



# Recognising the killings of Iraqi Kurds as genocide

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Under Saddam Hussein's rule many thousands of Iraqi Kurds were killed over several decades. This included chemical weapons attacks, for instance at Halabja, and mass executions and internment, culminating in the 'Anfal' campaigns of 1988.

The UK does not officially recognise this as genocide, although several bodies (including courts in Iraq and the Netherlands) have done so. In the UK there is no clear process for officially recognising events as genocide, but the UK can prosecute people for genocide even if the events took place outside the UK (after 1991).

Under the [1948 Genocide Convention](#), genocide is defined as mass killings or other acts intended to destroy a particular group of people. States must prevent or punish genocide, individually or through the UN, and the International Criminal Court can be involved (for events after 2002).

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## 1 Were the killings of Iraqi Kurds genocide?

During Saddam Hussein's rule, Iraqi Kurds were subject to often severe repression and mass casualties, resulting in claims of genocide. The worst incident was in Halabja, where 5,000 civilian inhabitants are thought to have died in an aerial bombardment of mustard gas and nerve agents. A 1993 Human Rights Watch report said that 2,000 villages were destroyed, as well as dozens of towns and administrative centres, including Qala Dizeh which had had 70,000 residents.<sup>1</sup>

Human Rights Watch says a charge of genocide is justified in the case of the Iraqi military operations in 1988 (the "Anfal" campaign which caused the deaths of some 180,000 Iraqi Kurds), which it says far transcended legitimate counterinsurgency. The reasons it gives include the murder and disappearance of tens of thousands of non-combatants selected on the basis of their ethnic-national identity. It also cites the use of chemical and nerve agents against civilians; the near-total destruction of Kurdish assets and infrastructure; and the abandonment of large numbers of vulnerable people.

Following the US-led invasion of Iraq in March 2003, and the toppling of Saddam Hussein's government, the Supreme Iraqi Criminal Tribunal (SICT) was established. It has since tried former senior Ba'ath Party, army, security and government officials for gross human rights violations. The trial for abuses committed during the Anfal campaign concluded on 24 June 2007, six months after Saddam Hussein was executed. Three of the six defendants – Ali Hassan al-Majid, Sultan Hashim Ahmad al-Ta'i and Hussain Rashid al-Tikri – were sentenced to death for war crimes and crimes against humanity. Ali Hassan al-Majid – known as Chemical Ali – was also convicted of genocide. The SICT Appeals Chamber confirmed the death sentences on 4 September 2007.

In 2005, a Dutch court had also ruled that the killing of Iraqi Kurds by Saddam Hussein's regime was an act of genocide. It sentenced a trader to 15 years in jail for selling the chemicals used in the gas attacks.<sup>2</sup>

## 2 United Nations action on the killings

The legal authority for the SICT flowed from the acceptance by the United Nations of the Coalition Provisional Authority (CPA) as the legitimate occupying power in Security Council Resolution 1483.<sup>3</sup> The resolution called for an accountability mechanism "for crimes and atrocities committed by the previous Iraqi regime,"<sup>4</sup> and the CPA duly issued a regulation setting up the SICT. Unlike other internationally-backed courts, however, the SICT included only Iraqi judges and prosecutors and followed the Iraqi criminal procedure. Behind the scenes, a large amount of international advice and support was provided to the process, particularly from American and British lawyers with the CPA.<sup>5</sup> However, it was considered politically wise for the process to be seen as an Iraqi one.

Although the international community gave Iraq the responsibility for prosecuting senior officials from the old regime in Iraq, both the UN Assistance Mission to Iraq (UNAMI) and the UN High Commission for Refugees (UNHCR) continued to work in Northern Iraq to alleviate

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<sup>1</sup> [Genocide in Iraq: the Anfal Campaign Against the Kurds - a Middle East Watch Report](#), Human Rights Watch, July 1993

<sup>2</sup> "Dutch court says gassing of Iraqi Kurds was 'genocide'", *Independent*, 24 December 2005; "[Killing of Iraq Kurds 'genocide'](#)", *BBC news*, 23 December 2005

<sup>3</sup> [UN Security Council Resolution 1483](#), 22 May 2003, preamble.

<sup>4</sup> [UN Security Council Resolution 1483](#), 22 May 2003, preamble

<sup>5</sup> International Bar Association, *Iraqi High Tribunal* [accessed 20 January 2011]

the continuing suffering caused by Saddam Hussein's policies. A referendum is due to be held on whether Kirkuk, subjected to a policy of "Arabisation" by Saddam, should be part of the Kurdistan region. UNAMI is conducting a programme to analyse, report on, and make recommendations on Kirkuk and on whether to integrate some Kurdish-inhabited cities in Diyala and Nineveh provinces into the Kurdistan Regional Government area.<sup>6</sup>

UNHCR continues to assist refugees and internally displaced persons in Iraq. While many Kurds have still to be resettled in Iraq, the Kurdistan region has become a magnet for refugees both from other parts of Iraq and from other countries. The relative stability of the Kurdistan region makes it attractive. Iraq has the one of the highest number of displaced persons in the world.

### 3 UK approach

The UK does not officially recognise the killings of Iraqi Kurds under Saddam Hussein's rule as genocide. Alastair Burt explained in a PQ answer in April 2012:

Whether or not the term "genocide" is appropriate, it is clear that an appalling atrocity was perpetrated against the Iraqi Kurds, not least at Halabja. They were among a number of minorities who were attacked by Saddam Hussein. It is noteworthy that his indictment at the end of the day was for crimes against humanity. So many suffered as a result of his activities and we should remember them all, as we remember the opportunities now created in Iraq for a new future.<sup>7</sup>

There are various ways in which the UK could be seen as recognising mass killings as genocide, but on the whole their effects would be political and symbolic rather than legal:

- The Government could make a statement, either written or oral or in response to a PQ.
- Parliament could pass a motion that the killings be recognised as genocide.
- A Select Committee report might conclude that the killings were genocide, in which case the Government could use its response to set out its views.
- An EDM could be laid calling for recognition of the killings as genocide. There have been several such EDMs, for example [EDM 1805 of 2007-08](#), tabled by Bob Spink:

That this House notes that the Supreme Criminal Court of Iraq has reached its verdict on the Anfal Campaign, declaring it to be a mass killing, a genocide, against the Kurdish people; and calls on the international community to respect the Court's decision and recognise the mass killing of Kurds as genocide.

- Parliament could pass an Act stating that the killings amounted to the crime of genocide. However, for such an Act to allow prosecutions it would have to have retrospective effect, which may be contrary to Article 7 of the *European Convention on Human Rights*. In any case, prosecution would not happen unless there was both a realistic prospect of conviction (is there sufficient evidence that can be used in court and is it reliable?) and a public interest in prosecuting.<sup>8</sup>

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<sup>6</sup> Kenneth Katzman, *The Kurds in Post-Saddam Iraq*, Congressional Research Service, 1 October 2010, p7

<sup>7</sup> [HC Deb 17 April 2012 c167](#)

<sup>8</sup> See for example the Crown Prosecution Service's [Code for Crown Prosecutors](#), ch. 5

The pros and cons of such recognition have been debated many times in both Houses, for instance in the House of Lords on 14 April 1999.<sup>9</sup>

Acts of genocide, crimes against humanity and war crimes – if committed after 1 January 1991<sup>10</sup> – are punishable in the UK, even if they were committed outside the UK by UK nationals or residents or by people subject to UK service jurisdiction.<sup>11</sup> For these purposes the UK has adopted the definitions given in the [Rome Statute](#) of the ICC. That definition of genocide is taken direct from the Genocide Convention,<sup>12</sup> and is supplemented by the ICC's "Elements of crimes" which give a (non-binding) interpretation.<sup>13</sup>

The UK also has a wider 'universal jurisdiction' over war crimes and a limited number of other serious international crimes.<sup>14</sup> This means that they are crimes under domestic law, regardless of where they are committed or by or against whom. The international crimes for which the UK has universal jurisdiction include: grave breaches of the four 1949 Geneva Conventions and its Additional Protocol I;<sup>15</sup> torture by or on behalf of persons acting in an official capacity;<sup>16</sup> hostage taking;<sup>17</sup> and certain other terrorist offences.<sup>18</sup>

#### 4 The definition of genocide

Although the word 'genocide' is often used colloquially, as shorthand for the deliberate mass-murder of civilians, its definition under international law is more specific. Genocide under international law requires both a material element (specific acts such as killing members of a racial group) and a mental element (those acts must have been committed with the specific intent to destroy a particular group).

Genocide is defined in the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* (often referred to as the Genocide Convention). After affirming that genocide is a crime under international law whether committed in time of peace or war, the Genocide Convention defines genocide as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

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<sup>9</sup> HL Deb 14 April 1999 cc813-34

<sup>10</sup> ICCA s65A (inserted by the *Coroners and Justice Act 2009*, s70)

<sup>11</sup> *International Criminal Court Act 2001* (ICCA) and *International Criminal Court (Scotland) Act 2001* (as amended)

<sup>12</sup> See ICCA s50

<sup>13</sup> See the *International Criminal Court Act 2001 (Elements of Crimes) (No 2) Regulations 2004*, SI 2004/3239

<sup>14</sup> See Library Standard Note SN/IA/5422, [Universal jurisdiction](#), 25 March 2010

<sup>15</sup> *Geneva Conventions Act 1957* and *Geneva Conventions (Amendment) Act 1995*

<sup>16</sup> *Criminal Justice Act 1988* s134

<sup>17</sup> *Taking of Hostages Act 1982* s1

<sup>18</sup> For offences in England and Wales to which universal jurisdiction applies, see *Halsbury's Laws of England* vol 11 'Criminal Law and Procedure', para 1061

In addition to the crime of genocide itself, the Genocide Convention outlaws conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.

The definition in the Genocide Convention is authoritative under international law and has subsequently been adopted word-for-word by the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as the statute of the International Criminal Court (ICC).

Nevertheless, there is inevitably much scope for interpretation as to whether a set of crimes crosses the thresholds set out in the Genocide Convention.

## **5 States' obligation to 'prevent or punish' genocide**

Article 1 of the Genocide Convention says genocide is a crime under international law that the contracting parties must prevent or punish. Any party may call upon the UN organs to take appropriate action to suppress acts of genocide, it says, but it does not make clear what that might be. Military intervention, for example, would normally have to be authorised by Security Council.

The obligation to act, some have argued, has in the past made states reluctant to accept that genocide is taking place, even where the evidence is strong. Conversely, those groups which believe that they are being subjected to serious human rights abuses may, quite understandably, argue that they are being subjected to genocide. And, of course, it will sometimes be true. However, by virtue of the fact that it is the most heinous of crimes against humanity, the threshold has to be an extremely high one.

In principle, where evidence strongly suggests that genocide is taking place and such claims can be rapidly verified, a designation should be made and action to prevent and punish should then follow. Where – as may often be the case – the evidence is more ambiguous, the claims may have to be tested.

In this context, the UN Security Council, if it has become seized of the matter, may refer the situation to the International Criminal Court (ICC).<sup>19</sup> The ICC can independently decide to investigate too, but only in relation to crimes committed on the territory of states that are members of the ICC or have accepted the ICC's jurisdiction, or by nationals or those states. In either case the ICC has no power to deal with events before 1 July 2002.

Another option, which happened with regard to Darfur for example, is that the UN may establish an independent panel to adjudicate. The UN International Commission of Inquiry on Darfur, contrary to the view expressed by the US government at the time, decided in 2005 that genocide was not taking place in Darfur.<sup>20</sup> However, the ICC Chief Prosecutor has since issued [arrest warrants](#) against President al-Bashir that cover crimes of genocide as well as war crimes and crimes against humanity.

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<sup>19</sup> See Library Research Paper 01/39, *The International Criminal Court Bill [HL] Bill 70 of 2000-2001*, 28 March 2001 and Standard Note 5042, *The International Criminal Court: Current Cases and Contemporary Debates*, 20 April 2009

<sup>20</sup> *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, 25 January 2005

## **6 Crimes against humanity and war crimes**

It is not a case of genocide or nothing: crimes against humanity and/or war crimes are extremely serious charges in their own right. Again, the ICC could be involved, or there could be a UN-mandated independent investigation into what has been taking place. Another route is via the UN Human Rights Council.

There is a degree of overlap between crimes against humanity, genocide and war crimes. The key difference between crimes against humanity and genocide is that the former do not require an intent to “destroy in whole or in part,” but only the targeting of a given group and carrying out a policy of “widespread or systematic” violations. Crimes against humanity are distinguishable from war crimes in that they apply not only in the context of armed conflict: instead they apply in times of both war and peace.