictions

The Trial Chamber convicted Majid of three counts of genocide based on the commission of three different underlying crimes: (i) killing members of a group; (ii) causing serious bodily or mental harm to members of a group; and (iii) deliberately inflicting on a group living conditions calculated to bring about its physical destruction in whole or in part.\textsuperscript{142}

This Article's preliminary conclusion is that Majid's genocide convictions appear well-founded.\textsuperscript{143} The elements of the \textit{chapeau}, or the elements that must be proven regardless of which underlying crime supports the charge, are: (i) intent to destroy; (ii) in whole or in part; (iii) a national, ethnical, racial, or religious group; (iv) "as such."\textsuperscript{144} This Article examines the IHT's findings as to each element in turn (although the Tribunal has not organized its findings this clearly).\textsuperscript{145} Each of these elements appears to have been met, based on the facts as found by the Tribunal.

\textsuperscript{140} For example, as to Majid's assertion that he was not aware of the use of chemical weapons, the IHT concluded:

His allegations [that the chemical weapons] were an intention to scare the Kurds... [are proven false] by Letter [4008], dated 1987 June 20, where he ordered corps commanders to use [special] ammunition [i.e., chemical weapons] to kill the [largest] number of those within Prohibited Zones. [Majid] affirmed authenticity of the letter, in addition to other letters... [discussing the use of] special ammunition[s]...

\textit{Id.} at 515.

\textsuperscript{141} For example, it is largely irrelevant that Majid "did not take part [in] Al-Anfal Operations," as Majid maintained, \textit{id.} at 479 (emphasis added), because the IHT found that he had \textit{ordered} them, \textit{see id.} at 492 (noting that according to the Tribunal, Majid "ordered them all to execute what's mentioned in the letter... [Doc. No. 4008]"). "Ordering" is a separate form of individual criminal responsibility from "committing." \textit{Compare IHT Statute, supra note 12, art. 15/Second/A (covering "committing"), with id. art. 15/Second/B (covering "ordering").} Even for a joint criminal enterprise, which, as discussed below, was also found to exist in this case, a participant need not personally commit the crimes. \textit{See IHT Statute, supra note 12, art. 15/Second/A.}

\textsuperscript{142} \textit{See Al Anfal Trial Chamber Judgment, supra note 2, at 517.}

\textsuperscript{143} \textit{See caveats supra note 98.}

\textsuperscript{144} IHT Statute, \textit{supra} note 12, art. 11; \textit{see also} Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-T, \textit{Trial Judgment}, ¶ 655 (Jan. 17, 2005) [hereinafter \textit{Blagojević and Jokić Trial Judgment}] ("[T]he specific intent of the crime of genocide [is] the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.'").

\textsuperscript{145} This Article necessarily contains a distillation of the Tribunal's findings.
Intent to Destroy

The first element necessary to prove genocide is "intent to destroy." The law permits "intent to destroy" to be inferred. Some of the factors courts have looked to for inferring such intent include: (i) the extent of the actual destruction; (ii) the existence of a genocidal plan or policy; (iii) the perpetration and/or repetition of other destructive or discriminatory acts committed as part of the same pattern of conduct; and (iv) the utterances of the accused.

Here, the IHT concluded that there was "intent to destroy" based on a variety of factors, including: (i) the use of aircraft, tanks, artillery, helicopters, rocket launchers, infantry, and "special ammunitions" (i.e., chemical weapons) to attack the Iraqi Kurds; (ii) direct orders from Majid to carry out the attack; (iii) direct orders from Majid to kill the largest possible number of people; (iv) that the attacking troops prevented individuals from escaping so that none were able to cross the border into Turkey; (v) that attacking troops "did not distinguish between the victims . . . [as] civilians or fighters ([Peshmerga])", (vi) that thousands of children, women, and elderly were killed by chemical weapons; (vii) that the former regime "prevented . . . humanit[arian] organizations from entering Kurdistan to . . . find out the circumstances of the victims"; (viii) that the attacking troops destroyed "the electricity and [water filtration systems]"; and (ix) that animal and human existence was prohibited in the restricted areas.


147. Prosecutor v. Brdanin, Case No. IT-99-36-T, Trial Judgment, ¶¶ 971–89 (Sept. 1, 2004) [hereinafter Brdanin Trial Judgment]; see also Prosecutor v. Jelisić, Case No. IT-95-10-A, Appeals Judgment, ¶ 47 (July 5, 2001) (inferring "intent to destroy" from "the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts").

148. Al Anfal Trial Chamber Judgment, supra note 2, at 493.

149. Id. at 494.

150. Id.

151. Id.

152. Id. at 500.

153. Id. at 494.

154. Id. at 498.

155. Id.

156. Id.
The IHT also found a “strategy and prepared policy by the regime to target the Kurds.” Evidence of the plan came from the “repetition” and “systematization” of the attacks. “[T]he Anfal Operations [were divided] into eight phases,” each having

the same style and system in all phases concerning the attack, and usage of chemical weapons, village demolition, coercive dislocation of the population, prohibiting . . . human and animal presence in the area, death from starvation in the detention camps, the similarity in digging the mass graves and the means of execution.

The Tribunal saw further evidence of the plan in the way mass executions were prepared:

[W]hen they were transferred to the prepared places for . . . executions, th[e victims] saw the gravediggers in . . . place and the holes were ready and then they were pushed towards these holes where the execution teams were shooting them . . . . The gravediggers and [shovels] then covered these holes with dirt.

The IHT ultimately concluded that this “plan or policy was preplanned and reviewed by . . . Saddam Hussein and his Command’s Members, including . . . Majid.”

The Tribunal further relied on the intentions expressed by Majid in audiotaped recordings, and considered the derogatory phrases Majid and other government officials used to describe the Kurds as evidence of their “intent to destroy.” For example, Saddam Hussein was recorded saying that “[t]he Kurds learned their bad habits from the ‘Ajam’ [the Persians].” Majid himself was taped saying that he did not trust Kurds, who were accepted as “second [class citizens]” in Iraq, if at all. Contemptuous and abusive phrases were also used by guards at the Tup Zawa and Nuqrat al-Salman detention camps and by execution teams. The IHT summarized: “The disdain, vituperation, and blasphemies are clear evidence[] [of the] [Ba’ath] organization’s real intent, headed by . . . Saddam Hussein and . . . Majid.”

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157. Id. at 497. Case law states that a plan or policy is not required to prove intent to destroy, although it may be an important factor. See Krštić Appeals Judgment, supra note 146, ¶ 225.

158. Al Anfal Trial Chamber Judgment, supra note 2, at 499.

159. Id. at 500.

160. Id. at 513.

161. Id. at 498.

162. Id.

163. Id. at 498.

164. Id. at 514.
Finally, the Tribunal concluded that "[t]he real intention [of] the regime" was also revealed in "honoring . . . those who committed the . . . crimes," particularly "through granting . . . medal[s] [of bravery] to each of Hashim Sultan and Ayad Zaki for their distinguished roles in Al-Anfal operations."\textsuperscript{165} Based on all of the evidence, the IHT concluded that Majid had "intent to partially or totally eradicate Kurdish civilians due to their ethnicity."\textsuperscript{166}

\textit{In Whole or In Part}

The next requirement of the \textit{chapeau} of genocide is that the "intent to destroy" be directed at a group "in whole or in part." As to this requirement, the IHT appeared to find that the destruction was aimed at "partial eradication" of the Iraqi Kurds.\textsuperscript{167} The Tribunal noted that "some sources estimate Al-Anfal victims to reach 182 thousand[",\textsuperscript{168} although it did not make that finding itself. The IHT found that the operations "stretched over most of Kurdistan, within it four governorates [Kirkuk, al-Sulaymaniyyah, Irbil, and Dujuk], devastating and dislocating vast regions [more than 3,000 villages], murdering, relocating and arresting tens of thousands of victims, preventing . . . human and animal existence as well as agronomy, and shutting down [wells] via reinforced concrete."\textsuperscript{169}

The IHT did not evaluate whether the part of the group targeted was "substantial," as courts have generally required for genocide cases.\textsuperscript{170} However, based on the Tribunal's factual findings, this requirement is arguably satisfied. In analyzing whether the "in part" requirement is met, ICTY case law establishes the importance of examining both the targeted group's size as well as its significance within a given community.\textsuperscript{171} Here, it would seem reasonable to conclude both that (i) the number targeted was numerically significant—there were, according to the IHT,

\begin{itemize}
\item \textsuperscript{165} \textit{Id.} at 499.
\item \textsuperscript{166} \textit{Id.} at 516.
\item \textsuperscript{167} \textit{Id.} at 501 ("Targeting this [large number] of civil inhabitants, which is not to be considered easy, is evidence [of] the partial eradication's intent of [Majid]." (emphasis added)).
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} \textit{Id.}
\item \textsuperscript{170} As explained by the ICTY:
\end{itemize}

\begin{quote}
It is well established that where a conviction for genocide relies on the intent to destroy a protected group "in part," the part must be a substantial part of that group. The aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted must be significant enough to have an impact on the group as a whole.
\end{quote}

\textit{Krstić Appeals Judgment, supra} note 146, \textit{¶} 8-9.
“tens of thousands of victims,” more than 3,000 villages destroyed, and, by some estimates, 182,000 victims; and (ii) the targeted group had considerable importance within the community—this is suggested by the IHT’s finding that Majid’s acts led “to the deaths of a vital, immense majority of Kurd[ish] inhabitants in Northern Iraq.” Thus, the Tribunal’s factual findings arguably satisfy the “substantial part” requirement.

**National, Ethnic, Racial, or Religious Group**

The Genocide Convention and other statutory definitions of genocide protect only four groups from targeted destruction—specifically, “national, ethnic, racial or religious group[s].” Here, the IHT appears to have found that the Kurds were both a “national” and an “ethnic” group, and therefore protected. The Tribunal correctly observed that an “ethnic group is generally known as a group [whose] members . . . shar[e] the same language [and] culture.” The IHT stated:

The Kurds are considered as a national and ethnic group living in the northern region of Iraq and their region named . . . (Kurdistan . . .). The Kurds share a language, culture and history[,] and the Kurdish language [has been] considered as an official language in [the] Kurdish region since 1970 . . .[,] and . . . the second official language in Iraq . . . according to the . . . constitution [of] 2005[.]. Also the Iraqi temporary constitution [of] 1970 ratified that the Kurdish nationality [was the second most predominant] after the Arab in Iraq.

The conclusion that the Kurds were a separate ethnic group, based on having a different language and culture from Arab Iraqis, appears warranted. It makes less sense to say that Iraqi Kurds were targeted

172. *Al Anfal Trial Chamber Judgment, supra* note 2, at 501.

173. *Id.* at 517 (emphasis added). Because the IHT does not purport to firmly conclude how many Kurds were targeted or killed in the Anfal campaign, the IHT does not analyze that number as a percentage of the total Kurdish population at the time, although that is a typical method of examining the “in part” requirement. See, e.g., *Krstić Appeals Judgment, supra* note 146, ¶ 12 (“The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group.”).

174. *See, e.g., IHT Statute, supra* note 12, art. 11/First.

175. *Id.* at 488; *see also* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶¶ 510, 516 (Sept. 2, 1998) [hereinafter *Akayesu Trial Judgment*] (“An ethnic group is generally defined as a group whose members share a common language or culture.”).

176. *Al Anfal Trial Chamber Judgment, supra* note 2, at 490 (emphasis added); *see also id.* at 493 (“The Kurds are a national and ethnic group living in [the] Kurdistan area for many thousands of years in . . . northern Iraq and the Iraqi temporary constitution [of] 1970 had endorse[d] them as [the] second nationality in Iraq.” (emphasis added)).

177. Perceived stigmatization of the group, by either the perpetrator or the victim, on the basis of “perceived national, ethnical, racial or religious characteristics” is also relevant. As the ICTY Trial Chamber in Brdanin explained:
because of their nationality, because Arab Iraqis and Iraqi Kurds were all Iraqi nationals (although perhaps the Tribunal is simply making the distinction that it was the Kurds in Northern Iraq, and not all Kurds, who were targeted). Nevertheless, targeting such an ethnic group suffices for purposes of genocide; thus, this requirement appears to have been met.

As Such

The final requirement of the chapeau of genocide is that the national, ethnic, racial, or religious group be targeted "as such." That is, "[t]he victims of the crime must be targeted because of their membership in the protected group . . . ."178 Here, the IHT concluded that "[t]he Kurds were targeted for their ethnicity."179 While this appears to have been true, it also appears oversimplified. There was also a potential political motivation for the targeting—specifically, the Peshmerga militia, which was aligned with Iran in the then-ongoing Iran-Iraq war, was operating in northern Iraq's Kurdish areas, with support from local civilians. The judge who wrote the section of the Trial Chamber judgment discussing Sultan Ahmad,180 however, persuasively explains that the existence of such a political motivation for targeting the Kurds does not negate genocidal intent.181 This is a correct conclusion, given the differentiation that the law draws between motive and intent.182

[T]he relevant protected group may be identified by means of the subjective criterion of the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics. In some instances, the victim may perceive himself or herself to belong to the aforesaid group.

Brdanin Trial Judgment, supra note 147, ¶ 690; see also Prosecutor v. Jelisić, Case No. IT-95-10-A, Trial Judgment, ¶ 70 (Dec. 14, 1999). The ICTY Appeals Chamber has held: "Although the objective determination of a religious group still remains possible . . . it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community." Id. During the Anfal campaign, the facts certainly demonstrate that the Kurds were singled out from other Iraqis.

178. Blagojević and Jokić Trial Judgment, supra note 144, ¶ 669 (emphasis added).
179. Al Anfal Trial Chamber Judgment, supra note 2, at 490.
180. Based on differences in writing style and analysis (as well as duplication of effort), it seems clear that different judges wrote different sections of the trial chamber judgment—perhaps each judge wrote on one of the five convicted defendants.
181. Regarding the "as such" requirement, the judge who wrote the portion of the judgment discussing Sultan Ahmad stated: "It is important to mention that the relation between ethnic group and political program, which practically merge between ethnic and political identifies, does not [negate] the intention of genocide which moves the given convict." Al Anfal Trial Chamber Judgment, supra note 2, at 629 (citing Prosecutor Nahimana et al., Case No. ICTR-99-52-A, Appeals Judgment, ¶ 969 (Nov. 28, 2007) [hereinafter Nahimana Appeals Judgment]). In other words, the fact that there is also a political motivation for targeting an ethnic group (for example, punishing the Kurds for supporting Peshmerga forces) does not negate the intent to destroy the group on the basis of their ethnicity.
Accordingly, all of the elements of genocide’s *dolus specialis* appear to be satisfied. Of course, a genocide conviction must also be based on at least one type of “underlying crime.” Here, the IHT found that three underlying crimes had occurred: (i) killing members of the group; (ii) causing serious bodily or mental harm to members of the group; and (iii) deliberately inflicting on the group living conditions calculated to bring about its physical destruction in whole or in part.

*First Underlying Crime: Killing Members of the Group*

“Killing” will only support a genocide conviction if the individuals killed are members of the protected group.\(^{183}\) This crime also has a *mens rea* requirement: the Prosecutor must show that there was intent to kill members of the group (though this intent need not reach the level of premeditation,\(^{184}\) and need not necessarily belong to the defendant).

Here, the IHT relied primarily on the following evidence of killing members of the group: (i) the wide authority given to Majid over the northern area;\(^{185}\) and (ii) Majid’s express directives, including his order “banning the human[s] and animals in the area, banning travel, [and] cultivation,” his order to use “artillery, helicopters and aircrafts to kill the largest possible number of those who exist within these restricted areas day and night,” and, finally, his orders to kill individuals from the ages of fifteen to seventy, after extracting useful information.\(^{186}\) The IHT summarized the evidence by stating that Majid had issued “killing orders,”\(^{187}\) and concluded that “[t]he troops . . . carried out attacks killing thousands of Kurds using chemical and conventional weapons based on [the] orders or encouraging letters from [Majid].”\(^{188}\) It is clear from the facts that a good deal of this killing was done with intent, Majid’s orders contributed to the killing, and that the IHT found that Majid acted with premeditation.\(^{189}\) Thus, the elements of the underlying crime of “killing members of the group” certainly appear met.

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183. *Brdanin Trial Judgment*, *supra* note 147, ¶ 689.
186. *Id.* at 492 (referring to Majid’s orders in Doc. No. 4008, June 20, 1987).
187. *Id.* at 494.
188. *Id.* at 496.
189. *Id.* at 517 (“Majid contributed, individually, in executing [a] joint criminal plan with others . . . *premeditated*ly, through issuing orders to murder, cause severe physical or mental damages [sic], and [subject] them to harsh living conditions aiming to exterminate them all.” (emphasis added)).
Second Underlying Crime: Causing Serious Bodily or Mental Harm to Members of the Group

International case law defines this underlying crime as “an intentional act or omission causing serious bodily or mental suffering.”\footnote{190} “[B]odily harm refers to harm that seriously injures the health, causes disfigurement or causes any serious injury to the external [or] internal organs or senses.”\footnote{191} Acts that have been recognized to constitute “serious bodily or mental harm” include: “torture, inhuman or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, [and] deportation,”\footnote{192} as well as other “harm that damages health or causes disfigurement or serious injury.”\footnote{193} This crime also requires that “the harm . . . be inflicted intentionally.”\footnote{194} Finally, causation or at least substantial contribution is also required.\footnote{195}

As to this crime, the IHT found that “[t]he ex-regime waged a large scale[] military attack over Kurdistan [through] an elaborate[] and systematic plan or policy targeting Kurds as national ethnic communities.”\footnote{196} The Tribunal also determined that the harm inflicted by the former regime—including killing thousands, “destroying and ruining . . . thousands of villages,” and dislocating inhabitants by “driving them away to detention . . . camps, or to mass graves”—“[constituted] severe mental or physical [harm to] civilians . . .”\footnote{197}

Additionally, based on victim and witness testimony, the IHT found that detainees were exposed to “a diversity of physical and psychological tortures.”\footnote{198} For example, Kurdish women in the Tupzawa and Nuqrat al-Salman detention camps were raped.\footnote{199} Some victims witnessed the
deaths of family members,\footnote{Id. at 504.} and other detainees were "exposed to unbearable starvation" or forced to walk on smashed glass.\footnote{Id.} Finally, some individuals were hung with "gas bottles" tied to their sexual organs.\footnote{Id.} The IHT concluded that these techniques were designed "to oppress, humiliate, disdain and harm."\footnote{Id. at 505.} The Tribunal additionally noted that when the victims/witnesses stood before the IHT, most of them still bore scars on their bodies, had respiratory problems due to chemical gas attacks, and suffered from psychological harm from their time spent in prison.\footnote{Id. at 505–06.} The IHT stated that if it "wanted to tell the details of each crime, it would be in need of volumes and volumes of books."\footnote{Id. at 517 (finding that "Majid contributed, individually, in executing [a] joint criminal plan with others . . . premeditatedly, through issuing orders to murder, cause severe physical or mental damages [sic], and [subject] them to harsh living conditions aiming to exterminate them all" (emphasis added)).} Ultimately, based on this evidence, the IHT found Majid "legally responsible [for the] crimes committed," as he was "the highest commander in the Northern area, issuing detention orders, instigating such acts, and contributing with other individuals . . . to perpetrate a crime, aiming to reinforce [Ba’ath] and security systems’ criminal activity or purpose."\footnote{Id. at 517 (noting that Majid’s orders were “implemented by his subordinate[s,] leading to the deaths of a vital, immense majority of Kurds [sic] inhabitants in Northern Iraq, killing them, causing severe physical or mental damage[,] and [subjecting] people to harsh living conditions, [calculated to bring about their destruction]” (emphasis added)).} Accordingly, the facts found by the IHT show that: (i) Kurdish civilians suffered "serious bodily or mental harm" during the Anfal campaign; (ii) at least some of the infliction of serious bodily or mental harm was intentional (and, in Majid’s case, premeditated);\footnote{Id. at 517} and (iii) Majid clearly had a role in causing, or substantially contributing to, the serious bodily or mental harm.\footnote{Id. at 517} Thus, the elements of this underlying crime also appear met.

Third Underlying Crime: Deliberately Inflicting on the Group Living Conditions Calculated to Bring About Its Physical Destruction in Whole or in Part

The third underlying crime involves subjecting the targeted group to living conditions calculated to cause its destruction, in whole or in part. Case law demonstrates that the conditions inflicted on the group "must be calculated to bring about the physical destruction of the targeted
group in whole or in part and must be inflicted on it deliberately.”209 The crime covers “methods of destruction by which the perpetrator does not immediately kill group members, but which, ultimately, seek their physical destruction.”210 Acts covered by this crime include, but are not limited to, “subjecting the group to a subsistence diet, systematic expulsion from homes, and denial of the right to medical services.”211 Also included in this crime is “the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion.”212

In concluding that this crime occurred, the IHT cited: (i) the prohibition on agronomy, agriculture, and industry in the “prohibited zones”213 (ii) the dislocation of civilian Kurds to prison camps;214 (iii) the subjection of those in camps to “harsh living conditions”;215 (iv) the denial in camps of “suitable health care,” causing many to suffer from “diarrhea, vomiting and skin illnesses”;216 (v) the beatings that occurred in prison camps;217 (vi) the provision of non-potable water;218 (vii) the daily food rations of bread only;219 (viii) the deprivation of suitable clothing;220 and (ix) the segregation of families.221 The IHT found that such conditions led to the deaths of over 700 detainees at the Nuqrat al-Salman prison camp alone.222 The Tribunal also concluded that Majid’s orders had a direct link to the perpetration of this crime,223 and that Majid acted with

209. |Brđanin Trial Judgment, supra note 147, ¶ 692.|
210. |Stakić Trial Judgment, supra note 184, ¶ 518 (citing Akayesu Trial Judgment, supra note 175, ¶ 505).|
211. |Brđanin Trial Judgment, supra note 147, ¶ 691; see also Stakić Trial Judgment, supra note 184, ¶ 517.|
212. |Brđanin Trial Judgment, supra note 147, ¶ 691; see also Stakić Trial Judgment, supra note 184, ¶ 517.|
213. |Al Anfal Trial Chamber Judgment, supra note 2, at 507.|
214. |Id.|
215. |Id.|
216. |Id.|
217. |Id. at 508.|
218. |Id.|
219. |Id.|
220. |Id. at 508–09.|
221. |Id. at 509.|
222. |Id. at 508.|
223. |See id. at 517 (“These were the orders implemented by his [Majid’s] subordinate[s] leading to the deaths of a vital, immense majority of Kurds inhabitants [sic] in Northern Iraq, killing them, causing severe physical or mental damage [sic] and [subjecting] people to harsh living conditions, aimed [at their] [sic] eradication.” (emphasis added)).|
premeditation. Accordingly, this third and final underlying crime also appears persuasively established.

**Individual Criminal Responsibility**

The final inquiry when determining whether an individual committed genocide is whether the defendant was sufficiently connected to the crimes to warrant "individual criminal responsibility." The IHT Statute allows for a defendant to be convicted under various theories of individual criminal responsibility, namely, committing the crime (individually or with others); ordering, soliciting, inducing, aiding and abetting, or attempting to commit the crime; committing a crime with a group of persons sharing a common criminal intent; or, in the case of genocide, inciting genocide. The Statute also permits convictions for "command responsibility." Here, the IHT convicted Majid of both committing genocide and "ordering, soliciting or inducing" genocide.

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224. *Id.* ("Majid contributed, individually, in executing [a] joint criminal plan with others... premeditatedly, through issuing orders to murder, cause severe physical or mental damages [sic], and [subject] them to harsh living conditions aiming to exterminate them all." (emphasis added)).

225. *See* caveats supra note 98.

226. *See* IHT Statute, supra note 12, art. 15/Second/A-F (individual criminal responsibility).

227. *Id.* art. 15/Fourth (command responsibility).

228. *Al Anfal Trial Chamber Judgment, supra* note 2, at 517 (citing IHT Statute, supra note 12, art. 11/Second/A (committing genocide)); *id.* art. 15/Second/B (ordering, soliciting, and inducing)). At another point, the IHT suggested that Majid had command responsibility over the troops that committed the crimes. *See Al Anfal Trial Chamber Judgment, supra* note 2, at 510. The IHT ultimately did not convict Majid of command responsibility for genocide, perhaps out of concerns that it would have been impermissibly cumulative with the convictions for individual responsibility as to genocide. *See* JENNIFER TRAHAN, HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: A DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 524–27 (2006) [hereinafter TRAHAN, ICTY DIGEST] (discussing sentencing where there is both individual and command responsibility).
First, as to "committing," the Tribunal appears to have found[229] that Majid was a participant in a joint criminal enterprise, which is considered a form of responsibility for committing a crime.230 It determined that Majid "contributed, with . . . Saddam Hussein, in carrying on their joint criminal plan, aimed at and intending to eradicate the Kurds in Northern Iraq . . . aged 15 to 70 years old."231 The IHT further held that "Majid contributed, individually, in executing a joint criminal plan with others through issuing orders to murder, to cause severe physical or mental damage[, and to subject the Kurds] to harsh living conditions aiming to exterminate them all."232

Although the IHT did not conduct its analysis in this fashion, the requirements for joint criminal enterprise responsibility—assuming that was the form of responsibility determined—are:

(i) a plurality of persons . . . ;

(ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute . . . ; and

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229. The IHT Statute includes "common purpose" as a form of individual criminal responsibility. Specifically, the IHT Statute criminalizes:

Contributing by any other means, together with a group of persons with a common criminal intent, to the commission or attempted commission of . . . a crime [covered by the Statute] provided such contribution is intentional and is either:

1. [m]ade with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Tribunal; [or]

2. [m]ade with the knowledge of the intention of the group to commit the crime.

IHT Statute, supra note 12, art. 15/Second/D. The IHT Statute does not expressly include joint criminal enterprise. These forms of responsibility are similar, but distinct. Joint criminal enterprise has been an accepted form of responsibility, for example, at the ICTY, as well as at the ICTR and the Special Court for Sierra Leone, see, e.g., TRAHAN, ICTY DIGEST, supra note 228, at 390–438 (discussing joint criminal enterprise under ICTY law), without being explicitly included in any of those tribunals' statutes. Therefore, if the judges in fact used joint criminal enterprise instead of common purposes, that would not seem problematic. It is also possible that the judges intended to use "common purpose" and not joint criminal enterprise.

230. Kvočka Appeals Judgment, supra note 91, ¶ 79 ("[T]he Appeals Chamber has held that participation in a joint criminal enterprise is a form of 'commission' . . . .").

231. Al Anfal Trial Chamber Judgment, supra note 2, at 516 (emphasis added). The IHT found that "[Bu'ath] Party Command and the Revolutionary Command Council found that the only trustable person able to carry [out] their policy in Northern Iraq is none but . . . Majid." Id. at 516.
(iii) participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.

A "type 1" joint criminal enterprise—which applies where the crimes are part of a joint criminal plan—also requires a showing of "shared intent." Here, the IHT found that "Majid contributed . . . in executing [a] joint criminal plan with others . . . premeditatedly . . . ," which approximates the intent finding. The facts found by the IHT also clearly establish that (i) a group of individuals was involved in creating and executing the Anfal operations (Majid, Saddam Hussein, the other defendants, as well as others); (ii) the Anfal operations constituted a joint criminal plan to attack and killing civilians in "prohibited zones" in the Kurdish areas of Iraq, either transferring survivors to "camps" or executing them; and (iii) Majid clearly was involved in both creating and implementing both the criminal plan and one or more of genocide's underlying crimes. Thus, it appears that the elements of joint criminal responsibility regarding genocide are met.

Second, as noted above, Majid was also convicted of "ordering" genocide. Although the IHT again did not go through this type of analysis in a clear fashion, the elements of "ordering" as a form of individual criminal responsibility require: (i) "that a person in a position of authority instructs another person to commit an offence"; (ii) "a causal link between the act of ordering and the physical perpetration of a


234. A "type 1" joint criminal enterprise is

a "basic" form of joint criminal enterprise. It is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention. An example is a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants may carry out a different role, each of them has the intent to kill.


236. Al Anfal Trial Chamber Judgment, supra note 2, at 517 (emphasis added).

237. The IHT's factual findings as to both the nature of the joint criminal plan and Majid's involvement in it were based on assertions found in Document Nos. 3650 and 4008.

238. As mentioned above, the IHT convicted Majid under provisions covering both "committing" genocide, and "ordering, soliciting or inducing" genocide. Id. While this Article analyzes the latter conviction as though the IHT found Majid responsible for "ordering" genocide, it is possible that the Tribunal intended to suggest that he was additionally responsible for "soliciting or inducing" genocide, which also appears to be a reasonable conclusion.

crime”, and (iii) that the person in a position of authority ordered “an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order” (mens rea).

Here, these elements appear met based on the facts as found by the IHT. First, the Tribunal concluded that Majid was in a position of authority. The IHT also found a causal link between Majid’s orders and the perpetration of numerous crimes. Finally, the IHT found that Majid both intended to commit genocide and “acted with premeditation,” therefore satisfying the mens rea requirement for “ordering” genocide.

Preliminarily, then, the IHT’s conclusion that genocide occurred looks warranted. Although the Tribunal could have analyzed the elements of individual criminal responsibility more clearly and thoroughly, Majid’s convictions for committing and ordering genocide appear warranted based on the findings of fact.

### 3. Majid’s Crimes Against Humanity Convictions

The Trial Chamber convicted Majid of seven counts of crimes against humanity based on the following underlying crimes: (i) willful killing; (ii) extermination; (iii) deportation or forcible transfer of population; (iv) imprisonment or other severe deprivation of physical liberty in violation of fundamental norms of international law; (v) torture; (vi) enforced disappearances; and (vii) other inhumane acts of similar character intentionally causing great suffering or serious injury to the body or to mental or physical health.

Based on the IHT’s findings, Majid’s crimes against humanity convictions appear well-founded. The Tribunal seems to have found Majid individually responsible as a participant in a joint criminal enterprise for

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242. Al Anfal Trial Chamber Judgment, supra note 2, at 481 (citing Doc. No. 160).
243. Id. at 512 (citing Doc. Nos. 4008 and 3650 and Majid’s orders therein, as to which the IHT stated: “These two letters are considered the pillars upon which all attacks after [April 6, 1987] were based”).
244. Id. at 516.
245. Id. at 516–17.
246. See caveats supra note 98.
247. Al Anfal Trial Chamber Judgment, supra note 2, at 526–27.
248. Id. at 537.
249. Id. at 545.
250. Id. at 552.
251. Id. at 560.
252. Id. at 568.
253. Id. at 574.
254. See caveats supra note 98.
all of the underlying crimes except torture. As to that crime, the IHT appears to have convicted Majid on the basis of command responsibility. These conclusions seem reasonable based on the facts as found by the Tribunal.

The *chapeau* requirements for crimes against humanity have been defined as follows: (i) there must be an attack; (ii) the acts of the perpetrator must be part of the attack; (iii) the attack must be directed against any civilian population; (iv) the attack must be *widespread or systematic*; and (v) the perpetrator must know that his or her acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his or her acts fit into such a pattern (*i.e.*, are part of the attack). Additionally, the IHT Statute requires that the attack directed against the civilian population be "pursuant to or in furtherance of a [S]tate or organizational policy."  

Here, the IHT explicitly found several of the *chapeau* requirements met. As to an "attack," (prong i), the Tribunal found that the "acts [committed] against Northern Iraq[i] Kurds and Kurdish villages ... using massive Military Force and mistreatment ... constitute an attack within the concept [of the Tribunal Statute]." The Tribunal also noted that, during the course of the attack, "[a]l[ll] of [the] [S]tate’s military and civil[ian] capabilities were exploited" and bombing from "aircraft[], artillery, rocket launchers, special ammunition [*i.e.* chemical weapons] and conventional weapons, caus[ed] the death of thousands of Kurdish civil[ian] inhabitants and injury [to] thousands [more] ..."  

The IHT also found that the attacks were "*widespread or systematic*" as required under prong iv. Specifically, the IHT relied on the fact that more than three thousand villages were targeted and that the operations "relied on organized plans laid down and applied by officials in the for-

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256. *IHT Statute*, supra note 12, art. 12/SecondA.

257. The IHT did not, however, group its findings by "prongs" or "elements," and does not use the term "chapeau." This Article does so to facilitate analyzing whether all of the required elements have been satisfied.

258. *Al Anfal Trial Chamber Judgment*, supra note 2, at 519 (emphasis added).

259. *Id.* at 521.

260. *Id.* at 519 ("[T]he attacks carried [out] throughout the operations known as Al Anfal ... were large scale [and] systematic.").
mer regime.” As to whether the attack was “pursuant to or in furtherance of a state or organizational policy,” the IHT concluded that “all attacks, which occurred after [June 1987] were an implementation of a stipulated policy . . . [reflected] in the instructions issued by . . . Majid . . . .”

The IHT does not explicitly address what this Article identifies as prongs ii, iii, and v of the chapeau; however, based on the Tribunal’s findings, these requirements appear to be satisfied. It appears clear that Majid’s acts were part of the attack (prong ii), because according to the IHT, it was Majid’s orders that provided the catalyst for the entire Anfal campaign. As to whether the attack was “directed against any civilian population” (prong iii), the IHT found that “civil[ian] inhabitants in Kurdish villages” were attacked. Finally, it appears that Majid knew that his acts were part of a pattern of widespread or systematic crimes directed against the civilian population, and knew of the wider context in which his acts occurred (prong v), because Majid gave the orders for the Anfal campaign. Accordingly, it appears that all of the chapeau requirements of crimes against humanity were either expressly found or are contained in the IHT’s findings.

261. Id.
262. Id. at 520 (emphasis added) (referring primarily to the instructions contained in Doc. No. 4008).
263. Minor discrepancies between this Article’s analysis and the Tribunal’s findings may also be explained by the fact that the IHT may have relied on the ICC Elements of Crimes, whereas this analysis also relies to some extent on ICTY case law.
264. Al Anfal Trial Chamber Judgment, supra note 2, at 524. The Tribunal noted:

All these tragedies and calamites, which affected the civil[ian] Kurds, were the result of orders issued by . . . Majid to his henchmen . . . as per a joint criminal plan, according to Decree [160] . . . . To effectuate this plan or policy . . . Majid issued Letters [3650] and [4008] . . . .

Id.
265. See, e.g., id. at 522. The IHT also found that the attackers did not comply with “war codes’ requirements” (i.e., international humanitarian law) when the military forces carried out the attack. Id. at 522–23. Because Iraqi forces were also clearly targeting Peshmerga as part of the Anfal campaign, the Tribunal’s omission to examine this requirement more thoroughly is somewhat troubling, because the Anfal operations were clearly not aimed purely at civilians. For crimes against humanity purposes, the law requires that the attack be “predominantly” civilian in nature. Limaj Trial Judgment, supra note 255, ¶ 186. Based on the large number of villages attacked (an estimated 3,000), Al Anfal Trial Chamber Judgment, supra note 2, at 501, and the fact that all individuals in the villages between the ages of fifteen and seventy (included) were ordered killed, id. at 523, this requirement appears to be met.
266. Al Anfal Trial Chamber Judgment, supra note 2, at 524. The IHT analyzed what this Article terms “prong v” for each of the underlying crimes, apparently finding it satisfied as to each.
First Underlying Crime: Willful Killing

As with genocide, a conviction for crimes against humanity requires proof of the existence of underlying “crimes” or “acts.”267 In Majid’s case, the first underlying crime analyzed by the IHT is willful killing, which has been defined as “the intentional killing of a person without any lawful justification or excuse or the intentional infliction of grievous bodily harm leading to death with knowledge that such harm will likely cause the victim’s death.”268

Here, there was no question that killing occurred without any lawful justification or excuse as a result of the military attack on Kurdistan. The IHT found that “thousands faded away in camps or were driven to mass graves or field executions.”269 The IHT also examined particular killings, such as an order by Majid “to execute 28 persons, among who[m] were four women from Shaqlawa,”270 and an instance “when officers gathered 33 men in the village of Kurimi and shot them down, murdering 27, without investigating whether they were civilians or [Peshmerga] fighters.”271

As for causation (or substantial contribution), the IHT was “convinced that . . . Majid ordered the murder of all those found within the Prohibited Zone”272 and that Majid ordered civilians to be executed without trial.273 As to mens rea, the IHT found proof of Majid’s “intent and knowledge” based on his orders “to kill any one exist[ing] in the restricted security area from age (15) to (70).”274 The IHT therefore concluded that Majid’s actions were premeditated.275 Thus, the elements of willful killing appear satisfied.

Second Underlying Crime: Extermination

The IHT also convicted Majid of extermination as a second underlying crime against humanity.276 The IHT Statute defines “extermination”
as the “intentional infliction of [harsh] living conditions, such as the deprivation of access to food and medicine, with the intent to bring about the destruction of part of the population.” Case law also defines extermination as murder on a mass scale that is intentionally inflicted. The IHT’s conclusion that extermination occurred appears supported under either definition.

First, as to the occurrence of murder on a mass scale, the IHT looked at the size of the attack over Kurdistan, which “covered four governorates,” as well as Majid’s expressed intentions to target everyone from the ages of fifteen to seventy and to kill the greatest number possible. The IHT also looked to evidence of mass graves. The Tribunal noted that estimates of the dead as a result of the Anfal campaign reached as high as 182,000. It also found an estimated 1,800 died in prison. Second, the IHT found facts showing the intentional infliction of harsh living conditions. The IHT looked to conditions at the detention camps of Tupzawa, Nuqrat al-Salman, and Nazarki, and concluded that the detainees were exposed to harsh conditions, such as [a] lack of medical care and food shortage. “Most of the victims confirmed that the daily personal ration was one or two loaves of bread[,] and hundreds of them died in those horrible prisons.”

The IHT further concluded that Majid “premeditated issuing orders to carry out [extermination] against the Kurdish civilian inhabitants in northern Iraq.” Accordingly, the elements of this underlying crime appear met.

277. IHT Statute, supra note 12, art. 12/Second/B. The IHT Statute was probably intended to track the ICC Statute, under which “extermination” “includes” (but is not limited to) “the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.” ICC Elements of Crimes, supra note 146, art. 7(1)(b). The more limited definition under the IHT Statute, caused by the absence of the word “includes,” may thus be a typographical error.

278. For example, the ICTY stated that the elements of the crime of extermination are:

a) [an] act or omission that results in the death of persons on a massive scale (actus reus), and

b) the intent to kill persons on a massive scale, or to inflict serious bodily injury or create conditions of life that lead to the death in the reasonable knowledge that such act or omission is likely to cause the death of a large number of persons (mens rea).

Blagojević and Jokić Trial Judgment, supra note 144, ¶ 572.

279. Al Anfal Trial Chamber Judgment, supra note 2, at 529.

280. Id. at 530.

281. Id. at 529.

282. Id. at 530, 531, 536.

283. Id. at 501.

284. Id. at 533.

285. Id. at 532.

286. Id.

287. Id. at 536.
Third Underlying Crime: Deportation or Forcible Transfer

The third underlying crime against humanity of which Majid was convicted was deportation or forcible transfer of a population. The IHT Statute defines this crime as “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.” The IHT concluded that, during the Anfal, Iraqi military forces “destroyed more than three thousand villages and transferred the civilian inhabitants, men, children and women ... forcibly dislocating them after arresting them contrary to ... national and international law.”

The IHT also specifically found that the populations transfers (i) were against the will of the individuals being transferred, (ii) were not justified by military necessity, and (iii) were not justified on the basis of protecting the individuals involved (an argument Majid invoked).

As to Majid’s role, the IHT concluded that he ordered “dislocation to compounds” and that civilian inhabitants were threatened “to leave their houses and area or else they [would] be held responsible.”

The IHT also found that Majid “confessed [to] dislocating families to compounds prepared for such purposes.” The Tribunal concluded that

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288. Id. at 545.
289. IHT Statute, supra note 12, art. 12/Second/D; see also Simić, Tadić, and Zarić Trial Judgment, supra note 255, ¶ 121 (“Both deportation and unlawful or forcible transfer relate to the involuntary and unlawful displacement, or movement, or relocation, or removal of persons from the territory in which they reside.”); id. ¶ 122 (“Forcible transfer [as opposed to deportation] has been defined as a forced removal or displacement of people from one area to another which may take place within the same national borders.”).
290. Al Anfal Trial Chamber Judgment, supra note 2, at 539 (emphasis added).
291. Id.
292. Id. at 541. The IHT found:

[T]he existence of Kurdish resistance ([Peshmerga]) does not justify such systematic wide scales [sic] attack against more than three thousands [sic] villages, exploiting all [the] government’s military capabilities from aircrafts [sic], helicopters, armors [sic] rocket launchers and special ammunitions ... All this super power was targeted against civilian villagers ... [T]he IHT is totally convinced that there was no justification for such an attack . . . .

Id. In looking at whether there was military necessity, the IHT may be confusing this underlying crime (where necessity is no defense), with the underlying crime of “ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.” See IHT Statute, supra note 12, art. 13/Fourth/H.
293. Al Anfal Trial Chamber Judgment, supra note 2, at 544 (“[T]o allege or say that coercive dislocation was implemented for the security of civilians, will not convince the IHT, because] letters number 3650 and 4008 [note that] civilian inhabitants escaped their villages after ... [being] bombard[ed] with ... [chemical] and conventional weapons.”).
294. Id. at 478.
295. Id. at 542 (relying on Doc. Nos. 3650 and 4008).
296. Id. at 543.
297. Id.
"[h]uge numbers of civil[ian] inhabitants were coercively dislocated as the number of burned down and demolished villages reached more than 3000 . . ."298 Thus, the IHT found that there were mass displacements, the displacements were coercive, and the displacements were not permissible under international law.299 Also, the IHT concluded that Majid acted with "criminal intent" in dislocating civilian inhabitants from their villages, arresting them, and detaining them in camps.300 Accordingly, the elements of forcible population transfer appear met.

Fourth Underlying Crime: Imprisonment or Unlawful Confinement

The elements of the crime against humanity of imprisonment or unlawful confinement have been defined as: (i) an individual is deprived of his or her liberty; (ii) the deprivation of liberty is imposed arbitrarily (that is, with no legal justification); and (iii) there is an act or omission performed by the accused "with the intent . . . or in the reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty."301

The IHT found that Majid ordered the detention of arrested persons,302 and that imprisonment or detention "had been proved by victims who stayed for a variety of periods at Tupzawa, Nazrki Bahirka or Nuqrat Al-Salman camps."303 For example, detainees at the Bahiraka camp "remained for a year and [a] half."304 The IHT also found that the deprivations of liberty were imposed "randomly[,] without trials or considering [the victims’] rights."305 Finally, the facts also suggest that Majid acted with the requisite intent, as he admitted to the IHT that "no detainee [could] be released unless he [said] so."306 Accordingly, the

298. Id. One victim testified that there were 7,000 children, women, and elderly detained at Nuqrat Al-Salman alone. Id.

299. There is no suggestion that the individuals subject to displacement were not lawfully present.

300. Al Anfal Trial Chamber Judgment, supra note 2, at 544.

301. Simić, Tadić, and Zarić Trial Judgment, supra note 255, ¶ 64; see also Prosecutor v. Krnojelac, Case No. IT-97-25-T, Trial Judgment, ¶ 115 (Mar. 15, 2002). The ICC Elements of Crimes state the elements of imprisonment or severe deprivation of physical liberty to be: "(i) the perpetrator imprisoned one or more persons[,] or otherwise severely deprived one or more persons of physical liberty, and (ii) the gravity of the conduct was such that it was in violation of fundamental rules of international law." ICC Elements of Crimes, supra note 146, art. 7(1)(e) (including also the chapeau requirements).

302. Al Anfal Trial Chamber Judgment, supra note 2, at 548 (citing Majid’s orders in Doc. No. 4008).

303. Id.

304. Id.

305. Id. at 551. As part of the discussion of this crime, the IHT also examined the "inhuman maltreatment" and "physical assault" suffered by detainees at the camps. Id. at 549. However, such conditions do not appear relevant to this crime.

306. Id. at 547.
elements of imprisonment or unlawful confinement roughly appear to have been shown.

Fifth Underlying Crime: Torture

Majid was also convicted of torture as an underlying crime against humanity. The IHT Statute defines torture as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused . . .” Based on the evidence before it, the IHT determined that torture took many forms during the Anfal, including summary executions, beatings, solitary confinement for long periods of time while blindfolded, hangings, deprivation of food, deprivation of basic hygiene and medical care, rape, and other acts of sexual violence that occurred at the prison camps, including acts by camp commanders and guards. These findings clearly suggest that torture occurred.

Sixth Underlying Crime: Enforced Disappearances

The IHT further convicted Majid of enforced disappearances as an underlying crime against humanity. The IHT Statute defines “enforced disappearances” as:

[i] the arrest, detention or abduction of persons [ii] by, or with the authorization, support or acquiescence of, the State or a political organization, [iii] followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, [iv] with the intention of removing them from the protection of the law for a prolonged period of time.

Here, as to the first requirement, the IHT relied on extensive victim and witness testimony about family members who “disappeared” without explanation. In fact, these disappearances were so pervasive that, as explained above, the Kurds developed a term to describe the victims:

307. Id. at 560.
308. IHT Statute, supra note 12, art. 12/Second/F.
309. Al Anfal Trial Chamber Judgment, supra note 2, at 553.
310. As to the requirement that the person tortured was in the custody or under the control of the accused, the IHT found that Majid “was the absolute leader in the northern area.” Id. at 478 (relying on Decree No. 160). In fact, Majid admitted to the Tribunal that “no detainee [could] be released unless he [said] so.” Id. at 547. Thus, the IHT concluded that Majid ordered the imprisonments, id. at 548, which suggests that the requirements of “custody” or “control” were essentially met.
311. Id. at 568.
312. IHT Statute, supra note 12, art. 12/Second/G.
313. Al Anfal Trial Chamber Judgment, supra note 2, at 563–64.
the "Anfalized."\textsuperscript{314} The IHT noted that each victim who appeared before
the IHT submitted a list of between thirty and seventy names of persons
missing from his or her village.\textsuperscript{315} The Tribunal concluded that thousands
of these persons are still missing.\textsuperscript{316} The IHT also found that the State
contributed to the detentions, arrests, and coercive harboring (the second
requirement),\textsuperscript{317} and found that victims were denied information about
the fate of those who had disappeared,\textsuperscript{318} despite instances of personal
demand (the third requirement).\textsuperscript{319} Finally, the facts suggest the intent to
remove the victims from "the protection of the law for a prolonged pe-
riod of time" (the fourth requirement).\textsuperscript{320} As to Majid's role, the IHT
concluded that he "premeditated and ordered the harboring of individu-
als, coercively,"\textsuperscript{321} and that "[t]his order had been carried [out] by his
subordinates[,] causing the harbor [disappearance] of countless numbers
of civil[ian] inhabitants."\textsuperscript{322} Accordingly, the elements of this crime ap-
ppear satisfied.

\textbf{Seventh Underlying Crimes: Other Inhumane Acts}

The IHT additionally convicted Majid of "other inhumane acts" as a
crime against humanity.\textsuperscript{323} This underlying crime was "deliberately de-
signed as a residual category."\textsuperscript{324} For an act to qualify as an "other
inhumane act," (i) the victim must have suffered serious bodily or mental
harm, the degree of severity being assessed on a case-by-case basis with
due regard for individual circumstances; (ii) the suffering must be the
result of an act or omission of the accused or his subordinate; and, (iii)
when the offense was committed, the accused or his subordinate must
have been motivated by the intent to inflict serious bodily or mental
harm on the victim.\textsuperscript{325}

\footnotesize
\begin{itemize}
\item \textsuperscript{314.} \textit{Id.} at 565.
\item \textsuperscript{315.} \textit{Id.} at 566-67.
\item \textsuperscript{316.} \textit{Id.} at 566.
\item \textsuperscript{317.} \textit{Id.} ("[A]ll [of the] [S]tate's capabilities had been exploited to implement Al-Anfal
campaigns.").
\item \textsuperscript{318.} \textit{Id.}
\item \textsuperscript{319.} \textit{Id.} at 567.
\item \textsuperscript{320.} For example, detainees at the Bahiraka camp "remained for a year and [a] half." \textit{Id.}
at 548.
\item \textsuperscript{321.} \textit{Id.} at 568.
\item \textsuperscript{322.} \textit{Id.}
\item \textsuperscript{323.} \textit{Id.} at 574.
\item \textsuperscript{324.} \textit{Kordić and Ćerkez Appeals Judgment}, supra note 91, \textsuperscript{\textsuperscript{324}} note 91, \textsuperscript{\textsuperscript{324}} 839; \textit{see also} Prosecutor v.
Kupreškić et al., Case No. IT-95-16-T, Trial Judgment, \textsuperscript{\textsuperscript{324}} \textsuperscript{\textsuperscript{324}} 563 (Jan. 14, 2000).
\item \textsuperscript{325.} \textit{Kordić and Ćerkez Appeals Judgment}, supra note 91, \textsuperscript{\textsuperscript{325}} note 91, \textsuperscript{\textsuperscript{325}} 117; \textit{see also} Prosecutor v.
Blaškić, Case No. IT-95-14-T, Trial Judgment, \textsuperscript{\textsuperscript{325}} \textsuperscript{\textsuperscript{325}} 243 (Mar. 3, 2000) [hereinafter \textit{Blaškić Trial
Judgment}].
\end{itemize}
Here, based primarily on eye-witness testimony, the IHT concluded that “Kurdish civilian inhabitants in North[ern] Iraq, [e]specially the females, were exposed to harsh inhuman suffer[ing], physical and psychological damages, and coercive sexual assault.”326 The Tribunal further found that the crimes occurred under Majid’s “full awareness and acknowledgement . . .”327 Camp officers were “fully aware of [Majid’s] criminal intentions . . . to partially or totally eradicate the Kurds in Northern Iraq.”328 “[A]s a guard told one of the victims at Nuqrat al-Salman prison camp: ‘they brought you here to die not to live.’”329 Thus, the findings of the IHT show that (i) serious bodily or mental harm occurred; (ii) the suffering appears to have been the result of Majid’s ordering individuals to be detained in camps in circumstances in which camp officers were “fully aware of [Majid’s] criminal intentions” that many Kurds not survive; and (iii) subordinates of Majid—camp guards—clearly acted with intent when they perpetrated these crimes. Although the IHT failed to apply the law to these facts in a precise manner, the factual findings seem to show that this underlying crime occurred.

Individual Criminal Responsibility

The final inquiry in a crimes against humanity case is whether the particular defendant is sufficiently connected to the crimes to warrant individual criminal responsibility.330 Here, it appears that the IHT convicted Majid of being a participant in a joint criminal enterprise (a form of “committing”) with regard to six of the underlying crimes.331 As to the underlying crime of torture, it appears that the Tribunal convicted Majid of “command responsibility.”332 This Article’s preliminary conclusion is that the IHT’s finding of these forms of responsibility is warranted.333

326. Al Anfal Trial Chamber Judgment, supra note 2, at 572. In particular, the Tribunal focused on findings of rape and psychological harm. Id. at 366–67.
327. Id. at 573 (page 573 is erroneously labeled as a second page 572).
328. Id.
329. Id.
330. See IHT Statute, supra note 12, art. 15 (listing forms of individual criminal responsibility).
331. See Al Anfal Trial Chamber Judgment, supra note 2, at 526 (finding a joint criminal enterprise regarding murder); id. at 537 (finding a joint criminal enterprise regarding extermination); id. at 545 (finding a joint criminal enterprise regarding deportation or forcible transfer); id. at 552 (finding a joint criminal enterprise regarding imprisonment or other severe deprivation of physical liberty); id. at 568 (finding a joint criminal enterprise regarding enforced disappearances); id. at 573–74 (finding a joint criminal enterprise regarding other inhumane acts).
332. Id. at 560.
333. See caveats supra note 98.
Although the IHT did not go through the elements required for joint criminal enterprise responsibility (or did not do so in a clear fashion), the elements appear present in the IHT’s factual findings. Here—as already shown above regarding genocide—the facts clearly established that (i) a group of individuals was involved in creating and executing the Anfal operations; (ii) the Anfal operations constituted a joint criminal plan to attack and kill civilians in “prohibited zones” in Kurdish areas of Iraq, either transferring survivors to “camps” or executing them; and (iii) Majid clearly was involved in both creating and implementing the criminal plan involving one or more of the underlying crimes.

Additionally, as mentioned above, for a “type 1” joint criminal enterprise, it is necessary to show shared intent. Here, the IHT appears to find that Majid had the requisite intent for all of the underlying crimes except “other inhumane acts.” Thus, as to five of the underlying crimes, the IHT’s conclusion that there was a joint criminal enterprise—a “type 1” joint criminal enterprise, to be specific—seems appropriate.

As to “other inhumane acts,” the IHT suggests that the acts, such as rape, were “logic[all to expect.” This finding suggests that as to that crime, Majid’s role should perhaps have been characterized as a participant in a “type 3” criminal enterprise, which exists when the crimes were a “natural and foreseeable consequence” of the joint criminal enterprise, even if, for example, rape was not part of Majid’s original plan. The mental state required for a “type 3” joint criminal enterprise also

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334. For a list of the elements of joint criminal responsibility, see supra note 233 and accompanying text.
335. See supra Part II.B.2 (offering a discussion of “[i]ndividual criminal responsibility” regarding Majid’s genocide convictions).
336. See Al Anfal Trial Chamber Judgment, supra note 2, at 524 (“All these tragedies and calamities, which affected the civil[ian] Kurds, were the result of orders issued by ... Majid to his henchmen ... as per a joint criminal plan, according to Decree [160] ... To effectuate this plan or policy ... [Majid] issued Letters [3650] and [4008] ... ”).
337. See supra note 234 (defining a “type 1” joint criminal enterprise).
339. Al Anfal Trial Judgment, supra note 2, at 526 (concluding that Majid’s actions were premeditated as to willful killing); id. at 536 (concluding that Majid’s actions were premeditated as to extermination); id. at 544 (concluding that Majid acted with “criminal intent” as to deportation or forcible transfer); id. at 547–48 (finding facts suggesting that Majid acted with intent as to imprisonment); id. at 568 (concluding that Majid acted with premeditation as to enforced disappearances).
340. Id. at 573 (page 573 is erroneously labeled as a second page 572).
341. The ICTY has found that “[t]he third, ‘extended’ form of joint criminal enterprise entails responsibility for crimes committed beyond the common purpose, but which are nevertheless a natural and foreseeable consequence of the common purpose.” Kvočka Appeals Judgment, supra note 91, ¶ 83. The actus reus of the joint criminal enterprise is the same whether it is “type 1” or “type 3.” Brdanin Trial Judgment, supra note 147, ¶ 260.
appears to have been shown. Accordingly, the IHT’s conclusion that there was a joint criminal enterprise as to “other inhumane acts” also seems appropriate, provided it was a “type 3” joint criminal enterprise.

As to torture, the IHT appears to have found Majid responsible under a theory of command responsibility. The elements of command responsibility are: (i) the existence of a superior-subordinate relationship; (ii) the superior’s real or constructive knowledge that the criminal act was about to be or had been committed; and (iii) the superior’s failure to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

Effective control (necessary to prove the first requirement) was arguably shown, for example, by the IHT’s findings that Majid “was the absolute leader in the northern area,” that Majid had ordered the imprisonments, and by Majid’s admission that “no detainee [could] be released unless he [said] so.” As to the second requirement, the IHT concluded that Majid knew of the crimes being committed by his subordinates. In particular, the IHT looked at documentary evidence, in which Majid wrote: “We don’t mind cutting off the traitors[’] heads, but it had been [sic] preferable to send them to security for investigation, hoping to extract some useful info[mation], prior to execution.”

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342. The *mens rea* for a “type 3” joint criminal enterprise requires:

First, the accused must have the intention to participate in and contribute to the common criminal purpose. Second, ... the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.

343. It should be noted that the IHT does not discuss any of the “joint criminal enterprise” charges or findings by “type” of joint criminal enterprise. Given that the judges involved had never adjudicated these types of crimes, and given the vagueness of the charges, see *supra* Part I.C, their failure to be more specific is understandable. Yet, the lack of specificity regarding the form of individual criminal responsibility is a failing, and also makes it extremely hard for a defendant to craft arguments on appeal, thereby potentially frustrating appellate rights.

344. *Al Anfal Trial Chamber Judgment, supra* note 2, at 560.
347. *Al Anfal Trial Chamber Judgment, supra* note 2, at 496.
348. *Id. at* 548.
349. *Id. at* 547.
350. *Id. at* 557.
351. *Id. at* 559 (citing Doc. No. 2083, also identified by the IHT as Doc. No. 5083). There is some dispute over whether the writing is that of Majid, *see id.* at 482 (attributing the
Moreover, in an audio recording, Majid stated: "I deprived them from working in Kirkuk and its neighborhoods and villages, some I imprisoned, detained or beating by stick [sic]." The IHT concluded that these statements showed "instigation and provocation to carry out torture ..." The Tribunal also found that Majid did not take necessary measures to prevent the perpetration of these acts (part of the third requirement). Thus, the elements of command responsibility appear roughly met for this final underlying crime.

Accordingly, based on its factual findings, the IHT appears to have correctly concluded that crimes against humanity occurred. It also appears that the IHT appropriately convicted Majid as a participant in a joint criminal enterprise, or for command responsibility as to these crimes.

**Failure to Charge and to Find Rape**

This Article does have one remaining criticism with the Tribunal’s decision regarding Majid. When discussing “torture” and “other inhumane acts,” the IHT concluded that rape occurred in prison camps. However, neither Majid, nor any other defendant, was charged with or convicted of rape as a war crime or underlying crime against humanity. While Majid may not have personally committed rape—the IHT did not refer to evidence of this—the rapes committed during the Anfal clearly were a foreseeable risk of the joint criminal enterprise. This suggests that Majid could have been charged with, and convicted of, rape on the basis of a “type 3” joint criminal enterprise. While the judges did place some emphasis on crimes that particularly impacted Kurdish women, this emphasis was not an adequate substitute. The lack of proper attention to rape being committed per se results in: (i) insufficient acknowledgement of the suffering of the victims of this crime; (ii) insufficient attention to the criminal aspects of rape; and (iii) insufficient attention to the suffering of women, in particular, as victims of the Anfal campaign.
4. Majid's War Crimes Convictions

The Trial Chamber convicted Majid of five counts of war crimes: (i) intentionally directing attacks against the civilian population, (ii) ordering the displacement of the civilian population for reasons related to the conflict, (iii) intentionally directing attacks against buildings dedicated to religious or educational purposes, or against hospitals and places where the sick and wounded are collected, (iv) pillage, and (v) destroying or seizing the property of an adversary. This Article's preliminary conclusion, based on the facts as found by the IHT, is that four of Majid's five war crimes convictions appear well-founded.

To obtain a conviction for war crimes, it is initially necessary to satisfy the preconditions, or chapeau requirements. First, there must be "armed conflict." Here, the IHT concluded that there was internal armed conflict, not merely a domestic disturbance. Second, one must show that the perpetrator was aware of factual circumstances that establish the existence of armed conflict. Here, the IHT concluded that Majid was "fully aware" of such factual conditions. Third, there must be a nexus between the crimes and the armed conflict. The IHT held...
that the crimes "were committed in a time and geographic frame during the military conflict (1987–88) linked to the attack on Kurdistan in Al-Anfal operations."\textsuperscript{369} Accordingly, the \textit{chapeau} requirements appear met.

\textit{First War Crime: Intentionally Directing Attacks Against the Civilian Population}

The first war crime, intentionally directing attacks against the civilian population, occurs where: (i) the perpetrator directed acts of violence against the civilian population or individual civilians not taking direct part in hostilities, causing death or serious injury to body or health within the civilian population; and (ii) the offender wilfully (\textit{i.e.}, intentionally) made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.\textsuperscript{370} According to the IHT, "[b]efore starting Al-Anfal operations and the wide scale attacks on Kurdistan, there were scattered unorganized attacks [violating] the [laws of war] and international conventions ... but during Al-Anfal[,] the attacks, were more severe and cruel against the civilians."\textsuperscript{371} In concluding that these attacks were aimed at civilians, the IHT relied on documents revealing the use of chemical weapons,\textsuperscript{372} as well as victim and witness testimony.\textsuperscript{373} Furthermore, because chemical weapons were used, the IHT specifically rejected the argument that Majid had advanced that the military operations were necessary, finding that "chemical

\textsuperscript{369} \textit{Al Anfal Trial Chamber Judgment, supra} note 2, at 579 (referring to the war crime of intentionally directing attacks against the civilian population); \textit{see also id.} at 584 ("These orders are correlated to an existing conflict between [the] Iraqi regime and [Peshmerga] Forces.").

\textsuperscript{370} \textit{Galić Trial Judgment, supra} note 255, ¶ 56. The ICC Element of Crimes identify similar elements:

1. The perpetrator directed an attack.
2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

\textit{ICC Elements of Crimes, supra} note 146, art. 8(2)(e)(i).

\textsuperscript{371} \textit{Al Anfal Trial Chamber Judgment, supra} note 2, at 576.

\textsuperscript{372} \textit{Id.}

\textsuperscript{373} \textit{See id.} at 577–79. For example, some witnesses stated that they found corpses of children holding baby bottles in their mouths, and one witness testified to losing more than seventy persons in his family, including his mother, daughter, brother, and four young sons and nephews. \textit{Id.}
The weapons' usage means [a] lack of distinguishing between civilians and fighters. The IHT concluded that "Majid issued orders to conduct attacks against civil[ian] inhabitants," and that he acted with intent. Accordingly, the elements of this war crime appear met.

Second War Crime: Ordering the Displacement of the Civilian Population for Reasons Related to the Conflict

The comparable war crime of "displacing civilians" under the ICC Statute has the following elements: (i) the perpetrator ordered a displacement of a civilian population; (ii) such order was not justified by the security of the civilians involved or by military necessity; and (iii) the perpetrator was in a position to effect such displacement by giving such order.

As to this crime, the IHT relied on documentary evidence that reported that "all saboteurs' families were dislocated" and on Majid's admission that "I am the one in charge of dislocation or relocation into compounds . . ." The IHT concluded "it is clear that orders of dislocation and relocation were issued by . . . Majid." The IHT also observed that "most of [the] plaintiffs and victims stated that civilians were dislocated from more than 300[0] villages." These findings appear to establish both that Majid ordered civilian displacements and that he was in a position to do so.

Additionally, the IHT rejected the argument that displacements were for the security of the civilians, as the civilians "were dislocated to detention and prison camps, where they were put under firm surveillance by the Iraqi government." The IHT also rejected the argument that displacement was based on "military necessity." The IHT instead concluded that the displacements were politically motivated and served

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374. "Military necessity" is not an affirmative defense to the crime in any event. See ICC Elements of Crimes, supra note 146, art. 8(2)(c)(i).
375. Al Anfal Trial Chamber Judgment, supra note 2, at 581.
376. Id. at 582.
377. ICC Elements of Crimes, supra note 146, art. 8(2)(c)(viii). These elements are in addition to the chapeau requirements.
378. Al Anfal Trial Chamber Judgment, supra note 2, at 584 (quoting Doc. No. 4151). "Saboteurs" refers to Peshmerga.
379. Id.
380. Id. (citing Doc. Nos. 3650 and 4008).
381. Id.
382. Id. at 586. The way in which the IHT words this finding of fact raises concerns that the IHT may have put the burden of proof on the defendant.
383. See id. at 584 ("Is it logical to claim [that] the destruction of all those villages and dislocation of civilians [was] for military [necessity] . . . as the majority of those victims are elder[ly], children and women?"). The way in which the IHT words this finding of fact again raises concerns as to whether it put the burden of proof on the defendant.
to further the "Arabization of vast regions in Kurdistan, changing the demography of Kirkuk." Accordingly, all of the elements of this war crime appear to have been established.

**Third War Crime: Intentionally Directing Attacks Against Buildings Dedicated to Religious or Educational Purposes, or Against Hospitals and Places Where the Sick and Wounded Are Collected**

This crime occurs where: (i) an attack has caused damage or destruction to protected property; (ii) the damaged or destroyed property was not used for military purposes at the time that the acts of hostility directed against these objects took place; and (iii) the act was carried out with the intent to damage or destroy the property in question.385

The IHT found that, during the Anfal campaign, "more than 3000 villages were totally destroyed," including approximately 1,000 primary and preparatory schools, more than 2,000 mosques, and a medical clinic.386 The Tribunal concluded that these buildings were destroyed as a result of Majid's orders387 and that Majid "ordered [forces] to launch raids over protected buildings . . . ."388 The IHT's findings also roughly suggest that the buildings were not "military objectives" (i.e., were not used for military purposes at the time of the attack),389 and that Majid acted with intent.390 Accordingly, the elements of this war crime appear roughly established.

**Fourth War Crime: Pillage**

Majid was also convicted of the war crime of pillage. Its elements require that: (i) the perpetrator appropriated certain property; (ii) the perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use; and (iii) the appropriation was without the consent of the owner.391

In a letter used as evidence at trial, Majid wrote: "'Whatever national defense regiments' consultants and fighters confiscate belong[s] to

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384. *Id.* at 586.
386. *Al Anfal Trial Chamber Judgment*, supra note 2, at 589.
387. *Id.* at 590 (citing Doc. Nos. 3650 and 4008).
388. *Id.* at 591.
389. *Id.* at 592. The IHT stated: "There is no excuse to justify the total destruction as . . . military necessity." *Id.* at 592. The IHT is possibly confusing "military necessity" with whether the buildings were used for military purposes. The IHT certainly alluded to no evidence that the schools, mosques, and medical clinic were used for military purposes.
390. See *id.* at 591 (noting that, as "part of this joint plan and intent," Majid "aimed" and ordered the launching of raids on protected buildings).
391. See ICC Elements of Crimes, *supra* note 146, art. 8(2)(e)(v). These elements are in addition to the *chapeau* requirements.
them, free of charge.' Additionally, witnesses provided testimony as to the looting of, among other things, food, blankets, watches, money, livestock, jewelry, and a tractor. The IHT concluded that the soldiers, as well as intelligence and security personnel, "coercively confiscated Kurds' properties and money[,] and . . . the spoils were declared as their rights, following . . . Majid['s] orders." The IHT also found that Majid "permitted robbery, instigating and encouraging . . . it by granting the right, for National Defense Regiments' fighters, to confiscate Kurdish villagers' properties. This was a clear signal to military and security systems, to perpetrate these acts as they will not be legally charged for it." The IHT concluded that Majid acted "premeditatedly" when he "incited others to loot." Accordingly, the elements of this crime appear roughly met.

Fifth War Crime: Destroying or Seizing the Property of an Adversary

As to this crime, the Tribunal found that there was extensive destruction of property during the Anfal. Specifically, the IHT concluded that "[m]ore than 3000 villages, including schools, clinics, mosques, houses, fountains, and electricity stations were burned down." Furthermore, Majid "confessed [to] giving orders to destroy Kurdish villages in Northern Iraq." The IHT additionally found that the destruction was not demanded by the necessities of the conflict.

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392. Al Anfal Trial Chamber Judgment, supra note 2, at 593.
393. Id. at 594.
394. Id.
395. Id. at 596.
396. Id. at 595.
397. Because the ICC Elements of Crimes is worded as if the defendant were always personally committing the crimes, it is not easily applied to other forms of responsibility (such as, for example, responsibility for "ordering" the commission of the crime).
398. See, e.g., Al Anfal Trial Chamber Judgment, supra note 2, at 598 (recalling testimony as to villages being destroyed).
399. Id.
400. Id. at 599.
401. The IHT stated that [Majid] confessed many times to [the] IHT that he ordered the destruction of villages [thought] to contain or shelter [Peshmerga] fighters . . . Targeting villages claiming that they provide shelter for Kurdish fighters does not justify eradication, or total demolition of [the] villages, as military necessities. If we assume that war efforts imposed a security belt all along [the] Iraqi borders, such condition[s] will not also justify the implementation of murders, massacres, [and] large scaled property devastation without differentiation.

Id. at 600.
An issue arises here as to whether the IHT found that the destroyed property was that “of an adversary,” as the crime appears to require. If “adversary” is read to mean a military adversary, then that element has not been shown because civilians are not “adversaries,” and the testimony cited pertained only to the destruction of villages and villagers’ property. Accordingly, it is unclear if this final war crime was proven.

**Individual Criminal Responsibility**

The final inquiry is whether the particular defendant involved is sufficiently linked to the crimes to warrant individual criminal responsibility. Here, it appears that the IHT convicted Majid of being a participant in a joint criminal enterprise with regard to all war crimes. This Article’s preliminary conclusion is that the IHT’s finding of this form of responsibility appears warranted.

All of the acts required for showing joint criminal enterprise responsibility—such as the existence of a group of perpetrators, the existence of a joint criminal plan, and participation by the accused—appear to have been established, as discussed above. Additionally, for a “type 1”

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402. The elements of the war crime of destroying or seizing the enemy’s property require:

1. The perpetrator destroyed or seized certain property.
2. Such property was property of an adversary.
3. Such property was protected from that destruction or seizure under the international law of armed conflict.
4. The perpetrator was aware of the factual circumstances that established the status of the property.
5. The destruction or seizure was not required by military necessity.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

ICC Elements of Crimes, *supra* note 146, art. 8(2)(e)(xii) (emphasis added). The sixth and seventh prongs are analyzed in this Article as *chapeau* requirements because they are common to all of the war crimes.

403. See, e.g., *Al Anfal Trial Chamber Judgment, supra* note 2, at 594.

404. See *id.* at 582 (finding a joint criminal enterprise regarding intentionally directing attacks); *id.* at 585 (finding a joint criminal enterprise regarding ordering displacement); *id.* at 591 (finding a joint criminal enterprise regarding intentionally directing attacks against protected buildings); *id.* at 595 (finding a joint criminal enterprise regarding pillage); *id.* at 599 (finding a joint criminal enterprise regarding destroying or seizing the property of an adversary).

405. See caveats *supra* note 98.

406. See discussion of individual criminal responsibility regarding Majid’s convictions for genocide and crimes against humanity *supra* Parts II.B.2, II.B.3.
joint criminal enterprise, it is necessary to show "shared intent." Here, the IHT found that Majid intended or premeditated all of the war crimes. Accordingly, the IHT's conclusion that there was a joint criminal enterprise as to these war crimes appears appropriate, if one accepts the IHT's findings of fact.

Even if there were not a joint criminal enterprise, the Tribunal's conclusions generally suggest that it could have convicted Majid additionally or alternatively under other theories of individual criminal responsibility. For example, as to intentionally directing attacks against the civilian population, the IHT found that "Majid issued orders to conduct attacks against civil[ian] inhabitants," which suggests "ordering" as a form of responsibility. With respect to ordering displacement, the IHT also concluded that Majid "perpetrat[ed] coercive dislocation of civil[ian] inhabitants . . . through his orders," which suggests "committing" and/or "ordering" as possible forms of responsibility. Next, as to intentionally directing attacks against protected buildings, the IHT concluded that Majid "ordered [forces] to launch raids," which also suggests "ordering" as a form of responsibility. Finally, as to destroying or seizing the property of an adversary, the IHT found that Majid "confessed [to] giving orders to destroy Kurdish villages in Northern Iraq," which again suggests "ordering" as a form of responsibility.

Accordingly, this Article concludes that four of the five war crimes convictions of Majid appear to have a solid basis, based on the facts as found by the Tribunal. Furthermore, while Majid's war crimes convictions appear supportable under a joint criminal enterprise theory, he

408. *Al Anfal Trial Chamber Judgment*, supra note 2, at 582 ("[Majid] intentionally contributed and issued orders to direct attacks against civil[ian] inhabitants in Northern Iraq."); *id.* at 585 ("[Majid] issued orders premeditating the dislocation of civil[ian] inhabitants."); *id.* at 591 (noting that, as "part of this joint plan and intent," Majid "aimed" and ordered the launching of raids over protected buildings); *id.* at 595 (noting that, as to pillage, the IHT found that Majid acted "premeditatedly"); *id.* at 599 (noting that, as to destroying or seizing the property of an adversary, the IHT found that Majid "intended and ordered the destruction of [the] hostile side's property without . . . military necessity").
409. *Id.* at 581 (emphasis added).
410. *Id.* at 586 (citing Doc. Nos. 3650 and 4008) (emphasis added).
411. *Id.* at 591 (emphasis added).
412. *Id.* at 599 (emphasis added).
413. A determination of "intent" would also be needed for these alternative convictions; the IHT here has essentially already found such intent. *See supra* note 408 and accompanying text. As to the crime of pillage, the IHT concluded that Majid "incited" others to loot. *Al Anfal Trial Chamber Judgment*, supra note 2, at 595. The IHT Statute, however, only criminalizes "incitement" as to genocide, not other crimes, so incitement would not be an alternative conviction regarding pillage. *See* IHT Statute, *supra* note 12, art. 15/Second/E.
414. *See* caveats *supra* note 98.
could have been convicted under additional theories of individual criminal responsibility as well.

C. Sultan Hashim Ahmad

Many of the convictions of Sultan Ahmad appear sound—although, as discussed above, due to fair trial problems and a lack of serious appellate review, this Article does not necessarily suggest that the convictions should stand.\(^{415}\) In short, the IHT found that Sultan Ahmad led the 1st Corps, which was one of the three contingents of troops that carried out the Anfal campaign.\(^{416}\) While Sultan Ahmad maintained that he never knew about the use of chemical weapons, the IHT found that position refuted by documentary evidence.\(^{417}\) Furthermore, based on the extensive targeting of civilians, the IHT also rejected Ahmad’s claim that the Anfal was purely a military operation.\(^{418}\)

As to his genocide convictions, the principle weakness appears to be the Tribunal’s analysis of individual criminal responsibility. Although the IHT appears to invoke joint criminal enterprise responsibility, it also suggested that it was Majid who possessed genocidal intent, not Sultan Ahmad.\(^{419}\) Thus, the IHT arguably should have convicted Sultan Ahmad for aiding and abetting genocide. Under international legal standards (which the IHT Statute expressly makes relevant), an aider and abettor would receive a lesser penalty than a primary perpetrator.\(^{420}\) Furthermore, the fact that Sultan Ahmad invoked the defense of “following orders,” also suggests that mitigation of his sentence would be appropriate.

As for Ahmad’s crimes against humanity conviction, the weakest part of the Tribunal’s analysis is its discussion of individual criminal responsibility. This Article concludes that only three of the five crimes against humanity convictions, and only two of the four war crimes convictions, appear well-founded.\(^{421}\) Thus, several factors suggest that the death penalty should not be imposed: (i) Sultan Ahmad, unlike Majid, was not consistently found to have genocidal intent; (ii) Sultan Ahmad testified—and the IHT apparently accepted—that he acted under orders; (iii) certain counts as to which he was convicted do not seem to have all

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\(^{415}\) See supra Part I.C (discussing fair trial problems); see also infra Part III (discussing a lack of serious appellate review).

\(^{416}\) Al Anfal Trial Chamber Judgment, supra note 2, at 624.

\(^{417}\) Id. at 694.

\(^{418}\) Id. at 639.

\(^{419}\) See infra Part II.C.2 (discussing individual criminal responsibility for crimes of genocide of defendant Sultan Ahmad).

\(^{420}\) See, e.g., Krnojelac Appeals Judgment, supra note 338, ¶ 73 (“[A]iding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator.”).

\(^{421}\) See caveats supra note 98.
the required elements of the crimes proved; and (iv) as with all of the
defendants, the fair trial problems and lack of serious appellate review
are defects that raise questions as to all of the convictions.

1. The Tribunal’s Conclusions as to
Sultan Ahmad’s Role in the Anfal

The IHT found that Sultan Ahmad “command[ed] many of [the] Al-
Anfal Operations and participat[ed] in other operations.” 422 Documentary
evidence showed Sultan Ahmad to be a recipient of a variety of orders
related to the Anfal. Specifically, he received orders from Majid to im-
pose economic sanctions on the northern area, prohibiting “supplies of
food and medicine to the Kurdish villages . . . in addition to agriculture,
gas, human beings and animals . . . .” 423 He also received orders to pro-
hibit “human and animal existence” in certain areas, and to kill every
person whose age is between fifteen and seventy years included. 424 Sultan
Ahmad further received requests “to carry on special strikes (using
chemical weapons),” and was directed to “attack [concentrations of the
population] using intensive special strikes 48 hours prior to starting the
operation in order to create panic . . . .” 425 Evidence also revealed that
Sultan Ahmad received instructions from the Northern Organization Of-
office stating that “[w]e have no problem in chopping the traitors’ heads
[off] . . . but it would [be] better if they were taken to the security direc-
torates to be interrogated[,] maybe they have some information we can
benefit from . . . before their execution.” 426 Finally, Sultan Ahmad re-
ceived additional commands to “[use] special ammunition (Chemicals)
against the enemy’s gatherings as long as it is possible” 427 and to destroy
all villages and eliminate all houses within any village. 428 Documentary
evidence also revealed that Sultan Ahmad was granted a medal of brav-
ery for his role in the Anfal operations. 429

Sultan Ahmad admitted that he led the first Anfal operation, 430 but
stated that he had no involvement in the fifth, sixth, and seventh Anfal

422. Al Anfal Trial Chamber Judgment, supra note 2, at 649.
423. Id. at 610 (citing Doc. No. 3650).
424. Id. at 632 (citing Doc. No. 4008).
425. Id. at 610 (citing Doc. No. 1122, Aug. 21, 1988, directed to the 1st and 5th Corps).
426. Id. at 611 (quoting Doc. No. 5083, July 22, 1987). Here, the IHT attributes the
comments to Saddam Hussein. Elsewhere, however, the IHT attributed the comments to Ma-
jid. See id. at 482.
427. Id. at 611 (citing Doc. No. 349, Apr. 27, 1988).
428. Id. at 611, 723 (citing Doc. No. 1182, Aug. 28, 1988).
429. Id. at 611; see also id. at 612–13 (discussing evidence regarding sending individuals
to various security directorates).
430. Id. at 624.
operations. As to the first Anfal, Sultan Ahmad stated: “Our mission was to expel the saboteurs, cleans[e] the area, dislocat[e] citizens and families [in] Prohibited Zones, and hand[] them over to [the] Northern Organization Office, through the intelligence system.” He claimed that he “did not exceed the limits of executing orders issued to [him].” When questioned about the legitimacy of dislocating and demolishing villages, he responded that he was “a military officer who carried [out] orders whether these orders were legitimate or not.” He stated, “If I object to the implementation of any order I will be sentenced to death as per Military law in a state of war.”

In his defense, Sultan Ahmad argued, inter alia, that he had nothing to do with mass graves and was never in charge of security or police personnel. In leading the first Anfal, Sultan Ahmad argued that he was merely following orders of Nazar 'Abd-al-Karim or Hussein Rashid. Similarly, while he admitted that military troops moved civilians and their belongings to Kirkuk, he took the position that in “dislocating civilians” he followed orders from the Northern Organization Office (i.e., Majid). He maintained that the aim of the Anfal operations was to simply intercept Peshmerga forces, and claimed that he did not know about any special weapons or ammunition.

In light of the evidence, the IHT ultimately concluded that Sultan Ahmad “implemented a military plan through wide-range attacks by ordering his soldiers and the forces under his command to attack the Kurdish villages in the north of Iraq with . . . chemical and conventional weapons[,] carrying out the orders of the accused [defendant Majid] . . . .” The Tribunal rejected Sultan Ahmad’s arguments that he did not know about the use of chemical weapons, after reviewing documentary evidence which suggested that he did. Noting how the Anfal operations

431. *Id.* at 627. It is reasonable to infer that this limited denial is an admission that Sultan Ahmad was involved in the other Anfal operations.
432. *Id.* at 624.
433. *Id.*
434. *Id.* at 625.
435. *Id.*
436. *Id.*
437. Elsewhere, the IHT stated that Sultan Ahmad claimed to have received orders from Nazar 'Abd-al-Karim Al-Khazraji, Chief of Army Staff. *Id.* at 668.
438. *Id.* at 624. Hussein Rashid admitted that he had ordered Sultan Ahmad to lead the first Anfal operation. *Id.* at 623.
439. *Id.* at 626.
440. *Id.* at 625.
441. *Id.* at 627.
442. *Id.* at 624.
443. *Id.* at 695.
444. *Id.* at 694 (citing Doc. Nos. 160, 3650, and 4008).
were conducted, the IHT also rejected Sultan Ahmad’s argument that the operations were purely military operations. While the defense of “following orders,” which Sultan Ahmad also invoked, is not available as an affirmative defense under the IHT Statute, it is permitted as a mitigating factor to reduce a sentence. However, in this situation, there clearly was no mitigation, because Sultan Ahmad received the death penalty.

2. Sultan Ahmad’s Genocide Convictions

The Trial Chamber convicted Sultan Ahmad of three counts of genocide based on the following underlying crimes: (i) killing members of the group; (ii) causing serious bodily or mental harm to members of the group; and (iii) deliberately inflicting on the group conditions of life calculated to bring about its destruction in whole or in part. Based on the facts as found by the Tribunal, the conclusion that these underlying crimes of genocide occurred appears sound, but the Tribunal’s findings as to Sultan Ahmad’s form of responsibility does not. Because this Article has already examined the Trial Chamber’s findings as to the chapeau requirements for genocide in discussing Majid’s convictions, it will not separately discuss similar findings made regarding Sultan Ahmad. This Article does, however, separately examine the underlying

445. The IHT found that (i) the attacking military forces began killing “without differentiating between civilians and combatants ([Peshmerga]”); (ii) the “intensive special strikes” targeted “all inhabitants whether civilians, combatants, children or woman”; (iii) “[a]n area that exceeded (2000) villages were all demolished”; and (iv) “[t]he aggressors did not differentiate between their victims regardless [of] their age, sex, health or pregnancy, which is clearly indicated by the murder of thousands of children by poisonous gases ...” Id. at 639.

446. See IHT Statute, supra note 12, art. 15/Fifth (“The fact that an accused person acted pursuant to an order of the Government or of his superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”). This follows the approach taken by the International Military Tribunal at Nuremberg. See Charter of the International Military Tribunal art. 8, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter]. The IHT should have examined whether this rule was customary international law, and thereby demonstrated that it applied in Iraq at the time of the Anfal, in order to avoid the problem of nullum crimen sine lege. This analysis was particularly called for because, under Iraqi law, acting pursuant to orders had previously been an affirmative defense. See Penal Code with Amendments (Iraq), ¶ 40(2), STS 251/88 (1969), available at http://www.ictj.org/static/MENA/Iraq/iraq.penalcode.1969.eng.pdf. The statute reads: “There is no crime if the act is committed by a public official or agent in the following circumstances ... [i]f he commits the act in performance of an order from a superior which he is obliged to obey or which he feels he is obliged to obey ...” Id.

447. Al Anfal Trial Chamber Judgment, supra note 2, at 640, 696.

448. Id. at 643, 696.

449. Id. at 649, 696.

450. See caveats supra note 98.

451. See Al Anfal Trial Chamber Judgment, supra note 2, at 628–34 (discussing the chapeau requirements for genocide); see also supra text accompanying notes 178–182 (dis-
crimes, in order to discuss Sultan Ahmad's role and individual criminal responsibility regarding each.

First Underlying Crime: Killing Members of the Group

The first underlying crime of which Sultan Ahmad was convicted is killing members of the group.\textsuperscript{452} As to evidence of this crime, the IHT relied on documentary evidence in which Majid directed Sultan Ahmad (and other commanders) to prohibit "human and animal existence" in certain areas, and to "kill every person whose age is between 15 and 70 years included."\textsuperscript{453} The IHT found that "thousands were killed in their villages by conventional and chemical weapons."\textsuperscript{454} The Tribunal further found that Sultan Ahmad's command over "[t]he usage of aircrafts, tanks, artilleries, armors [sic] and infantry . . . in the 1st Anfal operation . . . and [his] participation in implementing Al-Anfal operations including the Closure (8th Al-Anfal operation), all are . . . proof[] . . . [of] his perpetration [of] killing . . . ."\textsuperscript{455} The IHT concluded that the killing constituted "premeditated murder."\textsuperscript{456}

Second Underlying Crime: Causing Serious Bodily or Mental Harm to Members of the Group

As to this second underlying crime,\textsuperscript{457} the IHT found that "grievous bodily and psychological harm"\textsuperscript{458} had occurred. This conclusion was based on, among other things, (i) the launching of the attacks against villagers, resulting in the deaths of thousands of civilians;\textsuperscript{459} (ii) that villagers were dislocated into detention centers;\textsuperscript{460} (iii) the fatal deprivation of food and water in camps;\textsuperscript{461} (iv) that victims were subject to awful treatment in camps—such as witnessing a dog eat a loved-one's dead body;\textsuperscript{462} and (v) the injuries that the victims sustained due to exposure to chemical weapons.\textsuperscript{463} As to Sultan Ahmad's role in the infliction of serious bodily or mental harm, the IHT concluded that he caused "severe mental or physical damages to the community's members . . . by issuing

\begin{itemize}
\item \textsuperscript{452} For the elements of this underlying crime, see \textit{supra} Part II.B.2.
\item \textsuperscript{453} \textit{See Al Anfal Trial Chamber Judgment, supra} note 2, at 623.
\item \textsuperscript{454} \textit{Id.} at 635.
\item \textsuperscript{455} \textit{Id.} at 634.
\item \textsuperscript{456} For the full analysis, see \textit{id.} at 633.
\item \textsuperscript{457} For the elements of this underlying crime, see \textit{supra} Part II.B.2.
\item \textsuperscript{458} \textit{Al Anfal Trial Chamber Judgment, supra} note 2, at 641.
\item \textsuperscript{459} \textit{Id.}
\item \textsuperscript{460} \textit{Id.}
\item \textsuperscript{461} \textit{Id.} at 641-42.
\item \textsuperscript{462} \textit{Id.} at 642.
\item \textsuperscript{463} \textit{Id.}
\end{itemize}
order to 1st Corps' forces to launch a systematic large scaled attack over Kurdish civil inhabitants [villagers] . . . .

The IHT also stated that Sultan Ahmad was "fully aware of his acts [i.e., orders,] which eminently assisted in perpetrating genocide by causing severe mental and physical damages . . . ." This conclusion is less than a finding of "intent," but from the fact that Sultan Ahmad issued the orders, it would seem possible to infer his intent or the intent of troops under his command.

Third Underlying Crime: Deliberately Inflicting on the Group Living Conditions Calculated to Bring About Its Physical Destruction in Whole or in Part

As to the underlying crime of deliberately inflicting on the group living conditions calculated to bring about its physical destruction in whole or in part, the crux of the IHT's findings are that Sultan Ahmad played a role in dislocating "women, children and elders to prison camps" as well as "ruining houses and devastating villages." The IHT found that, at the camps, "detainees were exposed to harsh living conditions," "lack[ed] suitable hygiene and care," and suffered from "ailments like diarrhea, vomiting, and skin illnesses." Famine was also prevalent. The IHT concluded that it was clear that those in charge of the camps did not provide even minimal health services. The detainees had inadequate clothing, and some, particularly the women, were raped. Those victims who survived murder by chemical and conventional weapons in the initial attacks, and were not executed at mass graves, suffered "humiliation, degradation . . . lack of hygiene, and segregation . . . ." As to Sultan Ahmad's role in inflicting these conditions, the IHT concluded that "through commanding many of Al-Anfal Operations and participating in other operations . . . [Sultan Ahmad] is criminally responsible . . . in premeditatedly subjecting the group to hard living conditions intend[ed] to eradicate them totally or partially . . . ." Accordingly, the elements of the three underlying crimes roughly appear to

464. Id. at 634.
465. Id.
466. To satisfy the crime's mens rea standard, "the harm must be inflicted intentionally," Blagojević and Jokić Trial Judgment, supra note 144, ¶ 645; see also Brdanin Trial Judgment, supra note 147, ¶ 690.
467. For the elements of this underlying crime, see supra Part II.B.2.
468. Al Anfal Trial Chamber Judgment, supra note 2, at 645.
469. Id. at 645.
470. Id.
471. Id. at 646.
472. Id. at 647.
473. Id. at 647-48.
474. Id. at 648.
475. Id. at 649.
have been shown, and the IHT's finding that the three underlying crimes occurred in its discussion of Majid would have sufficed in any event.

**Individual Criminal Responsibility**

As to individual criminal responsibility, the IHT at one point seems to suggest that Sultan Ahmad bore all forms of responsibility. The Tribunal states that Sultan Ahmad "aided in assisting, participating, contributing [to] and ... committing the crime of genocide against the Kurdish civilians as a national and ethnic group, through the mass murder [of] which he was clearly aware." More consistently, however, the IHT finds that there was joint criminal enterprise responsibility. For example, the Tribunal concluded that Sultan Ahmad "perpetrated actions through[] his contribution in a ... joint criminal plan to perpetrate genocide by causing severe mental or physical damages to the community's members ... ."  

For Sultan Ahmad's involvement to qualify as a "type 1" joint criminal enterprise, it would be necessary to show that Sultan Ahmad himself possessed genocidal intent. However, while the IHT does, at one point, suggest such intent, it more consistently found that it was Majid who had genocidal intent, and that Sultan Ahmad participated while knowing of Majid's intent. The IHT stated that Sultan Ahmad "was aware of the wide-range operations against the Kurds in the north of Iraq ... [and was] also aware of the accused ('Ali Hasan Al-Majid's) intention [to] commit[] ... genocide ... against them ... ." The Tribunal concluded that by giving orders to his forces to attack with conventional and chemical weapons, Sultan Ahmad "helped in committing ... genocide."

476. *Id.* at 640 (emphasis added).
477. *Id.* at 643; see also *id.* at 649 (finding a joint criminal plan to subject a group to living conditions calculated to bring about destruction of the group in whole or in part).
478. *Krnojelac Appeals Judgment, supra* note 338, § 84 (noting that a "type 1" joint criminal enterprise requires a showing of shared intent).
479. *Al Anfal Trial Chamber Judgment, supra* note 2, at 639.
480. The IHT states:

[T]he accused (Sultan Hashim Ahmad) was fully aware of what 'Ali Hasan Al-Majid and Saddam Hussein intended to do with the Kurdish civilians in Northern Iraq and he knew that he was ordered to attack the civilians using lethal weapons (Chemical weapons) ... . The accused (Sultan Hashim Ahmad) knew that ... ('Ali Hasan Al-Majid) intended to commit genocide against the Kurdish civilians in Northern Iraq ... and he was required to take necessary actions to achieve the aims and intentions of [Majid].

*Id.* at 693 (emphasis added).
481. *Id.* at 695 (emphasis added).
482. *Id.*
Accordingly, on balance, the IHT seems to find that Sultan Ahmad knowingly participated in the Anfal campaign, but that it was Majid who possessed the genocidal intent. As a result of this finding, Sultan Ahmad arguably should have been convicted of aiding and abetting genocide, rather than committing genocide.\footnote{See Brđanin Trial Judgment, supra note 147, ¶ 730. The Chamber noted:} Complicity in genocide, where it consists of aiding and abetting genocide, does not require proof that the accomplice had the specific intent to destroy, in whole or in part, a protected group. Id. (emphasis added) (citations omitted).

Additionally, to convict of aiding and abetting genocide, the prosecutor must show that "[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and [that] this support has a substantial effect upon the perpetration of the crime . . . ." Vasiljević Appeals Judgment, supra note 234, ¶ 102. The IHT's findings satisfy both parts of this test, showing that Sultan Ahmad assisted in the commission of genocide's three underlying crimes and suggesting that his actions had a substantial effect on the perpetration of the crimes.

It is also possible that the IHT was attempting to characterize Sultan Ahmad's responsibility under the "common purpose" doctrine, under which a defendant can be found guilty if (i) they belong to a group of persons with a "common criminal intent," and (ii) they contribute to that group "with the knowledge of the intention of the group to commit the crime." See IHT Statute, supra note 12, art. 15/Second/D. If analyzed that way, it still seems that Ahmad should have been found responsible for something less than possessing genocidal intent. It is possible that the IHT also intended to base some of the other joint criminal enterprise convictions on the "common purpose" doctrine. In that case, this Article incorrectly analyzes them as a "type I" or a "type 3" joint criminal enterprise. This confusion illustrates why it is so important for the IHT to be explicit in the future as to the form of individual criminal responsibility it is finding.

\footnote{The IHT Statute states:} The penalty for any crimes under Articles 11, 12, 13 [genocide, crimes against humanity, and war crimes] which do not have a counterpart under Iraqi law shall be determined by the Trial Chambers taking into account such factors as the gravity of the crime, the individual circumstances of the convicted person, guided by judicial precedents and relevant sentences issued by the international criminal tribunals. Id. art. 24/Fifth (emphasis added).

\footnote{As explained by the ICTY Appeals Chamber,} [A]iding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator. This principle has also been recognized in the ICTR and in many national jurisdictions. While Radislav Krstić's crime is undoubtedly grave, the finding that he lacked genocidal intent significantly diminishes his responsibility. The same analysis applies to the reduction of Krstić's...
lesser sentence would be more appropriate is that Sultan Ahmad testified that he acted under orders\textsuperscript{486} (a position that the IHT does not appear to dispute). As mentioned above, the IHT Statute permits mitigation of punishment for acting pursuant to orders.\textsuperscript{487}

3. Sultan Ahmad's Crimes Against Humanity Convictions

The Trial Chamber convicted Sultan Ahmad of five counts of crimes against humanity based on the following underlying crimes: murder;\textsuperscript{488} extermination;\textsuperscript{489} deportation or forcible transfer of population;\textsuperscript{490} imprisonment;\textsuperscript{491} and other inhumane acts.\textsuperscript{492} Based on the facts as found by the Tribunal, it appears that three of Sultan Ahmad's five convictions for crimes against humanity are warranted.\textsuperscript{493} While the IHT did not thoroughly analyze the chapeau requirements of crimes against humanity, as discussed above, the facts clearly suggest that the requirements were met.\textsuperscript{494} The weakest link regarding the crimes against humanity convictions is the analysis of individual criminal responsibility. Because the IHT does not analyze Sultan Ahmad's intent satisfactorily with respect to two underlying crimes (deportation or forcible transfer and extermination), those two convictions are not warranted.

First Underlying Crime: Willful Killing

As to the first underlying crime of willful killing, the elements, roughly stated, require: (i) killing; (ii) causation (or at least a substantial responsibility for the murders as a violation of laws or customs of war . . . . As such, the revision of Krstić's conviction to aiding and abetting these two crimes merits a considerable reduction of his sentence.

Krstić Appeals Judgment, supra note 146, ¶ 268 (citations omitted). The ICTY Appeals Chamber reached a similar conclusion in Krnojelac. Krnojelac Appeals Judgment, supra note 338, ¶ 73 ("'[T]he seriousness of what is done by a participant in a joint criminal enterprise who was not the principal offender is significantly greater than what is done by one who merely aids and abets the principal offender' . . . ." (citation omitted)).

\textsuperscript{486} Al Anfal Trial Chamber Judgment, supra note 2, at 624–25.
\textsuperscript{487} IHT Statute, supra note 12, art. 15/Fifth.
\textsuperscript{488} Al Anfal Trial Chamber Judgment, supra note 2, at 655, 699.
\textsuperscript{489} Id. at 660, 701.
\textsuperscript{490} Id. at 665–66, 704.
\textsuperscript{491} Id. at 671, 706.
\textsuperscript{492} Id. at 675, 708.
\textsuperscript{493} See caveats supra note 98.
\textsuperscript{494} See supra Part II.B.3 (discussing the chapeau requirements for crimes against humanity as applied to defendant Majid). As to the chapeau requirements that are defendant-specific—showing that Sultan Ahmad's acts were part of the attack and that he knew of the context in which his acts occurred—the former would be satisfied by Sultan Ahmad's role in leading the first Anfal operation, and the latter would be satisfied by the evidence that the IHT examined in concluding that Sultan Ahmad was aware of the factual circumstances that proved the existence of armed conflict. See Al Anfal Trial Chamber Judgment, supra note 2, at 679.
contribution to the killing); \textsuperscript{495} and (iii) intent.\textsuperscript{496} With regard to killing, the IHT looked to evidence that the victims killed by bombing "were women, children and [the] elderly," and that "Land Forces attacked the civilians after finishing the air bombing."\textsuperscript{497} Numerous groups of young men, women, and children were executed and buried in mass graves, and "[t]housands of the civilian inhabitants were killed as a result of using . . . chemical gases."\textsuperscript{498} As to Sultan Ahmad's role in the killing, the IHT found that "he directed the First Al-Anfal operations, directed other operations, participated in preparing the plans, [and] supported the other Al-Anfal Operations."\textsuperscript{499} This clearly suggests that Sultan Ahmad at least substantially contributed to the killings. The IHT also concluded that the killings were "premeditated."\textsuperscript{500} Thus, the elements of this crime appear met.

**Second Underlying Crime: Extermination**

As explained above, "extermination" is alternately defined as (i) the "intentional infliction of [harsh] living conditions . . . with the intent to bring about the destruction of part of the population,"\textsuperscript{501} or (ii) murder on a mass scale that is intentionally inflicted.\textsuperscript{502} Here, the IHT found that "hundreds were killed and wounded in the attack by artillery, rocket launchers, aircraft and . . . chemical weapons."\textsuperscript{503} The survivors, particularly (but not exclusively) young men, were buried in mass graves.\textsuperscript{504} The IHT concluded that "thousands" of civilian villagers died,\textsuperscript{505} and that Sultan Ahmad "participated in committing homicide with the coordination of the other units, especially the Air Force."\textsuperscript{506} It also found that Sultan Ahmad "moved the civilian inhabitants to the detention camps through the military units [commanded] by him;" and, from there, many were executed and taken to mass graves.\textsuperscript{507}

\textsuperscript{495} See, e.g., Nahimana Trial Judgment, supra note 181, ¶ 492 ("Where a person is accused of having planned, instigated, ordered or aided and abetted the commission of [a crime], the Prosecutor must establish that the accused's acts or omissions substantially contributed [thereto].").

\textsuperscript{496} For a full discussion of the elements, see supra Part II.B.3.

\textsuperscript{497} Al Anfal Trial Chamber Judgment, supra note 2, at 653.

\textsuperscript{498} Id. at 654.

\textsuperscript{499} Id.

\textsuperscript{500} Id. at 699.

\textsuperscript{501} IHT Statute, supra note 12, art. 12/Second/B.

\textsuperscript{502} For the ICTY definition of the elements of extermination, see supra note 278.

\textsuperscript{503} Al Anfal Trial Chamber Judgment, supra note 2, at 656.

\textsuperscript{504} Id. at 657.

\textsuperscript{505} Id. at 658.

\textsuperscript{506} Id. at 659.

\textsuperscript{507} Id.
While these findings seem to suggest that mass killings occurred, they appear silent as to Sultan Ahmad’s intent. Although one might infer that some or a large part of the killing was intentional, because the IHT never adequately examined Sultan Ahmad’s mental state in its discussion of individual criminal responsibility, a required element of the crime appears to be missing.508

Third Underlying Crime: Deportation or Forcible Transfer

The IHT additionally convicted Sultan Ahmad of deportation or forcible transfer as an underlying crime against humanity.509 This crime is defined in the IHT Statute to mean “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”510 The IHT found that the Kurdish villages had been destroyed, and that the civilians, “including women, children and old men[,]” were relocated to concentration camps “[against] their desires and forcibly.”511 Furthermore, Sultan Ahmad admitted that he implemented the military order to move them.512 These facts thus establish that displacement occurred. Again, however, the required element of intent513 appears to be missing,514 which, as discussed below, is problematic for showing individual criminal responsibility.

508. This Article takes the position that, as to an underlying crime, the IHT’s failure to expressly find the requisite mental state is not problematic, because such mental state is often inferred, and may be that of a perpetrator other than the defendant. However, this Article also takes the position that, for purposes of individual criminal responsibility, the defendant’s mental state must have been expressly found by the Tribunal, and, if it was not, a finding of responsibility is not warranted.

509. Al Anfal Trial Chamber Judgment, supra note 2, at 665–66, 704.

510. IHT Statute, supra note 12, art. 12/Second/D. International case law provides a similar definition: “Both deportation and unlawful or forcible transfer relate to the involuntary and unlawful displacement, or movement, or relocation, or removal of persons from the territory in which they reside.” Simić, Tadić, and Zarić Trial Judgment, supra note 255, ¶ 121; see also id. ¶ 122 (“Forcible transfer [as opposed to deportation] has been defined as a forced removal or displacement of people from one area to another which may take place within the same national borders.”).

511. Al Anfal Trial Chamber Judgment, supra note 2, at 662.

512. Id.

513. See Stakić Trial Judgment, supra note 184, ¶ 686–87 (“[T]he intent of the perpetrator must be that the victim is ‘removed, which implies the aim that the person is not returning.’” (citation omitted)).

514. The IHT suggested that Sultan Ahmad acted with an “awareness” of what would result. Al Anfal Trial Chamber Judgment, supra note 2, at 665. Awareness alone does not amount to a finding of intent.
Fourth Underlying Crime: Imprisonment or Severe Deprivation of Physical Liberty

The fourth underlying crime against humanity of which Sultan Ahmad was convicted was "imprisonment or other severe deprivation of physical liberty in violation of fundamental norms of international law."\(^5\)

The IHT found that, after the initial Anfal bombardments, "civilian inhabitants were arrested and transferred in military vehicles to detention camps."\(^5\)\(^6\) Sultan Ahmad also admitted to dislocating villagers on orders of defendant Majid,\(^5\)\(^7\) and the IHT found that "the coercive hiding [i.e., imprisonment] of these victims occurred officially and [was] organized by the State . . . [since] all Government civilian, military, security and party Services in the Northern Area participated in this operation . . . ."\(^5\)\(^8\) The IHT does not appear to analyze whether there was a legal basis for the imprisonment, but in the portion of the Trial Chamber judgment discussing Majid, the IHT found that there was no such basis.\(^5\)\(^9\) The IHT also concluded that Sultan Ahmad had a "common criminal intention to perpetrate the crime."\(^5\)\(^2\) Thus, all of the elements of this underlying crime appear met.

Fifth Underlying Crime: Other Inhumane Acts

The IHT additionally convicted Sultan Ahmad of "other inhumane acts" as an underlying crime against humanity.\(^5\)\(^2\)\(^1\) The elements of "other inhumane acts," roughly stated, are: (i) serious bodily or mental harm; (ii) caused by an act or omission of the accused or his subordinate; (iii) where the accused or his subordinate intended to cause such harm.\(^5\)\(^2\)\(^2\)

Here, it is clear that the victims suffered "serious bodily or mental harm." The IHT found that when the troops eradicated the Kurdish villages, the villagers were prevented from plowing or farming their lands and had their food supply "blockaded."\(^5\)\(^2\)\(^3\) Those civilians in the detention camps "suffered from hunger, disease and bad treatment," had their property seized, and were subjected to mental and physical torture.\(^5\)\(^2\)\(^4\)

\(^5\)\(^1\). Id. at 671, 706; see also IHT Statute, supra note 12, art. 12/First/E.
\(^5\)\(^1\)\(^6\). Al Anfal Trial Chamber Judgment, supra note 2, at 668.
\(^5\)\(^1\)\(^7\). Id.
\(^5\)\(^1\)\(^8\). Id. at 670.
\(^5\)\(^1\)\(^9\). See id. at 551 ("Those victims were imprisoned via an order from . . . Majid, randomly without trials or considering their rights, violating international principles." (emphasis added)).
\(^5\)\(^2\)\(^0\). Id. at 671 (emphasis added).
\(^5\)\(^2\)\(^1\). Id. at 650.
\(^5\)\(^2\)\(^2\). For a full articulation of the elements, see supra Part II.B.3.
\(^5\)\(^2\)\(^3\). Al Anfal Trial Chamber Judgment, supra note 2, at 672.
\(^5\)\(^2\)\(^4\). Id.
Young women were also subjected to "sexual assault by the prison guards." Many of the 3,000 to 4,000 detainees died of hunger, as they were supplied with nothing more than dry bread and salty water. A child who was three and a half years old was "beaten until he swooned." One victim further testified that prisoners were forced to walk barefoot over broken glass and were ordered to beat one another. Others were tied up, hung upside down, and their sexual organs tied to gas cylinders. The IHT suggested that this suffering was the result of Sultan Ahmad's orders to the 1st Corps to attack Kurdish villages (satisfying the causation or substantial contribution requirement). However, as to the intent, the IHT found that Sultan Ahmad launched the attacks with "full awareness" of the consequences. As discussed below, this again is less than a finding of intent.

**Individual Criminal Responsibility**

As to individual criminal responsibility, the IHT found Sultan Ahmad responsible as a participant in a "joint criminal plan." This suggests that the IHT determined that there was joint criminal enterprise responsibility. Here, as already explained, the facts found by the IHT suggest: (i) a group of individuals was involved in creating and executing the Anfal operations; (ii) the Anfal operations constituted a joint criminal plan to attack and kill civilians in "prohibited zones" in Kurdish areas of Iraq, either transferring survivors to "camps" or executing them; and

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525. Id. at 673.
526. Id.
527. Id. at 674.
528. Id.
529. Id.
530. Id. at 675. The IHT could have also cited Sultan Ahmad's role in forcibly transferring individuals to detention camps. Id. at 668.
531. Id. at 708.
532. See id. at 699 (finding that, as to murder, Sultan Ahmad was responsible as a participant in a "joint criminal plan"); id. at 660 (characterizing Sultan Ahmad, as to extermination, as having "personally" "participated" with other accused persons in a "joint criminal plan"); id. at 665 (concluding that, as to deportation, Sultan Ahmad "participated with others in a joint criminal plan"); id. at 671 (concluding that, as to imprisonment, he had "common criminal intention to perpetrate the crime"); id. at 675 (finding, as to other inhumane acts, a "joint criminal plan").
533. The elements of joint criminal enterprise responsibility require: (i) a plurality of persons; (ii) the existence of a common plan, design or purpose that amounts to or involves the commission of a crime provided for in the Statute; and (iii) participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. Krnojelac Appeals Judgment, supra note 338, ¶ 31; see also Tadić Appeals Judgment, supra note 233, ¶ 227.
(iii) Sultan Ahmad commanded or participated in many of the Anfal operations.534

As to mental state, a "type 1" joint criminal enterprise requires shared intent.535 Here, the IHT seems to have found shared intent, or something comparable, with regard to the underlying crimes of willful killing and imprisonment.536 As to the crime of "other inhumane acts," the IHT appears to suggest that there was a "type 3" joint criminal enterprise — i.e., that the crimes were a natural and foreseeable consequence of the joint criminal enterprise in which Sultan Ahmad participated.537 As to deportation, however, not only does the mental state finding appear missing, but the IHT seems to vacillate between finding a "type 1" and "type 3" joint criminal enterprise, rendering its analysis inconsistent and confused.538 Finally, as to extermination, the IHT does not appear to ana-

534. Al Anfal Trial Chamber Judgment, supra note 2, at 649.
536. Al Anfal Trial Chamber Judgment, supra note 2, at 699 (finding that the willful killing was "premeditated"); id. at 671 (finding Sultan Ahmad had "common criminal intention to perpetrate" imprisonment).
537. Kvočka Appeals Judgment, supra note 91, ¶ 83 (stating that "[t]he third, 'extended' form of joint criminal enterprise entails responsibility for crimes committed beyond the common purpose, but which are nevertheless a natural and foreseeable consequence of the common purpose"). As the ICTY has noted:

The requisite mens rea for the extended form is twofold. First, the accused must have the intention to participate in and contribute to the common criminal purpose. Second, in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.

Id. ¶ 83.
538. As to the "other inhumane acts," the IHT suggested that the crimes were the "expected normal result" of the "joint criminal plan," and that Sultan Ahmad "[wa]s aware that this criminal plan in which he participated ... by issuing his orders ... to conduct those attacks will lead to the destruction of houses and civilian villages and the [forsaking] of [villagers' lives]." Al Anfal Trial Chamber Judgment, supra note 2, at 675 (emphasis added); see also id. at 708 (finding that Sultan Ahmad launched the attacks with "full awareness" of the consequences which could lead to "destruction of houses, villages, all means of life, and countless numbers of civilians; causing severe physical and mental damages, as well as depriving civilians [of] their lifestyles").
539. As to deportation, the IHT concluded that Sultan Ahmad participated with others in a joint criminal plan in order to execute a wide-range and systematic attack against the civilian inhabitants in the north of Iraq ... through issuing orders to the forces that were under his command (1st Corps Forces) during Al-Anfal operation[s], with ... awareness [of] the normal result that might occur during the attacks ....
lyze Sultan Ahmad’s intentions, so a requirement of individual criminal responsibility appears to be missing.

Accordingly, this Article’s preliminary conclusions are that: (i) as to willful killing and imprisonment, the IHT found a “type 1” joint criminal enterprise; (ii) as to other inhumane acts, the IHT found a “type 3” joint criminal enterprise; and (iii) as to deportation and extermination, the individual criminal responsibility analysis appears inconsistent or incomplete due to the IHT’s failure to analyze, or to consistently analyze, Sultan Ahmad’s intent. Thus, at least according to this analysis, only three of the five crimes against humanity convictions appear well-founded based on the facts as found by the Tribunal.

4. Sultan Ahmad’s War Crimes Convictions

The Trial Chamber convicted Sultan Ahmad of four war crimes: (i) intentionally directing attacks against the civilian population, (ii) intentionally directing attacks against buildings dedicated to religious or educational purposes or against hospitals and places where the sick and wounded are collected, (iii) ordering the displacement of the civilian population for reasons related to the conflict; and (iv) destroying or seizing the property of an adversary. Based on the IHT’s findings of fact, it appears that only two of these war crimes convictions were well-founded. Because this Article already examined the chapeau requirements for war crimes, it will not do so again here. It will instead analyze the underlying crimes and Sultan Ahmad’s individual criminal responsibility.

the displacement was a natural and foreseeable consequence of the joint criminal enterprise (a “type 3”) or it was part of the joint criminal enterprise (a “type 1”). It cannot be both.

It should be noted that because the IHT does not discuss “type 1” or “type 3” joint criminal enterprise, this analysis may be incorrect. The IHT needs to be more precise in terms of which form of individual criminal responsibility it finds.

See supra note 98.

Al Anfal Trial Chamber Judgment, supra note 2, at 679, 710–11.

Id. at 682, 713.

Id. at 684, 715.

Id. at 717–18.

See supra note 98.

See supra Part II.B.4.

As to whether the defendant was aware of the factual circumstances that proved the existence of armed conflict, see ICC Elements of Crimes, supra note 146, art. 8, the IHT found this satisfied in Sultan Ahmad’s case, see Al Anfal Trial Chamber Judgment, supra note 2, at 679.
First Underlying Crime: Intentionally Directing Attacks Against the Civilian Population

As to the first war crime, the IHT found that Sultan Ahmad “conducted the first Al-Anfal ... and other campaigns ... wherein the military units attacked ... the Kurdish villages[,] ... using all [the] State's military capabilities ... to bombard the civilian inhabitants ... [T]he bombardment resulted in the deaths of thousands of children, women and elderly people.” The IHT also looked at village fatality figures to conclude that the victims were “civilian.” As to Sultan Ahmad’s role, the IHT found that he issued orders to the troops to effectuate the attacks. The Tribunal also concluded that there was “joint criminal intent” to commit the crime, which suggests the required mens rea.

Second Underlying Crime: Intentionally Directing Attacks Against Buildings Dedicated to Religious or Educational Purposes, or Against Hospitals and Places Where the Sick and Wounded Are Collected

The IHT found clear evidence of damage to, or destruction of, protected property, noting that Sultan Ahmad “issued orders to forces under his command, to launch premeditated raids over protected buildings,” and target them specifically. In total, the IHT concluded that more than 3,000 villages had been destroyed. Furthermore, the Tribunal found that the damaged or destroyed property was not used for military purposes and hence maintained its “legal[ly] protect[ed] status.” Finally, the IHT concluded that the destruction was “premeditated.” Thus, the elements of this crime appear satisfied.

Third Underlying Crime: Ordering the Displacement of the Civilian Population for Reasons Related to the Conflict

As to this crime, the IHT “did not find any evidence which proves that ... [Sultan] Ahmad issued ... orders to dislocate Kurdish civil inhabitants or relocate them away from their villages.” Rather, the IHT concluded that Sultan Ahmad “should have been aware that his ... or-

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549. *Al Anfal Trial Chamber Judgment, supra note 2, at 677.*
550. *Id.* at 678.
551. *Id.* at 679.
552. *Id.*
553. *Id.* at 712-13.
554. *Id.* at 681.
555. *Id.* at 713.
556. *Id.* at 712-13.
557. *Id.* at 714.
Thus, it appears that the requirement of "ordering" is not satisfied by the IHT's analysis. Even if one were to analyze Sultan Ahmad's role as somehow assisting the "ordering" by a primary perpetrator (such as Majid), the crime still may well not have been shown, because the Tribunal's analysis of individual criminal responsibility, discussed below, otherwise seems internally inconsistent.

Fourth Underlying Crime: Destroying or Seizing the Property of an Adversary

Sultan Ahmad's conviction for "destroying or seizing the property of an adversary" is based primarily on the fact that he issued orders to launch attacks over Kurdish villages in northern Iraq, and that the ensuing destruction of villages was a "rational result that could have been predicted." As mentioned above, a question exists regarding whether the property destroyed was that "of an adversary," as appears to be required, since the IHT has generally portrayed the Anfal operations as attacking civilians and civilian property (rather than the Kurdish Peshmerga militia and its property). Accordingly, it is unclear whether all of the elements of this crime have been established.

Individual Criminal Responsibility

As to Sultan Ahmad's individual criminal responsibility for war crimes, the IHT characterized it as that of a participant in a joint criminal enterprise. For the first two war crimes, the IHT appears to have found a "type 1" joint criminal enterprise. It then appears to find a "type 3"
joint criminal enterprise for the other crimes (although the IHT does not invoke these terms). 564

As to the first two war crimes—intentionally directing attacks against the civilian population and intentionally directing attacks against buildings dedicated to religious or educational purposes, or against hospitals and places where the sick and wounded are collected—the finding of a "type 1" joint criminal enterprise appears correct. The IHT concluded that there was "joint criminal intention" to commit the crimes, 565 which appears to be a finding of shared intent. 566 The facts also clearly suggest that the remaining elements of a joint criminal enterprise were established. 567

As to the third war crime—ordering the displacement of the civilian population for reasons related to the conflict—the Tribunal's reasoning appears confused. It vacillates between suggesting that there was a "type 1" joint criminal enterprise (when it found "joint criminal intention")568 and a "type 3" joint criminal enterprise (when it concluded Sultan Ahmad "should have been aware that his issued orders...[would] definitely lead to orders of dislocation"). 569 This vacillation suggests a legal error by the Tribunal. 570

As to the fourth war crime—destroying or seizing the property of an adversary—the IHT also suggested the existence of a "type 3" joint criminal enterprise. Here, the IHT found that the destruction or seizure of the property was a natural and foreseeable consequence resulting from Sultan Ahmad's participation in a joint criminal enterprise, and found that Sultan Ahmad knowingly took that risk. 571 While these findings sug-

564. For discussion of "type 1" and "type 3" joint criminal enterprises, see supra Parts II.B.2, II.B.3 (offering an analysis of Majid's genocide and crimes against humanity convictions).

565. Al Anfal Trial Chamber Judgment, supra note 2, at 679, 682.

566. As to intentionally directing attacks against the civilian population, the IHT also found that Sultan Ahmad "premeditatedly contributed" to the "joint criminal plan" by "launching those large scaled attacks against civil inhabitants." Id. at 710. This suggests both joint criminal enterprise responsibility and intent on the part of Sultan Ahmad. See id. at 712-13 (finding that the destruction of protected buildings was "premeditated"). Because the IHT found that Sultan Ahmad ordered the attacks, id. at 710, Ahmad could also have been held responsible for "ordering" the commission of both war crimes.

567. See supra Part II.C.3 (discussing individual criminal responsibility as to Sultan Ahmad's convictions for crimes against humanity).

568. Al Anfal Trial Chamber Judgment, supra note 2, at 684.

569. Id. at 714.

570. It is also unclear that the mental state found (that Ahmad "should have been aware" of the destruction) would suffice for a "type 3" joint criminal enterprise. See Kvoćka Appeals Judgment, supra note 91, ¶ 83. Rather, this mental state appears to approximate more closely the mental state for command responsibility (although the IHT does not otherwise attempt to establish command responsibility). See IHT Statute, supra note 12, art. 15/Fourth.

571. See Al Anfal Trial Chamber Judgment, supra note 2, at 717 (finding that the "total destruction of villages [was] a rational result[] that could have been predicted [by] contribu-
gest the presence of a "type 3" joint criminal enterprise, they are not alone sufficient. A problem arises in that another element of the crime—the destruction of the property of an "adversary"—appears to be missing. Thus, it appears that only two of the four war crimes convictions have foundation based on the facts as found by the Tribunal.

D. Hussein Rashid al-Tikriti

The Tribunal's convictions of Hussein Rashid are generally not well-organized. If, however, one attempts to group the IHT's findings according to the elements of the crimes, most elements do appear met, although the Trial Chamber's analysis of individual criminal responsibility is quite limited and the IHT never responded to several of Hussein Rashid's legal arguments. For a number of reasons, the Tribunal's imposition of a death sentence seems too harsh.

In addition, for a number of reasons, the Tribunal's imposition of a death sentence seems too harsh. First, the IHT finds that Hussein Rashid primarily supplied and equipped military forces and provided them with military maps. This finding suggests that Hussein Rashid played a secondary role in the operations, similar to that of al-Douri and al-Jaburi, who received life sentences. Second, at least as to genocide, there is no finding of genocidal intent, meaning that, as a matter of law, Hussein Rashid's responsibility was arguably akin to that of an aider and abettor. This lower degree of responsibility also suggests that a lesser sentence was warranted. Third, Hussein Rashid invoked the defense of "following orders," which can be used to mitigate a sentence. For all of these reasons, Hussein Rashid's sentence appears too severe.

1. The Tribunal's Conclusions as to Hussein Rashid's Role in the Anfal

Some of the key evidence used by the IHT to convict Hussein Rashid includes documents suggesting his awareness of both the use of chemical weapons and the targeting of civilian villages as part of the Anfal campaign. For example, Hussein Rashid admitted to seeing a copy of a letter issued by the Chief of Army Staff that includes instructions to

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572. For discussion of a "type 3" joint criminal enterprise, see supra note 537.
573. See caveats supra note 98.
574. Al Anfal Trial Chamber Judgment, supra note 2, at 725, 733.
575. IHT Statute, supra note 12, art. 15/Fifth.
576. See caveats supra note 98.
577. Id. at 729 (citing Doc. No. 349, Apr. 27, 1988).
use "special ammunitions over foe's grouping" and to "strike[e] saboteurs' headquarters with the aforementioned ammunitions." Hussein Rashid also admitted to receiving a copy of a letter that included instructions to demolish villages, and to destroy buildings within villages that had survived previous bombings. Finally, Hussein Rashid admitted that he received another letter including a request for "special air strikes," but stated that he only received this letter for the purpose of updating maps.

In addition to this documentary evidence, the IHT looked to witness testimony in convicting Hussein Rashid. According to the testimony of Sultan Ahmad, Hussein Rashid issued "orders" to Sultan Ahmad concerning the military operations. Al-Douri also testified that "big plans [such as Al Anfal] correlated to big operations," and that these operations were preplanned by the Operations Directorate, headed by Hussein Rashid.

Throughout his trial, Hussein Rashid maintained that his role in the operations was "consultative" only, and that his decisions were limited to the "provision of resources" and providing "technical information" to the Chief of Army Staff. Elsewhere, he described his duties as limited to "provid[ing] consultation and advice, and to participation in planning." Hussein Rashid admitted that he was asked about a study regarding the Anfal operations, but claimed that he was only asked to give a "technical military opinion concerning the provision of military and human resources." He testified that he never participated in planning strikes against non-military targets, and that he had no authority to issue orders to troops, but rather responded to orders by the Chief of Army Staff. Hussein Rashid also stated that his department did not

578. Id. at 723, 753 (emphasis added).
579. Id. at 723 (citing Doc. (R.A.C.)/40/1182, Aug. 28, 1988).
580. Id. (citing Doc. No. 183, Mar. 20, 1988).
581. Id. at 724. The IHT confusingly stated both that Hussein Rashid denied giving such orders to Sultan Ahmad, id. at 726, and that Hussein Rashid admitted to ordering Sultan Ahmad to lead the first Anfal operation, id. at 623. The latter, if correct, would certainly be an admission of "ordering."
582. Id. at 724-25.
583. Id. at 725.
584. Id. at 727.
585. Id. at 733. This is basically an admission of "planning" as a form of individual responsibility.
586. Id. at 732.
587. Id. at 725. Document No. (R.A.C.)/40/1182, which discusses demolishing villages, id. at 723, and which Hussein Rashid admitted receiving, id. at 729, suggests that Hussein Rashid at least knew of plans to demolish villages.
588. Id. at 726.
589. Id.
handle prisoners or detainees.\textsuperscript{590} He denied any responsibility for using chemical weapons because “plans submitted to his department didn’t include any sign of using chemical weapons.”\textsuperscript{591}

As to his legal arguments, Hussein Rashid argued that: (i) a prisoner of war should not be prosecuted;\textsuperscript{592} (ii) the tribunal was illegitimate;\textsuperscript{593} (iii) the “experts,” as U.S. nationals, were biased;\textsuperscript{594} (iv) he merely “followed orders”;\textsuperscript{595} (v) displacement can be for beneficial purposes;\textsuperscript{596} (vi) the Anfal plans were for a “purely military operation . . . targeting the Iranian army and Kurdish insurgents during [the] Iraq-Iran war”;\textsuperscript{597} and (vii) the plans were to confront a regular army, not civilians.\textsuperscript{598}

After reviewing the evidence, the IHT ultimately concluded that Hussein Rashid “participated in planning for the Anfal Operations, and his affiliated directorates armed the military forces and supplied them with ammunitions and other equipment [so that] the Anfal operations [might succeed] . . . .”\textsuperscript{599} Hussein Rashid “offered support in planning and preparing the human and physical resources, providing military technical expertise and updated maps.”\textsuperscript{600}

2. Hussein Rashid’s Genocide Convictions

The Trial Chamber convicted Hussein Rashid of two counts of genocide based on (i) killing members of the group;\textsuperscript{601} and (ii) causing serious bodily or mental harm to members of the group.\textsuperscript{602} Based on the evidence

\textsuperscript{590.} Id.
\textsuperscript{591.} Id. This position seems undercut by Document Nos. 349 and 183, both of which reveal that chemical weapons were being used, and both of which Hussein Rashid admits that he received. Id. at 729.
\textsuperscript{593.} Al Anfal Trial Chamber Judgment, supra note 2, at 727. The legitimacy of the Tribunal was a topic raised by defense motion early in the trial, and the Tribunal was found to be legitimate. UPDATE I, supra note 13, at 7–8.
\textsuperscript{594.} Al Anfal Trial Chamber Judgment, supra note 2, at 728.
\textsuperscript{595.} Id. “Following orders,” as mentioned above, is not an affirmative defense under the IHT Statute, but only a mitigating factor. See IHT Statute, supra note 12, art. 15/Fifth.
\textsuperscript{596.} Al Anfal Trial Chamber Judgment, supra note 2, at 728. This position was rejected by the IHT in its discussion of Majid. See id. at 584 (discussing Majid’s war crimes convictions and finding that displacements did not occur for the security of the civilians involved).
\textsuperscript{597.} Id. at 729.
\textsuperscript{598.} Id. at 731. This position, as well as the previous one, appears undercut, for example, by Document No. (R.A.C.)401182, which discusses demolishing villages, id. at 723, and which Hussein Rashid admitted to having received, id. at 729.
\textsuperscript{599.} Id. at 767.
\textsuperscript{600.} Id. at 750.
\textsuperscript{601.} Id. at 751.
\textsuperscript{602.} Id. at 755.
as found by the Tribunal, the genocide convictions appear warranted. However, this case is perhaps the weakest of the five defendants convicted of genocide, because the IHT’s reasoning as to Hussein Rashid is the least well-articulated. As to individual responsibility, the Tribunal’s suggestion that joint criminal enterprise responsibility existed is arguably erroneous because the IHT never found the required intent. Instead, Hussein Rashid arguably should have been convicted of aiding and abetting genocide.

Because this Article has already examined the Trial Chamber’s findings as to the *chapeau* for genocide, it will not separately discuss similar findings made regarding Hussein Rashid. Instead, this Article will analyze the IHT’s findings as to the underlying crimes, as well as Hussein Rashid’s individual criminal responsibility.

**First Underlying Crime: Killing Members of the Group**

First, while not contained in the Tribunal’s analysis of the underlying crime of killing, the IHT did examine expert testimony as to the existence of mass graves when discussing Hussein Rashid’s conviction. The Tribunal concluded that Hussein Rashid “participated indirectly in killing maybe hundreds of [the] Kurdish populace.”

Second, although there is no clear finding of “intent” or “premeditation” with respect to this particular crime, the IHT found, in its analysis of murder as a crime against humanity that Hussein Rashid acted with “premeditation.” This finding suggests that he also acted with premeditation regarding the comparable underlying crime of “killing.”

**Second Underlying Crime: Causing Serious Bodily or Mental Harm to Members of the Group**

As to the underlying crime of causing serious bodily or mental harm to members of the group, the IHT found that Hussein Rashid “contributed in planning [the] Al-Anfal operations” and “supplied the military troops with all required ... personnel, equipment[], and ... weapons,” which caused “severe physical and mental harm [to] Kurdish civil inhabitants in Northern Iraq.” That harm included “freeze[ing] the

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603. See supra Part II.B.2 (discussing Majid’s genocide convictions).
604. See *Al Anfal Trial Chamber Judgment*, supra note 2, at 743–51 (discussing Hussein Rashid’s genocide convictions, including the *chapeau* for genocide). Hussein Rashid’s own intent is discussed below in the analysis of individual criminal responsibility.
605. Id. at 735–40.
606. Id. at 754 (page 754 is erroneously labeled as a second page 757 in the English translation).
607. Id. at 760.
608. There is no substantive legal difference between “murder” and “killing.”
609. *Al Anfal Trial Chamber Judgment*, supra note 2, at 752–53.
agronomy, prevent[ing] harvesting the crops, as well as pasturing and plowing.610 The Anfal plans also included directions “to kill any human or animal found within the [prohibited] zones.”611

The IHT also concluded that the documentary evidence revealed Hussein Rashid’s awareness of “special strikes,”612 and “indicate[d] clearly that [Hussein Rashid] participated in causing mental and physical [harm,] to Kurdish civil inhabitants in Northern Iraq . . . .”613 As to intent,614 the IHT elsewhere found that serious bodily or mental harm was intentionally inflicted.615

Individual Criminal Responsibility

The IHT never expressly addressed the form of individual criminal responsibility on which it based Hussein Rashid’s convictions. The Tribunal, however, concluded that Hussein Rashid provided “human and physical [resources] to the military troops,”616 and “contributed and participated in a joint criminal plan, with other [defendants], to target and eradicate . . . the Kurdish civil inhabitants of Northern Iraq.”617 Elsewhere, the IHT states that the Anfal crimes were “planned and supported” by Hussein Rashid.618 These conclusions suggest that the IHT may have found joint criminal enterprise responsibility. Alternately, the Tribunal certainly could have convicted Hussein Rashid on a theory of “planning” or “aiding and abetting.”619

610. Id. at 753.
611. Id.
612. Id. (citing Doc. Nos. 349 and 183).
613. Id. at 757.
614. As to the mens rea requirement for this crime, “the harm must be inflicted intentionally.” Blagojević and Jokić Trial Judgment, supra note 144, ¶ 645; Brđanin Trial Judgment, supra note 147, ¶ 690.
615. See Al Anfal Trial Chamber Judgment, supra note 2, at 517 (finding that Majid acted “premeditatedly” as to this underlying crime).
616. Id. at 747.
617. Id. at 750 (emphasis added).
618. Id.
619. See Kordić and Čerkez Appeals Judgment, supra note 91, ¶ 31. The Appeals Chamber noted:

[1] In relation to “planning,” a person who plans an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite mens rea for establishing responsibility under Article 7(1) of the Statute pursuant to planning. Planning with such awareness has to be regarded as accepting that crime.

ld. The Trial Chamber stated that

[a] person who plans an act or omission with an intent that the crime be committed, or with an awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite mens rea for establishing responsibility under Article 7(1) of the Statute for planning.
As discussed above, the “basic” form of joint criminal enterprise responsibility (“type 1”) requires a showing of shared genocidal intent.\(^6\) While the IHT does include one conclusory sentence that suggests a finding of “joint criminal intent,” it nowhere points to any evidence suggesting that Hussein Rashid shared Majid’s genocidal intent. Case law requires that genocidal intent be proven by a “surplus” of intent.\(^6\) This clearly was not found.

On the other hand, the facts as found by the IHT could support a conviction for aiding and abetting genocide. To be responsible for “aiding and abetting,” it is sufficient to show that “‘an accused knew that his own acts assisted in the commission of genocide by the principal offender and was aware of the principal offender’s state of mind . . . .’.”\(^6\) Here, the IHT did find that Majid had the requisite genocidal intent,\(^6\) and that Hussein Rashid acted with an awareness of Majid’s state of mind. Specifically, the IHT found that Hussein Rashid “reviewed . . . letter number (4008), dated 1987 June 20, and realized the intention of [Majid to commit genocide] . . . .”\(^6\) Given this finding, it seems implicit that Hussein Rashid knew his acts assisted in the commission of the Anfal (although the IHT should have expressly made such a finding).\(^6\) Accordingly, there would seem to be foundation for a conviction of aiding and abetting genocide. As mentioned above, the responsibility of an

\(^6\) Limaj Trial Judgment, supra note 255, \(\S\) 513

\(^6\) Krnojelac Appeals Judgment, supra note 338, \(\S\) 84 (noting that a “type 1” joint criminal enterprise requires shared intent).

\(^6\) See Al Anfal Trial Chamber Judgment, supra note 2, at 755 (“[T]he court finds [Hussein Rashid] criminally responsible for perpetrated acts via contributing in a joint criminal intent with other group of convicts, through a joint criminal plan . . . .”).

\(^6\) Stakić Trial Judgment, supra note 184, \(\S\) 520 (“Genocide is a unique crime where special emphasis is placed on the specific intent. The crime is, in fact, characterized and distinguished by a ‘surplus’ of intent.”).

\(^6\) Brdanin Trial Judgment, supra note 147, \(\S\) 730. The Tribunal’s findings might also have provided foundation for a finding of “common purpose” responsibility. For a discussion of the “common purpose” doctrine, see supra note 229.

\(^6\) See supra Part II.B.2 (discussing Majid’s genocide convictions).

\(^6\) Al Anfal Trial Chamber Judgment, supra note 2, at 747; see also id. at 754 (page 754 is erroneously labeled as a second page 757) (“[Hussein Rashid] admitted attending regularly the planning meetings of Al-Anfal which were held in Kirkuk, on 1988 April, where a discussion and a study for Al-Anfal plans were laid down in detail[, including the usage of Special Ammunition (Chemicals) . . . .”).

\(^6\) For aiding and abetting genocide, additionally, it must be shown that “[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime . . . .” Vasiljević Appeals Judgment, supra note 234, \(\S\) 102. Here, the Tribunal’s findings as to Hussein Rashid’s role in participating in planning the Anfal Operations, and supplying forces with maps, specific locations, and resources, would likely suffice. See Al Anfal Trial Chamber Judgment, supra note 2, at 767, 750. Of course, such findings should have been expressly made.
aider and abettor is considered lesser than that of a co-perpetrator. Accordingly, if Hussein Rashid's responsibility is seen as that of, or akin to, an aider and abettor, his sentence arguably is too stringent.

3. Hussein Rashid's Crimes Against Humanity Convictions

The Trial Chamber also convicted Hussein Rashid of two counts of crimes against humanity based on the underlying crimes of murder and extermination. Based on the facts as found by the Tribunal, it appears that Hussein Rashid's convictions for crimes against humanity are fairly sound, even if not well-articulated. Although the IHT does not perform the required analysis of individual criminal responsibility, the elements of joint criminal enterprise responsibility appear present in the Tribunal's findings. Finally, because the IHT previously found, and this Article previously examined, the chapeau requirements for crimes against humanity, it does not do so again here.

First Underlying Crime: Willful Killing

The IHT based its finding that killings occurred on the fact that "the military troops aimed fire from their different weapons toward Kurdish villages, starting with light weapons, [moving to] artillery and rocket launchers, [and] ending with helicopters and aircraft[,] which [bombed] the villages with conventional and chemical weapons." As to Hussein Rashid's role in the killings, the IHT found that he attended "all meetings regarding planning or organizing" the Anfal campaign. In his

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627. See supra notes 484–485.
628. Al Anfal Trial Chamber Judgment, supra note 2, at 766.
629. Id. at 774.
630. See caveats supra note 98.
631. See supra Part II.B.3 (examining the chapeau elements of crimes against humanity in the discussion of Majid's conviction). The part of the chapeau that is defendant-specific—showing that Hussein Rashid's acts were part of the attack and that Hussein Rashid knew of the context in which his acts occurred—was found:

[Hussein Rashid] was aware that his actions were part of a large-scale and methodical attack against civilian residents through the huge military forces used for that attack against the Kurdish civilian residents during the [eight] Anfal ... operations. The government didn't spare the usage of any weapon by the military forces during those attacks and the government used tens of thousands of soldiers in the attacks. [Hussein Rashid] was [in] daily contact with the attacking military forces through attending the planning meetings ... held at the Operations Department which [was] headed by him or through the various official letters and correspondence that were copied and sent to the Operations Department to let the [defendant know] about all the military movements and [its] results against the Kurdish civilian residents.

Al Anfal Trial Chamber Judgment, supra note 2, at 765.
632. Al Anfal Trial Chamber Judgment, supra note 2, at 758.
633. Id. at 759.
testimony, Hussein Rashid also revealed that “all military plans were not to be... executed before being presented to the Operations Directorate” (which was under Rashid’s command), and that he and the Chief of Army Staff briefed Sultan Ahmad about the Al-Anfal operation. In separate testimony, Sultan Ahmad confirmed that plans would not be executed unless discussed by the relevant Directorates. The IHT concluded that Hussein Rashid “contributed in planning for Al-Anfal operations.”

As to premeditation or intent, the IHT found this requirement met based on the fact that Hussein Rashid “contributed in planning for Al-Anfal operations.” “[T]he Operations Directorate that was under the command of [Hussein Rashid] included six directorates, and each had a particular mission to plan for the military operations”: the Organizing Directorate participated in planning; the Arming Directorate organized the equipment; the Supply Directorate would provide human resources; the Survey Directorate would prepare maps. The IHT concluded that “[t]his entire operation indicates proof of premeditated murder...” Accordingly, the elements of willful killing as an underlying crime against humanity appear satisfied.

Second Underlying Crime: Extermination

As mentioned above, “extermination” is defined as either (i) the intentional infliction of living conditions calculated to destroy the population in whole or in part, or (ii) intentionally inflicted murder on a mass scale. Here, as to murder occurring on a mass scale, the IHT relied on victim and witness statements that some villagers were arrested and executed, while scores of others ended up in mass graves. The IHT concluded: “It is obvious that the military troops... had carried [out] a wide-range and methodical attack against the Kurdish civilian inhabitants in the north of Iraq...” As a result, “thousands of civilian inhabitants were killed and relocated, the same number of them were transferred to... detention camps.” As to Hussein Rashid’s role, the

634. Id.
635. Id.
636. Id. at 760.
637. Id.
638. Id. at 760–61.
639. Id. at 761.
640. IHT Statute, supra note 12, art. 12/Second/B.
641. See Blagojević and Jokić Trial Judgment, supra note 144, ¶ 572.
642. Al-Anfal Trial Chamber Judgment, supra note 2, at 768.
643. Id. at 769.
644. Id. at 773.
645. Id.
IHT concluded that "some of the Anfal plans were prepared in the operations department headed by [Hussein Rashid] . . . ".

As to Hussein Rashid's mental state, the IHT relied on his presence at conferences in Kirkuk and meetings held at the armed forces general command headquarters (where the use of chemical weapons against civilians was discussed) as evidence of his "intention." It additionally found that the living conditions imposed on the civilians were such that would "cause the imminent eradication of a group of inhabitants—a factor relevant to the mens rea of extermination." Accordingly, the elements of extermination as an underlying crime against humanity appear roughly satisfied.

**Individual Criminal Responsibility**

Here, again, the IHT appears to suggest that there was a joint criminal enterprise, concluding that Hussein Rashid "participated with other [defendants] in a joint criminal plan to boost the criminal activity of the former regime and to achieve its criminal purposes." This time, the conclusion that there was a joint criminal enterprise appears warranted. As previously discussed, the IHT's findings are that (i) a group of individuals was involved in creating and executing the Anfal operations; (ii) the Anfal operations constituted a joint criminal plan to attack and kill civilians in "prohibited zones" in Kurdish areas of Iraq; and (iii) Hussein Rashid participated in planning the Anfal operations in that "some of the Anfal plans were prepared in the operations department," of which he was the head. The remaining requirement for a "type 1" joint criminal enterprise is that Hussein Rashid shared the intent to commit the joint criminal plan. The Tribunal's conclusions that Hussein Rashid possessed intent as to both willful killing and extermination would appear to satisfy this requirement if the joint criminal plan is defined

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646. *Id.*
647. *Id.* at 770.
648. *Id.*
649. See Blagojević and Jokić Trial Judgment, supra note 144, ¶ 572 (noting that the mens rea element for the crime of extermination requires "the intent to kill persons on a massive scale, or to inflict serious bodily injury or create conditions of life that lead to the death in the reasonable knowledge that such act or omission is likely to cause the death of a large number of persons . . . ") (emphasis added)).
650. *Al Anfal Trial Chamber Judgment,* supra note 2, at 774 (emphasis added); see also *id.* at 765 (finding that Hussein Rashid was "criminally responsible . . . through his participation in a criminal intent [sic] along with [a] group of people").
651. *Id.* at 773.
652. See *Krnojelac Appeals Judgment,* supra note 338, ¶ 84.
narrowly enough. Thus, the elements of crimes against humanity appear roughly satisfied.

4. Hussein Rashid's War Crimes Convictions

The Trial Chamber additionally convicted Hussein Rashid of two war crimes: (i) intentionally directing attacks against the civilian population and (ii) intentionally directing attacks against buildings dedicated to religious or educational purposes or against hospitals and places where the sick and wounded are collected. Based on the facts as found by the Tribunal, it appears that Hussein Rashid's war crimes convictions are justified. While the IHT again provided limited analysis of individual criminal responsibility, the elements of joint criminal enterprise responsibility again appear present. Because the chapeau requirements for war crimes have already been examined, this Article will not do so again here.

First Underlying Crime: Intentionally Directing Attacks Against the Civilian Population

The IHT relied on victim and witness testimony to find that civilians were attacked, concluding that "it was proved that these victims were civilians[,] most of them were women, children, elderly and farmers and had no relation [to] the conflict that was taking place in Kurdistan."

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653. See Krstić Appeals Judgment, supra note 146, ¶ 20 ("The proof of the mental state with respect to the commission of the underlying act can serve as evidence from which the fact-finder may draw the further inference that the accused possessed the specific intent to destroy."); Brdanin Trial Judgment, supra note 147, ¶ 706.
654. See caveats supra note 98.
655. Al Anfal Trial Chamber Judgment, supra note 2, at 783.
656. Id. at 788–89.
657. See caveats supra note 98.
658. See supra Part II.B.4.
659. As to the one chapeau requirement that is defendant-specific—that Hussein Rashid was aware of the factual circumstances that established the existence of armed conflict—this appears to have been established. The Tribunal found:

[Hussein] Rashid . . . had a complete knowledge about the details of the events that were happening, through his awareness of [various documents discussed], whereas we proved that he [planned] or participated in the planning of al Anfal operations and was attending all meetings and conferences that also planned and prepared for that operation[.]

Al Anfal Trial Chamber Judgment, supra note 2, at 783; see also ICC Elements of Crimes, supra note 146, art. 8(2)(a)(i) (requiring for war crimes committed during internal armed conflict that "[t]he perpetrator was aware of factual circumstances that established the existence of an armed conflict").
660. Al Anfal Trial Chamber Judgment, supra note 2, at 780. Although there were also military targets (Peshmerga), the way in which the attacks occurred suggests that the civilian
The IHT also noted that “artillery rockets, shells of multiple launchers[,] and bombs” do “not differentiate between a civilian and a fighter.”

Additionally, the Tribunal found that Hussein Rashid willfully made the civilian population the object of attack, concluding that he “knew the factual circumstances in all eight [Anfal] operations” and “planned or participated in the planning of all Anfal operations . . . .” The IHT also found that Hussein Rashid bears “responsibility [for] premeditated murder [for] executing attacks against civilian inhabitants . . . [who] were not directly participating in . . . military acts.”

**Second Underlying Crime: Intentionally Directing Attacks Against Buildings Dedicated to Religious or Educational Purposes or Against Hospitals and Places Where the Sick and Wounded Are Collected**

As to this crime, the IHT concluded, based on victim and witness testimony, that the Anfal campaign involved destroying villages that “contained schools, mosques, and infirmaries . . . .” The IHT additionally relied on documentary evidence referring to “removing all the villages” and destroying all buildings in each village. The IHT further stated that it “did not find any evidence to [prove] that these protected buildings [had lost their legal protection].” Moreover, the IHT found that the participants in the joint criminal plan, including Hussein Rashid, “intended to target and to direct attacks against protected property.”

Casualties could in no way be explained as “collateral damage.” As explained in *Kordić and Čerkez*:

> It is . . . accepted that attacks aimed at military objectives, including objects and combatants, may cause “collateral civilian damage.” International customary law recognises that in the conduct of military operations during armed conflicts a distinction must be drawn at all times between persons actively taking part in the hostilities and civilian population and provides that [a] the civilian populations as such shall not be the object of military operations, and [b] every effort be made to spare the civilian populations from the ravages of war, and [c] all necessary precautions should be taken to avoid injury, loss or damage to the civilian population.

*Kordić and Čerkez Appeals Judgment, supra note 91, ¶ 52.*

661. *Al Anfal Trial Chamber Judgment, supra note 2, at 780.*

662. *Id. at 783.*

663. *Id. (emphasis added).*

664. *Id. at 786–87.*

665. *Id. at 785–86.*

666. *Id. at 786 (citing Doc. No. 1182).*

667. *Id. at 788. The IHT also noted that “[it] is not acceptable to base on or [invoke] military necessit[y] as an excuse to target . . . protected buildings, and it is not reasonable to destroy all the protected buildings in thousands of Kurdish villages within the four northern governorates, for warlike necessities.”* *Id.* This statement may confuse “military necessity,” with the question of whether the buildings were used for military purposes.

668. *Id.*
Individual Criminal Responsibility

The IHT appears to find that there was a joint criminal enterprise with respect to both war crimes. While the IHT did not thoroughly analyze the elements of joint criminal enterprise responsibility, based on the facts as found by the Tribunal, they appear met.\textsuperscript{669} As to the first crime—directing attacks against civilians—the IHT stated that Hussein Rashid "participated in a criminal plan . . . in order to boost the criminal activity or the criminal purpose of the former regime and its military systems."\textsuperscript{670} The IHT found that there was "a joint criminal intention,"\textsuperscript{671} which appears to be a finding of "shared intent" as required for a "type I" joint criminal enterprise.\textsuperscript{672} As to the second war crime, directing attacks against protected buildings, the IHT similarly found "that [Hussein Rashid] participated [in] his personal capacity in the joint criminal plan with all the other [defendants]."\textsuperscript{673} The IHT also found that the defendants "intended to target, and to direct attacks against protected property,"\textsuperscript{674} which would roughly satisfy the "shared intent" requirement.\textsuperscript{675} Accordingly, based on the facts as found by the Trial Chamber, the elements of this war crime also appear met.\textsuperscript{676}

E. Sabir Abd al-Aziz al-Douri

The Tribunal's convictions of al-Douri appear justified based on the facts as found by the Trial Chamber.\textsuperscript{677} While he was not directly involved as a key perpetrator, al-Douri was found to be instrumental in both creating a study as to the possible use of chemical weapons, and suggesting specific targets, including Peshmerga sites (legitimate military targets) and Kurdish villages (illegitimate targets). The primary concerns regarding his conviction—aside from the fair trial issues and lack of adequate appellate review—are: (i) the genocide conviction does not explain whether al-Douri was an aider and abettor of genocide or a "co-perpetrator," which might have caused an error; and (ii) there appear to be gaps in the analysis as to all three crimes of which he was convicted. On balance, however, the evidence, as found by the IHT, appears

\begin{itemize}
  \item \textsuperscript{669} For a more complete analysis of the elements of joint criminal enterprise responsibility, see supra Part II.D.3 (discussing Hussein Rashid's convictions for crimes against humanity).
  \item \textsuperscript{670} Al Anfal Trial Chamber Judgment, supra note 2, at 782-83.
  \item \textsuperscript{671} Id. at 783.
  \item \textsuperscript{672} Krnojelac Appeals Judgment, supra note 338, ¶ 84.
  \item \textsuperscript{673} Al Anfal Trial Chamber Judgment, supra note 2, at 788.
  \item \textsuperscript{674} Id.
  \item \textsuperscript{675} Krnojelac Appeals Judgment, supra note 338, ¶ 84.
  \item \textsuperscript{676} But see caveats supra note 98.
  \item \textsuperscript{677} See caveats supra note 98.
\end{itemize}
to support a conviction as to all three crimes (although perhaps only as to one of the two war crimes).

1. The Tribunal’s Conclusions as to al-Douri’s Role in the Anfal

Al-Douri was a Staff Major General and Director of the General Military Intelligence Directorate during the Anfal.\textsuperscript{678} He described his job as “providing . . . intelligence information [for] Military Operations.”\textsuperscript{679} Some of the key documentary evidence on which the IHT relied in convicting al-Douri include documents revealing the use of chemical weapons against civilians. For example, al-Douri signed correspondence indicating the intent of the General Military Intelligence Directorate to comply with all of the instructions as to chemical attacks.\textsuperscript{680} He also signed a letter concerning the possibility of using “special ammunitions” and discussing the results of previous attacks.\textsuperscript{681} In another document, al-Douri recommends “examin[ing] the ability of the chemical weapons” and suggests targeting locations that he considers to be a “refuge for Iran’s agents,” including “Balisan basin, Tutma village, Khati village, Shaykh Wasanan village, Qara Dagh basin, Takya village, Balak Jar village, [and] Siwsinan village.”\textsuperscript{682} Moreover, al-Douri signed correspondence detailing the defensive measures taken by the Peshmerga and area residents to reduce the effects of the chemical weapons.\textsuperscript{683} Finally, al-Douri signed a document tabulating the body count of not only “saboteurs,” but also “families” and “villagers.”\textsuperscript{684}

In his defense, al-Douri argued that he had never suggested killing civilians,\textsuperscript{685} that he never personally “committed” any of the crimes,\textsuperscript{686} and that he acted with no “preconceived malice.”\textsuperscript{687} Al-Douri also argued that his actions took place in the context of the war between Iran and Iraq; that all armies of the world have units that provide intelligence

\textsuperscript{678.} Al Anfal Trial Chamber Judgment, supra note 2, at 790.
\textsuperscript{679.} Id.
\textsuperscript{680.} Id. at 794.
\textsuperscript{681.} Id. at 791 (citing Doc. No. 5809, Mar. 10, 1987). When confronted with the letter, al-Douri admitted that he signed the document, but stated that he did not recollect presenting any suggestion regarding using special ammunitions in the Northern Area. Id.
\textsuperscript{682.} Id. at 792 (citing Doc. No. U3\S2\6885, Mar. 25, 1987). Al-Douri again admitted his signature but stated that he did not recollect suggesting that special ammunitions be used. Id.
\textsuperscript{683.} Id. at 857–58 (discussing Correspondence No. M5\U3\S2\8859, Apr. 30, 1987).
\textsuperscript{684.} Id. at 879 (emphasis added) (citing Doc. No. M5\U3\S2\1325, June 10, 1988).
\textsuperscript{685.} Id. at 795. This position seems contradicted by the documents signed by al-Douri that discuss the targeting of villages, and the anti-chemical procedures taken by Peshmerga and “the residents.” See, e.g., id. at 884 (discussing Correspondence No. M5/U3/S2/8859).
\textsuperscript{686.} Id. at 810. This argument ignores the fact that one may incur criminal responsibility without personally committing crimes.
\textsuperscript{687.} Id. at 811.
about enemy troop positions; that Military Intelligence had no competence to make military decisions in carrying out operations; and that plans were pursued to defend Iraq from Iranian forces and forces that supported them, not to kill Kurdish civilians.\(^{688}\) Al-Douri admitted that he selected targets for the armed forces, but testified that he was providing information about enemy headquarters.\(^{689}\) Additional arguments made by al-Douri included: (i) one cannot be convicted of something that is not a crime at the time;\(^{690}\) (ii) a soldier cannot be interrogated about legal duties;\(^{691}\) (iii) the Tribunal was wrong to refuse his requests to present defense witnesses and a military expert;\(^{692}\) and (iv) he “was a soldier who abided by his professional duties.”\(^{693}\) He also claimed that he refused to obey orders to identify locations suitable to be bombed by special weapons.\(^{694}\)

The IHT does not appear to address each of these arguments—as it arguably should have—although some appear necessarily rejected by the Trial Chamber’s factual findings. The IHT expressly concluded that al-Douri gathered information on activities that took place in the Northern Area and submitted it to the military authorities, so that they could carry out military operations.\(^{695}\) Based on documents and testimony, the IHT also concluded that it was al-Douri who “presented information and plans”\(^{696}\) in a study on the use of internationally prohibited special ammunitions in the Northern Area.\(^{697}\) “The study ... included many recommendations such as the use of chemical weapons, [and] continuation of strikes, specifying the place and date of strikes as well as the targets ... to be bombarded by chemical weapons.”\(^{698}\)

2. Al-Douri’s Genocide Convictions

The Trial Chamber convicted al-Douri of two counts of genocide based on (i) killing members of the group; and (ii) causing serious bodily

\(^{688}\) Id. at 812–13. Al-Douri was cut off from fully making arguments about the Iran-Iraq war context, which may be an additional fair trial problem. Id. at 813.

\(^{689}\) Id. at 815.

\(^{690}\) Id. at 820.

\(^{691}\) Id. at 821.

\(^{692}\) Id. at 824. For a discussion of the fair trial problems related to the lack of defense witnesses, see supra Part I.C.

\(^{693}\) Id. at 827.

\(^{694}\) Id. at 828.

\(^{695}\) Id. at 802.

\(^{696}\) Id. at 795. 803.

\(^{697}\) Id. at 803. Al-Douri admitted to conducting the study but argued that he was just following orders from a superior. See id. at 814 (reporting al-Douri as saying, “Is there any soldier ... [who] can disobey a military order?”).
or mental harm to members of the group. Based on the facts as found by the Trial Chamber, it appears that al-Douri might have been convicted either as an aider and abettor of genocide or as a co-perpetrator. However, it is unclear on which theory the IHT in fact relied.

First Underlying Crime: Killing Members of the Group

The IHT does not directly examine the elements of the first underlying crime (or does not do so clearly). However, the Tribunal's findings do seem to contain the required elements. The IHT found that (i) murders occurred during the Anfal campaign, (ii) al-Douri made suggestions that villages should be targeted, and (iii) the murders were "premeditated." Accordingly, all of the required elements appear to be met. Furthermore, al-Douri's claims that he only suggested military targets seems inconsistent with the documents suggesting that al-Douri knew that villages, residents, and families were being targeted, although the IHT should have made such findings expressly.

Second Underlying Crime: Causing Serious Bodily or Mental Harm to Members of the Group

As to the second underlying crime, the IHT primarily relied on al-Douri's study regarding the use of chemical weapons, in which he "tackled the usage of different chemical weapons (Sarin, Valon, and Mustard [Gas]) by all available methods; artillery, air force, and army aviation through Anfal operations." The Tribunal also relied on a document in which al-Douri suggested targeting villages in the Balisan Basin and Qara Dagh Basin areas. Finally, the IHT relied on the testimony of villagers who were maimed or whose family members were maimed or killed in the chemical weapons attacks. There can be little doubt that the use of chemical weapons on residents of the Kurdish areas during the Anfal caused "serious bodily or mental harm." Al-Douri's suggestions as to the targeting of particular villages also undoubtedly caused some of

699. Id. at 859.
700. See infra Part II.E.2; see also caveats supra note 98. Because this Article has already examined the Tribunal's findings as to the chapeau requirements for genocide, it will not discuss them separately here. See supra Part II.B.2; see infra Part II.E.2 (analyzing the IHT's findings as to al-Douri's mental state).
701. See Al Anfal Trial Chamber Judgment, supra note 2, at 835 ("[T]hese frequent attacks led to [the deaths of] many people living in the Kurdish villages.").
702. Id. at 840.
703. Id. at 815.
705. Id. at 844.
706. Id. at 845.
707. Id. at 846–55.
the suffering.\textsuperscript{708} Furthermore, documents signed by al-Douri certainly suggest intentional targeting of villages. Thus, while the IHT’s analysis leaves a good deal to be desired, the findings tend to suggest that the required elements of these two underlying crimes were proved.

\textit{Individual Criminal Responsibility}

Additionally, a form of individual criminal responsibility is required. The IHT did not expressly convict al-Douri of any particular form of individual responsibility, but did specify that the convictions were under Article 11(e) of the IHT Statute, which covers “complicity in genocide.”\textsuperscript{709} “Complicity in genocide” has been interpreted to cover both “accomplice” responsibility (as in a co-perpetrator) as well as “aiding and abetting” responsibility.\textsuperscript{710}

If by convicting al-Douri of “complicity in genocide” the IHT intended to find al-Douri responsible as a “co-perpetrator,” then it would generally need to show that he possessed genocidal intent.\textsuperscript{711} If the “complicity” conviction is intended to suggest that al-Douri was an “aider and abettor,” it would suffice that “an accused knew that his own

\textsuperscript{708} See, e.g., id. at 820 (citing Doc. No. U3/S2/6885, Mar. 25, 1987). The IHT also found that al-Douri “did not only specify the targets and the locations—which were mostly safe villages inhabited by civilians ... [and order] the Air Force or the Army Aviation ... to attack the villages by Special ammunition ... . He was also interested to know the results of these attacks and their affected volume.” Id. at 857 (emphasis added). The mention of “ordering” raises the possibility that it might have been an additional form of responsibility.

\textsuperscript{709} IHT Statute, supra note 12, art. 11(e).

\textsuperscript{710} The ICTY stated in \textit{Brdanin}:

\begin{quote}
According to the jurisprudence of the Tribunal and of the ICTR, complicity in genocide under Article 4(3)(e) can consist of aiding and abetting genocide, although . . . there may be other acts which are not strictly aiding and abetting but which could amount to complicity. The Appeals Chamber has held that “the terms ‘complicity’ and ‘accomplice’ may encompass conduct broader than aiding and abetting.”
\end{quote}

\textit{Brdanin Trial Judgment, supra note 147, ¶ 729; see also Blagovjević and Jokić Trial Judgment, supra note 144, ¶ 776 (“[C]omplicity has generally been broadly conceived as a form of secondary liability[,] and as such, it covers various heads of responsibility listed under Article 7(1).”).}

\textsuperscript{711} The ICTY has explained:

\begin{quote}
[T]here is authority to suggest that complicity in genocide, where it prohibits conduct broader than aiding and abetting, requires proof that the accomplice had the specific intent to destroy a protected group. Article 4 of the Statute is most naturally read to suggest that Article 4(2)'s requirement that a perpetrator of genocide possess the requisite “intent to destroy” a protected group applies to all of the prohibited acts enumerated in Article 4(3), including complicity in genocide. There is also evidence that the drafters of the Genocide Convention intended the charge of complicity in genocide to require a showing of genocidal intent.
\end{quote}

\textit{Krstić Appeals Judgment, supra note 146, ¶ 142.}
acts assisted in the commission of genocide by the principal offender and was aware of the principal offender’s state of mind. . . .” 712 The IHT seems to vacillate between these positions. 713

As to the theory that al-Douri himself possessed genocidal intent, the IHT appears to rely on a variety of documentary evidence 714 suggesting that al-Douri was involved in the decision to use chemical and other weapons against both Peshmerga forces and villagers. The IHT also looked to the fact that al-Douri took no measures to avoid targeting civilians, 715 which the Tribunal suggested indicated “that the accused had intention to commit genocide.” 716 The IHT further concluded that al-Douri’s study and suggestions encouraging the use of chemical weapons against Kurdish nationalists, “with his awareness that it is a lethal and an internationally prohibited weapon, is obvious evidence of his criminal intention to destroy the Kurdish people totally or partially.” 717 Both of these positions may involve a leap of logic. However, if one credits the Tribunal’s factual findings, they appear to conclude that al-Douri himself possessed genocidal intent.

As to the theory that al-Douri aided and abetted genocide, the IHT suggested that one can infer the genocidal intent of the primary

712. As the ICTY has explained:

Complicity in genocide, where it consists of aiding and abetting genocide, does not require proof that the accomplice had the specific intent to destroy, in whole or in part, a protected group. Instead. . . the Prosecution must prove beyond reasonable doubt “that an accused knew that his own acts assisted in the commission of genocide by the principal offender and was aware of the principal offender’s state of mind; it need not show that an accused shared the specific intent of the principal offender.”

Brdanin Trial Judgment, supra note 147, ¶ 730. For aiding and abetting genocide, it must also be shown that “[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. . . .” Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Judgment, ¶ 45 (July 29, 2004) [hereinafter Blaškić Appeals Judgment].

713. The IHT at various points also suggested that al-Douri was a co-perpetrator in a joint criminal enterprise and concluded that he participated “with other [defendants]” in a “joint criminal plan.” Al Anfal Trial Chamber Judgment, supra note 2, at 871. That finding suggests that the factual elements of a joint criminal enterprise were likely present. For the factual elements of a joint criminal enterprise, see supra note 533.

714. Al Anfal Trial Chamber Judgment, supra note 2, at 833–34, 856.
715. Id. at 858.
716. Id.
717. Id. at 856 (emphasis added). The IHT also makes various other findings in its discussion of genocide that appear directed at the intent requirement but seem to fall short of meeting it. For example, the Tribunal states that “the accused did not exert any effort to distinguish between fighters or civilians,” “didn’t show any effort . . . to avoid killing the civilians,” and “was fully aware of the international prohibition of [chemical] weapons.” Id. at 839. It is unclear which legal conclusions the IHT is reaching based on these statements.
perpetrators based on factors such as "the number of harmed individuals[,] . . . the person[s] or property . . . target[ed], [use of] insulting language towards the targeted group members, weapons' usage, systemic way [in which the crimes were planned], and the [extend of] the actual eradication."\textsuperscript{718} These standards appear to be based on ICTY law.\textsuperscript{719} The IHT also examined whether the attacks were pursuant to a "plan or policy," also a factor in inferring genocidal intent,\textsuperscript{720} and found such evidence.\textsuperscript{721} Additionally, the IHT relied on documents signed by al-Douri regarding the use of chemical weapons\textsuperscript{722} that suggested that al-Douri played a part in that plan. The IHT concluded that al-Douri "was fully aware" of the primary perpetrators' intent to "commit[ ] the crimes [of] the previous regime."\textsuperscript{723} These findings suggest that the primary perpetrators possessed genocidal intent, and that al-Douri, knowing of such intent, assisted them.

Thus, the Tribunal's findings are quite unclear as to whether it found al-Douri to be an aider and abettor or a co-perpetrator of genocide. The IHT should have made these distinctions because the responsibility of an aider and abettor is generally regarded as less than that of a co-perpetrator.\textsuperscript{724} Accordingly, if al-Douri was an aider and abettor, there may have been a sentencing error. Also, this apparent vacillation as to theory in and of itself suggests potential error.

3. Al-Douri's Crimes Against Humanity Conviction

The Trial Chamber also convicted al-Douri of willful killing as a crime against humanity.\textsuperscript{725} The \textit{chapeau} requirements for crimes against

\textsuperscript{718} \textit{Id.} at 856. The IHT also considered factors such as "[t]he number of victims, corporeal harm, the use of offensive language to targeted individuals, the methodical way [in which plans were followed], the relative degree of the actual destruction, [and] the repetition, compatibility and methodology of the [attack]." \textit{Id.}

\textsuperscript{719} See \textit{TRAHAN, ICTY DIGEST, supra} note 228, at 155–56 (summarizing cases that describe the factors for inferring "intent to destroy").

\textsuperscript{720} The ICTY Appeals Chamber explained in \textit{Krstić}:

\begin{quote}
[T]he existence of a plan or policy is not a legal ingredient of the crime of genocide. While the existence of such a plan may help to establish that the accused possessed the requisite genocidal intent, it remains only evidence supporting the inference of intent, and does not become a legal ingredient of the offence.
\end{quote}

\textit{Krstić Appeals Judgment, supra} note 146, ¶ 225 (internal quotations omitted).

\textsuperscript{721} \textit{Al Anfal Trial Chamber Judgment, supra} note 2, at 834 (citing Doc. No. 160).

\textsuperscript{722} \textit{Id.} at 856.

\textsuperscript{723} \textit{Id.} at 830 (emphasis added).

\textsuperscript{724} See \textit{TRAHAN, ICTY DIGEST, supra} note 228, at 441 (discussing cases that support the proposition that "responsibility of an aider and abettor is less than a participant in a joint criminal enterprise").

\textsuperscript{725} \textit{Al Anfal Trial Chamber Judgment, supra} note 2, at 871.
humanity have been examined above, and will not be re-examined here.

**War Crime: Willful Killing**

As to willful killing, the IHT concluded that al-Douri caused the deaths of one or more people because he instructed armed forces to attack villages. The Tribunal also found that al-Douri’s actions in this respect were “premeditated.” These findings roughly satisfy the elements of willful killing, although it would have been helpful had the IHT addressed al-Douri’s arguments that appear related to this crime.

**Individual Criminal Responsibility**

As to individual criminal responsibility, the IHT referred to al-Douri as “contributi[ng] in implementing a joint criminal plan with other [defendants].” As discussed above, there seem to be ample findings to support the conclusion that there was a joint criminal enterprise, and the IHT here found that al-Douri contributed to implementing the criminal plan. In evaluating whether the underlying crime of willful killing occurred, the IHT also found the killings to be “premeditated.” While a “type 1” joint criminal enterprise requires a showing of shared intent to

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726.  See supra Part II.B.3.
727.  The parts of the *chapeau* that are defendant-specific appear to be met. The IHT concluded that al-Douri’s acts were part of the attack, based on documents revealing permanent contacts between al-Douri and the General Military Intelligence Directorate on the one hand, and the “forces which carried out the attack[s]” on the other. *Al Anfal Trial Chamber Judgment*, supra note 2, at 869. The Tribunal also concluded that al-Douri knew of the wider context in which his acts occurred, based on documentary evidence that “contained suggestions and instructions directed to military establishments . . . which launched systematic large scaled attacks against civil inhabitants . . . [that were] headed at the time by [al-Douri].” *Id.* at 870.
728.  *Id.* at 861.
729.  *Id.*
730.  *Id.* at 871.
731.  See, e.g., supra Part II.B.2 (discussing Majid’s individual criminal responsibility for genocide).
732.  The IHT also found that al-Douri’s actions were premeditated based on the fact that “he did not exert any remarkable effort” to prevent or punish the crimes committed in the Anfal operations. *Al Anfal Trial Chamber Judgment*, supra note 2, at 871. This conclusion seems to confuse joint criminal enterprise (where preventing and punishing crimes is irrelevant) and command responsibility (where preventing and punishing crimes is relevant). Where a superior knew or had reason to know that a crime was about to be or had been committed by troops under the superior’s effective command and control, command responsibility imposes a duty to prevent and/or punish the crimes. *See, e.g.*, *Kordić and Čerkez Appeals Judgment*, supra note 91, ¶ 839. The IHT, however, made no attempt to show that al-Douri had command and control over troops, nor did it mention command responsibility.
733.  *Al Anfal Trial Chamber Judgment*, supra note 2, at 861.
734.  For discussion of a “type 1” joint criminal enterprise, see supra note 234.
commit the joint criminal plan, the Prosecution need not establish that "every participant agreed to every one of the crimes committed." Accordingly, it is possible that the finding of premeditation regarding killing would suffice for individual criminal responsibility if the parts of the plan in which al-Douri was said to have been involved were articulated narrowly enough. Thus, while the Tribunal's analysis again leaves much to be desired, the elements of willful killing as a crime against humanity appear roughly satisfied.

4. Al-Douri's War Crimes Convictions

Al-Douri was also convicted of two war crimes: intentionally directing attacks against the civilian population and destroying the property of an adversary. This Article will not re-examine the chapeau requirements for war crimes, other than to note that the elements that are defendant-specific appear met.

First Underlying Crime: Intentionally Directing Attacks Against the Civilian Population

As to this crime, the IHT relied on victim and witness testimony of civilians who were attacked and who saw family members and other civilians killed by conventional or chemical weapons during the Anfal operations. The Tribunal also relied on documentary evidence, including one document signed by al-Douri, that tabulated body counts and indicated that families and villagers were attacked. While various documents clearly also show an intent to target Peshmerga (a valid target), as a matter of law, the presence of non-civilians within the targeted population does not change the nature of the attack for the purposes of

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735. Knjofelac Appeals Judgment, supra note 338, ¶ 84.
736. The ICTY Trial Chamber has explained:

[While a JCE [joint criminal enterprise] may have a number of different criminal objects, it is not necessary for the Prosecution to establish that every participant agreed to every one of the crimes committed. However, it is necessary for the Prosecution to prove that, between the member of the JCE physically committing the material crime charged and the person held responsible under the JCE for that crime, there was a common plan to commit at least that particular crime.

Brdanin Trial Judgment, supra note 147, ¶ 264 (emphasis added).
737. See caveats supra note 98.
738. Al Anfal Trial Chamber Judgment, supra note 2, at 872–82.
739. Id. at 883–96.
740. As to showing al-Douri's knowledge of the facts establishing the existence of armed conflict, the IHT found that requirement met by relying on various documentary evidence. See id. at 892, 882.
741. Id. at 873–79.
this war crime, provided that those attacked are "predominantly civil-
ian." The IHT did not examine whether this test had been met—a gap
in its analysis—but the evidence clearly suggests that a very large num-
ber of civilians were killed during the operations.  

As to causation (or substantial contribution) and intent, these re-
quirements would appear met based on the Tribunal's conclusion that
al-Douri "premeditatedly caused, through a joint criminal plan" the at-
tacks against civilian inhabitants during the Anfal. The Tribunal's
decision would have been stronger had it acknowledged that al-Douri
was clearly also specifying Peshmerga targets, and reached a conclusion
consistent with that fact. For example, the IHT could have pointed to
documents suggesting a willingness to eradicate large numbers of
Kurdish villages and villagers, even if there was also intent to target
Peshmerga.

Second Underlying Crime: Destroying the Property of an Adversary

Regarding its findings as to the second war crime, the IHT relied on
a document, copied to the General Military Intelligence Directorate, dis-
cussing (i) the "[e]limination of all villages and houses within one
village since . . . one or more houses was left [from previous cleansing
operations]"; (ii) directions to "destroy and eliminate" various Kurdish
villages; and (iii) reports on the burning of villages and scattered
houses. As to al-Douri's intent, the IHT concluded that he "premedi-
tated" the destruction, citing numerous documents sent to the General
Military Intelligence Directorate and Intelligence Services. At least one
of these documents, reporting on the demolition of villages, was signed
by al-Douri.

As already discussed above, there is an issue of whether the IHT
found that the destroyed property was that of an "adversary," as the crime
requires. If that is read to mean a "military adversary"—and logic sugg-
ests such a reading, because civilians are not "adversaries"—then that

743.  Strugar Trial Judgment, supra note 240, ¶ 1282.
744.  Al Anfal Trial Chamber Judgment, supra note 2, at 501 (noting that estimates of
civilian deaths reach as high as 182,000).
745.  Id. at 882.
746.  Id. at 886 (citing Doc. No. 1122, Aug. 21, 1988).
747.  Id. at 893.
748.  Id. at 893-95. As to the lack of military necessity, the IHT concluded that "war
operations did not make destroying those properties or seizing them a necessity." Id. at 892. It
also characterized the destruction as a "scorched earth policy." Id.
749.  For the elements of the war crime of destroying or seizing the enemy's property, see
supra note 402.
element has not been shown. Accordingly, it is unclear if the elements of this crime were satisfied.

**Individual Criminal Responsibility**

While, once again, the IHT did not specifically state al-Douri's form of individual responsibility, it did state that he "participated with other suspects in a joint criminal [enterprise]" to perpetrate law of war violations, and that he followed "a joint criminal plan" in targeting civilians for attack. This language suggests that al-Douri was found to be a participant in a joint criminal enterprise. As mentioned above, the factual requirements of joint criminal enterprise responsibility appear to be met, and the IHT here found that al-Douri contributed to implementing the criminal plan. Because the IHT concluded that there was premeditation as to both war crimes, those findings would arguably suffice to show shared intent if the "type 1" joint criminal enterprise were narrowly defined.

Thus, although the Tribunal's analysis is far from clear and has some gaps, al-Douri's convictions generally appear supported by the factual findings of the Trial Chamber. As to the genocide conviction, the IHT should have been more specific as to whether it was based on aiding and abetting genocide or co-perpetration. Because the responsibility of an aider and abettor is generally regarded as less than that of a co-perpetrator, this lack of clarity could have impacted on al-Douri's sentencing, and the vacillation as to legal theory also suggests legal error. It is also unclear whether one of the war crimes, destroying the property of an adversary, was shown.

**F. Farhan Mutlaq al-Jaburi**

The Tribunal's conviction of al-Jaburi for genocide appears to be supported by the facts found by the Trial Chamber. While al-Jaburi was not directly involved as a key perpetrator, the IHT found that he provided intelligence that assisted the Anfal campaigns. The primary

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750. See, e.g., *Al Anfal Trial Chamber Judgment*, supra note 2, at 594 (discussing destruction of villages and villagers' property).
751. *Id.* at 872, 883.
752. See, e.g., supra Part II.B.2 (discussing Majid's individual criminal responsibility for genocide).
753. *Krnojelac Appeals Judgment*, supra note 338, ¶ 84 (noting that a "type 1" joint criminal enterprise requires shared intent).
754. See caveats supra note 98.
755. See *Trahan*, ICTY DIGEST, supra note 228, at 441 (discussing cases that support the proposition that "responsibility of an aider and abettor is less than a participant in a joint criminal enterprise").
756. See caveats supra note 98.
concern regarding his conviction is that although the IHT suggested that al-Jaburi was a "contributor" or "collaborator," it does not further identify his particular form of responsibility—such as aiding and abetting or co-perpetration of a joint criminal enterprise. Arguably, this failing may have had an adverse impact on al-Jaburi's sentence. While there are gaps in the Tribunal's legal analysis, the factual findings generally support a conviction of aiding and abetting genocide and participating in a joint criminal enterprise as to crimes against humanity.

1. The Tribunal's Conclusions as to al-Jaburi's Role in the Anfal

The IHT found that al-Jaburi was Director of the Northern Intelligence System and then Director of the Eastern Intelligence System effective November 2, 1987.

Some of the key evidence on which the IHT relied in convicting al-Jaburi includes documents discussing destroyed villages, field executions without trial, detention of families, and the use of chemical weapons, including against village residents. The IHT also relied on the testimony of defendants al-Douri, Hussein Rashid, and Sultan Ahmad that al-Jaburi was "in charge of transferring families[,] including children, women and elders[,] from their villages to the Northern Organization Office." Al-Jaburi denied that role. Defendant Majid also testified that the Eastern and Northern Zones' Intelligence Systems were under al-Jaburi's authority and received orders from Majid.

Three witnesses testified on behalf of the defendant, one as a character witness, and two others testified that they never saw al-Jaburi commit crimes. Al-Jaburi's primary defense was that his role solely pertained

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757. This is in addition to the fair trial issues and lack of adequate appellate review. See caveats supra note 98.
758. Al Anfal Trial Chamber Judgment, supra note 2, at 917.
759. See id. at 901–02 (citing Doc. No. 384, signed by al-Jaburi, which includes a list of villages destroyed within the Eastern System sector between October 15, 1987, and November 1, 1987).
760. Id. at 902, 919 (citing Doc. No. 1289, which regards carrying out field executions against "criminals" without trial). Al-Jaburi confessed that field executions were carried out without trial, but stated that this was pursuant to Majid's orders. Id. at 919.
761. Id. at 903 (citing Doc. No. 15055, which discusses the detention of two families that took refuge in a prohibited zone and were transferred to a Security Directorate).
762. Id. at 902, 921 (citing Doc. No. 13613, which regards chemical weapons attacks conducted on the Balisan Area that killed both "saboteurs" and village residents).
763. Id. at 918.
764. Id. at 911.
765. Id. at 907.
766. See id. at 915–16.
to gathering information. As to his intentions, al-Jaburi argued that he was only "following orders."

The IHT ultimately found that al-Jaburi’s duties were “to survey hostile and Kurdish villagers’ activities” and “to provide sufficient information about targeted villages.” Specifically, the IHT found that “he used to provide detailed information and reports on targeted villages, enemy’s positions, number of forces, type of weapons, and results of chemical and conventional weapons’ attacks over villages and Kurdish fighters [Peshmerga,] identifying the points of strength and weakness.” He also “monitored the movements of families, [and] submitted information regarding victims and [those] injured by chemical weapons.” The IHT also found that al-Jaburi was aware of the Anfal plans, and was “in charge of sending Kurdish villagers to [the] North[ern] Organization Office, supervising interrogations, executing detainees and notifying [defendant Majid] about all details.”

2. Al-Jaburi’s Genocide Conviction(s)

The IHT convicted al-Jaburi of killing as a form of genocide. He may have also been convicted of causing serious bodily or mental harm as a form of genocide, but this is unclear, as there is a discrepancy between the body of the Trial Chamber judgment—which states that al-Jaburi was convicted on both counts—and the final summation of the convictions—which states that he was only convicted of the underlying crime of killing.

The key flaw of al-Jaburi’s conviction is that the IHT convicted him under Articles 15(1) and 15(2) of the IHT Statute (which cover all forms of individual responsibility), rather than selecting the appropriate form. Notwithstanding, it appears that al-Jaburi’s conviction for genocide has foundation if one accepts the Tribunal’s factual findings. While the IHT, in discussing al-Jaburi, does not separately address whether or not

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767. See id. at 912.
768. Al-Jaburi testified that he was “doing his job” and that “no one dares to refuse [Majid’s] orders.” Id. at 911.
769. Id. at 917.
770. Id.
771. Id.
772. Id. at 921.
773. Id. at 918.
774. Id. at 922.
775. Id.
776. Id. at 943.
777. IHT Statute, supra note 12, arts. 15(1), 15(2).
778. See caveats supra note 98.
genocide occurred, the facts clearly suggest that it did. The part of the Trial Chamber judgment discussing al-Jaburi also does not appear to analyze the elements of genocide’s underlying crimes at issue. This is somewhat troubling, but there is little doubt that the crimes did occur during the Anfal campaign. Those findings have also been previously analyzed in this Article.

**Individual Criminal Responsibility**

As to individual criminal responsibility, the Trial Chamber concluded that there was no “direct evidence[ ]” of criminal intent to commit genocide, that is, al-Jaburi had no intent to partly or completely eradicate Kurdish nationals. Rather, because his role was to gather information and submit it to defendant al-Douri, and there was no evidence of al-Jaburi’s participation in decision-making, the IHT concluded that al-Jaburi “contributed” to committing genocide. The judgment also refers to him as “collaborating” in committing genocide. The IHT found that “by helping in targeting and providing information after launching attacks,” al-Douri “facilitate[d] and helped the continuation of the... attacks and murder.”

Al-Jaburi’s form of responsibility, might, for example, appropriately be characterized as that of an aider and abettor. For aiding and abetting genocide, the law requires that

> [t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime...

This standard arguably would be met by the Tribunal’s factual findings. The Trial Chamber found that al-Jaburi provided “detailed information and reports on targeted villages, enemy’s positions, number of forces, type of weapons, and results of chemical and conventional weapons’ attacks over villages and Kurdish fighters [Peshmerga] identifying the points of strength and weakness,” and concluded that he “vastly helped

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780. *See supra* Parts II.B.2, II.C.2, II.D.2, II.E.2 (analyzing genocide’s underlying crimes in relation to Majid, Sultan Ahmad, Hussein Rashid, and al-Douri).

781. *Al Anfal Trial Chamber Judgment, supra* note 2, at 919.

782. *Id.* at 920.

783. *Id.* at 922.

784. *Id.* at 920.

785. *Blaškić Appeals Judgment, supra* note 712, ¶ 45.

786. *Al Anfal Trial Chamber Judgment, supra* note 2, at 917.
committing genocide." The would seem to roughly satisfy the requirements of both assisting and that the assistance had a "substantial effect" on the perpetration of the crimes.

As to the mental state for aiding and abetting genocide, "an individual who aids and abets a specific intent offense may be held responsible if he assists the commission of the crime knowing the intent behind the crime." Here, the IHT found that al-Jaburi was aware of the Anfal plans and that he "knew that the attacks were not military-conventional ones." The IHT also concluded that he was "fully aware and acknowledged that his acts contributed to the crime." This appears again to roughly satisfy the legal requirements.

Accordingly, it appears that the Trial Chamber's factual findings support al-Jaburi's conviction of genocide. However, by finding al-Jaburi guilty of genocide and not aiding and abetting genocide, a sentencing error may have resulted. As noted above, there is law that "aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator." Because the IHT never articulated its reasoning for sentencing al-Jaburi to life in prison rather than death, it is unclear whether it considered this lesser responsibility. It is also possible that his lesser sentence reflects that he was convicted on fewer counts than the other convicted defendants. Arguably both factors, as well as the fact that he acted under orders, should have been reflected in his sentence.

3. Al-Jaburi's Crimes Against Humanity Convictions

The Trial Chamber also convicted al-Jaburi of willful killing and deportation or forcible transfer of population as crimes against humanity. These convictions seem reasonable based on the facts found by the Tribunal. The primary problem again appears to be the limited legal analysis of individual criminal responsibility. This Article will not re-examine the chapeau requirements for crimes against humanity here,

787. Id. at 922.
788. Krstić Appeals Judgment, supra note 146, ¶ 140.
789. See Al Anfal Trial Chamber Judgment, supra note 2, at 921 (citing Doc. Nos. 4008 and 3650).
790. Id. at 922.
791. Id.
792. Vasiljević Appeals Judgment, supra note 234, ¶ 182; Krstić Appeals Judgment, supra note 146, ¶ 268 (noting that the same standard applies under ICTR law and in many national jurisdictions).
793. Al Anfal Trial Chamber Judgment, supra note 2, at 911 (summarizing al-Jaburi's testimony).
794. Id. at 944.
795. See caveats supra note 98.
other than to note that the requirements that are defendant-specific appear to have been roughly satisfied as to al-Jaburi. 796

First Underlying Crime: Willful Killing

As to this first underlying crime, the IHT relied on reports submitted by al-Jaburi regarding the targeting of villages and the results of conventional and chemical weapons attacks. 797 It also relied on its finding that al-Jaburi knew of the Anfal operations, and was “fully aware of [Majid’s] orders to launch systematic large scaled attacks against Kurdish civilians, killing those residing in prohibited zones.” 798 The IHT additionally found that al-Jaburi “was aware” that the chemical weapons, by nature, did not “differentiate between a civilian and [a] fighter.” 799 The IHT concluded that al-Jaburi played a direct role in making the attacks easier for the army where he provided intelligence reports concerning the nature and efficiency of attacks’ locations, analyzing hostile forces’ stance, their points of weaknesses and strength. Even though he did not recommend the use of chemical weapons, he gave reports on their efficiency. Based on that, he is considered as contributor in achieving the criminal result . . . . 800

The IHT concluded that “based on [al-Jaburi’s] participation,” he “provided help and encouragement” for launching “systematic wide scaled attacks against Kurdish civilians in Northern Iraq, using conventional and chemical weapons.” 801

Based on these facts found by the Trial Chamber, it seems that the elements of the underlying crime—specifically, (i) murder; (ii) causation or substantial contribution; 802 and (iii) intent 803—were met. The IHT found that many Kurdish men, boys, women, children, and elderly were

796. Specifically, the IHT found that al-Jaburi’s acts “provided help and encouragement for the attacks.” Al Anfal Trial Chamber Judgment, supra note 2, at 920. Furthermore, the facts as found by the Tribunal seem to suggest that al-Jaburi knew of the wider context in which his acts occurred. The IHT found that al-Jaburi was “fully aware” of Majid’s “orders to launch systematic large scaled attacks against Kurdish civilians, killing those residing in prohibited zones.” Id. at 926. It also concluded that al-Jaburi “played a very essential and important role in making the operation successful.” Id.

797. Id. at 924.
798. Id. at 926 (referring to the operations as articulated in Doc. Nos. 4008 and 3680).
799. Id.
800. Id.
801. Id. at 927.
802. For a discussion of the “substantial contribution” requirement, see supra note 195.
803. For a full articulation of the elements, see supra Part II.B.3.
murdered as part of the Anfal campaign. As to whether al-Jaburi’s actions were a substantial cause of some of the deaths, that appears met based on the Tribunal’s conclusion that al-Jaburi “played a very essential and important role in making the [Anfal] operation successful.”

As to mental state, the IHT concluded that, based on his role, al-Jaburi had “intentions to launch a systematic large scaled wide-range attack,” and that murder was “premeditated.”

Second Underlying Crime: Deportation or Forcible Transfer

Based on the IHT’s finding that al-Jaburi’s role included transporting Kurdish civilians to Northern Organization Office, the IHT concluded that he was also responsible for deportation or forcible transfer as a crime against humanity. The IHT appears also to offer an alternative theory that even if al-Jaburi were not involved in displacements, because of his role in facilitating the attacks using chemical and conventional weapons, displacement was “expected as a possible logical consequence.”

To show forcible displacement, it is necessary “that the displacement takes place under coercion”—that is, “where the persons concerned had no real choice.” Here, entire villages of individuals in so-called “prohibited zones” were displaced under conditions that clearly indicated that the alternative of staying would likely lead to death. Moreover, defendants al-Douri, Hussein Rashid, and Sultan Ahmad all testified that al-Jaburi was involved in transporting Kurdish villagers to the Northern Organization Office. A document signed by al-Jaburi, which discusses transfer of two families from a prohibited zone, would seem to provide further support. Accordingly, it is clear that displacements occurred and that they were not permissible under international law.
Individual Criminal Responsibility

With regard to both crimes against humanity convictions, the IHT convicted al-Jaburi under Articles 15(1) and 15(2) of the IHT Statute (i.e., all forms of responsibility), thereby again failing to identify any particular form of responsibility. The IHT also does virtually no analysis of individual criminal responsibility. At one point, the IHT characterized al-Jaburi as a “contributor”; this suggests that the IHT may have found him to be a co-perpetrator of a “type 1” joint criminal enterprise. At another point, the IHT stated that he provided “help,” “encouragement,” and “support[,]” which suggests aiding and abetting responsibility. Again, because co-perpetration is generally seen as more serious than aiding and abetting, the failure to be more definitive could have caused a sentencing error (at least under international standards).

When analyzing the situation as a joint criminal enterprise (which, on balance, appears to be what the IHT suggests), the necessary elements appear present. Here, (i) the plurality of persons would be the five convicted defendants plus added individuals; (ii) the IHT found that there was a “joint criminal plan”; and (iii) the IHT found that al-Jaburi “participated in [the joint criminal plan by] killing civil[ian] residents [who were] Kurds.”

As to the mental state, for a “type 1” joint criminal enterprise, that requires shared intent, which might be as limited as shared intent to commit one crime. Accordingly, it is possible that the findings of “premeditated murder” as to willful killing and a finding of “joint criminal initiation,” which presumably means “joint criminal intent,” as to deportation or forcible transfer, would suffice for individual criminal responsibility if the part of the plan that al-Jaburi was said to have been involved in were articulated narrowly enough.

Alternatively, the IHT also suggested that displacement was a “normal and predictable consequence[] of using chemical and conventional

813. Id. at 927, 929 (page 929 is erroneously labeled as a second page 517); see IHT Statute, supra note 12, arts. 15(1), 15(b).
814. Al Anfal Trial Chamber Judgment, supra note 2, at 926.
815. For discussion of a “type 1” joint criminal enterprise, see supra note 234.
816. Al Anfal Trial Chamber Judgment, supra note 2, at 927.
817. Id. at 929 (page 929 is erroneously labeled as a second page 517).
818. Vasiljević Appeals Judgment, supra note 234, ¶ 73.
819. See supra note 420.
820. Al Anfal Trial Chamber Judgment, supra note 2, at 926.
821. Id. (finding that al-Jaburi acted under orders issued in Doc. Nos. 4008 and 3650).
823. See supra note 736.
824. Al Anfal Trial Chamber Judgment, supra note 2, at 926.
825. Id. at 929 (page 929 is erroneously labeled as a second page 517).
This suggests a "type 3" joint criminal enterprise. One would also need a finding that al-Jaburi took the risk that displacement might occur by participating in the Anfal campaign, which again seems to be a reasonable conclusion based on the facts found by the Trial Chamber (although one not explicitly made). Accordingly, it also seems possible that there was a "type 3" joint criminal enterprise.

Thus, the Tribunal's most significant failing is not characterizing al-Jaburi's role as warranting any particular form of responsibility. Al-Jaburi's genocide conviction(s) appear(s) to be supported by the factual evidence as found by the Trial Chamber, but the conviction(s) arguably should have been for aiding and abetting genocide. As to the two crimes against humanity convictions, they appear to have foundation if willful killing is evaluated as a "type 1" joint criminal enterprise, and deportation or forcible transfer is evaluated as a "type 1" or "type 3" joint criminal enterprise, although that vacillation suggests legal error. Given that an aider and abettor generally is seen to bear less responsibility than a perpetrator, the Tribunal's failure to differentiate between co-perpetration and aiding and abetting genocide may have had an erroneous impact on sentencing. An argument could be made that if al-Jaburi were an aider and abettor of genocide, then because he acted under orders, and because he was convicted on fewer counts than any of the other convicted defendants, his sentence of life in prison is too stringent.

In conclusion, many of the Trial Chamber's convictions appear to be sound. Given the standard of proof of "beyond a reasonable doubt," some of the flaws noted in this Article suggest that certain of the convictions, however, should not stand. In the future, the IHT should be more precise as to which form of individual criminal responsibility it is finding and whether the requisite mental state was established by the evidence. The IHT should also not present alternative theories as to part of its convictions, but reach definitive conclusions. Again, given the fair trial issues that exist, as well as the flaws in appellate review, this Article does not necessarily suggest that even as to convictions where all of the elements of the crimes were established, the convictions should necessarily stand. Ideally, a mechanism would be found so that there could be genuine appellate review of the trial.

826. Id. Again, the IHT should not make findings in the alternative.
827. For discussion of a "type 3" joint criminal enterprise, see supra note 342 and accompanying text.
828. See Al Anfal Trial Chamber Judgment, supra note 2, at 911 (summarizing al-Jaburi's testimony).
829. See supra Part I.C; see infra Part III.
III. THE CASSATION CHAMBER JUDGMENT

After the Trial Chamber rendered its decision in the Anfal case, both sides had thirty days to file appellate briefs.\(^{830}\) Not long thereafter, on September 4, 2007, the Cassation Chamber rendered its decision, affirming all convictions on all counts. This Article has two primary concerns with the appeals process. First, after this extremely complex trial and extremely lengthy Trial Chamber judgment, a mere thirty days to file appellate briefs was palpably inadequate. Second, the quality of the Cassation Chamber judgment does not suggest that there was any serious legal review.

A. Inadequate Time for Filing for Appeal

The thirty-day time period given to appeal appears to be wholly inadequate, and potentially a violation of the right to an appeal and the right to adequate time and facilities for the preparation of a defense. "The right to adequate time and facilities to prepare the [defense] applies both to the accused and their lawyer at all stages of the proceedings, including before the trial and during any appeals."\(^{831}\) What constitutes "adequate" time depends on the nature of the proceedings and the factual circumstances of a case.\(^{832}\) "Factors to be taken into account include the complexity of a case, the defendant’s access to evidence, the time limits provided for in domestic law for certain actions in the proceedings, etc."\(^{833}\)

The Anfal case was extremely complex. It put at issue multiple charges of genocide, war crimes, and crimes against humanity, regarding defendants who played different roles in the Anfal campaign. The complexity of filing appellate briefing was only increased by the fact that the Trial Chamber judgment was repeatedly opaque as to which form of individual criminal responsibility it found. Moreover, the Trial Chamber judgment on which the appeal was based was 963 pages in length, covering a trial that lasted fifty-nine days, with a voluminous trial

\(^{830}\) See IHT Statute, supra note 12, art. 16 ("The Tribunal shall follow the rules of procedure provided for in the Criminal Procedure Law 23 of 1971 and the Rules of Procedures and Evidence appended to this Law"); Iraq Code of Criminal Procedure, supra note 72, art. 252(A) (stating that a petition for appeal must be presented "within a period of thirty days, starting from the day after the judgement was issued").


\(^{833}\) Id. (emphasis added).
To compound matters, there appears to have been a delay in getting the Trial Chamber judgment to defense counsel, so that they did not in fact have access to the judgment for the entire thirty-day period.

B. The Lack of Serious Review Suggested by the Cassation Chamber Judgment

The Cassation Chamber judgment also appears to have been the product of a rushed review process that failed to seriously grapple with substantive and procedural issues. While the Cassation Chamber judges did issue a written decision (twenty-eight pages in length), the decision primarily recites the convictions against each defendant; lists some, but not all, of the arguments raised on appeal by the defendants; and recites what appear to be the Trial Chamber's conclusions as to the role that each defendant played with respect to the Anfal campaign. The judgment, however, does not seriously grapple with the procedural and fair trial challenges presented, examine the elements of any of the crimes or individual criminal responsibility, or respond to a plethora of the defendants' arguments raised on appeal. This lack of serious appellate review may have risen to the level of a violation of the right to review by a higher tribunal.

The IHT Statute suggests that the appellate review will cover: (i) errors of law; (ii) errors of procedure; and/or (iii) material errors of fact that led to a violation of justice. Here, there appears to have been no "genuine review." The Cassation Chamber Judgment commences with an eight-page recitation of the convictions reached by the Trial Chamber. It then recites some—but by no means all—of the arguments raised on appeal.

834. At the ICTY and ICTR—both of which adjudicate similarly complex cases—the time provided to defendants to file for appeal is considerably longer. The ICTY and ICTR require that a notice of appeal be filed within thirty days after the judgment is pronounced. This notice need only identify the "grounds of the appeal," Int'l Crim. Trib. for Rwanda, Rules of Evidence and Procedure, Rule 108, U.N. Doc. ITR/3/Rev.1 (June 29, 1995) [hereinafter ICTR Rules of Evidence and Procedure] (emphasis added), or the "order, decision or ruling challenged, and the substance of the alleged errors and the relief sought." ld. (emphasis added). An appellant's brief setting out all arguments must be filed within seventy-five days after the notice of appeal at the ICTY, meaning 105 days in total, Int'l Crim. Trib. for the Former Yugoslavia, Rules of Evidence and Procedure, Rule 111(a) U.N. Doc. IT/32/Rev.38 (June 13, 2006), or within ninety days of the "certification of the trial record by the Registrar" at the ICTR, ICTR Rules of Evidence and Procedure, supra, Rule 111.

835. Al Anfal Cassation Chamber Judgment, supra note 19, at 2–10 (Iraqi High Trib. 2007) [hereinafter Al Anfal Cassation Chamber Judgment].

836. The right to review by a higher tribunal has been construed to require a "genuine review of the issues in the case." FAIR TRIALS MANUAL, supra note 831, at 26.3.

837. IHT Statute, supra note 12, art. 25.


839. For example, Sultan Ahmad raises approximately thirty-six arguments in his appellate brief. See Brief for Sultan Hashim Ahmad, Al Anfal, Case No. 1/CSecond/2006, Cassation
appeal by the defendants. Furthermore, the substance of the Cassation Chamber decision occupies fourteen pages. While this Article does not suggest that the merits of a decision should be judged based on length alone, potential errors in a 963-page judgment cannot possibly be addressed in fourteen pages. The Cassation Chamber never examines the \textit{chapeau} requirements of the three crimes—genocide, war crimes, and crimes against humanity—although it occasionally recites some of the language pertinent to the \textit{chapeau} in passing, but without giving any sense that the Cassation Chamber judges realized the importance of these \textit{chapeau} elements. It mentions some of the underlying crimes, but again, without any reference to their elements. It does very little examination as to individual criminal responsibility, and the limited analysis it does provide leaves one guessing as to what form of individual criminal responsibility the Cassation Chamber thought the Trial Chamber had found and whether or not the elements had been shown. The Cassation Chamber devotes a single paragraph to fair trial issues—cursorily dismissing issues (i) as to the legitimacy of the tribunal, (ii) that defense witnesses and experts did not testify, and (iii) as to the adequacy of the charges—in a few sentences each. It is thus palpably inadequate in many respects—so inadequate, that it arguably should not be regarded as appellate review.

\section*{Conclusion}

It is exceedingly difficult to conduct document- and witness-intensive trials regarding extremely complex crimes, involving multiple defendants, and complicated standards of individual criminal responsibility, especially when the judges have not had prior experience in adjudicating such cases. That said, it appears that there were both numerous fair trial problems associated with the Anfal trial, and that the Trial Chamber judges crafted a fairly well done Trial Chamber judgment supported by the evidence. There are two primary faults with the Trial Chamber Judgment, 2–10 (Iraqi High Trib. 2007) (on file with author). However, the Cassation Chamber lists only three of them. \textit{Al Anfal Cassation Chamber Judgment, supra} note 19, at 11. Similarly, Hussein Rashid raises a large number of arguments in his appeal papers. \textit{See Brief for Husayn Rashid Mohammed, Al Anfal, Case No. 1/CSecond/2006, Cassation Chamber Judgment, 2–10} (Iraqi High Trib. 2007) (on file with author). However, the Cassation Chamber notes approximately four of them. \textit{Al Anfal Cassation Chamber Judgment, supra} note 19, at 11.

840. \textit{Al Anfal Cassation Chamber Judgment, supra} note 19, at 10–12.

841. \textit{Id.} at 13–27.

842. The type of review of the Trial Chamber judgment that this Article has attempted—while undoubtedly imperfect—suggests the type of review that the Cassation Chamber should have attempted.
Chamber judgment. The Trial Chamber judges: (i) did not seriously address fair trial issues; and (ii) should have analyzed individual criminal responsibility more carefully, making clear which form of responsibility they found. Despite these criticisms, as to most counts, the required elements appear present in the Tribunal’s factual findings—although this Article suggests that as to the defendants other than Majid, the genocide convictions arguably should have been for aiding and abetting genocide because the IHT never found (or consistently found) that the other defendants possessed the intent necessary for genocide. By contrast, the Cassation Chamber judgment appears so flawed that it raises the issue of whether serious review was intended or attempted, or whether the Cassation Chamber may have, in effect, been acting politically and not as a judicial review chamber.

The Anfal campaign was an extraordinarily brutal one conducted by the Iraqi regime against its Kurdish citizens. The significance of the Anfal trial is difficult to overstate. Senior leaders of the regime were forced to face justice for horrific crimes. These trials presented an historic opportunity to create a solid record of the crimes, and bring at least some measure of justice to the victims. Unfortunately, the danger of trials not fully conducted pursuant to international fair trial standards is that they subject the verdict to lingering questions: Was the trial fair? Was justice achieved? The fact that the Trial Chamber judgment and Cassation Chamber judgment both fail to deal seriously with fair trial issues was a lost opportunity to put some of these fairness questions to rest. The lack of serious appellate review also undermined the largely solid work that was put into the Trial Chamber opinion. Victims who testified were clearly given a voice, and official listeners—the IHT judges—gave them their due. Unfortunately, however, because the IHT has no outreach program, and it is unlikely that many members of the public will read the 963-page Trial Chamber judgment, the achievements (and failings) of the trial will also be obscured. The victims deserve that the public know about these crimes by the former Iraqi regime, and deserve the creation of a solid historical record, free from doubt. It is hoped that the victims will feel at least a degree of solace in knowing that at least some justice was done through the Anfal trial, despite its flaws.
APPENDIX: Overview of the Convictions

As explained in detail in this Article, and subject to caveats previously discussed regarding unresolved fair trial problems and lack of adequate appellate review that leave lingering problems as to all convictions, this Article concludes:

As to Ali Hassan al-Majid: The Tribunal’s factual findings suggest that he was basically the “architect” of the entire Anfal campaign. He was responsible for two seriously incriminating documents—Document Nos. 4008 and 3650—which set forth the plan to commit most of the Anfal crimes. Furthermore, the Tribunal’s findings as to his intentions appear to be amply supported by audiotape played at trial in which he discusses using chemical weapons against the Iraqi Kurds.\(^{843}\) The facts found by the Tribunal support the Tribunal’s legal conclusion that genocide occurred, and that the three underlying crimes of genocide as to which Majid was convicted occurred. In terms of individual criminal responsibility, the facts also appear to support Majid’s convictions for committing genocide as a participant in a joint criminal enterprise and ordering genocide. The three underlying crimes (and thus three counts of genocide) as to which he was convicted were: killing members of the group, causing serious bodily harm to members of the group, and intentionally inflicting upon the group conditions calculated to destroy the group in whole or in part. His crimes against humanity convictions (willful killing, extermination, deportation or forcible transfer, imprisonment, torture, enforced disappearances, and other inhumane acts) appear well-founded, as do four of the five war crimes convictions (intentionally directing attacks against the civilian population, ordering the displacement of the civilian population, intentionally directing attacks against protected buildings, and pillage).\(^{844}\)

As to Sultan Hashim Ahmad: The Tribunal found that he commanded the 1st Corps troops who perpetrated part of the Anfal campaign.\(^{845}\) This Article suggests that as to his genocide

\(^{843}\) The Tribunal’s findings as to Majid’s role in the Anfal are detailed more thoroughly in Part II.B.I.

\(^{844}\) This Article has some questions as to whether the elements of “destroying or seizing the property of an adversary” were proven. Furthermore, as previously mentioned, this Article does not advocate that the death penalty be implemented as to any defendant.

\(^{845}\) The Tribunal’s findings as to Sultan Ahmad’s role in the Anfal are detailed more thoroughly in Part II.C.I.
conviction, based on the facts found by the Tribunal, and, in particular, the Tribunal's findings as to mental state, his genocide convictions should have been for aiding and abetting genocide because, on balance, the Tribunal appears to have found that it was Majid who possessed genocidal intent, and, knowing of that intent, Sultan Ahmad nonetheless knowingly participated in the Anfal. Three of the five crimes against humanity convictions also appear to have foundation (willful killing, imprisonment, and other inhumane acts). This Article, however, does find flaws with the crimes against humanity convictions based on deportation and extermination. Two of the four war crimes convictions appear to have foundation (intentionally directing attacks against the civilian population and intentionally directing attacks against protected buildings). This Article, however, has concerns regarding the war crime of ordering the displacement of the civilian population, as the Tribunal's reasoning appears to vacillate as to which form of individual criminal responsibility was found. As to the final war crime (destroying or seizing the property of an adversary), an element of the crime may not have been proven. Because (i) certain of Sultan Ahmad's convictions appear flawed, (ii) under international legal standards (made relevant under the IHT Statute), the responsibility of an "aider and abettor" is less than that of a co-perpetrator, and (iii) Sultan Ahmad invoked the defense of "following orders," which permits mitigation of punishment, imposition of the death penalty is not warranted.

As to Hussein Rashid al-Tikriti: The Tribunal found that Hussein Rashid, as former Chief of Army Staff's Deputy for Military Operations, participated in planning and providing supplies for the Anfal operations. This Article suggests that the death penalty seems too severe compared to the sentence of the other defendants because (i) the evidence suggests that his role was more comparable to that of defendants al-Douri and al-Jaburi, who were given life sentences, and (ii) Hussein Rashid invoked the defense of "following orders." As to genocide, the facts as found by the IHT, and, in particular, the Tribunal's findings as to mental state, suggest that his convictions should, at most, have been for aiding and abetting genocide. There does, however, appear to be foundation for his two crimes against humanity convictions (murder and extermination), and his two war crimes.

846. The Tribunal's findings as to Hussein Rashid's role in the Anfal are detailed more thoroughly in Part II.D.I.
convictions (intentionally directing attacks against the civilian population and intentionally directing attacks against protected buildings).

**As to Sabir Abd al-Aziz al-Douri:** The Tribunal found that al-Douri, as former Staff Major General and Director of the General Military Intelligence Directorate, provided intelligence regarding the Anfal campaign. There is a lack of clarity as to whether the Tribunal found that he aided and abetted genocide or was a co-perpetrator. If he was an aider and abettor, there could have been a sentencing error. (The ambiguity alone also potentially suggests error.) The fact that he invoked the defense of "following orders" also suggests mitigation could be warranted. While the Tribunal’s analysis has some gaps, the one crimes against humanity conviction (willful killing) appears to have foundation, and at least one of the war crimes convictions appears to have foundation (intentionally directing attacks against the civilian population). As to the war crime of destroying or seizing the property of an adversary, an element of the crime may not have been proven. Any error as to the convictions should be considered regarding his sentence.

**As to Farhan Mutlaq al-Jaburi:** The Tribunal found that al-Jaburi, as former Director of the Northern and then Eastern Intelligence Systems, provided intelligence regarding the Anfal campaign. This Article suggests that, based on the facts as found by the Tribunal, and, in particular, the Tribunal’s findings as to mental state, the genocide conviction(s) again should have been characterized as aiding and abetting genocide. The crimes against humanity convictions (willful killing, and deportation or forcible transfer) appear to have foundation (although the IHT’s vacillation as to legal theory suggests possible error as to the latter conviction). Because (i) al-Jaburi was at most an aider and abettor of genocide; (ii) he invoked the defense of “following orders”; (iii) he was convicted of fewer counts than any of the other convicted defendants; and (iv) there may have been an error as to one of those convictions, his sentence of life in prison appears too stringent.

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847. The Tribunal’s findings as to al-Douri’s role in the Anfal are detailed more thoroughly in Part II.E.1.
848. The Tribunal’s findings as to al-Jaburi’s role in the Anfal are detailed more thoroughly in Part II.F.1.
Because the Cassation Chamber judgment did not seriously review any of these issues, this Article has attempted to perform something akin to appellate-level analysis.