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## Did The Execution Of Baghdad Merchants In July Of 1992 Amount To Any Crimes Within The Jurisdiction Of The Iraqi Special Tribunal?

Pratheep Sevanthinathan

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CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW  
INTERNATIONAL WAR CRIMES RESEARCH LAB

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MEMORANDUM FOR THE  
THE IRAQI SPECIAL TRIBUNAL

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ISSUES:

DID THE EXECUTION OF BAGHDAD MERCHANTS IN JULY OF 1992 AMOUNT TO  
ANY CRIMES WITHIN THE JURISDICTION OF THE IRAQI SPECIAL TRIBUNAL?

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Prepared by Pratheep Sevanthinathan  
Summer 2005

## TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	iv
<b>I. <u>INTRODUCTION AND SUMMARY OF CONCLUSION</u>.....</b>	<b>1</b>
A. Issues.....	1
A. Summary of Conclusions.....	1
1. Members of the Former Regime Cannot Be Tried by the Iraqi Special Tribunal Under Article 11 of the IST Statute, Because No Genocide Has Occurred.....	1
2. Members of the Former Regime Can Be Tried by the Iraqi Special Tribunal Under Article 12 of the IST Statute for Crimes Against Humanity.....	2
3. Members of the Former Regime Can Be Tried by the Iraqi Special Tribunal Under Article 13 of the IST Statute for War Crimes, if there Is Proof that the Executions Were in Relation to an Armed Conflict.....	4
4. Members of the Former Regime Can Be Tried by the Iraqi Special Tribunal Under Article 14(a) of the IST Statute, Which Prohibits Outside Manipulation of the Judiciary.....	4
5. Article 15 of the IST Statute Extends Criminal Liability to Anyone Who Attempts or Contributes to the Crime.....	5
6. The Former Regime Committed Several Human Rights Violations and Violated Several International Laws, During the Trials and Executions, Which Do Not Fall Under IST Jurisdiction.....	6
<b>II. <u>FACTUAL BACKGROUND</u>.....</b>	<b>7</b>
<b>III. <u>EXTRAJUDICIAL AND SUMMARY EXECUTIONS</u>.....</b>	<b>8</b>
<b>IV. <u>THE DIFFERENCE AMONG THE INTERNATIONAL CRIMES IN THE IST</u>.....</b>	<b>10</b>

<b>V. <u>DO THE EXECUTIONS CONSTITUTE A CRIME UNDER IST JURISDICTION?</u></b>	<b>12</b>
1. Article 11 - Genocide.....	12
2. Article 12 – Crimes Against Humanity.....	19
I. <u>Was there an attack?</u> .....	21
II. <u>Were acts of the perpetrators part of the attack?</u> .....	22
III. <u>Was the attack directed against any civilian population?</u> .....	23
IV. <u>Were the executions widespread or systematic?</u> .....	24
a) <i>Widespread</i> .....	24
b) <i>Systematic</i> .....	26
V. <u>Did the perpetrator know the acts constituted part of a pattern of widespread or systematic crimes directed against a civilian population?</u> .....	27
3. Article 13 – War Crimes.....	30
I. <u>Was an ‘armed conflict’ in progress during the executions?</u> .....	31
II. <u>Is there a nexus between the armed conflicts and the executions?</u> .....	33
III. <u>Internal or International Armed Conflict?</u> .....	36
IV. <u>Mens rea</u> .....	38
4. Article 14 – Violations of Stipulated Iraqi Laws (Abuse of Power).....	39
5. Who can be charged?.....	40
<b>VI. <u>HUMAN RIGHTS VIOLATIONS</u></b> .....	<b>41</b>
<b>III. <u>CONCLUSION</u></b> .....	<b>46</b>
<b>Chart 1</b> .....	<b>47</b>

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

### **A. Issues**

The Iraqi Special Tribunal (“Tribunal” or “IST”), has jurisdiction to hear cases which are grave in nature, namely genocide, war crimes, and crimes against humanity, that took place in Iraq between 1968 and 2003.<sup>1</sup> In the summer of 1992, over 60 merchants were tried and executed in Iraq for violating anti-trust laws. This memorandum examines whether any of the acts by the former regime which occurred during these trials and executions constitute crimes that may be tried by the IST.

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

#### **1. Members of the Former Regime Cannot Be Tried by the Iraqi Special Tribunal Under Article 11 of the IST Statute, Because No Genocide Has Occurred.**

Article 11 of the IST Statute grants jurisdiction to the Tribunal over genocide.<sup>2</sup> Genocide is defined by the Statute as killing, harming, or moving a national, ethnical, racial or religious group with the intent to destroy the group.<sup>3</sup> There are three requisite elements for genocide: (1) one or more prohibited acts, (2) against members of a protected group, (3) committed with the intent to destroy, in whole or in part, the group. The first element is satisfied in the case at hand because ‘killing’ is one of the prohibited acts listed in the Statute. However, it is unlikely that genocide occurred in this case because the second two elements of genocide are not satisfied. First, merchants are not a protected group. The intent of the Article 11, and the Genocide

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<sup>1</sup> See Statute of the Iraqi Special Tribunal, available at [http://www.cpa-iraq.org/human\\_rights/Statute.htm](http://www.cpa-iraq.org/human_rights/Statute.htm) [hereinafter IST Statute] [Reproduced in the accompanying notebook at Tab 14]

<sup>2</sup> *Id.* at art. 11.

<sup>3</sup> *Id.*

Convention<sup>4</sup> which it was based upon, was clearly to protect only national, ethnical, racial, or religious groups. Professional groups such as merchants do not fall into any of these categories. Second, even if merchants can be called a protected group, there is no evidence to support an assertion the killings of the merchants were intended to destroy merchants as a group (or any other group that the merchants belonged to). Thus, no one involved in the executions should be tried for genocide.

### **7. Members of the Former Regime Can Be Tried by the Iraqi Special Tribunal Under Article 12 of the IST Statute for Crimes Against Humanity.**

Article 12 of the IST Statute grants the Tribunal jurisdiction to hear crimes against humanity.<sup>5</sup> Crimes against humanity are widespread or systematic attacks on a civilian population (where an ‘attack’ is defined in Article 12 by various deplorable acts). In order for a person to have committed crimes against humanity: (1) there must be an attack; (2) the acts of the perpetrator must be part of the attack; (3) the attack must be directed against any civilian population; (4) the attack must be widespread or systematic; and (5) the perpetrator must know that his/her acts constitute part of a pattern of widespread or systematic crimes.<sup>6</sup> Applying these factors to the case at hand, several of people involved in the executions can be charged with crimes against humanity.

The *first* element, that an attack must have occurred, is easily satisfied because ‘killing’ is the first enumerated act which constitutes an ‘attack’ under Article 12.<sup>7</sup> The *second* element,

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<sup>4</sup> See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention] [Reproduced in the accompanying notebook at Tab 1]

<sup>5</sup> See IST Statute, *supra* note 1, art. 12. [Reproduced in the accompanying notebook at Tab 14]

<sup>6</sup> See Mohamed Elewa Badar, *From the Nuremburg Statute to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 SAN DIEGO INT’L L.J. 73(2004).[hereinafter Badar] [Reproduced in the accompanying notebook at Tab 50]

<sup>7</sup> See IST Statute, *supra* note 1, art. 12(a)(1). [Reproduced in the accompanying notebook at Tab 14]

that the acts of the perpetrator be part of the attack, is satisfied by most of those involved in the execution. Anyone who killed merchants, or ordered or aided the killings, will have committed acts that are part of the attacks. The *third* element, that the attack be directed against a civilian population, is easily satisfied, as the merchants clearly fall within the historic definitions of civilians. The *fourth* element, the required scale of the attack, can also be satisfied by showing that the over 60 merchants were executed as a plan to deflect criticism from the regime, which itself, was part of a larger plan to use ‘special’ courts to eliminate people the former regime did not find desirable. The numerosity of victims may indicate that the attacks were widespread; while the existence of a preconceived plan, the fact that the executions occurred on more than one occasion, and the existence of complex extra-judicial courts (used mainly to levy death penalties) may show that the killings were systematic. Finally, the last factor to be assessed in determining whether a crime against humanity occurred is the perpetrator’s *mens rea*. The requisite *mens rea* for the perpetrator of a crime against humanity is an intent to commit the underlying offense and knowledge that the offence is part of a larger policy or crime.<sup>8</sup> Thus, all persons who contributed to the killing of the merchants with the knowledge of a larger plan to execute merchants can be charged with crimes against humanity under Articles 12 and 15<sup>9</sup> of the IST Statute.

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<sup>8</sup> See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2003). [hereinafter Cassese] [Reproduced in the accompanying notebook at Tab 38]

<sup>9</sup> See IST Statute, *supra* note 1, art. 15. [Reproduced in the accompanying notebook at Tab 14] Article 15 sets forth individual criminal responsibility.

**8. Members of the Former Regime Can Be Tried by the Iraqi Special Tribunal Under Article 13 of the IST Statute for War Crimes, if there Is Proof that the Executions Were in Relation to an Armed Conflict.**

Those responsible for the execution of the merchants may be tried by the Tribunal under Article 13 for war crimes.<sup>10</sup> Article 13 grants the IST jurisdiction over numerous inhumane acts committed during an armed conflict. The first two steps in establishing the existence of war crimes are factual inquiries. Namely, was there an armed conflict going on at the time of the executions and is there an obvious link between the executions and the armed conflict. Once the nexus to an armed conflict is established, the next step is to determine whether any of the prohibited acts of Article 13 have been committed. In the case at hand one particular act has clearly been committed: “The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable;”<sup>11</sup> Lastly, the mental element required for the commission of the war crimes is simply the requisite *mens rea* for the underlying offenses. Thus, all persons who contributed to the sentencing and executions of the merchants may be tried for war crimes under Articles 13 and 15, as long as a link between the crimes and an armed conflict can be established. It is unlikely, however, that any armed conflicts were ongoing in July of 1992 because the Gulf War had ended and most rebellions had been suppressed.

**4. Members of the Former Regime Can Be Tried by the Iraqi Special Tribunal Under Article 14(a) of the IST Statute, Which Prohibits Outside Manipulation of the Judiciary.**

Because there is evidence that senior members of the regime threatened a judge during a judicial proceedings in order to improperly influence a trial, those members can be tried by the

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<sup>10</sup> See *id.* at art. 13.

<sup>11</sup> *Id.* at art. 13(c)(4).

IST under Article 14 of the IST Statute.<sup>12</sup> Article 14(a) grants the Tribunal the power to try “those outside the judiciary [who attempted] to manipulate the judiciary or involvement in the functions of the judiciary, in violation, *inter alia*, of the Iraqi interim constitution of 1970, as amended”<sup>13</sup> There is evidence that a senior member of the regime had threatened to kill a Special Court for the Ministry of Interior (“SCMI”) judge with a handgun during an antitrust violation trial.<sup>14</sup> Thus, those persons who made the threats and any persons who contributed to the threatening of the judge can be tried by the IST under Articles 14 and 15. This conclusion is supported by precedent from the *Judges’ Trial*,<sup>15</sup> the *Ministries Trial*,<sup>16</sup> and the *High Command Trial*<sup>17</sup> of the Subsequent Nuremberg Trials.

#### **5. Article 15 of the IST Statute Extends Criminal Liability to Anyone Who Attempts or Contributes to the Crime.**

Article 15 of the IST Statute defines who can be held responsible for a crime under IST jurisdiction.<sup>18</sup> In addition to criminalizing the commission of any of the IST crimes, Article 15 makes it a crime to order, solicit, induce, aid, abet, contribute to, or attempt to commit the

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<sup>12</sup> *See id.* at art. 14.

<sup>13</sup> *Id.* at art. 14(a).

<sup>14</sup> Stated in an e-mail from Eric Blinderman to Michael Scharf on May 5<sup>th</sup>, 2005. [Reproduced in the accompanying notebook at Tab 57]

<sup>15</sup> *The United States of America vs. Josef Altstötter, et. al.*, 6 LAW REPORTS OF TRIALS OF WAR CRIMINALS 40, 58-59 (United Nations War Crimes Commission, 1948) (U.S. Mil. Trib. 1947). [hereinafter *Judges’ Trial*][Reproduced in the accompanying notebook at Tab 21]

<sup>16</sup> *The United States of America vs. Ernst von Weizsäcker, et. al.*, 16 I.L.R. 344, XIV Nuernberg Trials 314 (U.S. Milit. Trib. 1952). [hereinafter *Ministries Trial*] [Reproduced in the accompanying notebook at Tab 22]

<sup>17</sup> *The United States of America vs. Wilhelm von Leeb, et. al.*, U.S. Military Tribunal, Nuremberg, 30 December 1947-28 October 1948, Case No. 72, L.R.T.W.C., Vol. XII, at 72. [hereinafter *High Command Trial*] [Reproduced in the accompanying notebook at Tab 19]

<sup>18</sup> IST Statute, *supra* note 1, art. 15. [Reproduced in the accompanying notebook at Tab 14]

crime.<sup>19</sup> Additionally, Article 15 removes head-of-state immunity and any other special treatment, regarding criminal responsibility, for *any person* part of the Iraqi government.<sup>20</sup> Finally, the Statute adopts the doctrine of ‘superior responsibility,’ making superiors liable for IST crimes by subordinates,<sup>21</sup> and reaffirms that ‘following orders’ is not a defense to the commission of a crime under the IST Statute.<sup>22</sup>

**6. The Former Regime Committed Several Human Rights Violations and Violated Several International Laws, During the Trials and Executions, Which Do Not Fall Under IST Jurisdiction.**

The summary executions by the former regime are in direct violation of nearly every provision of Articles 6 and 14 of the International Covenant on Civil and Political Rights<sup>23</sup> (“ICCPR”). Article 6 of the ICCPR guarantees the right to life and provides guidance for the use of the death penalty.<sup>24</sup> Specifically, Article 6 implies that the death penalty should be used sparingly, as a last resort, and only after full judicial privileges are guaranteed. Article 14 ensures that everyone charged with a crime should have a fair trial.<sup>25</sup> The trials and executions of the merchants are obvious violations of these fundamental rights. However, the IST does not have jurisdiction over human rights violations not listed in its statute. Therefore, even though the violation of the Articles 6 and 14 are grave in nature, they cannot be tried by the IST.

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<sup>19</sup> *See id.*

<sup>20</sup> *Id.* at art. 15(c).

<sup>21</sup> *Id.* at art. 15(d).

<sup>22</sup> *Id.* at art. 15(e).

<sup>23</sup> *See* International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 UNTS 171, art. 6, 14. [hereinafter ICCPR] [Reproduced in accompanying notebook at Tab 7] Iraq signed the ICCPR on February 18, 1969 and ratified it on January 25, 1971. *See* Ratification status of ICCPR, Office of the High Commission on Human Rights, available at <http://www.ohchr.org/english/countries/ratification/4.htm> [Reproduced in accompanying notebook at Tab 70]

<sup>24</sup> ICCPR, *supra* note 23, at art. 6 [Reproduced in the accompanying notebook at Tab 7].

<sup>25</sup> *Id.* at art. 14.



## **II. FACTUAL BACKGROUND**<sup>26</sup>

The Special Court of the Ministry of Interior (“SCMI”) was a court which sat outside Iraq's general criminal court system and had jurisdiction to hear cases involving Iraqi Merchants. It was part of a system of extra-judicial courts that were answerable directly to Saddam Hussein and the Revolutionary Command Council, which was the highest executive organ in Iraq. Cases were referred to the courts by senior members of Hussein’s regime. Trials before these courts generally lasted no longer than a couple of hours and the defendants had no right of appeal. The defendants and defense council rarely knew what the defendants were being charged with until after the trial had started. Further, the courts were empowered to levy (and usually did levy) the death sentence – usually carried out within hours of imposition. Tens of thousands have reportedly been executed by these Special Courts.

By 1992, after the imposition of UN sanctions on Iraq, prices for basic foodstuffs and goods began to rise dramatically. To deflect criticism from the regime, Saddam Hussein allegedly issued orders to round up various merchants, in July of 1992, from Baghdad and send them to the SCMI on charges of violating Iraq's antitrust laws – a crime which (under the Iraqi penal code) is punishable by death.

As a result of this order from Saddam Hussein, approximately 44 merchants from Baghdad were arrested over the course of several hours and brought before the SCMI. All were tried and executed by morning. Although a defense attorney was present at their trials, he was not permitted to gather or introduce evidence nor was he even told the charges against his clients. In addition, there is evidence that a senior member of the former regime threatened the presiding judge of the SCMI with his hand gun, telling him that he would kill the judge if the case was not

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<sup>26</sup> The factual background is derived from an e-mail by Eric Blinderman sent to Pratheep Sevanthinathan on July 14<sup>th</sup>, 2005. [Reproduced in accompanying notebook at Tab 58]

settled. Approximately three months after the first round of executions, another 19 merchants were rounded up and executed under similar circumstances.

For the purposes of this memo, it will be assumed that the anti-trust charges were false or unproven and that the trials were conducted unfairly and prejudicially against the merchants. Therefore, the executions of the merchants shall be treated as extrajudicial and summary executions.

### **III. EXTRAJUDICIAL AND SUMMARY EXECUTIONS**

A summary execution is a type of extrajudicial punishment in which a person suspected of subversive or other criminal activity is killed, often at the time and place of their being discovered, and hence usually without any meaningful inquiry or investigation.<sup>27</sup> Summary executions typically occur in a theatre of war,<sup>28</sup> but are not limited to such circumstances. The term ‘summary execution’ is often used interchangeably with ‘extrajudicial execution.’ The difference between the terms is that ‘summary execution’ simply connotes a quick, on-the-spot, killing after detainment, while ‘extrajudicial execution’ tends to mean killing after detainment without a just trial.<sup>29</sup> As stated by Human Rights Watch, “[e]xtrajudicial executions occur when a public authority arbitrarily and deliberately takes the life of a human being in circumstances other than those related to the legitimate use of force in situations such as may occur in an armed

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<sup>27</sup> See Wikipedia, *Summary Execution*, at [http://en.wikipedia.org/wiki/Summary\\_execution](http://en.wikipedia.org/wiki/Summary_execution) (last modified 30 May 2005) [Reproduced in accompanying notebook at Tab 76]

<sup>28</sup> *Id.*

<sup>29</sup> See Wikipedia, *Extrajudicial Punishment*, at [http://en.wikipedia.org/wiki/Extrajudicial\\_punishment](http://en.wikipedia.org/wiki/Extrajudicial_punishment) (last modified 30 Mar 2005) [Reproduced in accompanying notebook at Tab 74] ‘Extrajudicial execution’ is also used to denote State-sponsored assassinations of targets which are a threat to the State’s peace. See also Amnesty International’s collection of articles related to ‘extrajudicial killings’ at <http://www.amnesty.org.uk/deliver/keyword/109.html>

confrontation or in carrying out the death penalty.”<sup>30</sup> Practically, most summary executions are extrajudicial, and vice versa.

Summary and extrajudicial executions are both clearly prohibited in international law as a violation of the right to life,<sup>31</sup> under customary international law and the International Covenant of Civil and Political Rights.<sup>32</sup> This prohibition is most evident in UN General Assembly resolution 2393 (XXIII) of 26 November 1968.<sup>33</sup> In that resolution, the General Assembly urged Governments to ensure that in countries where the death penalty could be imposed, persons accused of capital crimes were given the benefit of the most careful legal procedures and the greatest possible safeguards.<sup>34</sup> Further, in 1980 the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders condemned "the practice of killing and executing political opponents or *suspected offenders* carried out by armed forces, law enforcement or other governmental agencies or by paramilitary or political groups" acting with the support, tacit or otherwise, of official forces or agencies.<sup>35</sup>

The actions of the former regime in Iraq, concerning the execution of the Baghdad merchants, were classic instances of extrajudicial and summary executions. Hence, the

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<sup>30</sup> See Joel Solomon, Human Rights Watch, Mexico's International Human Rights Obligations, available at <http://www.hrw.org/reports/1999/mexico/Mexi991-04.htm> [hereinafter HRW] [Reproduced in part in accompanying notebook at Tab 66]

<sup>31</sup> *Id.*

<sup>32</sup> See ICCPR, *supra* note 23, art. 6; [Reproduced in the accompanying notebook at Tab 7] Which reiterates that "every human being has the inherent right to life." *Id.* The provision continues by stating that "this right shall be protected by law" and that "no one shall be arbitrarily deprived of his life". *Id.*

<sup>33</sup> G. A. Res. 2393, U.N. GAOR, 23<sup>rd</sup> Sess., U.N. Doc. 2393 (XXIII) (1968). [Reproduced in accompanying notebook at Tab 2]

<sup>34</sup> *Id.* See also Fact Sheet No.11 (Rev.1), Extrajudicial, Summary or Arbitrary Executions, available at <http://www.unhchr.ch/html/menu6/2/fs11.htm>. [Reproduced in the accompanying notebook at Tab 60]

<sup>35</sup> See Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Caracas, 25 August-5 September 1980: report prepared by the Secretariat (United Nations publication, Sales No. E.81.IV.4), chap. I, sect. B, resolution 5. [Reproduced in accompanying notebook at Tab 72]

executions were clear breaches of international law, most notably, the ICCPR. However, it does not necessarily follow that these breaches of international law may be tried by the Iraqi Special Tribunal. The IST does not have jurisdiction over all violations of international law. It may only hear crimes stipulated by its constitutive statute. As a result, only if the executions amounted to genocide, war crimes, or crimes against humanity will the IST have jurisdiction.

#### **IV. THE DIFFERENCE AMONG THE INTERNATIONAL CRIMES IN THE IST**

The Iraqi Special Tribunal has jurisdiction over genocide, crimes against humanity, and war crimes. These three crimes are known as the most heinous of all international crimes. The definitions and distinctness of these crimes has been evolving as newer tribunals encounter them. The IST Statute has defined the three crimes in a very broad manner in comparison to previous international and internationalized tribunals.<sup>36</sup> As a result, the IST Statute definitions contain substantial overlap amongst genocide, crimes against humanity, and war crimes. However, for purposes of serving indictments, the limits of each crime must be set out, and their differences must be delineated. Because the IST Statute has broadened the definitions of crimes against humanity and war crimes, using precedent from former tribunals and commentary on the international crimes can help to locate the focus of each IST crime.

In general, genocide is the crime of targeting and destroying or attempting to destroy a group of people based on race, nationality, religion, or ethnicity. Crimes against humanity are systematic or widespread attacks on a group of people. War crimes are attacks on people not taking part in hostilities by those who are taking part in the hostilities. Genocide and crimes

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<sup>36</sup> The broadness of the definitions is probably a product of the criticisms from the ICTY and ICTR judges and legal scholars regarding some of the superfluous requirements contained in the ICTY and ICTR statutes. For instance, many critics have argued that the distinction between internal and international war crimes serves no purpose. Additionally, many have argued that ICTY Statute's requirement of an armed conflict and the ICTR Statute's requirement of a discriminatory intent for crimes against humanity are overly limiting.

against humanity are similar in that they protect groups of people against intentional attacks by governments or militaries. They differ in that a mandatory prerequisite for crimes against humanity are that the attacks always be either widespread or systematic; while genocide has no such requirement. What genocide does require, differing from crimes against humanity, is the existence of a protected group (racial, national, ethnic, or religious).<sup>37</sup> Thus, attacks on groups of people are prohibited in international law, via crimes against humanity, if the attacks are widespread or systematic; or, via genocide, if the group being attacked is a protected group. War crimes share characteristics with both genocide and crimes against humanity, in that they encompass similar acts. War crimes differ from genocide and crimes against humanity, in that they can only occur in the presence of an armed conflict. Further, war crimes can occur on a smaller scale than crimes against humanity<sup>38</sup> (no widespread or systematic requirement) and the protected groups for war crimes are expanded to all people not involved in the armed conflict.<sup>39</sup>

The executions of the Baghdad merchants do not neatly fall within any of these categories, yet shares characteristics with all of the crimes. Depending on the circumstances surrounding the executions, those involved may be charged with any and each of the discussed crimes. The subsequent sections of this memo evaluate the facts of the case within the confines of genocide, crimes against humanity, and war crimes, and assesses whether any such crimes have been committed.

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<sup>37</sup> See Mariano-Florentino Cuéllar, *The International Criminal Court and the Political Economy of Antitreaty Disclosure*, 55 STAN. L. REV. 1597 (2003). [Reproduced in accompanying notebook at Tab 47]

“The difference between genocide and crimes against humanity is the absence of a mens rea requirement involving the destruction of a protected group...” *Id.* at 1604.

<sup>38</sup> See *id.* “...the difference between war crimes and crimes against humanity is that the latter may occur during peace or war, and could be perpetrated even against stateless victims or people of the perpetrator's own nationality.” *Id.*

<sup>39</sup> See Cara Levy Rodriguez, *Slaying the Monster: Why the United States Should not Support the Rome Treaty*, 14 AM. U. INT'L L. REV. 805, 862 (1999). [Reproduced in accompanying notebook at Tab 44]

## **V. DO THE EXECUTIONS CONSTITUTE A CRIME UNDER IST JURISDICTION?**

The Iraqi Special Tribunal is a specialized court which has limited jurisdiction. It was created to hear only the most heinous crimes committed by members of Iraq's ruling party between 1968 and 2003. Specifically, jurisdiction has been limited to cases involving (1) genocide,<sup>40</sup> (2) crimes against humanity,<sup>41</sup> (3) war crimes,<sup>42</sup> and (4) certain abuses of power.<sup>43</sup> Any crimes occurring in Iraq which do not fall into one of these categories are relegated to Iraqi federal courts.<sup>44</sup> Thus, if, and only if, any of the conduct surrounding the mass executions of the Iraqi merchants falls into one of the aforementioned categories can the IST hear the case.

### **1. Article 11 - Genocide**

Article 11 of the IST Statute grants the Tribunal jurisdiction to hear cases concerning genocide.<sup>45</sup> Genocide is defined by the Statute 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:*

*1. killing members of the group;*

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<sup>40</sup> See IST Statute, *supra* note 1, art. 11 [Reproduced in the accompanying notebook at Tab 14]

<sup>41</sup> *Id.* at art. 12

<sup>42</sup> *Id.* at art. 13

<sup>43</sup> *Id.* at art. 14

<sup>44</sup> See Law of Administration for the State of Iraq, available at <http://www.cpa-iraq.org/government/TAL.html> [hereinafter TAL] [Reproduced in accompanying notebook at Tab 8]. The Transitional Administrative Law (TAL) was signed on March 8, 2004 by the Interim Governing Council (GC) of Iraq and will be the Supreme Law of Iraq during the transitional period. The TAL sets out a path for the establishment of a representative and sovereign Iraqi government that protects fundamental rights and provides a stable political structure. The first phase of the transitional period began on 30 June 2004 when an Iraqi Interim Government was vested with full sovereignty, and the Coalition Provisional Authority was dissolved. The Iraqi government will govern according to the TAL and an annex issued before the beginning of the transitional period. The second phase begins when the Iraqi Transitional Government takes office after the elections of the National Assembly. The TAL was aimed to expire once a new permanent government is elected under a permanent constitution and takes office. See Iraqi Interim Government, GlobalPolicy.org, available at <http://www.globalsecurity.org/military/world/iraq/ig.htm> [Reproduced in accompanying notebook at Tab 65].

<sup>45</sup> See IST Statute, *supra* note 1, art. 11 [Reproduced in the accompanying notebook at Tab 14]

2. *causing serious bodily or mental harm to members of the group;*
3. *deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
4. *imposing measures intended to prevent births within the group; and*
5. *forcibly transferring children of the group to another group.*<sup>46</sup>

This definition of genocide is rooted in the Convention on the Prevention and Punishment of the Crime of Genocide, dated December 9, 1948 (“Genocide Convention”)<sup>47</sup>, which was ratified by Iraq on January 20, 1959.<sup>48</sup> The Convention provides the IST with the jurisdictional basis to hear the crime of genocide.<sup>49</sup> Thus, whether the IST has jurisdiction to prosecute a person for genocide should be based on interpretations of the Genocide Convention. However, since there is no Iraqi case law directly applying the convention<sup>50</sup> an examination of customary international law and precedent from international tribunals is necessary.

Under the Genocide Convention, the crime of genocide has three elements. (1) One or more prohibited acts, (2) against members of a protected group, (3) committed with the intent to destroy, in whole or in part, the protected group.<sup>51</sup> The first two comprise the *actus reus*, or

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<sup>46</sup> *Id.*

<sup>47</sup> See Genocide Convention, *supra* note 4. [Reproduced in the accompanying notebook at Tab 1]

<sup>48</sup> See IST Statute, *supra* note 1, art. 11(a). [Reproduced in the accompanying notebook at Tab 14]

<sup>49</sup> *Id.*

<sup>50</sup> See David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 TEX. INT’L L.J. 231 (2002). [hereinafter *Contours*] [Reproduced in accompanying notebook at Tab 45]

<sup>51</sup> *Id.* at 256

material component of the crime.<sup>52</sup> The latter element comprises genocide's *mens rea*, or requisite mental state.<sup>53</sup> All three elements must be proved in order to establish the crime.<sup>54</sup>

In the case at hand, the first element can easily be proved. “Killing members of the group”<sup>55</sup> is the first prohibited act mentioned in both the Genocide Convention and Article 11 of the IST Statute. Since there is evidence that approximately 63 merchants were targeted then killed, the first element of genocide can be satisfied if the prosecution can show that the merchants were unjustly killed (summary executions) instead of legally executed.

The final two elements are not as easy to prove. For one, it is not apparent from the language of the IST Statute and the Genocide Convention if merchants may constitute a ‘protected group.’ The exclusion of professional groups as a protected group from both documents suggests a desire to leave such groups unprotected by the Genocide Convention and the Tribunal. Both the IST Statute and the Genocide Convention clearly state that the protected groups are “national, ethnical, racial or religious group[s].”<sup>56</sup> Merchants, as a group, do not fall into any of these categories. The Trial Chamber of International Criminal Tribunal for Rwanda (“ICTR”) was the first court to define protected group status:

On reading through the *travaux préparatoires* of the Genocide Convention (Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September - 10 December 1948, Official Records of the General Assembly), it appears that the crime of genocide was allegedly perceived as targeting only ‘stable’ groups, constituted in a permanent fashion and membership

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<sup>52</sup> See *Prosecutor v. Jelusic*, Case No. IT-95-10, Judgment, para. 60 n.71, (ICTY Trial Chamber Dec. 14, 1999), at <http://www.un.org/icty/brcko/trialc1/judgement/index.htm> [Reproduced in accompanying notebook at Tab 24] See also *Contours*, *supra* note 49, at 256. [Reproduced in the accompanying notebook at Tab 45]

<sup>53</sup> *Id.* at 62. See also *Contours*, *supra* note 50, at 256. [Reproduced in the accompanying notebook at Tab 45]

<sup>54</sup> *Contours*, *supra* note 50, at 256.

<sup>55</sup> IST Statute, *supra* note 1, art. 11(a)(1) [Reproduced in the accompanying notebook at Tab 14]; Genocide Convention, *supra* note 4, art. 2(a). [Reproduced in the accompanying notebook at Tab 1]

<sup>56</sup> IST Statute, *supra* note 1, art. 11(a) [Reproduced in the accompanying notebook at Tab 14]; Genocide Convention, *supra* note 4, art. 2. [Reproduced in the accompanying notebook at Tab 14]



of which is determined by birth, with the exclusion of the more ‘mobile’ groups which one joins through individual voluntary commitment...<sup>57</sup>

Thus, some attribute the exclusion of groups such as professional and political groups from the Convention because they are groups which are joined voluntarily and the Convention only aims to protect those groups that are determined by birth.<sup>58</sup> However, as pointed out by noted legal scholar William Schabas, the very restrictive definition of protected group which appeared in the Genocide Convention was not what was intended by the framers of the Convention: “The debates leave little doubt that the decision to exclude political groups was mainly an attempt to rally a minority of Member States, in order to facilitate rapid ratification of the Convention, and not a principled decision based on some philosophical distinction between stable and more ephemeral groups.”<sup>59</sup>

In subsequent decisions, the ICTR adopted a purely subjective approach, noting that an ethnic group could be “a group identified as such by others, including perpetrators of the crimes.”<sup>60</sup> As the Trial Chamber held in *Rutaganda* “[t]he concepts of national, ethnical, racial and religious groups have been researched extensively and . . . at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed

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<sup>57</sup> See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (ICTR Trial Chamber Sept. 2, 1998) at <http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm> [Reproduced in accompanying notebook at Tab 23]

<sup>58</sup> See William A. Schabas, *Groups Protected By The Genocide Convention: Conflicting Interpretations From The International Criminal Tribunal For Rwanda*, 6 ILSA J. INT’L & COMP. L. 375 (2000). [Reproduced in accompanying notebook at Tab 52]

<sup>59</sup> *Id.* at 382. It was presumed that the Soviet Union would not sign the convention if political groups were considered ‘protected.’ *Id.*

<sup>60</sup> *Prosecutor v. Kayeshema and Ruzindana*, Case No. ICTR-95-1-T, Judgment, para. 98 (ICTR Trial Chamber, May 21, 1999), available at <http://www.ictr.org/ENGLISH/cases/KayRuz/judgement/index.htm> [Reproduced in accompanying notebook at Tab 26]

in the light of a particular political, social, and cultural context.”<sup>61</sup> Consequently, whether a group is protected by the Convention should be determined on a case-by-case basis, dependant upon the surrounding circumstances.

Therefore, even though it is unlikely that merchants are protected groups, there is still a slim chance that they may be considered protected under the Genocide Convention because of the universal ambiguity in the definitions of ethnic, racial, religious, and, specifically, national groups. For example, in *Akeyesu*,<sup>62</sup> the ICTR defined national groups as "a collection of people who are perceived to share a common legal bond based on common citizenship, coupled with reciprocity of rights and duties."<sup>63</sup> Under this definition the merchants may be considered a national group if they were all Iraqi citizens. The counter-argument to this position is that the drafters of the Genocide Convention intended for a collection of individuals organized on the basis of a common characteristic to be insufficient to establish nationality without some additional legal interest tying them together.<sup>64</sup> In other words, mere common citizenship and an additional shared characteristic will not be sufficient to establish a protected national group. An additional *legal* interest such as residence in another nation is needed for the group to qualify as protected under the Genocide Convention (e.g. if all Syrian nationals living in Iraq were targeted, they would be a protected national group).

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<sup>61</sup> *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence (ICTR Trial Chamber Dec. 6, 1999), at <http://www.ictr.org/ENGLISH/cases/Rutaganda/judgement/index.htm> [Reproduced in accompanying notebook at Tab 34]; *See also Prosecutor v. Krstic*, Case No. ICTY-98-33-T, Judgment (ICTY Trial Chamber Aug. 2, 2001), at <http://www.un.org/icty/krstic/TrialC1/judgement/index.htm> [Reproduced in accompanying notebook at Tab 28]

<sup>62</sup> *Akeyesu*, *supra* note 57. [Reproduced in the accompanying notebook at Tab 23]

<sup>63</sup> *Id.* at 512.

<sup>64</sup> *See*, e.g., U.N. GAOR 6th Comm., 3d Sess., 75th mtg. at 113, 115, U.N.Doc. A/C.6/SR.75 (1948) (Mr. Lacks, Pol.) (Mr. Petren, Swed.). [Reproduced in accompanying notebook at Tab 16]

Thus, since the merchants were targeted based on their profession and not on their ethnicity, religion, race, or nationality, they are not likely protected under the Genocide Convention or Article 11 or the IST Statute. As a result, the second element of genocide is not satisfied.

Likewise, the third element of genocide, the intent to destroy, in whole or in part, a protected group, is probably not satisfied. Several of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") cases have held that the requisite *mens rea* for genocide is a *purposeful* intent to commit genocide.<sup>65</sup> Additionally, in *Akayesu* the ICTR Trial Chamber held that the offender is only culpable "when he commits a [prohibited offence] *with the clear intent* to destroy, in whole or in part, a particular group."<sup>66</sup> The "clear intent to destroy" language strongly indicates a purpose to destroy the group is required as a *mens rea*; it is unlikely that "clear intent" could reasonably be equated with mere knowledge that certain acts will destroy the group.<sup>67</sup> Strengthening this position is the constitutive statute of the International Criminal Court ("ICC"), which expressly states that a purposeful intent is required for the crime of genocide.<sup>68</sup> Based on the stated facts, the intent of those responsible for the killings was not to destroy merchants or certain merchants, but rather, *to deflect criticism* from Saddam Hussein's regime. Mere knowledge that killing a large number of merchants could destroy them, as a group, in Iraq is not sufficient to satisfy the requisite *mens rea* for intent to commit genocide.

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<sup>65</sup> See *Jelusic*, *supra* note 52, (the defendant "could not be found guilty of genocide if he himself did not share the goal of destroying in part or in whole a group even if he knew that he was contributing to or thought his acts might be contributing to the partial or total destruction of a group.") [Reproduced in the accompanying notebook at Tab 24] *Id.* at 86. See also *Kristic*, *supra* note 57. [Reproduced in the accompanying notebook at Tab 28]

<sup>66</sup> *Akayesu*, *supra* note 58, at 521. [Reproduced in the accompanying notebook at Tab 23]

<sup>67</sup> See *Contours*, *supra* note 50. [Reproduced in the accompanying notebook at Tab 45]

<sup>68</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, art. 30 at 87 (1998). [hereinafter Rome Statute]. [Reproduced in accompanying notebook at Tab 11]

Therefore, in order to show that those responsible for the executions had a genocidal intent the evidence collected must be able to create an inference that genocide was desired result of the killings. For example, pertinent evidence would include: (1) a showing of the scale and general nature of the atrocities committed;<sup>69</sup> (2) proof of the discriminatory targeting of the members or property of one group to the exclusion of other groups;<sup>70</sup> (3) proof of methodical or systematic planning or killing;<sup>71</sup> (4) the weapons employed and the extent of bodily injury;<sup>72</sup> (5) documents reflecting participation in or knowledge of atrocities;<sup>73</sup> (6) derogatory language toward the targeted population;<sup>74</sup> (7) the destruction of a group's institutions;<sup>75</sup> and proof of widespread and systematic violence.<sup>76</sup> Without any such evidence, no charges of genocide should be filed against those responsible for the execution of the merchants.

In sum, it is unlikely that genocide was committed during the mass executions because there was no apparent "intent to destroy, in whole or in part, a national, ethnical, racial or

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<sup>69</sup> See *Akayesu*, *supra* note 58, at 523. [Reproduced in the accompanying notebook at Tab 23]

<sup>70</sup> *Kayishema*, *supra* note 60, para. 123. [Reproduced in the accompanying notebook at Tab 26]

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 527

<sup>74</sup> See *Jelusic*, *supra* note 52, at 73 [Reproduced in the accompanying notebook at Tab 24]; see also *Kayishema*, *supra* note 65, at 93. [Reproduced in the accompanying notebook at Tab 26]

<sup>75</sup> See *Prosecutor v. Karadzic and Mladic*, Confirmation of Indictment Pursuant to Rule 61, Case Nos. ICTY-95-5-R61 and ICTY-95-18-R61, para. 294 (ICTY Trial Chamber, July 16, 1996), available at <http://www.un.org/icty/karadzic&mladic/trialc/rev-ii960716-e.pdf> [Reproduced in accompanying notebook at Tab 25]

<sup>76</sup> See *Jelusic*, *supra* note 52, at 73. [Reproduced in the accompanying notebook at Tab 14]

religious group” as required by Article 11 of the IST Statute.<sup>77</sup> Both the requisite intent and protected group status is lacking in the case at hand.

## **2. Article 12 – Crimes Against Humanity**

Article 12 of the IST Statute grants the Tribunal jurisdiction to hear cases concerning ‘crimes against humanity.’<sup>78</sup> In general, crimes against humanity are “particularly odious offenses”<sup>79</sup> (such as murders, rapes, and torture) committed systematically or on a large scale.<sup>80</sup> While the specific acts which comprise crimes against humanity are fairly uniform,<sup>81</sup> the circumstances under which the acts are carried out vary jurisdictionally. Specifically, the statutes of the ICTY and ICTR, and the Rome Statute all state different conditions required for the existence of crimes against humanity. For example, the ICTY requires the existence of an armed conflict<sup>82</sup> and the ICTR requires the existence of discriminatory grounds<sup>83</sup> in order for there to be a crime against humanity.<sup>84</sup> These two requirements, however, have become obsolete

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<sup>77</sup> See IST Statute, *supra* note 1, art. 11. [Reproduced in the accompanying notebook at Tab 14]

<sup>78</sup> See *id.* art. 12.

<sup>79</sup> Cassese, *supra* note 8, at 64. [Reproduced in the accompanying notebook at Tab 38]

<sup>80</sup> *Id.*

<sup>81</sup> Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT'L L. 307 (2000). [hereinafter Duke] [Reproduced in accompanying notebook at Tab 51]

<sup>82</sup> The ICTY Statute mandates that the act be "committed in armed conflict, whether international or internal in character, and directed against any civilian population." Statute of the Int'l Criminal Trib. for the Former Yugoslavia, U.N.S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), amended by U.N.S.C. Res. 1166, U.N. SCOR, 53rd Sess., 3878th mtg., at art. 5, U.N. Doc. S/RES/1166 (1998) [hereinafter ICTY Statute] [Reproduced in accompanying notebook at Tab 13]

<sup>83</sup> The ICTR Statute defines a crime against humanity as an act "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds." Statute of the Int'l Criminal Trib. for Rwanda, U.N.S.C. Res. 955, U.N. SCOR, 49th Sess., 3453th mtg., at art. 3, U.N. Doc. S/RES/955 (1994). [hereinafter ICTR Statute] [Reproduced in accompanying notebook at Tab 12]

<sup>84</sup> However, in light of advice from legal scholars and international law experts, judges for both the ICTY and ICTR ultimately overlooked the mentioned conditions. See Duke, *supra* note 81. [Reproduced in the accompanying notebook at Tab 51]

as they no longer reflect customary international law.<sup>85</sup> Consequently, the newer Rome Statute for the International Criminal Court employs a more encompassing definition of crimes against humanity, which does not require armed conflicts or discriminatory grounds.<sup>86</sup> This broader definition of crimes against humanity was also adopted by the IST. Accordingly, crimes against humanity are defined under the IST Statute as;

*any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*<sup>87</sup>

1. *Murder;*
2. *Extermination;*
3. *Enslavement;*
4. *Deportation or forcible transfer of population;*
5. *Imprisonment or other severe deprivation of physical liberty in violation of fundamental norms of international law;*
6. *Torture;*
7. *Rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity;*

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<sup>85</sup> See Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEXAS INT'L L. J. 1, 29-31 (1996). [Reproduced in accompanying notebook at Tab 49] "[A] cursory survey of [the development of crimes against humanity] should remove any doubt that the concept of crimes against humanity under customary international law now extends to atrocities committed during peacetime. First, the linkage to war was not included in the definition of crimes against humanity contained in Control Council Law No.10...Second, in its authoritative report on the development of the laws of war at the conclusion of the Nuremberg trials and Control Council Law No. 10 trials, the U.N. War Crimes Commission concluded that international law may now sanction individuals for crimes against humanity committed not only during war but also during peacetime. Third, in the International Law Commission's formulation of the *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, the Commission indicated that crimes against humanity...could be committed apart from war...Fourth, the 1968 Convention on the Non-Applicability of Statutory Limitations to Certain War Crimes and Crimes Against Humanity provides in Article I that such limitations do not apply to '[c]rimes against humanity whether committed in time of war or in time of peace.' Finally, the Secretary-General's Report on the Statute of the Yugoslavia Tribunal...stated that international law now prohibits crimes against humanity 'regardless of whether they are committed in an armed conflict.'" *Id.* (citations omitted).

<sup>86</sup> See Rome Statute, *supra* note 68, art. 7. [Reproduced in the accompanying notebook at Tab 11]

<sup>87</sup> *Id.*

8. *Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Tribunal;*
9. *Enforced disappearance of persons; and*
10. *Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*

This codification of crimes against humanity in the IST Statute is largely based on the Rome Statute and customary international law – most of which was developed by the ICTY and ICTR. Thus, precedent from the ICTY and ICTR may be useful in interpreting Article 12.

Accordingly, in order to convict a person of a crime against humanity, precedent from the ICTY and ICTR dictates that several elements must be present: (1) there must be an attack; (2) the acts of the perpetrator must be part of the attack; (3) the attack must be directed against any civilian population; (4) the attack must be widespread or systematic; (5) the perpetrator must know that the acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that the acts fit into such a pattern.<sup>88</sup> Each of these elements must be satisfied in order for the perpetrators of the executions to be convicted of crimes against humanity.

#### I. Was there an attack?

Unlike in the ICTY and ICTR statutes, the term ‘attack’ is defined within the IST Statute itself. Article 12(b)(1) of the IST Statute defines “[a]ttack directed against any civilian population” as “a course of conduct involving the multiple commission[s] of acts referred to in

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<sup>88</sup> See *Prosecutor v. Kunarac*, Case No. IT-96-23/1-A, Judgment, at para. 85 (ICTY Appeals Chamber June 12, 2002), available at <http://www.un.org/icty/kunarac/appeal/judgement/index.htm> [Reproduced in accompanying notebook at Tab 29] See also Badar, *supra* note 6. [Reproduced in the accompanying notebook at Tab 50]

the above paragraph against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack.” In the case at hand, an argument can certainly be made that multiple murders took place during the executions. Since the executions were conducted without any actual legal basis,<sup>89</sup> they are probably *unjustified* killings, i.e., murders. Murder is the first prohibited act listed in Article 12, which constitutes an ‘attack.’<sup>90</sup> Therefore, the first element of a crime against humanity, the existence of attack, is likely satisfied. However, it should be noted that if the executions were indeed *legal* and justified punishments, then no attack within the meaning of ICTY will have occurred.

## II. Were acts of the perpetrators part of the attack?

The second element for crimes against humanity, that the acts of the perpetrators were part of the attack, is satisfied with a showing that an accused defendant’s actions or omissions<sup>91</sup> caused or aided the killing of the merchants. The acts of executing the merchants and the planning of the executions will clearly satisfy this element. Thus, the acts of the ‘executioners’ and their superiors were ‘part of the attack.’ Additionally, the intimidation of the judge by senior officials may also be considered ‘part of the attack’ for purposes of prosecution.<sup>92</sup> Finally, the

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<sup>89</sup> Assuming the charges against the merchants were fabricated and/or the trials were grossly unfair.

<sup>90</sup> Note that experts as well as the ICTY and ICTR have held that a single act may constitute an ‘attack’ for the purposes of prosecuting crimes against humanity. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, at para. 634 (May 7, 1997), available at <http://www.un.org/icty/tadic/trialc2/judgement/index.htm> [Reproduced in accompanying notebook at Tab 35] *See also* Duke, *supra* note 81. [Reproduced in the accompanying notebook at Tab 51]

<sup>91</sup> In *Akayesu* and *Rutaganda*, ICTR Trial Chamber I listed the commission *or omission* of an act that leads to death as a prerequisite for murder. Duke, *supra* note 81, at 331. [Reproduced in the accompanying notebook at Tab 51]

<sup>92</sup> Article 15(3) of the IST Statute extends criminal liability to anyone who provides the means for the commission of a crime. IST Statute, *supra* note 1, art. 15(3). [Reproduced in the accompanying notebook at Tab 14] *See High Command Trial*, *supra* note 16 [Reproduced in the accompanying notebook at Tab 19]; and *Ministries Trial*, *supra* note 17. [Reproduced in the accompanying notebook at Tab 22] In these trials high ranking Nazi officials and officers were convicted of war crimes and crimes against humanity; some, based merely on their facilitation of the plan to create a purified race.



sentencing by the judge is probably also part of the attack based on precedent from *Judges' Trial* at Nuremberg.<sup>93</sup> In the *Judges' Trial* several German judges were tried and sentenced by the Nuremberg Military Tribunal III for war crimes and crimes against humanity stemming from their participation in the genocide of the millions of Jews during the Holocaust through their capacity as justices of the peace.<sup>94</sup> In fact, at least one judge was convicted for war crimes and crimes against humanity despite publicly speaking out against the Nazi party and vehemently denying that he supported their plans or policies.<sup>95</sup>

### III. Was the attack directed against any civilian population?

The third element, which requires that the attack be direct against a civilian population, is also clearly satisfied in the case at hand. The requirement is intended to exclude attacks on armies as crimes against humanity. This allows courts to levy stiffer penalties to those who indiscriminately attack civilians during conflicts. In turn, civilians can garner additional protection during wars through deterrence; and warfare can be confined to militaries.

Assuming that the merchants were non-combatants, they are precisely the type of “civilian population” the IST Statute intends to protect. This is true even if every merchant was an Iraqi citizen. The IST Statute unambiguously states that crimes against humanity can be committed against “any civilian population,”<sup>96</sup> indicating that a State’s attack on its *own* citizens is covered by Article 12. This contention is supported by the ICTY holding in *Tadic*, which, in

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<sup>93</sup> See *Judges' Trial*, *supra* note 15. [Reproduced in the accompanying notebook at Tab 21] The judges in the *Judges' Trial* were convicted regardless of whether they were supporters of the Nazi party.

<sup>94</sup> Wikipedia, *Judges' Trial*, at [http://en.wikipedia.org/wiki/Judges%27\\_Trial](http://en.wikipedia.org/wiki/Judges%27_Trial). [Reproduced in accompanying notebook at Tab 75]

<sup>95</sup> See *Judges' Trial*, *supra* note 15, defendant Franz Schlegelberger. [Reproduced in the accompanying notebook at Tab 21]

<sup>96</sup> IST Statute, *supra* note 1, art. 12. [Reproduced in the accompanying notebook at Tab 14]

discussing the same provision from its own statute states "the inclusion of the word 'any' makes it clear that crimes against humanity can be committed against civilians of the *same nationality* as the perpetrator..."<sup>97</sup> Thus, even though the merchants and the perpetrators were all Iraqi, the killings were still an attack on a civilian population susceptible to crimes against humanity and covered by Article 12 of the IST Statute.

#### IV. Were the executions widespread or systematic?

The primary aspect differentiating a normal crime, falling under local court jurisdiction, and crimes against humanity, which fall under IST jurisdiction, is the widespread and systematic nature of the crimes. "Widespread" refers to the number of victims, whereas "systematic" refers to the existence of a policy or plan.<sup>98</sup> The purpose of these requirements is to exclude isolated and random acts from the category of crimes against humanity.<sup>99</sup> It is to be noted that "the requirement that the attack be 'widespread' or 'systematic' comes in the alternative;"<sup>100</sup> meaning that the two requirements are interchangeable and should be examined separately.

##### a) *Widespread*

Defining the scope of a widespread or systematic attack has been a challenge for prior tribunals. There has not yet been an exact definition settled on for 'widespread' attacks, although the consensus among most experts is that it implies a large number of victims. In *Akayesu*, ICTR Trial Chamber I cited the International Law Commission's (ILC) commentary to its 1996 Draft Code of Crimes to the effect that "widespread" may be defined as "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed

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<sup>97</sup> *Tadic*, *supra* note 90, at para. 634. [Reproduced in the accompanying notebook at Tab 35]

<sup>98</sup> *See Duke*, *supra* note 81, at 315. [Reproduced in the accompanying notebook at Tab 51]

<sup>99</sup> *Id.*

<sup>100</sup> *Kunarac*, *supra* note 88, at para. 93. [Reproduced in the accompanying notebook at Tab 29]

against a multiplicity of victims."<sup>101</sup> Similarly, Trial Chamber II in *Kayishema* understood 'widespread' to mean an attack "directed against a multiplicity of victims."<sup>102</sup> Thus, most believe that a large number of victims is required for an attack to be widespread. However, it should be noted that in the *Vukovar Hospital Decision*<sup>103</sup> the ICTY held that "an individual committing a crime against a single victim or a limited number of victims might be recognized as guilty of a crime against humanity if his acts were part of"<sup>104</sup> a larger plan or policy. Also, the execution by Soviet authorities of Hungarian leader Imre Nagy in 1956 was also called a crime against humanity even though there was only one victim.<sup>105</sup> The key inquiry is whether the killings are part of a larger-scale attack, i.e., if there are only a few victims, are these victims only a small portion of the *overall* number of victims. Chart 1, attached at the end of this memo, shows the number of victims various courts have deemed sufficient to find that crimes against humanity have occurred.<sup>106</sup>

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<sup>101</sup> See *Akayesu* *supra* note 57, at 580. [Reproduced in the accompanying notebook at Tab 23]

<sup>102</sup> *Kayishema*, *supra* note 60, at 123. [Reproduced in the accompanying notebook at Tab 26]

<sup>103</sup> See *Prosecutor v. Mksic, Radic, and Sljivancanin*, Case No. IT-95-13-R 61 Review of the Indictment Pursuant to Rule 61 of the Rules and Procedure and Evidence, April 3, 1996, at para. 29, quoted in *Tadic*, Case No. IT-94-1-T, Opinion and Judgment, at para. 643 (May 7, 1997) [hereinafter *Vukovar Hospital Decision*]. [Reproduced in accompanying notebook at Tab 30]

<sup>104</sup> *Id.*

<sup>105</sup> Even though the murder itself was not a mass scale, because the killing of a political leader is systematic insofar as it is meant to intimidate the entire "civilian population" of his supporters. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INT'L LAW: BEYOND THE NUREMBERG LEGACY 45, 59-60 (1997). [Reproduced in part in accompanying notebook at Tab 42]

<sup>106</sup> Recent decisions from various courts have showed that a small number of victims (such as the 60 merchants in this case) can still amount to crimes against humanity. For instance, the war crimes tribunal in East Timor has held that the killing of just one person was considered a crime against humanity because of its circumstances. East Timor Action Network, *selected postings from East Timor*, available at, <http://www.etan.org/et2004/november/22/22eight.htm>. [Reproduced in accompanying notebook at Tab 59] Likewise, a Florida court held that the killing of 70 people by a Chilean 'Caravan of Death' was a crime against humanity. However, it should be noted that both sets of killings were consequences of oppressive regimes that either supported or condoned the murdering of dissenters. See Center for Justice & Accountability, *Frequently Asked Questions - Cabello v. Fernández Larios*, [http://www.cja.org/cases/Cabello\\_Docs/CabelloFAQs.shtml](http://www.cja.org/cases/Cabello_Docs/CabelloFAQs.shtml) [Reproduced in accompanying notebook at Tab 56]

In the case at hand, the killing of the merchants can certainly be viewed as a widespread attack on the civilian population of Baghdad. There were numerous victims (63 merchants killed amongst thousands of others executed by extrajudicial courts) and the killings were part of a larger-scale attack (there were two sets of executions of merchants and several other similar executions by other extrajudicial courts). The primary counter-argument to this contention is that each execution was an isolated and legal punishment, not committed as part of a large-scale massacre. However, if the special extra-judicial courts of Hussein's regime were truly show courts which were a cloak for the execution of dissenters, then the argument that the merchant executions were isolated incidents does not hold true.

*b) Systematic*

Like the term 'widespread,' 'systematic' is not susceptible to a precise definition.<sup>107</sup> In general, 'systematic' attacks have come to denote repeated attacks as part of a preconceived plan. The ICTR, again citing the ILC, explained 'systematic' as "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources."<sup>108</sup> Likewise, in *Kayishema*, a systematic attack was said to be one "carried out pursuant to a preconceived policy or plan."<sup>109</sup> Thus, in determining whether an attack was 'systematic' the key inquiry is whether there was a policy or plan associated with the attacks. In the present case, the facts of the case do indicate that there was a preconceived plan in place. The plan was a policy choice made by the former regime to try and convict merchants for anti-

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<sup>107</sup> See Duke, *supra* note 81, at 315. [Reproduced in the accompanying notebook at Tab 51]

<sup>108</sup> See Akayesu, *supra* note 57, at 580. [Reproduced in the accompanying notebook at Tab 23] See also Duke, *supra* note 81. [Reproduced in the accompanying notebook at Tab 51]

<sup>109</sup> See *Kayishema*, *supra* note 60, at 123. [Reproduced in the accompanying notebook at Tab 26] See also Duke, *supra* note 81. [Reproduced in the accompanying notebook at Tab 51]

trust violations, in order to deflect criticism from the regime. This plan, ultimately, included the murder of many merchants. Even further, a larger parent plan apparently existed to use extrajudicial courts as conduit for carrying out mass executions. Thus, the requirement of a systematic attack is undoubtedly satisfied.

In sum, the requirements for a widespread or systematic attack are alternative requirements, with each possibly satisfied by the massacre of the merchants. The sheer number of victims will likely prove that the attack was widespread; while existence of preconceived plans and the fact that executions occurred on more than one occasion show that the killings were systematic.

V. Did the perpetrator know the acts constituted part of a pattern of widespread or systematic crimes directed against a civilian population?

The final element of crimes against humanity is the *mens rea*, requiring the perpetrator to have knowledge that his/her acts are part of larger-scale crimes against humanity. The Iraqi Special Tribunal includes a provision in Article 12 which requires “knowledge of the attack.”<sup>110</sup> Of the other three current international tribunal statutes, only the ICC’s statute includes a similar express *men rea* provision.<sup>111</sup> The inclusion of the requirement of “knowledge of the attack” was probably included in the Rome Statute and the IST Statute as a result of the confusion produced by the exclusion of such a provision in the ICTY and ICTR statutes. Unfortunately, in trying to clarify the mental state required for crimes against humanity, the IST Statute’s *mens rea* provision has added an additional ambiguity to the equation.

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<sup>110</sup> IST Statute, *supra* note 1, art. 11. [Reproduced in the accompanying notebook at Tab 14]

<sup>111</sup> See Rome Statute, *supra* note 68, art. 7(1). [Reproduced in the accompanying notebook at Tab 11]

From a plain reading of the Statute, “knowledge of the attack” could mean either the perpetrator of a crime against humanity must have knowledge that his/her conduct (1) is a crime itself or (2) is a prohibited act which is part of a widespread or systematic attack on a civilian population (i.e., a nexus between the act and a crime against humanity). The latter definition is probably the intended meaning.

Under Article 12, “attack” is defined as “a course of conduct involving the multiple commissions of acts referred to in the above paragraph against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack.”<sup>112</sup> The terming of an “attack” as a “course of conduct” while also referencing an “organizational policy” indicates that the “attack” is the ends to a criminal plan, which may or may not be comprised of smaller crimes. In the case at hand, the “multiple commissions” of “murder” is the ultimate goal and, therefore, the “attack.” Any acts which comprise the multiple commissions (killing one or two people, detaining, planning, ordering, etc.) may not be an “attack” themselves but still are punishable as crimes against humanity because they are part of the attack. When viewed in this light, the “knowledge of the attack” as mentioned in Article 12, must mean knowledge of the existence of a widespread or systematic attack on a civilian population. Such a reading of the statute makes sense in light of the fact that there are two criminal aspects to crimes against humanity; the individual criminal act and the larger inhumane policy or plan. The *mens rea* conveyed in the statute only addresses the larger policy/plan aspect of the crime, while remaining silent, as it should, on the individual criminal *mens rea* (because the requisite mental state for the underlying crime will differ from act to act). Thus, the perpetrator of crimes against humanity under the IST Statute, must have (1) the requisite *mens rea* for the underlying offense and (2)

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<sup>112</sup> IST Statute, *supra* note 1, art. 12(b)(1). [Reproduced in the accompanying notebook at Tab 14]

knowledge that his/her acts make up a smaller part of a larger “attack” on a civilian population.

This interpretation is supported by Professor Cassese, former president of the ICTY:

The requisite subjective element or *mens rea* in crimes against humanity is not simply limited to the *criminal intent* (or *recklessness*) *required for the underlying offence* (murder, extermination, deportation, rape torture, persecution, etc.). The viciousness of these crimes goes far beyond the underlying offence, however wicked or despicable it may be. This additional element – which helps to distinguish between crimes against humanity from war crimes – consists of awareness of the broader context into which this crime fits, that is *knowledge that the offences are part of a systematic policy* or of widespread and large-scale abuses.<sup>113</sup>

Further, holdings from both the ICTY and the ICTR provide support for Professor Cassese’s interpretation. For example, the ICTY Trial Chamber in *Tadic*, held that “the perpetrator must know of the broader context in which his act occurs.”<sup>114</sup> The ICTR came to a similar conclusion, but viewed the knowledge requirement as having two parts (which are seemingly redundant). The Trial Chamber in *Kayishema* held that the *mens rea* contained two parts; (1) knowledge of the attack and its widespread or systematic character and (2) awareness of the fact that the criminal activity constitutes part of the attack.<sup>115</sup> Additionally, in *R. v. Finta*,<sup>116</sup> the Canadian

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<sup>113</sup> Cassese, *supra* note 8, at 82. [Reproduced in the accompanying notebook at Tab 38]

<sup>114</sup> *Tadic*, *supra* note 90, at para. 656. [Reproduced in the accompanying notebook at Tab 35]

<sup>115</sup> See *Kayishema*, *supra* note 60, at para 123. [Reproduced in the accompanying notebook at Tab 26] The Trial Chamber in *Kayishema* wrote: “to be guilty of crimes against humanity the perpetrator must know that there is an attack on a civilian population and that his act is part of the attack;” and that part of what transforms an individual’s act into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused.” *Id.* at para. 134

<sup>116</sup> *R. v. Finta* [1994] 1 S.C.R. 701. [Reproduced in accompanying notebook at Tab 36]

Supreme Court held that the accused must be aware of or willfully blind to facts or circumstances that would bring his or her acts within the scope of a crime against humanity.<sup>117</sup>

Applying this precedent to the case at hand means that those who executed the merchants must have (1) purposefully intended to kill the merchants and (2) had knowledge that the executions were part of a systematic policy or of widespread abuses. Likewise, the persons who ordered or aided the executions must have (1) intended to order or aid the executions and (2) had knowledge that the executions were part of a systematic policy or of widespread abuses.

### **3. Article 13 – War Crimes**

Article 13 of the IST Statute grants the Tribunal jurisdiction over war crimes. In general, war crimes are crimes against people not involved in an armed conflict by those who are. War crimes are defined under the IST Statute as (1) “[g]rave breaches of the Geneva Conventions of 12 August 1949,”<sup>118</sup> (2) “[o]ther serious violations of the laws and customs applicable in international armed conflict” named in the statute,<sup>119</sup> (3) attacks on people not taking part in the hostilities during an armed conflict,<sup>120</sup> and (4) “[s]erious violations of the laws and customs of

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<sup>117</sup> See *id.* at 706. This and other supporting cases were cited in *Tadic*, *supra* note 90, at para. 657. [Reproduced in the accompanying notebook at Tab 35]

<sup>118</sup> IST Statute, *supra* note 1, art. 13(a) [Reproduced in the accompanying notebook at Tab 14]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950) [Reproduced in accompanying notebook at Tab 3], Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950) [Reproduced in accompanying notebook at Tab 4], Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [Reproduced in accompanying notebook at Tab 5], and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [Reproduced in accompanying notebook at Tab 6][collectively hereinafter Geneva Conventions]. The Geneva Conventions are international treaties governing the laws of war. For a brief summary of the Geneva Conventions visit, Wikipedia, *Geneva Conventions*, at [http://en.wikipedia.org/wiki/Geneva\\_conventions](http://en.wikipedia.org/wiki/Geneva_conventions) (last modified 28 May 2005). [Reproduced in accompanying notebook at Tab 74]

<sup>119</sup> IST Statute, *supra* note 1, art. 13(b). [Reproduced in the accompanying notebook at Tab 14]

<sup>120</sup> *Id.* at art. 13(c).



war applicable in armed conflict not of an international character.”<sup>121</sup> The common element amongst these crimes, and the base requirement for war crimes, is that the prohibited act must have occurred during an ‘armed conflict.’ Thus, the initial inquiry in determining if a war crime has taken place must focus on whether or not the prohibited act took place during an armed conflict.

#### I. Was an ‘armed conflict’ in progress during the executions?

‘Armed conflict’ has not been expressly defined by the IST Statute or the Geneva Conventions. Proving the existence of an armed conflict has never really been an issue among most war crime tribunals. For the most part, the existence of an armed conflict has been obvious in war crimes trials. However, when the existence of an armed conflict has not been obvious, it has been left to the States involved to determine whether an armed conflict exists.<sup>122</sup> If there is disagreement as to the armed conflict status of hostilities, the most applicable criteria is the intensity of violence.<sup>123</sup> In general, whether or not there are two sides fighting in a mutual battle, if the intensity of violence is very high, the hostilities will inevitably be considered an armed conflict.<sup>124</sup> Thus, even acts of terrorism or other small attacks can amount to an ‘armed conflict.’<sup>125</sup>

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<sup>121</sup> *Id.* at art. 13(d).

<sup>122</sup> M. Gandhi, *Common Article 3 Of Geneva Conventions, 1949 In The Era Of International Criminal Tribunals*, ISILYBIHRL 11, available at <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/11.html> [Reproduced in accompanying notebook at Tab 46]

<sup>123</sup> HANS-PETER-GASSER, “INTERNATIONAL HUMANITARIAN LAW”, IN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW (EDS.), M.K. BALACHANDRAN, ROSE VERGHESE (1998) [Reproduced in accompanying notebook at Tab 39]

<sup>124</sup> For example, the U.S. government has contended that September 11, 2001 attacks by al Qaeda on U.S. soil was an armed conflict despite the fact that it was a single unilateral attack. See Michael Scharf, *Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects*, 36 CASE W. RES. J. INT’L L. 359, 367 (2003). [hereinafter Scharf] [Reproduced in accompanying notebook at Tab 48]; “A single hostile act or attempted act may provide sufficient basis for the nexus [between the conduct and armed hostilities] so long as its magnitude or severity rises to the level of an ‘armed attack’ ...or the number, power, stated intent or organization of the force with

Although not expressly mentioned the Conventions themselves, the Additional Protocols to the Geneva Conventions<sup>126</sup> does provide guidance on how to determine the existence of an armed conflict. Article 51(2) of Protocol I (applicable to international armed conflicts) provides: “The civilian population as such, as well as individual civilians shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”<sup>127</sup> Likewise, Article 4(d) of Additional Protocol II (applicable to internal armed conflicts) provides: “the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever...”<sup>128</sup> Finally, Article 13 of Additional Protocol II states that: “The Civilian population as such, as well as individual civilians shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”<sup>129</sup> Thus, the Additional Protocols to the Geneva Conventions have inferred that armed conflicts entail violence against civilians on a scale large enough to spread terror.

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which the actor is associated is such tat the act or attempted act is tantamount to an attack by an armed force.” Department of Defense Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission, § 5(C) (April 30, 2003), *available at* <http://www.defenselink.mil/news/May2003/d200330430milcominstno2.pdf>

<sup>125</sup> See Scharf, *supra* note 124, at 359–374. [Reproduced in the accompanying notebook at Tab 48]

<sup>126</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 4, 16 I.L.M. 1391 [hereinafter Protocol I] [Reproduced in accompanying notebook at Tab 9]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442. [hereinafter Protocol II] [Reproduced in accompanying notebook at Tab 10]

<sup>127</sup> Protocol I, *supra* note 126, art. 51. [Reproduced in the accompanying notebook at Tab 9] See Scharf, *supra* note 124, at 364. [Reproduced in the accompanying notebook at Tab 48]

<sup>128</sup> Protocol II, *supra* note 126, art. 4. [Reproduced in the accompanying notebook at Tab 10] Scharf, *supra* note 124, at 364. [Reproduced in the accompanying notebook at Tab 48]

<sup>129</sup> Protocol II, *supra* note 126, art. 13. [Reproduced in the accompanying notebook at Tab 10] Scharf, *supra* note 124, at 364. [Reproduced in the accompanying notebook at Tab 48]

The ambiguity in the term ‘armed conflict’ is not accidental. The issue of what a “case of armed conflict” actually constituted arose continuously at the Diplomatic Conference that resulted in the composition of the Geneva Conventions of 1949.<sup>130</sup> Delegates at the Convention chose not to define ‘armed conflict’ because they did want to limit its scope; deliberately leaving it open for multiple interpretations. Thus, an armed conflict can be any hostilities ranging from an all out war to a simple rebellion.<sup>131</sup> For example, the Inter-American Commission on Human Rights held that the killing of under 42 civilians by the Argentine military during peacetime was an armed conflict.<sup>132</sup> Similarly, a U.S. court held that the hijacking of an airplane during peacetime was sufficient to satisfy the armed conflict threshold.<sup>133</sup> Still, many have attempted to define the limits and bounds of an ‘armed conflict.’ Jean S. Pictet, in his commentary to the Geneva Conventions, has opined that an armed conflict is relating to “armed forces on either side engaged in hostilities – conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country”<sup>134</sup> Additionally, in one of the few

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<sup>130</sup> JEAN S. PICTET, COMMENTAR FOR THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, 35 (1958). [hereinafter Pictet] [Reproduced in part in accompanying notebook at Tab 41]

<sup>131</sup> In the past, low intensity conflicts were not considered ‘armed conflicts’. *Id.* at p.33. However, the recent trend in international law has been to convey the armed conflict designation to even low intensity armed conflicts that have widespread impacts. See Scharf, *supra* note 124, at 364-369. [Reproduced in the accompanying notebook at Tab 48]

<sup>132</sup> *Abella v Argentina*, Case 11.137, Inter-Am. C.H.R., 55/97, OEA/Ser.L/V/II.98, doc. 6 rev. (Apr. 13 1998). [Reproduced in accompanying notebook at Tab 18] International humanitarian law “does not require the existence of large scale and generalized hostilities...” *Id.*

<sup>133</sup> See *United States v. United States v. Uniz*, 924 F.2d 1068 (1991). [Reproduced in accompanying notebook at Tab 37] On June 11, 1985 Yuniz hijacked a Jordanian airliner from Beirut and attempted it to the PLO Conference in Tunis to make a political statement. The laws of war were applied at his trial. See Scharf, *supra* note 124, at 368. [Reproduced in the accompanying notebook at Tab 48]

<sup>134</sup> Pictet, *supra* note 130, at 36. [Reproduced in the accompanying notebook at Tab 40]

working definitions of ‘armed conflict’ by a court, the ICTR defined the term as “the existence of open hostilities between armed forces, which are organized to a greater or lesser degree.”<sup>135</sup>

In the case at hand, facts are insufficient to make a determination regarding armed conflict status. At a minimum, there must be open hostilities between two (or more) groups of people. The war between Iraq and the United States and the several rebellions against Saddam Hussein’s regime during the 1990s are examples of hostilities which will qualify as armed conflicts for the present case.<sup>136</sup>

## II. Is there a nexus between the armed conflicts and the executions?

Once it is concluded that an armed conflict exists, the next step in establishing that war crimes have occurred is to determine whether there is a nexus between the armed conflict and the prohibited acts. This requirement is customary international law aimed at excluding crimes which are not related to the armed conflict. For example, the International Military Tribunal at Nuremberg (“IMT”) held that the crimes committed against the Jews of Germany *prior to* World War II could not be prosecuted by the IMT because they were not related “in execution of, or in connection with...” the war.<sup>137</sup> The IMT, however, did allow the same crimes (persecution,

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<sup>135</sup> *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment and Sentence, para 248. (ICTR Trial Chamber Jan. 27, 2000), available at <http://www.ictr.org/ENGLISH/cases/Musema/judgement/index.htm> [Reproduced in accompanying notebook at Tab 31]

<sup>136</sup> The executions took place in July of 1992 – after the Persian Gulf War had ended. At the time of the executions most rebellions had been suppressed and no-fly zones were in place. In short, there were no obvious armed conflicts ongoing in Iraq. The prosecution’s best argument for showing an armed conflict existed would be to bring forth evidence proving that the sporadic clashes between Coalition forces and the Iraqi regime amounted to an armed conflict as was defined in the above section. See Eric Bilderman’s e-mail to Pratheep Sevathinathan dated July 14, 2005.

<sup>137</sup> Judgment of the International Military Tribunal at Nuremberg (Oct. 1, 1946), in 1 International Military Tribunal, Trial of the Major War Criminals Before the International Military Tribunal 221 (English ed. 1947), available at <http://www.yale.edu/lawweb/avalon/imt/proc/judcont.htm> [Reproduced in accompanying notebook at Tab 20] The Nuremberg Charter required that both crimes against humanity and war crimes be linked to an armed conflict; a requirement which has since been removed from crimes against humanity in customary international law. *Id.* at Laws Relating to Crimes Against Humanity.

repression, and murdering of Jews) which occurred after the war commenced to be prosecuted, as the crimes were then sufficiently related to an armed conflict.<sup>138</sup> More recently, As the ICTY first held in *Tadic*, prosecution for war crimes requires that the “offence [was] closely related to the armed conflict as a whole.”<sup>139</sup> Similarly, the ICTY held later in *Pavo and Zenga*,<sup>140</sup> “[t]here must be an obvious link between the criminal act and the armed conflict.”<sup>141</sup> Thus, the mere fact that a prohibited act took place at the same time that an armed conflict was ongoing does not automatically make the act a war crime. This point was emphasized by the Trial Chamber of the ICTR when it held that:

*When the country is in a state of armed conflict, crimes committed in this period of time could be considered as having been committed in the context of armed conflict. However, it does not mean that all such crimes have a direct link with the armed conflict and all the victims of these crimes are victims of armed conflict.*<sup>142</sup>

Thus, even if the execution of merchants had occurred during the Persian Gulf War or during uprising against Hussein, if there is no link between the executions and those hostilities then no war crimes exist. There must be some indication that the plan to execute the merchants was part of an armed conflict. In the case at hand, the most suitable nexus would be between the executions and a rebellion based on criticism of the former regime; although there does not seem to be any facts indicating that such a rebellion ever occurred.

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<sup>138</sup> *Id.*

<sup>139</sup> *Tadic*, *supra* note 90, at para. 573. [Reproduced in the accompanying notebook at Tab 35]

<sup>140</sup> *Prosecutor v. Pavo and Zenga*, Case No. ICTY-96-21, Judgment (ICTY Trial Chamber Nov. 16, 1998). <http://www.un.org/icty/celebici/trialc2/judgement/index.htm>. [Reproduced in accompanying notebook at Tab 33]

<sup>141</sup> *Id.* at 193

<sup>142</sup> *See Kayishema*, *supra* note 60, at 600. [Reproduced in the accompanying notebook at Tab 26]

### III. Internal or International Armed Conflict?

The next step in determining whether war crimes have been committed, is determining whether the armed conflict was an international or internal conflict. Although the IST Statute has made strides to abolish the distinction, it still contains a few acts which are exclusive to international or internal conflicts. International conflicts are those between two or more States, or between a State and a national liberation movement, pursuant to Article 1(4) of the First Additional Protocol of 1977 of the Geneva Conventions.<sup>143</sup> Internal conflicts are large-scale armed hostilities, other than internal disturbances and tensions, or riots isolated or sporadic acts of armed violence, between State authorities and rebels, or between two or more organized armed groups within a State.<sup>144</sup> In the IST Statute, Article 13, sections (a) and (b) apply to international conflicts,<sup>145</sup> while section (d) applies to internal conflicts.<sup>146</sup> Section (c) of Article 13 applies to both internal and international conflicts.<sup>147</sup> Since each of these sections criminalize different acts, whether or not the executions amount to, or are comprised of, war crimes may depend on whether the executions were linked to an internal or international conflict.<sup>148</sup>

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<sup>143</sup> Cassese, *supra* note 8, at 54. [Reproduced in the accompanying notebook at Tab 38]

<sup>144</sup> *Id.*

<sup>145</sup> See IST Statute, *supra* note 1, art. 13(a) and (b). [Reproduced in the accompanying notebook at Tab 14]

<sup>146</sup> *Id.* at 13(d).

<sup>147</sup> *Id.* at 13(c).

<sup>148</sup> However, it should be noted that the more current view is that in modern warfare it no longer makes sense to distinguish between international and internal conflicts. Cassese, *supra* note 8, at 62. [Reproduced in the accompanying notebook at Tab 38] This point was stressed by the Appeals Chamber in *Tadic (Interlocutory Appeal)* when it opined: “Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign State are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a sovereign State?” *Tadic*, *supra* note 90, at para. 97. [Reproduced in the accompanying notebook at Tab 35] The distinction between international and internal conflicts has been severely watered-down by the IST Statute.

The prohibited acts which are exclusive to *international* war crimes, as listed in sections 13(a) and (b), and which apply to the case at hand (i.e., to the trials and executions) are: “Willful killings;”<sup>149</sup> “Willfully denying the right of a fair trial to a prisoner of war or other protected person;”<sup>150</sup> “Unlawful confinement,”<sup>151</sup> and collective punishment.<sup>152</sup> The last is probably the most fitting charge which could be brought against members of the former regime, if the executions were related solely to an international armed conflict. If the former regime argues that the executions did not amount to willful killings but rather were justified judicial executions, they can still be charged with collective punishment because it is highly unlikely that all 63 merchants violated anti-trust laws.

Prohibited acts which are exclusive to *internal* war crimes are listed in section 13(d). However, none of the prohibited acts which are exclusive to internal conflicts apply to the case at hand. Finally, certain acts are prohibited in both international and internal conflicts. The execution of the merchants concern several of these acts, including: “Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part

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<sup>149</sup> IST Statute, *supra* note 1, art. 13(a)(1). [Reproduced in the accompanying notebook at Tab 14] It has been opined that, “extrajudicial executions amount to “willful killings” under article 147 of the Fourth Geneva Convention and, by extension, are war crimes at international law.” See Ardi Imseis, *In the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT’L L.J. 65, 109 (2003). [Reproduced in accompanying notebook at Tab 43]

<sup>150</sup> IST Statute, *supra* note 1, art. 13(a)(5). [Reproduced in the accompanying notebook at Tab 14] Where protected persons include “civilians on the territory of the Detaining Power or subject to the belligerent occupation of an Occupying Power” Cassese, *supra* note 8, at 55. [Reproduced in the accompanying notebook at Tab 38]

<sup>151</sup> IST Statute, *supra* note 1, art. 13(a)(7). [Reproduced in the accompanying notebook at Tab 14]

<sup>152</sup> Collective punishment is the act of punishing a large group of people because of the actions of certain members of a group that they all belong. It is not one of the listed acts in the Article 13 of the IST Statute, but rather comes from Article 33 of the Fourth Geneva Convention, which states “[n]o protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.” Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 33, 12 August 1949, 75 U.N.T.S. 287.

in hostilities;”<sup>153</sup> “Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;”<sup>154</sup> “Taking of hostages;”<sup>155</sup> and “The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable;”<sup>156</sup> The last listed act is the most fitting charge for the trials and executions of the merchants. The “carrying out of executions” without “affording all judicial guarantees which are generally recognized as indispensable” is exactly the crime which was carried out. Thus, if there was an armed conflict during the executions and the executions were linked to the conflict then the acts of those responsible for ordering, aiding, contributing, and carrying out the executions fall neatly into IST jurisdiction under Articles 13(c)(4) and 15 of the IST Statute. *This means that even the judges who were coerced into sentencing the merchants may be tried for war crimes* pursuant to precedent from the *Judges’ Trial* at Nuremberg<sup>157</sup> (although they should have the affirmative defense of coercion at their disposal).

#### IV. Mens rea

Finally, unlike for crimes against humanity, the IST Statute does not require knowledge of the circumstances for war crimes. Thus the mental element required for war crimes are simply the requisite *mens reas* for the underlying acts.

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<sup>153</sup> IST Statute, *supra* note 1, at art. 13(b)(1) and 13(d)(1). [Reproduced in the accompanying notebook at Tab 14]

<sup>154</sup> *Id.* at art. 13(c)(1).

<sup>155</sup> *Id.* at art. 13(c)(3).

<sup>156</sup> *Id.* at art. 13(c)(4).

<sup>157</sup> *See Judges’ Trial*, *supra* note 15. [Reproduced in the accompanying notebook at Tab 21]



#### 4. Article 14 – Violations of Stipulated Iraqi Laws (Abuse of Power)

Unlike the ICTY, the ICTR, and the ICC, the Iraqi Tribunal includes violations of certain national laws in its jurisdiction. Article 14 of the IST Statute grants the Tribunal jurisdiction over “violations of stipulated Iraqi laws.”<sup>158</sup> Specifically, section (a) of Article 14 states that “[t]he Tribunal shall have the power to prosecute...[f]or those outside the judiciary, the attempt to manipulate the judiciary or involvement in the functions of the judiciary, in violation, *inter alia*, of the Iraqi interim constitution of 1970, as amended.”<sup>159</sup> From a literal interpretation of the Article, several of the persons involved in the mass executions can be charged for attempting to manipulate the judiciary. Certainly the person who threatened the presiding judge with a handgun can be charged under Article 14. The threat on the judge’s life in order to coerce him into sentencing the merchants was a clear attempt to manipulate the judiciary. Additionally, anyone else who may have threatened, compensated, or otherwise attempted to improperly influence the judiciary, even if unrelated to the execution of the merchants, may be tried by the IST under Article 14.<sup>160</sup> Finally, because no other international tribunal includes abuse of power in their jurisdiction, and because the crime is based on Iraqi law, precedent for the interpretation of Article 14 (if needed) should be obtained from Iraqi court decisions.

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<sup>158</sup> IST Statute, *supra* note 1, art. 14. [Reproduced in the accompanying notebook at Tab 14]

<sup>159</sup> *Id.* at art. 14(a).

<sup>160</sup> It should be noted that the *Judges’ Trial* case from the Nuremberg trials does not apply as precedent for Article 14 of the IST Statute. The *Judges’ Trial* defendants were all judges, lawyers, or other participants in the judiciary system of Germany. Article 14 of the IST expressly covers only those who are “outside the judiciary.” IST Statute, *supra* note 1, art. 14(1). [Reproduced in the accompanying notebook at Tab 14] Thus, Article 14 of the IST Statute aims at criminalizing the improper influencing of judicial proceedings from outside of the judiciary, whereas the *Judges’ Trial* case focuses on the improper conduct of those within the judiciary itself. The *High Command Trial* and the *Ministries Trial*, on the other hand, *can* be used as precedent applying to the senior (non-judicial) members of the regime violating Article 14.

## 5. Who can be charged?

Article 1 of the IST Statute states that “[t]he Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11 to 14 ...committed since July 17, 1968 and up until and including May 1, 2003, in the territory of the Republic of Iraq or elsewhere...”<sup>161</sup> Article 15 goes further and defines who, based on their actions, can be held responsible for a crime under IST jurisdiction.<sup>162</sup> Since the crimes under the IST are grave in nature and tend to involve a large number of people, the Statute expressly lists all persons who may be liable for a particular crime. In addition to criminalizing the commission<sup>163</sup> of any of the IST crimes, Article 15 makes it a crime to order, solicit, induce,<sup>164</sup> aid, abet,<sup>165</sup> contribute to,<sup>166</sup> or attempt to commit the crime.<sup>167</sup> Additionally, the Article 15 removes head-of-state immunity and any other special treatment, regarding criminal responsibility, for any person part of the Iraqi government.<sup>168</sup> Finally, Article 15 adopts the doctrine of ‘superior responsibility’<sup>169</sup> and

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<sup>161</sup> IST Statute, *supra* note 1, art. 1(2). [Reproduced in the accompanying notebook at Tab 14]

<sup>162</sup> *See id.* at art. 15(a). “A person who commits a crime within the jurisdiction of this Tribunal shall be individually responsible and liable for punishment in accordance with this Statute.” *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *See* IST Statute, *supra* note 1, art. 15(b)(2). Section (b)(5) also makes inciting others to commit genocide a crime. *Id.* at art. 15(b)(5). [Reproduced in the accompanying notebook at Tab 14]

<sup>165</sup> *Id.* at art. 15(b)(3).

<sup>166</sup> *Id.* at art. 15(b)(4).

<sup>167</sup> *Id.* at art. 15(b)(6).

<sup>168</sup> *Id.* at art. 15(c).

<sup>169</sup> *Id.* at art. 15(d). The ‘doctrine of superior responsibility’ is a modern version of command responsibility, developed by the ICTY and ICTR. It represents the concept that that superiors, whether or not recognized officially, are responsible for the criminal actions of their subordinates if they had recklessly allowed the subordinate to commit a crime. For a simple summary on superior responsibility *see* CBC News, *Command, superior and ministerial responsibility*, available at [http://www.cbc.ca/news/background/iraq/abughraib\\_commandresponsibility.html](http://www.cbc.ca/news/background/iraq/abughraib_commandresponsibility.html) [hereinafter CBC] [Reproduced in accompanying notebook at Tab 54]

removes ‘just following orders’<sup>170</sup> as a defense. The inclusion of these provisions make passing off liability to from superiors to subordinates and vice versa useless to defendants. Under the IST Statute, everyone is responsible for results they could have controlled. Thus, everyone involved in the executions ranging from the officers to the senior members of the regime to the judges at the trial may be charged if their participation in the executions if their participation is are encompassed by both Article 15 and any of the substantive crimes listed in Articles 11-14.

## **VI. HUMAN RIGHTS VIOLATIONS**

In addition to classifying the executions of the merchants as war crimes and crimes against humanity, the executions are also probably breaches of fundamental human rights, and further, a violation of several international conventions, including the ICCPR. Article 6(2) of the ICCPR, expressly states that:

*In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.*<sup>171</sup>

Because the ICCPR allows the death penalty “only for the most serious crimes” the executions of the merchants probably violate Article 6(2). Article 7 of the UN Human Rights Committee General Comment on ICCPR Article 6 states: “The Committee is of the opinion that the expression ‘the most serious crimes’ must be read restrictively to mean that the death penalty should be a quite exceptional measure.”<sup>172</sup> The UN Human Rights Committee has also specified

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<sup>170</sup> IST Statute, note 1, art. 15(e). [Reproduced in the accompanying notebook at Tab 14] For a simple summary on the ‘following orders defense’ see CBC, *supra* note 169. [Reproduced in the accompanying notebook at Tab 54]

<sup>171</sup> ICCPR, *supra* note 23, art. 6(2). [Reproduced in the accompanying notebook at Tab 7]

<sup>172</sup> Amnesty International, *People’s Republic of China Executed “according to law”? - The death penalty in China* (citing Article 7 of the UN Human Rights Committee General Comment on ICCPR Article 6), available at

that "...it is contrary to the Covenant to impose the death penalty for crimes which are of an economic nature."<sup>173</sup> In addition to the triviality, and economic nature, of the crime the executions were based on, the executions may also violate section 4 of Article 6. Section 4 states "[a]nyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases."<sup>174</sup> Thus, the denial of merchants' rights to seek pardons or commutations of their sentences provides the basis for another human rights violation by the former regime. Even more, the executions were also in violation of nearly every provision in Article 14 of the ICCPR – guaranteeing the right to a fair trial. Most significantly, the merchants were denied "a fair and public hearing by a competent, independent and impartial tribunal,"<sup>175</sup> "the right to be presumed innocent until proved guilty according to law,"<sup>176</sup> the right "[t]o be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him,"<sup>177</sup> the right

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<http://web.amnesty.org/library/index/ENGASA170032004> [hereinafter Amnesty] [Reproduced in accompanying notebook at Tab 53]

<sup>173</sup> ICCPR/c.79/Add.1(1992) para. 5. *See also* Amnesty, *supra* note 172. [Reproduced in the accompanying notebook at Tab 53] In 1984 the UN Economic and Social Council (ECOSOC) adopted the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. Among other things, these Safeguards state that the scope of the death penalty "should not go beyond intentional crimes with lethal or other extremely grave consequences", and that any legal process resulting in an execution must give "all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights." *Id.*

<sup>174</sup> ICCPR, *supra* note 23, at art. 6(4). [Reproduced in the accompanying notebook at Tab 7]

<sup>175</sup> *Id.* at art. 14(1).

<sup>176</sup> *Id.* at art. 14(2).

<sup>177</sup> *Id.* at art. 14(3)(a).

“to defend himself in person or through legal assistance of his own choosing,”<sup>178</sup> and “the right to his conviction and sentence being reviewed by a higher tribunal according to law.”<sup>179</sup>

Finally, the illegality and overall disdain of summary executions were reaffirmed in 1989, just 3 years prior to the executions, in the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions which stated:

Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody. This prohibition shall prevail over decrees issued by governmental authority.<sup>180</sup>

Thus, the extrajudicial executions of the merchants were violations of customary international law, international human rights norms, the ICCPR, and the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

*However*, an interesting aspect of the Iraqi Special Tribunal is that unlike other similar tribunals, including the ICTY, ICTR, and the Special Court for Sierra Leone, it does not have jurisdiction over breaches of international humanitarian law outside of genocide, crimes against

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<sup>178</sup> *Id.* at art. 14(3)(d).

<sup>179</sup> *Id.* at art. 14(5). *See also* Article 6 of ECOSOC resolution on Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (1996/15): [...] calls upon Member States in which the death penalty may be carried out to ensure that officials involved in decisions to carry out an execution are fully informed of the status of appeals and petitions for clemency of the prisoner in question.

<sup>180</sup> Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E.S.C. res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989). [Reproduced in accompanying notebook at Tab 69]

humanity, and war crimes. Article 1 of the ICTY Statute states “[t]he International Tribunal shall have the power to prosecute persons responsible for *serious violations of international humanitarian law* committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute”<sup>181</sup> Likewise, the Article 1 of the ICTR Statute states “The International Tribunal for Rwanda shall have the power to prosecute persons responsible for *serious violations of international humanitarian law* committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.”<sup>182</sup> Finally, echoed once again, the Statute of the Special Court for Sierra Leone states “[t]he Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for *serious violations of international humanitarian law* and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”<sup>183</sup> Contrast these provisions with the equivalent provision from the IST Statute, which states “[t]he Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11 to 14 below, committed since July 17, 1968 and up until and including May 1, 2003, in the territory of the Republic of Iraq or elsewhere, including crimes committed in connection with Iraq’s wars against the Islamic Republic of Iran and the State of Kuwait.”<sup>184</sup> *The IST*

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<sup>181</sup> ICTY Statute, *supra* note 82, art. 1 [Reproduced in the accompanying notebook at Tab 13]

<sup>182</sup> ICTR Statute, *supra* note 83, art. 1. [Reproduced in the accompanying notebook at Tab 12]

<sup>183</sup> Statute of the Special Court for Sierra Leone, art. 1(1), available at <http://www.sc-sl.org/scsl-statute.html>. [Reproduced in the accompanying notebooks at Tab 15]

<sup>184</sup> IST Statute, *supra* note 1, art. 1(b). [Reproduced in the accompanying notebook at Tab 14]

*Statute makes no mention of jurisdiction over violations of humanitarian law* not amounting to war crimes, genocide, and crimes against humanity. Since the IST Statute was based largely on the aforementioned ICTY and ICTR statutes, the exclusion of jurisdiction of *other* humanitarian violations must have been deliberate. The framers of the IST Statute must have intended to limit the IST jurisdiction to those crimes which are enumerated in the Statute itself.

The ramifications of the expressly excluding other humanitarian violations from the IST Statute are that the executions cannot be tried by the Tribunal if they do not amount to genocide, war crimes, or crimes against humanity. This is true even despite the fact that the summary executions are serious breaches of international law, including a violation of the ICCPR. Thus, if facts surrounding the execution of the merchants emerge which do not show that an armed conflict was present, or that the executions were not part of policy or plan, the IST will not have jurisdiction to hear the case, irregardless of the gravity of the conduct and the clear illegality of the executions.<sup>185</sup>

Still, when attempting to satisfy the objective elements of IST crimes, the denial of the fundamental rights can be used as evidence to prove that the executions were murders rather than lawful executions. Extrajudicial punishments are defined by their lack of due process, which, in certain circumstances (such as in battlefields) is justified. However, when due process and fundamental rights are illegitimately denied to the executed, the summary executions are equivalent to murders. Thus, the large-scale violations of the merchants' human rights, during the executions, are *prima facie* evidence of murder.

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<sup>185</sup> However, it should be noted that the human rights violations mentioned can be prosecuted by Iraqi federal courts if the Iraqi government chooses to do so.

## **VII. CONCLUSION**

Of the four types of crimes the IST has jurisdiction over, only two can be said to have likely occurred – crimes against humanity and abuse of power. Crimes against humanity likely occurred because the extrajudicial executions, if amounting to murder, were both systematic and widespread attacks on a civilian population. Only if those responsible for the executions can show that the killings were legal and not murders, will the executions not amount to crimes against humanity. Additionally, an abuse of power likely occurred because there was evidence of manipulation of the judiciary. Charges under Article 14 should be brought against those who were involved in the manipulations.

Genocide is the crime which least likely occurred during the executions. The targeting of a protected group is the key element of genocide. Merchants are not a protected group under either the IST Statute or the Genocide Convention. Thus, genocide likely did not occur based on the execution of merchants.

Finally, the executions may have amounted to war crimes under Article 13 of the IST Statute if the executions were related to an armed conflict. The relationship between the executions and an armed conflict is a factual inquiry for which the existence of war crimes is dependant upon. It is up to the prosecution to find a nexus between an armed conflict and the executions if the former regime is to be charged with war crimes stemming from the executions.

In sum, charges should be brought under Articles 12 (crimes against humanity), 14 (abuse of power), and 15 (criminal liability) of the IST Statute; and possibly also Article 13 (war crimes) if an armed conflict nexus is established.



**Chart 1 – Number of Victims Sufficient for Crimes against Humanity**

Court	Defendant	Crime	Number Directly Victimized by Defendant	Total Number of Victims	Judgment
East Timor	Benjamin <sup>i</sup> Sarmento <i>Deputy Commander of the Tim Sasarat Ablai Militia</i>	Murder and Deportation	<b>5</b> killed  Thousands deported	12,000 deported by Sarmento's group  250,00 total victims in East Timor crisis	12 years in prison for Crimes Against Humanity
East Timor	Lieutenant-Colonel Soedjarwo <sup>ii</sup> <i>Indonesian Military Chief</i>	Failing to prevent the killing of Timorese	0	Over 1,000  250,00 total victims in East Timor crisis	5 years in prison for Crimes Against Humanity
East Timor	Mateus Lao <sup>iii</sup> <i>Sakunar militia member</i>	Murder	<b>One</b> man was killed by Lao after trying to escape from East Timor	n/a – an apparently isolated incident  250,00 total victims in East Timor crisis	8 years in prison for Crimes Against Humanity
Florida	Armando Fernandez Larios <sup>iv</sup> <i>Chilean Military Officer</i>	Direct participation in an extra-judicial killing squad (the “Caravan of Death”)	One complaint, but several mentioned as part of the action	<b>70</b> by Larios’ Caravan of Death  2,603 under Pinochet	Found liable for, <i>inter alia</i> , crimes against humanity and was instructed to pay \$4 million in damages.
ICTR	Eliezer Niyitigeka <sup>v</sup> <i>Information Minister of Rwanda</i>	Murder, extermination, rape, and inhumane acts	Around <b>10</b> people were killed or raped by Niyitigeka himself.  His most damaging actions was his incitement of genocide via propaganda on Rwandan radio	800,00 killed during entire Rwanda crisis	Life in prison for crimes against humanity and genocide
ICTR	Jean Paul Akayesu <sup>vi</sup> <i>Mayor of Taba</i>	Did not prevent murder, extermination, inhumane acts, torture, and rape  Participated in a murder	<b>One</b> murdered by Akayesu himself  <b>11</b> were killed under Akayesu’s orders	2,000 killed in Taba while Akayesu was mayor  800,00 killed during entire Rwanda crisis	Life in prison for crimes against humanity (also convicted of genocide)
ICTY	Dario Kordic <sup>vii</sup> <i>Vice-president of the Bosnian Croat Republic</i>	Ordering a massacre	Ordered the massacre of hundreds	Hundreds because of his orders  200,000 killed during entire Balkan crisis	25 years in prison for, <i>inter alia</i> , Crimes Against Humanity
ICTY	Dragoljub Kunarac <sup>viii</sup> <i>Commander in the Serb Army</i>	Rape, torture, and enslavement	At least <b>16</b> raped by Kunarac himself	<b>Dozens</b> raped by Kunarac and his platoon  200,000 killed during entire Balkan crisis	28 years in prison for, <i>inter alia</i> , Crimes Against Humanity
IST	Judge	Not preventing murder	Could have prevented 63 murders	Tens of thousands were executed by the “Special Courts” in Iraq  300,000 were killed or are missing under Hussein’s regime.	
	Officials	Murder	Murdered between 0 and 63		
	Officers	Murder	Murdered between 0 and 63		

## Endnotes for Chart 1

<sup>i</sup> No Peace without Justice, *Ablai Militia Leaders Sentenced For Crimes Against Humanity*, at <http://www.npwj.org/?q=node/1348> [Reproduced in accompanying notebook at Tab 64]

<sup>ii</sup> The Guardian Unlimited, *Indonesian officer guilty of crimes against humanity in East Timor*, at <http://www.guardian.co.uk/indonesia/Story/0,2763,865837,00.html> [Reproduced in accompanying notebook at Tab 61]

<sup>iii</sup> ETAN, *supra* note 99. [Reproduced in the accompanying notebook at Tab 59]

<sup>iv</sup> North Gate News Online, *Finishing the Story*, available at <http://journalism.berkeley.edu/ngno/stories/001432.html> [Reproduced in accompanying notebook at Tab 65] ; *see also* Center for Justice and Accountability, *CHILE: Armando Fernandez Larios*, at <http://www.cja.org/cases/cabello.shtml> [Reproduced in accompanying notebook at Tab 51]

<sup>v</sup> *See Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, (ICTR Trial Chamber, May 16 2003) available at <http://www.ictt.org/ENGLISH/cases/Niyitegeka/judgement/index.htm> [Reproduced in accompanying notebook at Tab 30]; *See also* Global Policy Forum, *ICTR Finds Two Former Officials Guilty of Genocide*, at <http://www.globalpolicy.org/intljustice/tribunals/rwanda/2003/0515two.htm> [Reproduced in accompanying notebook at Tab 59]

<sup>vi</sup> Akayesu, *supra* note 57 [Reproduced in the accompanying notebook at Tab 23]; *see also* Trial Watch, *Jean-Paul Akayesu*, at <http://www.trial-ch.org/trialwatch/profiles/en/facts/p160.html> [Reproduced in accompanying notebook at Tab ]

<sup>vii</sup> *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-T, Judgment, paras. 338-39 (ICTY Trial Chamber, Feb. 21, 2001), available at <http://www.un.org/icty/kordic/trialc/judgement/index.htm> [Reproduced in accompanying notebook at Tab 25]; *see also* Global Policy Forum, *Croat Instigator of Ethnic Cleansing given 25 Years*, <http://www.globalpolicy.org/wldcourt/tribunal/2001/0227icty.htm> [Reproduced in accompanying notebook at Tab 61];

<sup>viii</sup> *Kunarac*, *supra* note 87 [Reproduced in the accompanying notebook at Tab 29]; *see also*, Global Policy Forum, *Three Bosnian Serbs Sentenced On Wartime Sexual Crimes*, at <http://www.globalpolicy.org/wldcourt/tribunal/2001/0222icty.htm>. [Reproduced in accompanying notebook at Tab 63]