

2005

The Criminal Culpability Of The Defendants And Saddam Hussein In Connection With The Treatment Of The People Of The Village Of Al-Dujayl

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

**MEMORANDUM FOR THE
OFFICE OF THE PROSECUTOR
OF THE IRAQI SPECIAL TRIBUNAL**

**ISSUE: THE CRIMINAL CULPABILITY OF THE DEFENDANTS AND SADDAM
HUSSEIN IN CONNECTION WITH THE TREATMENT OF THE PEOPLE OF THE
VILLAGE OF AL-DUJAYL**

**PREPARED BY PRATHIMA C. REDDY
SPRING 2005**

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issues

This memo analyzes whether the events which occurred in the village of Al-Dujayl constitute a crime under the jurisdiction of the Iraqi Special Tribunal. (Part I). Next, it will examine the substantive legal defenses which the Defendants might raise when charges are brought against them as a result of their alleged participation in the attacks. (Part II). Finally, it will discuss Saddam Hussein's culpability and possible defenses if charges are eventually brought against him for the same crimes as brought against those who have already been charged with crimes related to the village of Al-Dujayl. (Part III).

B. Summary of Conclusions

1. The Criminal Culpability of the Defendants

If the facts stipulated are proved, the Defendants, when brought before the Iraqi Special Tribunal ("IST") could be convicted of crimes against humanity and war crimes in violation the Geneva Convention. These acts do not amount to crimes of genocide because the Defendants did not specifically attack a particular ethnic, racial or religious group. Nevertheless, the Defendants' actions constitute war crimes and crimes against humanity. They engaged in and ordered the violent death of the residents of and destruction of the village of Al Dujayl. They did so through armed conflict, using extreme force to systematically attack these civilians. These Defendants should be held responsible for their criminal behavior in the Iraqi Special Tribunal using applicable international laws and standards.

2. The Defendant's Possible Defenses

The Defendants may claim self-defense, reprisals, justifiable necessity and obedience to the orders of a superior as possible defenses to these allegations. While these defenses will not exonerate the Defendants, they do have a legitimate argument for mitigation of their sentence through the doctrine of obedience to the orders of a superior. Historically, this defense has been successful during sentencing. The prosecution will be able to respond to this defense by making the argument that the Defendants crimes were shocking and extensive and that they were under a duty to disobey since they knew that their conduct was illegal. These factors will support the prosecution's argument for a conviction without a mitigated sentence.

3. Criminal Culpability of Saddam Hussein

If the Iraqi Special Tribunal chooses to bring charges against Saddam Hussein in connection with the attacks against the village of Al-Dujayl, he would be held culpable for the crimes of his subordinates through the doctrine of command responsibility. Hussein had effective control of the actions of the Defendants, was aware of the Defendant's plot to destroy the village of Al-Dujayl and did not prevent or punish their behavior. Since, Hussein's conduct meets the requirements of culpability for command responsibility; the prosecution has a viable case against him.

II. Factual Background

Before proceeding to the legal analysis, it is necessary to discuss the factual background relating to the Defendants' and Saddam Hussein's interaction with the people of the village of Al-Dujayl. In July of 1982, Hussein's motorcade was traveling through the village of Al-Dujayl, a town located approximately 40 miles north of Baghdad.¹ One of the villagers marked a

¹ Times Staff and Wire Reports, *Conflict in Iraq: Iraqi Judge on Tribunal Assassinated in Baghdad*, LOS ANGELES TIMES, March 2, 2005. {Reproduced in the accompanying Notebook 3 at Tab 46}.

vehicle in the convoy with a red marking, signaling to other villagers to fire upon the vehicle in what was an apparent plot to kill Hussein.² The attackers shot at the decoy vehicle, unaware that Hussein had escaped into another vehicle before the gunfight ensued and instead killed several members of Hussein's entourage.³

Within hours Iraqi intelligence agents and police appeared in the village.⁴ One hundred and forty three residents were immediately rounded up and executed later following show trials.⁵ Fifteen hundred villagers were imprisoned and detained for years without ever being formally charged.⁶ The remaining residents of the town were deported to Iran.⁷ In addition, government forces destroyed the town's date palm and fruit orchards and numerous homes in retaliation for the attack on the convoy.⁸ Bulldozers were eventually sent to destroy the entire village.⁹

The Defendants who are alleged to have carried out all of these attacks against the villagers of Al-Dujayl are Barzan Ibrahim Hassan Tikriti, Hussein's half-brother and the former chief of Iraqi intelligence; Taha Yassin Ramadan, a former deputy prime minister and vice president; Awad Hamad Bandr Sadun, former chief judge of the Revolutionary Court; Abdullah

² Hannah Allam, *Ex-Iraqi Officials Face Criminal Trial*, THE TIMES UNION, March 1, 2005. {Reproduced in the accompanying Notebook 3 at Tab 47}.

³ Jackie Spinner, *U.S. Forces Detain Father, Son in '82 Massacre: Hundreds Were Killed in Shiite Muslim Village*, THE WASHINGTON POST, Feb. 27, 2005. {Reproduced in the accompanying Notebook 3 at Tab 48}.

⁴ Monte Morin, *The Conflict in Iraq: Ex-Hussein Aides to Be Tried for Alleged Crimes Against Humanity*, LOS ANGELES TIMES, Los Angeles Times, March 1, 2005. {Reproduced in the accompanying Notebook 3 at Tab 49}.

⁵ Global News Wire Staff, *Iraq Refers First Case Involving Saddam Officials for Trial*, GLOBAL NEWS WIRE, March 1 2005. {Reproduced in the accompanying Notebook 3 at Tab 50}.

⁶ Edward Wong, *Five of Saddam's Allies are Charged with Crimes Against Humanity*, THE INTERNATIONAL HERALD TRIBUNE, March 2, 2005. {Reproduced in the accompanying Notebook 3 at Tab 51}.

⁷ Issue Statement From the Iraqi Special Tribunal {Reproduced in the accompanying Notebook 3 at Tab 74}

⁸ United Press International Staff, *Killing Make Iraq Judges More Fearful*, UNITED PRESS INTERNATIONAL, March 2, 2005. {Reproduced in the accompanying Notebook 3 at Tab 52}.

⁹ Economist Staff, *Iraq: The Town that Disappeared*, THE ECONOMIST NEWSPAPER, 1982, Dec. 4, 1982. {Reproduced in the accompanying Notebook 3 at Tab 53}.

Kadam Roweed Musheikhi, a local Baath Party official; and his son, Mizher Abdullah Kadam Roweed Musheikhi.¹⁰ Tikriti is alleged to be responsible for leading the entire attack onto the village.¹¹ Ramadan is said to have led the effort to eliminate the livelihoods of the towns remaining residents by systematically destroying the date plantations and farms which the residents relied upon.¹² Al-Sudan is accused of conducting the secret trials that led to the execution of the one-hundred and forty three men.¹³ Al-Musheikhi and his son, Mizher are accused with assisting secret agencies arrest the fifteen hundred detained villagers.¹⁴ If convicted, each of these individuals faces the death penalty.¹⁵

The Iraqi Special Tribunal released the following statement regarding these incidents: “The Hussein government knew that the assassination attempt was a ‘crime of opportunity’ with few participants but retaliated against the entire village.”¹⁶ The village of Al-Dujayl has essentially disappeared as a result of these events.¹⁷ The village originally contained a significant Sunni and Shia Muslim population.¹⁸

III. Jurisdiction of the Iraqi Special Tribunal

¹⁰ Edward Wong, *Charges Presented Against Five Former Allies of Saddam Hussein*, NEW YORK TIMES, March 1, 2005. {Reproduced in the accompanying Notebook 3 at Tab 54}.

¹¹ Liz Sly, *Iraqi Tribunal Charges Saddam Regime Members with Human-Rights Abuses*, THE CHICAGO TRIBUNE, March 1, 2005. {Reproduced in the accompanying Notebook 3 at Tab55}.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Morin, *supra* note 4. {Reproduced in the accompanying Notebook 3 at Tab 49}.

¹⁶ Caryle Murphy, *Special Iraqi Court to Try Ex-Officials: Case Centers on Mass Executions After 1982 Attempt to Kill Hussein*, THE WASHINGTON POST, March 1, 2005. {Reproduced in the accompanying Notebook 3 at Tab 56}.

¹⁷ Economist Staff, *supra* note 9. {Reproduced in the accompanying Notebook 3 at Tab 53}.

¹⁸ *Id.*

B. Jurisdictional Statement

The Iraqi Special Tribunal has jurisdiction over any Iraqi national or resident of Iraq with respect to acts of genocide, war crimes, and crimes of humanity committed in Iraq between July 17, 1968 and May 1, 2003. This extends to crimes committed against the people of Iraq (including its Arabs, Kurds, Turcomans, Assyrians and other ethnic groups, and its Shi'ites and Sunnis) whether or not committed in armed conflict. ¹⁹

C. The Applicable Articles of the Iraqi Special Tribunal

Article 11 of the Iraqi Special Tribunal Statute focuses on crimes of genocide, which are defined as acts of killing, causing serious bodily harm, inflicting conditions of life to bring about destruction, preventing birth or transferring children on a specific national, ethnical, racial or religious group.²⁰ Article 13 defines war crimes as a breach of the Geneva Conventions of August 12, 1949 against persons protected by the Geneva Convention. The acts delineated in this article include willful killing, torture, causing great suffering, destruction of property, unlawful deportations committed in an armed conflict. ²¹ Article 12 focuses on crimes against humanity which are defined as acts such as murder, extermination, enslavement, deportation, imprisonment, torture, and rape which are part of a widespread or systematic attack directed against any civilian population. ²²

Jurisdiction to Hear the Defendant's and Saddam Hussein's Case

¹⁹ Statute of the Iraqi Special Tribunal, art. 1(b), Dec. 10, 2003 available at http://www.cpa-iraq.org/human_rights/Statute.htm (last visited April, 18, 2005) [hereinafter IST Statute]. {Reproduced in the accompanying Notebook 1 at Tab 1}.

²⁰ *Id.* at art. 11.

²¹ *Id.* at art. 13.

²² *Id.* at art. 12.

The Iraqi Special Tribunal has jurisdiction to hear the case against the Defendants for the alleged acts that they committed against the people of Al Dujayl. The Defendants are residents of Iraq and committed these acts against residents of Iraq. They have allegedly committed crimes against humanity and war crimes in violation of the Geneva Convention against the people of Al Dujayl, in violation of Articles 12 and 13 of the Statute of the Iraqi Special Tribunal. The Iraqi Special Tribunal therefore has jurisdiction against the alleged crimes committed by the Defendants. The Iraqi Special Tribunal also has jurisdiction over Saddam Hussein if it chooses to indict him in connection with these alleged criminal activities since he is also a resident of Iraq.

PART ONE

IV. CRIMINAL CULPABILITY OF THE DEFENDANTS

A. Genocide

The term “Genocide” derives from the Greek term “genos”, meaning “race, nation, or tribe,” and from the Latin term “caedere”, or “cide” meaning “to kill.”²³ In 1944, Raphael Lemkin, a Polish Jewish lawyer, first developed this term which is now widely used.²⁴ After developing this term, Lemkin strived to encourage a broader recognition of the crime of eliminating entire ethnic, cultural, and racial groups through his genocide proposals.²⁵ Genocide is now considered to be an atrocious crime. This crime has manifested repeatedly in modern times throughout the world. This crime demonstrates a human capacity for cruelty on an

²³ ENCYCLOPEDIA BRITANNICA (8th ed. 2005). {Reproduced in the accompanying Notebook 3 at Tab 60}.

²⁴ Thomas Simon, *Defining Genocide*, 5 WIS. INT’L L.J. 243 (1996). {Reproduced in the accompanying Notebook 3 at Tab 38}.

²⁵ Veena Iyer, *A Problem from Hell: America and the Age of Genocide*, 16 HARV. HUM. RTS. J. 295 (2003). {Reproduced in the accompanying Notebook 3 at Tab 39}.

unprecedented and horrifying scale for which the international community rigidly condemns.²⁶ A charge of genocide requires proof of specific elements which can be a difficult task for the prosecution.

The Defendants cannot be prosecuted in the Iraqi Special Tribunal for genocide relating to the events that occurred in the village of Al Dujayl in July of 1982. A crime of genocide requires that the acts be committed against a specific national, ethnic, racial or religious group.²⁷ The criminal acts against the people of Al Dujayl were not the result of any such classification. The people of Al Dujayl are not a protected group of people that were targeted by the Defendants. The people of Al Dujayl are simply residents of Iraq. While the majority of the village is of Muslim origin, they are a mix of Sunni and Shi'ite Muslim and cannot be considered as a cohesive group.²⁸

Article II of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as the following:

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

- a) killing members of the group;
- b) Causing serious bodily or mental harm to members of the group
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group
- e) Forcibly transferring children of the group to another group.²⁹

²⁶ Payam Akhavan, *Recent Development: Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229 (1995). {Reproduced in the accompanying Notebook 3 at Tab 40}.

²⁷ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, available at <http://www.hrweb.org/legal/genocide.html>. {Reproduced in the accompanying Notebook 2 at Tab 10}.

²⁸ Economist Staff, *supra* note 9. {Reproduced in the accompanying Notebook 3 at Tab 53}

²⁹ Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 27. {Reproduced in the accompanying Notebook 2 at Tab 10}.

The language of this treaty highlights three important elements. First, the victims must constitute a national, ethnical, racial or religious group. Second, the Convention dictates that certain enumerated acts of harm or willful neglect must have been inflicted upon members of the group. Third, those acts of harm must have been undertaken with the intent to destroy or partially destroy the group. Each of these three elements must be present to constitute a crime of genocide.³⁰

The first required element of the crime of genocide requires a group status of the victims. These victims must belong to a national, ethnical, racial or religious group. This evaluation is subjective since these terms are not defined by either the Genocide Convention or international humanitarian law.³¹ In the case at hand, the prosecution can possibly make a showing that the Defendants did inflict willful harm upon the people of the village of Al-Dujayl with the intent to destroy the group and village, satisfying the second and third required elements. The first element, requiring a group status of the victims would, however, prove difficult for the prosecution to establish.

The International Criminal Tribunal for Rwanda (“ICTR”) and The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) have attempted to define the groups that qualify for protection under Article II of the Crime of Genocide. The ICTR, in *The Case of the Prosecutor of the Tribunal Against Jean Paul Akayesu* stated that identity of the groups that qualified for protected status for the crime of genocide must be based on “hereditary physical traits often identified within a geographical region, irrespective of linguistic, cultural, national or

³⁰ Genocide in Darbur: A Legal Analysis, Sept. 28, 2004, available at http://www.law.case.edu/war-crimes-research-portal/instant_analysis.asp?id=10 {Reproduced in the accompanying Notebook 3 at Tab 61},

³¹ *Id.*

religious factors.”³² The Tribunal also stated that a described ethnic group could also be “one whose members share a common language and culture.”³³ The Tribunal found *Jean Paul Akayesu* guilty of genocide for his actions committed in Rwanda in 1994 after finding that the Tutsi group is a protected group of ethnic and racial similarities.³⁴

It would be difficult for the prosecutors of the Iraqi Special Tribunal to qualify the villagers of Al-Dujayl as a protected class because they are not consolidated in the same religious or ethnic group. The village, while being predominantly a “Shiite Muslim village”³⁵ is also mixed with a “Sunni and Shia Muslim population”.³⁶ The villagers do not meet the precedent set by the *Akayesu* case because they do not share any hereditary physical traits or a common culture or language. The diversity of the villagers will serve as a bar for protection under the Convention on the Prevention and Punishment of the Crime of Genocide.

While the village is not of a uniform religious or cultural composition, the prosecution could possibly make the argument that the villagers were all national Iraqis, giving them a protected group status. Hurst Hannum, Professor of International Law at The Fletcher School of Law and Diplomacy of Tufts University and world-renowned consultant to the United Nations on issues ranging from minority rights to the situations in Afghanistan, East Timor, and Western Sahara has argued that the killing of victims who are members of a national group does constitute

³² Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998) {Reproduced in the accompanying Notebook 2 at Tab 20}.

³³ *Id* at para 513.

³⁴ *Id.* at Sec. 8.

³⁵ Morin, *supra* note 4. {Reproduced in the accompanying Notebook 3 at Tab 49}.

³⁶ Economist Staff, *supra* note 9. {Reproduced in the accompanying Notebook 3 at Tab 53}

genocide.³⁷ Hannum defended this argument specifically in the case of the treatment of Cambodians by the Khmer Rouge during the years of 1975-1979.³⁸ The Khmer Rouge subjected various groups of people in Cambodia to an especially harsh and extensive measures of the acts enumerated in Article II of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide.³⁹ While these atrocities were committed against diverse ethnic groups such as Cham, Vietnamese, Buddhist monks and other minority groups who are protected groups, commentators including Hannum have asserted that the Khmer Rouge committed genocide against the Khmer national group, intending to destroy a part of it.⁴⁰

The argument that a national group deserves protected status under Article II of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide has been widely criticized. The argument generally fails because it leads to the conclusion that all mass killings are equivalent to genocide. If that were the case, then any large group of people will belong to one or more national groups and will be able to claim protection.⁴¹ This circular argument deprives the crime of genocide of its distinct meaning and is therefore an unfavorable argument.

³⁷ Bio of Hurst Hannum, International Center for Alcohol Policies, available at http://www.icap.org/ICAP/about_ICAP/ICAP_Senior_Consultants/hannum.html {Reproduced in the accompanying Notebook 3 at Tab 73}.

³⁸ Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUM RTS. QRT. 82, 95-96, 135-38 (1989). {Reproduced in the accompanying Notebook 3 at Tab 41}.

³⁹ Report of the Group of Experts for Cambodia, U.N. Doc. S/1999/231 (March 16, 1999). {Reproduced in the accompanying Notebook 1 at Tab}.

⁴⁰ *Id.*

⁴¹ William A. Schabas, *Problems of International Codification – Were the Atrocities in Cambodia and Kosovo Genocide?*, Pgs. available at www.nesl.edu/lawrev/vol35/2/schabas.pdf {Reproduced in the accompanying Notebook 3 at Tab 62}.

Even if the prosecution were able to establish that the villagers are part of a protected class, this genocide argument will nevertheless, fail since the Defense will then state that it was not the Defendant's intent to destroy this specific Iraqi national group. They will assert that they were retaliating against the village as a whole due to the assassination attempt against Saddam Hussein. They will argue that the attacks had no bearing on the group status of the village. Intent to destroy a group based on ethnic or racial status is an element of the crime of genocide and in this case, the defense will state that the requisite intent was not present. So, even if the village could obtain protected status to satisfy the first element, while the second element of willful destruction is satisfied, the allegation of genocide would eventually fail because the intent to kill the group of villagers on the basis of group status is not present.

It is interesting to note that the ICTY has in one instance, taken a substantially different analysis in evaluating crimes of genocide. In the ICTY case, *The Prosecutor Against Goran Jellisic*, the Tribunal stated that the objective criteria alone were insufficient and believed that it was appropriate to evaluate a group status from the view of those persons who wish to single that group out from the rest of the community.⁴² It is the stigmatization of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.⁴³ A group may be stigmatized in this manner by way of positive or negative criteria. A "positive approach" would consist of the perpetrators of the crime distinguishing a group by the characteristics which they deem to be particular to a national, ethnical, racial or religious group. A "negative approach" would consist of identifying individuals as not being

⁴² Prosecutor v. Goran Jellisic, Case No.: IT-95-10-A, Judgment, Dec. 14, 1999, at 70. {Reproduced in the accompanying Notebook 2 at Tab 21 }

⁴³ *Id* at 71.

part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics.⁴⁴ The Tribunal therefore, concluded that then all rejected individuals would be able to create a distinct group.⁴⁵

In May 1992, *Goran Jellisic*, was indicted for the crime of genocide for intending to destroy a substantial or significant part of the Bosnian Muslim people as a national, ethnical, or religious group.⁴⁶ The Tribunal found that *Jellisic's* participation in the murder of members of the protected group of Bosnian Muslims supported of the genocide charge, satisfying the material element of the crime.⁴⁷ However, the prosecution's charge eventually failed because the Tribunal also found that the acts of *Jellisic* were not the physical expression of an affirmed resolve to destroy in whole or in part a group as such.⁴⁸ *Jellisic* therefore lacked the specific intent required because he performed his executions randomly. The Tribunal also noted that the intention necessary for the commission of a crime of genocide may not be presumed even in the case where the existence of a group is at least in part threatened.⁴⁹

Applying the standard set by the ICTY to the case at hand, it is possible that the prosecution can define the people of the village of Al-Dujayl as a protected group. The prosecution could argue that the people in the village were singled out by the Defendants and Saddam Hussein from the rest of the Iraqi community as targets of these attacks and they deserve

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 3.

⁴⁷ *Id.* at 100.

⁴⁸ *Id.* at 107.

⁴⁹ *Id.* at 78.

protection against the crime of genocide. The prosecution could further assert that the villagers of Al-Dujayl were stigmatized as a cohesive group and viewed themselves as such. Application of the subjective standard set by *Jellic* could successfully classify the villagers as a protected class but the requisite mens rea could prove difficult for the prosecution to establish. Similar to the accused in the *Jellic* case, the Defendants will state that they did not have the specific intent to exterminate this group and that this intent cannot be presumed just because the village was threatened. The defense would further argue that the attack was only retaliatory in nature to avenge the assassination attempt against Saddam Hussein and does not satisfy the mens rea requirement for the application of a crime of genocide.

If all the relevant facts are proven, the prosecution can make a showing that the Defendants committed acts that satisfy a charge of genocide. However, a showing that the villagers are part of a protected class and that the Defendants specifically intended to destroy this protected class of people will be difficult for the prosecution to accomplish. Accordingly, this will serve as a bar to a conviction of the crime of genocide.

II. War Crime

A. Background on War Crimes

War crimes can be classified into two categories: 1) war crimes committed in international armed conflicts and 2) war crimes perpetuated in internal armed conflicts.⁵⁰ These internal conflicts must be large-scale armed hostilities, as opposed to internal disturbances and tensions, riots or isolated or sporadic acts of armed violence, between State authorities and rebels or between two or more organized armed groups within a State.⁵¹

War crimes are those violations of the laws of war or international humanitarian law (herein “IHL”) that incur individual criminal responsibility.⁵² The Hague Conventions of 1899 and 1907 first codified wartime atrocities and set the standard for these violations.⁵³ The 1945 Charter of the International Military Tribunal at Nuremberg defined war crimes as violations of the laws or customs of war. Such violations include, but are not limited to: murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.⁵⁴

B. Crimes Against Civilians Under the Geneva Convention as a War Crime

⁵⁰ ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW, pg (2003) {Reproduced in the accompanying Notebook 3 at Tab 37}.

⁵¹ *Id.*

⁵² Steven Rattner, *Categories of War Crimes*, available at <http://www.crimesofwar.org/thebook/categories-of-warcrimes.html> {Reproduced in the accompanying Notebook 3 at Tab 63}.

⁵³ The Hague Convention 1899-1954, Laws and Customs of War on Land, available at <http://www.lib.byu.edu/~rdh/wwi/hague.html> {Reproduced in the accompanying Notebook 1 at Tab 11}.

⁵⁴ Charter of the International Military Tribunal, art. 6 (b), available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm> {Reproduced in the accompanying Notebook 1 at Tab 6}

Grave breaches of the 1949 Geneva Conventions are considered war crimes under international humanitarian law. There are four Geneva Conventions that address grave breaches as war crimes.⁵⁵ Each of the four Geneva Conventions (on wounded and sick on land, wounded and sick at sea, prisoners of war, and civilians) contains the following list of grave breaches: willful killing; torture or inhuman treatment (including medical experiments); willfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or civilian to serve in the forces of the hostile power; willfully depriving a prisoner of war or protected civilian of the rights of a fair and regular trial; unlawful deportation or transfer of a protected civilian; unlawful confinement of a protected civilian; and taking of hostages.⁵⁶

The international community has consistently recognized breaches of the Geneva Convention as punishable war crimes. The Statute of the International Criminal Court (“ICC”) lists as war crimes for international conflicts not only the grave breaches of the Geneva Conventions, but also twenty-six serious violations of the laws and customs of war.⁵⁷ The

⁵⁶ Rattner, *supra* note 52 {Reproduced in the accompanying Notebook 3 at Tab 63}. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War. {Reproduced in the accompanying Notebook 1 at Tab 7}

⁵⁷ Rome Statute of the International Criminal Court, available at http://www.iccpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf {Reproduced in the accompanying Notebook 1 at Tab 2}. (Article 8 1(b) enumerated the violations as the following: (i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion;(vii) Making improper use of a flag of truce, of the flag or of the

Statute of the ICC lists as war crimes for internal conflicts four serious violations of Common Article 3 (violence to life and person, outrages upon personal dignity, hostage taking, and summary executions), as well as twelve serious violations of the laws and customs of war (i.e., attacks on civilians, pillage, rape, or mutilation).⁵⁸ The Statute of the International Criminal

military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury; (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army; (xii) Declaring that no quarter will be given; (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war; (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war; (xvi) Pillaging a town or place, even when taken by assault; (xvii) Employing poison or poisoned weapons; (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123; (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions; (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations; (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions; (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

⁵⁸ *Id.* at art. 8 2(c). (art. 8 2(e) enumerates violations of the law and customs applicable in armed conflicts not of an international character as the following: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (v) Pillaging a town or place, even when taken by assault; (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3

Tribunal for Rwanda includes as war crimes serious violations of Common Article 3 as well as Additional Protocol II.⁵⁹ The Statute of the International Criminal Tribunal for the Former Yugoslavia includes serious violations of Common Article 3 of the Geneva Conventions, as well as other rules to protect victims of armed conflict and basic rules on methods of warfare. This includes violence to life or health (murder, ill-treatment, torture, mutilation, corporal punishment, rape, enforced prostitution, indecent assault), summary executions, hostage taking, collective punishment, and pillage.⁶⁰ The Statute for the Special Court of Sierra Leone also states that the Court has the power to prosecute persons who violate Article 3 Common to the Geneva Conventions and of Additional Protocol II⁶¹

The Iraqi Special Tribunal, similar to the ad hoc tribunals for Yugoslavia and Rwanda and the Special Court of Sierra Leone has jurisdiction over both grave breaches of the Geneva

common to the four Geneva Conventions; (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities; (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand; (ix) Killing or wounding treacherously a combatant adversary; (x) Declaring that no quarter will be given; (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict).

⁵⁹ Statute of the International Criminal Tribunal for Rwanda art 4. available at <http://www.ictt.org/ENGLISH/basicdocs/statute.html>. {Reproduced in the accompanying Notebook 1 at Tab}

⁶⁰ Statute of the International Criminal Tribunal for the Former Yugoslavia art. 3, available at <http://www.un.org/icty/legaldoc/index.html>. {Reproduced in the accompanying Notebook 1 at Tab 4}.

⁶¹ Statute of the Special Court of Sierra Leone art 3, available at <http://www.specialcourt.org/documents/Statute.html> {Reproduced in the accompanying Notebook 1 at Tab 5}. (Article 3 of this statute states that these violations include the following: (a) violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) pillage; (g) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; (h) threats to commit any of the foregoing acts.)

Conventions and other crimes committed in these particular conflicts. The ICC also has noted having have jurisdiction over most war crimes.⁶²

Article 3 of the Geneva Convention

Grave breaches of the Geneva Convention only apply in an international armed conflict whereas Article 3 of the Geneva Convention applies to internal armed conflict. In the case at hand, the conflict between the Defendants and the villagers of Al-Dujayl did not occur in an international context as all the parties are residents and nationals of Iraq. This signifies that the events in question must satisfy the non-international internal conflict threshold for Article 3 of the Geneva Convention to apply.

A war crime is considered a breach of the Geneva Conventions of August 12, 1949. Article 3 of the Geneva Convention Relative to the Protection of Civilians Persons in Time of War provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.
2. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
 - (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) Taking of hostages;
 - (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording

⁶² Rattner, *supra* note 52 {Reproduced in the accompanying Notebook 3 at Tab 63}.

all the judicial guarantees which are recognized as indispensable by civilized peoples.⁶³

International humanitarian law sets standards for parties to an armed conflict on the treatment of civilians and other protected person. Virtually all Member States have ratified the Geneva Conventions of 1949, with a majority signing or ratifying the Protocols of 1977. Armed conflicts, civilian casualties and the destruction of civilian infrastructure are consequences of deliberate targeting of non-combatants.⁶⁴

C. Application of the Geneva Convention against Defendants

In the case at hand, the actions of the Defendants constitute a war crime in an internal armed conflict. The modern law of war, now more frequently referred to as the law of armed conflict or as international humanitarian law, prohibits a range of activities related to the attacks on civilian persons and objects.⁶⁵ Whether the Geneva Conventions apply to the actions of the Defendants will turn on whether the actions were within the threshold requirement of armed conflict. There are limits on the right to kill, injure unnecessarily hence making the use of force and armed conflict inhumane. Flagrant violation of international humanitarian and human rights law persist when civilians continue to be targets in instances of armed conflict.⁶⁶ Article 3, the

⁶³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, available at <http://www.unhchr.ch/html/menu3/b/92.htm>, {Reproduced in the accompanying Notebook 1 at Tab 7}.

⁶⁴ *Id.*

⁶⁵ William J. Fenrick, *Justice in Cataclysm Criminal Trials in the Wake of Mass Violence: Comment: Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT'L L. 539 (1997). {Reproduced in the accompanying Notebook 3 at Tab 42}.

⁶⁶ Protection of Civilians on Armed Conflict, Report of the Secretary-General to the Security Council, U.N. Doc S/1999/957 (Sept. 08, 1999) {Reproduced in the accompanying Notebook 1 at Tab 14}.

text of which is repeated in all four Geneva Conventions, is the only part of the conventions that applies explicitly to internal armed conflicts.⁶⁷

Under international law, in order to hold individuals liable for violations of Common Article 3 and Protocols, the following five requirements must be met: First, the alleged crime(s) must have been committed in the context of a non-international armed conflict. Second, temporal requirements for the applicability of the respective regime must be met. Third, territorial requirements for the applicability of the respective regime must be met. Fourth, the individuals charged must be connected to a Party that was bound by the respective regime; and fifth, the victims of the alleged crimes must have been individuals that were protected under the respective regime.⁶⁸ The issue of a non-international armed conflict will be the controlling factor for the prosecution of the Iraqi Special Tribunal to establish to prevail in this claim.

D. The Issue of Armed Conflict

The context for the Common Article's application is stated as being an "armed conflict not of an international character."⁶⁹ However, it contains no definition of the term, armed conflict and does not provide conditions that govern its application. The concept of internal armed conflict in contemporary international humanitarian law has been, to a considerable extent, set by International Criminal Tribunal for the Former Yugoslavia.⁷⁰ The ICTY case of *Prosecutor v. Dusko Tadic* fashioned a useful definition of armed conflict to guide other tribunals.

⁶⁷Ratner, Steven, *International vs. Internal Armed Conflict*, available at <http://www.crimesofwar.org/thebook/intl-vs-internal.html> {Reproduced in the accompanying Notebook 3 at Tab}. See Geneva Conventions, art. 2 {Reproduced in the accompanying Notebook 3 at Tab 64}.

⁶⁸ Prosecutor v. Clement Kayishema and Obed Ruzindana, Case No. ICTR ICTR-95-1-I (June 1, 2001) {Reproduced in the accompanying Notebook 2 at Tab 22}.

⁶⁹ Geneva Convention, *supra* note 59, art. 3. {Reproduced in the accompanying Notebook 1 at Tab 7}.

In the case of the *Prosecutor v. Dusko Tadic, Tadic*, a citizen of the former Yugoslavia, of Serb ethnic descent, and a resident of the Republic of Bosnia and Herzegovina at the time of the alleged crimes was charged, along with his co-accused, Goran Borovnica, with a total of 132 counts involving grave breaches of the Geneva Conventions, violations of the laws or customs of war, and crimes against humanity.⁷¹ The accused were charged with individual counts of persecution, inhumane treatment, cruel treatment, rape, willful killing, murder, torture, willfully causing great suffering or serious injury to body and health, and inhumane acts. These acts were alleged to have been committed at the Omarska, Keraterm and Trnopolje camps and at other locations in opstina Prijedor in the Republic of Bosnia and Herzegovina.⁷² The indictment confirmed in 1995 along with the amendments, charges the accused with participation with Serb forces in the attack, destruction and plunder of Bosnian Muslim and Croat residential areas, the seizure and imprisonment of Muslims and Croats in the Omarska, Keraterm and Trnopolje camps, and the deportation and expulsion by force or threat of force of the majority of Muslim and Croat residents from opstina Prijedor. The accused are charged with participating in killings, torture, sexual assaults and other physical and psychological abuse of Muslims and Croats both within the camps and outside.⁷³

The Tribunal in *The Case of Prosecutor v. Dusko Tadic* stated that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a

⁷¹ *Prosecutor v. Dusko Tadic*, IT-95-1-AR72 9, Second Amended Indictment, Dec. 14, 1995. {Reproduced in the accompanying Notebook 2 at Tab 23}.

⁷² *Id.*

⁷³ *Id.*

State.⁷⁴ This definition focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict.⁷⁵ The Tribunal stated that in an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.⁷⁶ In determining the existence of armed conflict in Prijedor the Tribunal held, in accordance with the concept outlined above, that "the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities."⁷⁷ Thus, international humanitarian law does not pertain only to those areas where actual fighting takes place; it applies to the entire territory of the state involved in armed conflict. The Tribunal made the finding that, at all relevant times, an armed conflict was taking place between the parties to the conflict in the Republic of Bosnia and Herzegovina of sufficient scope and intensity for the purposes of the application of the laws or customs of war.⁷⁸

The Tribunal in the *Tadic* case further states that a sufficient nexus must be established between the alleged offense and the armed conflict which gives rise to the applicability of international humanitarian law.⁷⁹ The Tribunal found that the acts of the accused during the armed take-over and ethnic cleansing of Muslim and Croat areas of opstina, that the terror killings or otherwise in the areas of the Republic of Bosnia and Herzegovina controlled by

⁷⁴ Prosecutor v. Dusko Tadic, IT-95-1-AR72 9, Judgment May 7, 1997 {Reproduced in the accompanying Notebook 2 at Tab 23}.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

Bosnian Serb forces were all directly connected with the armed conflict.⁸⁰ The finding of the Tribunal of the existence of armed conflict in relation to the acts of the accused was sufficient to fulfill the requisite for a war crime.

The precedent on the issue of armed conflict set by the ICTY in the *Tadic* case has been following in subsequent ICTY cases as well as other Tribunals. In the ICTY case of *the Prosecutor of the Tribunal Against Zejnil Delalic, Zdravko Mucic, Esad Landzo*, the Tribunal applies the *Tadic* analysis to find the existence of an internal armed conflict. The Tribunal stated that *Tadic* definition of armed conflict was useful to distinguish from cases of civil unrest.⁸¹ In addition, it asserted that the emphasis in making such a distinction is on “the protracted extent of the armed violence and the extent of organization of the parties involved.”⁸²

In that case, ICTY indicted *Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* for forty-nine counts (four of which were removed before trial) with grave breaches of the Geneva Conventions of 1949 and violations of the laws or customs of war. The allegations stemmed from the events alleged that occurred at a detention facility in the village of Celebici, located in the Konjic municipality, in central Bosnia and Herzegovina, during certain months of 1992.⁸³ The Tribunal applies the *Tadic* test to determine that the presence of combat activities in Bosnia and Herzegovina and that these forces amount to an armed conflict.⁸⁴

⁸⁰ *Id.*

⁸¹ Prosecutor v. Zdravko Mucic, Hazim Delic and Esad Landzo Case No. IT-96-21, Initial Indictment, March 21, 1996. {Reproduced in the accompanying Notebook 2 at Tab 24}.

⁸² *Id.*

⁸³ Prosecutor v. Zdravko Mucic, Hazim Delic and Esad Landzo Case No. IT-96-21, Judgment, Nov. 16, 1998 {Reproduced in the accompanying Notebook 2 at Tab 24}.

⁸⁴ *Id.*

The ICTR, in the *Case of the Prosecutor of the Tribunal v. Jean Paul Akayesu* adopted the *Tadic* formula in determining the existence of an armed conflict in Rwanda. ICTR held that in order to determine the existence of armed conflict, it is "necessary to evaluate both the intensity and organization of the parties to the conflict", in line with the ICTY.⁸⁵ The Tribunal indicted *Akayesu* for genocide, war crimes and crimes against humanity for the killing, sexual abuse and other violence against the Tutsi performed by the accused and the communal police in Rwanda.⁸⁶ Evaluating the intensity and organization of the conflict, the Tribunal determined that since there was a civil war between two groups, the governmental forces and the RPF, both of which were well-organized.⁸⁷ Further, as pertaining to the intensity of conflict, all observers to the events stated that the confrontations were forceful.⁸⁸ Based on these factors, the Tribunal found that at the time of the alleged event, an armed conflict not of an international character existed as covered by Common Article 3 of the 1949 Geneva Conventions.

The Special Court of Sierra Leone has made findings similar to those of the ICTY and the ICTR on the issue of armed conflicts for charges of war crimes. The Special Court of Sierra Leone indicted *Alex Tamba Brima* on March 7, 2003 of crimes against humanity, violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (commonly known as war crimes) and other serious violations of international humanitarian law, in conformity with Articles 2, 3 and 4 of the Statute of the Special Court for Sierra Leone.⁸⁹ The Court stated that

⁸⁵ *Akayesu*, *supra* note 32, at 625. {Reproduced in the accompanying Notebook 2 at Tab 20}.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Alex Tamba Brima*, Case No. SCSL-2004-16-PT, available at Trial Watch <http://www.trialch.org/trialwatch/profiles/en/legalprocedures/p214.html> {Reproduced in the accompanying Notebook 2 at Tab 25 }

starting on November 30, 1996, a state of armed conflict existed in Sierra Leone and that a link existed between the armed conflict in question and the acts and omissions considered to constitute violations of Articles 2, 3 and 4 of the Statute of the SCSL.⁹⁰ *Brima* was the leader of the AFRC group in its operations to control the district of Kenema and Kono.⁹¹ He was charged with atrocities against the civilian population such as murder, amputations, abductions, forced labor, burning down of villages, use of child soldiers, multiple violations of sexual integrity, forced marriage. The Court stated that their methods were a means to take control of this territory of Sierra Leone by terrorizing and punishing the civilians in those regions.⁹² The Court found that an armed conflict existed in the hostile nature of these circumstances and also found him guilty of the above mentioned acts.

In the Defendants case, the prosecution should advocate for the Tribunal to apply the standard set by the other Tribunals, specifically in the cases of *Tadic*, *Delalic Akeyasu and Brima* in determining the existence of an armed conflict. If the facts are proven, the prosecution can argue that an armed conflict existed at the relevant time in the village of Al-Dujayl by applying the law of these cases. Applying the *Tadic* rule that an armed conflict is an organized conflict, beyond banditry that can exist before and after the existence of the actual event, the prosecution can argue that the villagers were subjected to an armed conflict situation not only during the events that destroyed their village but also for the period of time preceding these events. An internal armed conflict existed in the village, evidenced by the fact that the Defendants continuously used armed forces to initially threaten and later attack the villagers. Applying the rationale of the *Delalic* case, the prosecution can further prove the existence of an armed conflict

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

by revealing the fact that the Defendants attacked the village in an organizational manner and that the combat amounted to more than just civil unrest. The prosecution will also find support in the position of the *Akeyasu* rule that the intensity and organization of the parties involved contributes to a showing of armed conflict. The Defendants in this case intensely attacked the village until they reached their goal of savage destruction of the entire village including its residents and property. And finally since the *Brima* case looked to all the circumstances surrounded the events in question to determine an armed conflict, the prosecution can likewise use this to their favor. The Defendants attacked all the villagers of Al-Dujayl including young women and children, making the attack hostile and brutal. The Defendants used all possible means to further their goal of taking the village of Al-Dujayl away from the villagers. Based on the foregoing reason, the prosecution will be able to establish the existence of an armed conflict in the village of Al-Dujayl

E. The Issue of Large-Scale Hostility

A war crime must be an internal conflict that is a large-scale armed hostility, as opposed to internal disturbances and tensions, riots or isolated or sporadic acts of armed violence, between State authorities and rebels or between two or more organized armed groups within a State.⁹³ Once the prosecution establishes that an armed conflict existed in the village of Al-Dujayl, it must then prove that Defendants conduct amounts to a large-scale attack. If the facts stated above are proven, it is evident that the attack on the village of Al-Dujayl was not an isolated incident. The Defendants working in conjunction delegated tasks in a manner that would eliminate the entire village. They detained, executed and deported the villagers over the course of several years. The Defendants were organized and meticulous in their conduct. As further evidenced by the fact that the entire village has been destroyed, the prosecution can successfully

⁹³ Geneva Convention, *supra* note 59, art. 3. {Reproduced in the accompanying Notebook 1 at Tab 7}

argue that these armed attacks were large-scale in nature, proving that the Defendants committed a war crime.

III. Crime Against Humanity

A. Definition

Crimes against humanity, defined by Article 12 of the Statute of the Iraqi Tribunal allow for prosecution for crimes that are part of a widespread or systematic attack directed against a civilian population with knowledge of the attack.⁹⁴

B. Background on Crimes Against Humanity

The offense known as a crime against humanity dates back to 1945 when the United States and other Allies developed the Agreement for the prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal (IMT), sitting at Nuremberg.⁹⁵ Article 6 (c) of this Charter defines Crimes against Humanity as “atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.”⁹⁶ This was the first time that a crime against humanity was recognized as a positive international law.

Since its inception, crimes against humanity has been included in the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), The Special Court for Sierra Leone as well as in the

⁹⁴ IST Statute, *supra* note 19, art 14. {Reproduced in the accompanying Notebook 1 at Tab 1 }

⁹⁵ Bassiouni, Cherif, *Crimes Against Humanity*, available at <http://www.crimesofwar.org/thebook/crimes-against-humanity.html> {Reproduced in the accompanying Notebook 3 at Tab 65 }

⁹⁶ Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, Official Gazette Control Council for Germany 50-55 (1946). Available at <http://www1.umn.edu/humanrts/instree/ccno10.htm> {Reproduced in the accompanying Notebook 1 at Tab 9 }

statute of the International Criminal Court (ICC). These crimes refer to specific acts of violence against persons irrespective of whether the person is a national or nonnational and irrespective of whether these acts are committed in time of war or time of peace, and (2) these acts must be the product of persecution against an identifiable group of persons irrespective of the make-up of that group or the purpose of the persecution.⁹⁷ This is often stated as a "widespread or systematic" conduct of the perpetrators which results in the commission of the specific crimes contained in the definition of crimes against humanity.

C. A Crime Against Humanity Under The Statute of the Iraqi Special Tribunal Crime

The Iraqi Special Tribunal codifies Crimes Against Humanity in Article 12 of the Iraqi Special Tribunal. The Article states:

A crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

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;
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.⁹⁸

D. The Mens Reas Requirement

⁹⁷ Bassiouni, Cherif, *Crimes Against Humanity*, available at <http://www.crimesofwar.org/thebook/crimes-against-humanity.html> {Reproduced in the accompanying Notebook 3 at Tab 65}

⁹⁸ IST Statute, *supra* note 19, art 12. {Reproduced in the accompanying Notebook I at Tab 1}.

In the case *The Prosecutor v. Dusko Tadic*, the Tribunal for the former Yugoslavia held that:

the determination of the elements comprising the mens rea of crimes against humanity has proved particularly difficult and controversial. Nevertheless, the requisite mens rea for crimes against humanity appears to be the intent to commit the underlying offence, combined with the knowledge of the broader context in which that offence occurs.⁹⁹

In the case *Ruzindana*, the Tribunal for Rwanda stated that:

The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act. 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(s) 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."¹⁰⁰

Crimes against humanity require the existence of a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds.¹⁰¹ The crimes need not be both widespread and systematic but one is a requisite for this crime.¹⁰² "Widespread" is defined as massive or large-scale, involving many victims; "systematic" refers to an organized pattern of conduct, not a mere random occurrence.¹⁰³

E. Application of Crimes Against Humanity

In the case at hand, the prosecution has a viable case for a crime against humanity against the Defendants. The facts reveal that the Defendants deported residents of the village of Al-Dujayl to Iran imprisoned them until as late as 1986 and summarily murdered hundreds of

⁹⁹ Tadic, *supra* note 67. {Reproduced in the accompanying Notebook 2 at Tab 23}

¹⁰⁰ Ruzindana, *supra* note 64 {Reproduced in the accompanying Notebook 2 at Tab 22}.

¹⁰¹ Prosecutor v. Eliezer Niyitegeka, Case No. ICTR-96-14-T, Judgment July 9, 2004. {Reproduced in the accompanying Notebook 2 at Tab 27}.

¹⁰² *Id.*

¹⁰³ *Id.*

people of the village of Al-Dujayl. The Defendants also allegedly took part in other inhumane acts such as cutting down all of the date trees in the village, bull-dozing the entire town and destroying over 247,000 acres of orchards and palm groves.¹⁰⁴ If these facts are proven at the trial, then the conduct of the Defendant would fall within the definition of a crime against humanity as a violation of Article 5 of the International Statute. In order for the Iraqi Special Tribunal to convict the Defendants of a crime against humanity, the prosecution will have to prove the requisite elements of the crime as detailed below.

The prosecution will have to prove that the Defendants possessed the requisite mens rea component for this crime. In *the case of Niyitegeka*, the ICTR found that the *Niyitegeka* participated in and led the attacks against Tutsi including the shooting of Tutsi refugees and procurement of weapons and gendarmes for attacks against Tutsi.¹⁰⁵ The Tribunal stated that these revealed that found that *Niyitegeka* had the requisite intent to kill them.¹⁰⁶ Their actions in planning and carrying out the attacks indicted that it was a widespread and systematic attack against the civilian Tutsi population.¹⁰⁷

This case is analogous to the Defendants' treatment of the villagers of Al-Dujayl. If the prosecution is able to prove the facts stated above, this would show that the compounded acts of the Defendants in killing, detaining, deporting the villagers and destroying the village indicates that the Defendants understood the consequences of their actions. They were aware that their actions would create devastation for the people of Al-Dujayl. The prosecution may be able to show that the Defendants intended to retaliate against the village for their assassination attempt

¹⁰⁴ Issue Statement, *supra* note 7. {Reproduced in the accompanying Notebook 3 at Tab 74}

¹⁰⁵ Prosecutor v. Eliezer Niyitegeka, *supra* note 94 {Reproduced in the accompanying Notebook 2 at Tab 27}.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

against Saddam Hussein. This would further show that it was their intent to cause suffering upon the village to create an example for any other rebel forces in Iraq that may chose to harm Hussein. The prosecution must make a showing that the Defendants had knowledge that their conduct would create devastation.

F. Widespread and Systematic

The prosecution will also have show that along with the requisite mens rea, the Defendants behaved in a widespread and systematic fashion in accordance with a plan to carry out the alleged attacks. In the *case of the Prosecutor v. Eliebezer Niyitegeka*, there was evidence of daily attacks in Bisesero against the Tutsi seeking shelter there, leading to thousands of Tutsi being killed, and that of a large number of Tutsi refugee corpses in Kibuye town at the relevant time.¹⁰⁸ The evidence further showed that all ages and sexes of Tutsis were targeted in the killing.¹⁰⁹ The attacks were considered to be methodical, organized and on a large scale, involving many armed attackers.¹¹⁰ Therefore, the Tribunal found that the attacks against the Tutsi civilian population were widespread and systematic attack.¹¹¹

In the case at hand, the alleged attacks by the Defendants upon the village of Al-Dujayl were widespread and systematic in that the Defendants intended to cause suffering to the people of Al Dujayl by all possible means. They killed them, deported them, destroyed their homes and orchards. Implementing a systematic mechanism to inflict harm, they even removed all the date trees in the village that serves as a viable resource for the villagers. The Defendants did not discriminate in their conduct, killing men, women and children, essentially anyone that

¹⁰⁸ *Id*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

was present in the village at the time of the attack. The Defendants were organized in their plan of destruction to the extent that they even destroyed the agriculture of the village before they bulldozed the entire town. The IST should be able to make finding of a widespread and systematic attack analogous to *the case of Niyitekga*.

PART TWO

IV. CRIMINAL DEFENSES OF THE DEFENDANTS

A. Justified Self Defense

The Defendants may claim self defense or justified reprisal in their defense. They may assert that the people of Al Dujayl attacked Saddam Hussein's convoy, provoking the retaliatory attacks on the village. Self-defense is lawful provided that the acts fulfill the following requirements:

1. the actions in self-defense are done in response to an imminent or actual lawful attack of the person or another person
2. there is no other way of preventing or stopping the offenses
3. the unlawful conduct of the other has not been caused by the person acting in self-defense
4. the conduct in self-defense is proportionate to the offense to which the person reacts.¹¹²

It is questionable whether these Defendants can invoke this defense because while the violent acts may be retaliatory in nature, they did not immediately react to the attack against Saddam Hussein's convoy and instead waited a period of time to launch their retaliatory action. They did not do so at the time of the conflict but instead waited to bring in reinforcements. Their attack on the village was not necessarily a measure to prevent any further harm because they did not take specific steps to combat future assassination attempts and instead chose to destroy an entire village consisting of thousands of people.

Moreover, justified self-defense requires proportionality between the harm prevented and the harm inflicted, in the sense that the prevention of harm cannot be achieved by causing harm

¹¹² Cassese, *supra* note 48, pg 222 {Reproduced in the accompanying Notebook 3 at Tab 37}.

that is completely disproportionate.¹¹³ The principle of proportionality is embedded in almost every national legal system and underlies the international legal order.¹¹⁴ The issue of proportionality is the basis of The Geneva Conventions of August 12, 1947.¹¹⁵ The Additional Protocol I of 1977 extended the requirement of proportionality to non-combatants by defining war crimes to include the military destruction of a non-military target.¹¹⁶ Justified self-defense requires proportionality between the harm prevented and the harm inflicted, in the sense that the prevention of harm cannot be achieved by causing harm that is completely disproportionate.¹¹⁷

If the alleged acts committed against the village of Al-Dujayl are attributed to the Defendants and the Tribunal finds that the Defendants acted in retaliation, then their conduct would be considered disproportionate to the assassination attempt. The prosecution can argue the requisite proportionality is lacking since the offense in question was a failed assassination attempt while the conduct in self-defense was the massacre of an entire village. The Defendants also murdered all its' inhabitants. Some have argued extending this defense to include cases where an attack has already occurred has not yet occurred but a party is preparation to attack.¹¹⁸

¹¹³ Horst Fishcer, *The Principle of Proportionality in the Handbook of Humanitarian Law in Armed Conflicts* (2000) available at <http://www.biologyoflaw.com/content/Expansions/EXC31.html>{Reproduced in the accompanying Notebook 3 at Tab 66}.

¹¹⁴ *Id.*

¹¹⁵ Geneva Convention, *supra* note 59. {Reproduced in the accompanying Notebook 1 at Tab 7}

¹¹⁶ Protocol Additional to the Geneva Conventions of August 12, 1949, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/d67c3971bcff1c10c125641e0052b545> {Reproduced in the accompanying Notebook 1 at Tab 8}.

¹¹⁷ Mordechai Kremnitzer & Khalid Ghanayim, *Twenty-Five Years of George P. Fletcher's Rethinking Criminal Law: Proportionality and the Aggressor's Culpability in Self-Defense*, 39 TULSA L. REV. 875 (2004). {Reproduced in the accompanying Notebook 3 at Tab 43}

¹¹⁸ LORI F. DAMROSCH & DAVID J. SCHEFFER, *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER*, pg. 52 (1991). {Reproduced in the accompanying Notebook 3 at Tab 36}

This argument has been widely criticized.¹¹⁹ This argument does not apply to the case at hand because there is no evidence that indicates that the villagers were planning a future attack against Saddam Hussein. It's unclear that the Defendants prevented any future harm.

The United States has also attempted to invoke this defense as a justification of the United States invasion of Iraq. In March 2003, the United States declared war against Iraq.¹²⁰ The United States justified the war based on Iraq's suspected development of nuclear and biological weapons and its suspected involvement with terrorist organizations.¹²¹ Based on this information, the United States believed that it would be attacked by Iraq or that Iraq would support another nation in an attack against the United States in the future. The United States' war against Iraq, therefore, was based on the doctrine of self-defense, more specifically anticipatory self-defense.

The United States' use of this defense is questionable. International customary law requires a country's act of anticipatory self-defense to contain the elements of necessity, immediacy, and proportionality.¹²² The President attempted to present the threats from Iraq as imminent and necessary. President Bush first began applying the right of anticipatory self-defense to Iraq when he stated in his State of the Union Address that Iraq was one of the countries that made up the "axis of evil."¹²³ He stated that, "Iraq continues to flaunt its hostility toward America and to support terror. The Iraqi regime has plotted to develop anthrax, nerve gas, and nuclear weapons

¹¹⁹ *Id.*

¹²⁰ The Oval Office, *President Bush Addresses the Nation*, OFFICE OF THE PRESS SECRETARY, March 19, 2003, available at <http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html> (last checked on April 18, 2005). {Reproduced in the accompanying Notebook 3 at Tab 57}.

¹²¹ *Id.*

¹²² THOMAS FRANCK, *RECOURSE TO FORCE: STATE ACTIONS AGAINST THREATS AND ARMED ATTACKS* 97-108 (2002) {Reproduced in the accompanying Notebook 3 at Tab 34}.

¹²³ Oval Office Press Release, *supra* note 103. {Reproduced in the accompanying Notebook 3 at Tab 57}.

for over a decade."¹²⁴ He also intimated that the United States would act unilaterally by stating, "I will not wait on events while danger gathers. I will not stand by as peril draws closer and closer."¹²⁵ While the United States attempted to convince the nation and the international community that Iraq posed an imminent threat that justified the invasion, the evidence that Iraq had nuclear and biological weapons has been seriously questioned.¹²⁶ Hans Blix, the Chief on the U.N. inspectors, stated in a briefing to the Security Council that they had not located any evidence that would suggest that Iraq has been producing nuclear and biological weapons prior to the invasion.¹²⁷ The facts support the conclusion that the United States acted unilaterally and their invasion of Iraq does not qualify an anticipatory self-defense.

The United States was unsuccessful in invoking a self-defense justification for the war on Iraq because the situation lacked the requisite immediacy which then negated the existence of necessity and created disproportionality. Without evidence of real threat from Iraq, the United State's defense failed. This is analogous to the case of the Defendants before the Iraqi Special Tribunal. There is no evidence indicating that the villagers were plotting against Saddam Hussein, creating a threat that would necessitate destroying the entire village. The assassination attempt may have been the result of the intentions of a few villagers and not the entire village. Even if there was an imminent threat to Hussein's life, the Defendants did not tailor conduct accordingly. They instead chose to wipe out the entire village, indicating that their behavior was not the result of self-defense.

B. Use of Force

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁷ New York Times Staff, *Threats and Responses: Word on Gas and Germs: No 'Smoking Gun' Found*, THE NEW YORK TIMES, January 10, 2003. {Reproduced in the accompanying Notebook 3 at Tab 58}.

It can be argued that the Defendants exercised unnecessary force in the treatment of the people of Al Dujayl which would further diminish any self defense claim. States are forbidden to use, or threaten to use, force in their relations.¹²⁸ The use of force against civilians is only permitted when there is no other alternative to inflicting injury and suffering for achieving a lawful military objective.¹²⁹ The Defendants may assert that their treatment of the people of Al Dujayl was retaliatory in nature and necessary to punish them for their attack against his convoy. But they are still culpable for the excessive and unnecessary use of force. The violent killing of 500 residents compounded with the fact that he bulldozed the town, destroyed the orchard and deported 186 people indicates that his use of force was excessive. The method and means that they employed did not inflict the least possible amount of suffering and injury.

C. Reprisals

Reprisal is a legal term in international humanitarian law describing a particular kind of retaliation.¹³⁰ Rules of customary law have developed in the past that provide the limits within which retaliation could be regarded as a legitimate reprisal.¹³¹ Lawful reprisal consists of acts which normally would be illegal, but are taken in response to prior illegal attacks. A reprisal can only be taken as a last resort in self-defense, and must be executed with the objective of ensuring future compliance with legal norms.¹³²

¹²⁸ NATALINO RONZITTI, *RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY* (1985). {Reproduced in the accompanying Notebook 3 at Tab 35}.

¹²⁹ *Id.*

¹³⁰ Kenneth Anderson, *Reprisal Killings*, available at <http://www.crimesofwar.org/thebook/reprisal-killing.html> {Reproduced in the accompanying Notebook 3 at Tab 67}.

¹³¹ Frits Kalshoven, *Reprisals*, available at <http://www.crimesofwar.org/thebook/reprisal.html> {Reproduced in the accompanying Notebook 3 at Tab 68}.

¹³² Crimes of War, *What are the Distinctions Between Reprisal, Retaliation and Revenge?* available at <http://www.crimesofwar.org/expert/attack-ques04.html> {Reproduced in the accompanying Notebook 3 at Tab 69}.

The main elements of this customary "right of reprisal" are: subsidiarity (failure of all other available means), notice (formal warning of the planned action), proportionality (the damage and suffering inflicted on the adverse party not to exceed the level of damage and suffering resulting from its unlawful conduct), temporary character (termination of the reprisal when the adversary stops violating the law).¹³³ All four Geneva Conventions of 1949 categorically prohibit reprisals against the persons and objects they are designed to protect.¹³⁴

In the case at hand, the Defendants did not conduct reprisals with the intent of ensuring that the villagers conduct themselves properly. The Defendants incapacitated the entire village, making it clear that their aim did not involve any form of rehabilitation. They made no attempts to find the specific individuals who initially attacked Hussein's convoy. The damage that they inflicted upon the village far exceeded the unlawful conduct of the villagers. Additionally, the Defendants did not provide the villagers with an opportunity to cease their unlawful conduct in the future and instead chose to murder all of them. For the above reasons, the prosecution can successfully argue that the Defendants actions were not the result of a lawful reprisal.

D. Justifiable Necessity

Justified necessity derives from the utilitarian consideration of the lesser evil involved.¹³⁵ Its scope is limited by the underlying duty of social solidarity.¹³⁶ In a situation of necessity, a utilitarian approach weighs all of the interests and considerations that may influence the balance

¹³³ Kalshoven, *supra* note 111. {Reproduced in the accompanying Notebook 3 at Tab 68}.

¹³⁴ Geneva Convention, *supra* note 59. {Reproduced in the accompanying Notebook 1 at Tab 7}.

¹³⁵ Michael J. Kelly, *Time Warp to 1945 – Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law*, 13 J. TRANSNAT'L POL'Y 1 (2003). {Reproduced in the accompanying Notebook 3 at Tab 44}.

¹³⁶ *Id.*

between the harm inflicted and the harm prevented.¹³⁷ The balance is one of competing interests rather than simply one of competing values, and the theory is that of balancing interests. The term "interest" is quite broad. The following considerations must be weighed in striking the balance between the harm inflicted and the harm prevented:

- (1) the societal importance of the protected values (life versus freedom or property, physical integrity versus freedom or property, freedom versus property, etc.) as a central consideration in striking the balance;
- (2) the concrete worth of protected interests (a work of art of acknowledged artistic or historic value as opposed to a work lacking recognized value, the value of a multi-storied residence or hotel as opposed to a private home or an individual apartment);
- (3) the severity of the threat to the protected interest (concrete or abstract);
- (4) the probability of the realization of the threat to the protected interest, and the probability of harm to another protected interest;
- (5) the probability of saving the protected interest
- (6) the autonomy of the person who possesses the threatened interest (for example, the owner may not desire that the interest be defended);
- (7) the source of the threat; and
- (8) the consistence of protecting the interest of the legal order (the case of escape from legal custody).¹³⁸

The harm prevented must therefore significantly outweigh the harm inflicted.

In the case at hand, the Defendants will claim that they were acting to protect their superior, Saddam Hussein from the villagers of Al-Dujayl that garnered hostility and disdain for Hussein. They may argue that they were attempting to protect him and themselves against the threatening villagers. They may assert that they were preventing any further harm. While it is unclear whether any harm was actually prevented, the Defendants claim will nevertheless fail when the balancing test stated above is applied. While the Defendants may have been protecting certain important societal values such as respect to authority and civil peace, the severity of their threat and the source of the threat are too severe to create an adequate balance for the doctrine of justifiable necessity. As previously stated, the Defendants used all possible means to forcibly

¹³⁷ *Id.*

¹³⁸ *Id.*

punish the villagers on Al-Dujayl in a brutal and appalling fashion. The nexus between the harm prevented and the harm inflicted is nonexistent.

Under international law, a state is excused from a legal infringement if its acts to “safeguard an essential interest against a grave and imminent peril”.¹³⁹ As in domestic penal law, this principle is called necessity. It is defined in the Article 25 of the Articles of the Responsibility of States for Internationally Wrongful Acts, adopted by the UN International Law Commission.¹⁴⁰ Article 25 views necessity as an extraordinary plea and imposes severe limitations on its invocation.¹⁴¹ The act done must be the only way to prevent peril. What is more, action taken under “necessity” may not seriously impair an essential interest.¹⁴² Necessity according to Article 25 may not be invoked if the state by its own action contributed to creating the situation of peril.¹⁴³ The standard of contribution is low.¹⁴⁴ In the *Gabcikovo-Nagymaros Project Case*, the International Court of Justice said that the defense of necessity is unavailable even if the act of the state invoking it is not the cause of the peril. Contributing, in other words, need not rise to the level of causing. So long as the act was a factor in creating the peril, a plea of necessity is foreclosed.¹⁴⁵

¹³⁹ Beth Van Schaack, *Command Responsibility- A Step Backwards*, July 7, 1998. {Reproduced in the accompanying Notebook 3 at Tab 70}

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ John Quigley, *The Defense of Necessity of Necessity in Request for Advisory Opinion in Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory*, March 7, 2004. {Reproduced in the accompanying Notebook 3 at Tab 71}

¹⁴⁵ Case Concerning the Gabcikovo-Nagymaros Project, Case 92 (Sept 1997). {Reproduced in the accompanying Notebook 2 at Tab 26}

The Defendants' claim that their conduct was necessitated by the wrongful acts of the villagers will turn on whether their conduct was necessary as the only means to calm uproar against Saddam Hussein. The Defendants were not in serious harm; in fact the assassination attempt was not made directly against them when they carried out the attack on the village. The prosecution could argue that the assassination attempt was a result of Hussein's own conduct. The prosecution should argue that the Defendants did not face an extraordinary necessity if any in line with Article 25.

E. Obedience to the Orders of a Superior

The Defendants may also claim a defense in that they allegedly followed the orders of their superior, Saddam Hussein in carrying out these attacks and therefore, are not liable for their actions. The Nuremberg Tribunal first discussed this defense. Article 8 of the Nuremberg Charter deals specifically with the defense of superior orders. While obedience to superior orders is not always a defense, that issue may be considered after a finding of culpability when considering the imposition of sanction.¹⁴⁶ Many international criminal tribunals have taken a similar stance by imposing liability on defendants. These courts prohibit a defense of superior orders per se, but typically allow the fact that a subordinate followed a superior's order to serve as a mitigating factor for sentencing purposes. Treating the fact that a subordinate followed an order only as a mitigating factor for sentencing purposes allows the subordinate to avoid some punishment but it does not absolve him of responsibility.¹⁴⁷

¹⁴⁶ IMT Charter, *supra* note 51. {Reproduced in the accompanying Notebook 1 at Tab 6}.

¹⁴⁷ James Inco, *Defense of Superior Orders Before Military Commissions*, 13 DUKE J. COMP. & INT'L L. 389 (2003). {Reproduced in the accompanying Notebook 3 at Tab 45}.

During the trial of twenty-two defendants held at the Nuremberg Tribunal, it was the primary contention of the various defendants that they were entitled to rely upon the defense of superior orders, particularly where the individual defendants lacked the specific knowledge that the order in question was illegal. The Tribunal nevertheless refused to accept this defense, particularly in the *Case of General Keitel*. The Tribunal also refused to view the defense for mitigation of punishment. The Tribunal stated that where "crimes so shocking and extensive had been committed consciously, ruthlessly and without military excuse or justification"; the defense was unavailable for any purposes.¹⁴⁸

The applicability of this defense for the Defendants will turn on whether the prosecution will be able to make a showing that the alleged crimes were shocking, extensive, conscious, ruthless and without military justification. The analysis of the Nuremberg Tribunal in the *General Keitel case* will provide useful for the IST in determining how much weight to give this defense. Similar to Nuremberg Trials, the case at hand contains allegations of war crimes and crimes against humanity. The Defendants in the case before the Iraqi Special Tribunal essentially destroyed an entire village in Iraq. The destruction included all the inhabitants of the village and all the property and land in the village. If the facts are proved as alleged, this should be sufficient to make a showing that this was a shocking and ruthless crime. A military justification is lacking because the Defendants did not target only the people who attempted to assassinate Saddam Hussein but instead consciously attacked the village as a whole.

The Defendants may also claim that while they committed these alleged attacks, they were only following orders and were not in a position to disobey the authority of Saddam Hussein. They may claim that they feared for their own lives and they were under duress in deciding whether to carry out these attacks. An early case of the ICTY, *Drazen Erdemovic*, a

¹⁴⁸ Case of General Keitel, Nuremberg Trials {Reproduced in the accompanying Notebook 2 at Tab 28}.

Croat, who initially entered a plea of guilty to the murder of a number of civilians, addressed this issue.¹⁴⁹ *Erdemovic* stated that he was told to either participate in the killings, or he could get in line with the victims.¹⁵⁰ *Erdemovic* claimed that the threat to be real and that he feared for the safety of his family if he did not comply with his supervisor's orders.¹⁵¹ The Tribunal stated that the duress that the *Erdemovic* experienced was not a significant factor in light of the fact that the order that *Erdemovic* had received was absolutely illegal and he was duty-bound to refuse to follow them.¹⁵² The Tribunal, nevertheless eventually sentenced the Erdemovic to 5 years, indicating that they allowed this defense as a mitigating factor.¹⁵³

Lieutenant Calley, a lieutenant in the US Army attempted to invoke the defense of obedience to the orders of a superior before the United States Military Court of Appeals in 1973.¹⁵⁴ *Lieutenant Calley* was found guilty of premeditated murder of 22 people and of one case of attempted murder against a child of two years of age.¹⁵⁵ On March 16, 1968, The Barker Task Force of the US Army entered the village of My Lai in Quang Ngai Province situated in South Vietnam. The Company was under the command of Captain Ernest Medina. In little over three hours, members of this company executed around 500 civilians including children, women and

¹⁴⁹ Prosecutor v. Erdemovic, Case No.: IT-96-22-A, (ICTY Appeals Chamber, Oct. 7, 1997). {Reproduced in the accompanying Notebook 2 at Tab 29}.

¹⁵⁰ *Id*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ United States v. William L. Calley Jr. Case No. 26,875 22 U.S.C.M.A. 534 (Dec. 21, 1973) {Reproduced in the accompanying Notebook 2 at Tab 30}.

¹⁵⁵ *Id.*

elderly people.¹⁵⁶ *Lieutenant Calley* was found to have actively participated in the massacre and execution of the village of My Lai.¹⁵⁷

The Court of Military Appeals stated that *Calley* could not invoke in the defense of obedience to the orders of his superiors.¹⁵⁸ The Court stated that indeed, an act committed in conformity with an illegal order is not subject to punishment, except:

1. if the accused knew that the order was illegal: in such a case the personal character of the accused must be taken into account (education, hierarchical level, experience in the field, etc.) or
2. if someone with common sense and understanding, would have known, in the same circumstances, that this order was illegal: in this case, the assessment is no longer focused on the personality of the accused but on an abstractly defined standard.¹⁵⁹

In this case, the Court judged that the order given to kill children and unarmed civilians, who were incapable of offering resistance, was very clearly illegal. Any person “with common sense and understanding” would have realized this.¹⁶⁰ It was even possible to be more demanding of Calley in this respect, in view of his grade and experience.¹⁶¹ On 9 November, 1974, William Calley was paroled and freed after only three and a half years of imprisonment, indicating that there may have been some leniency towards his sentencing in light of this defense.¹⁶²

If Defendants in the Iraqi Special Tribunal claim a defense of obedience to the orders of their superior, Saddam Hussein similar to cases such *Keitel*, *Erdemovic* and *Calley*, the Iraqi Special Tribunal should follow the precedents set by cases in the past and find that the

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

Defendants had a duty to refuse to commit illegal acts ordered by their supervisor. The prosecution can invalidate the extent of this defense by showing that the alleged crimes were shocking, extensive, had been committed consciously, ruthlessly and without military excuse or justification similar to prosecution in the *Keitel* case. The fact that the conduct of the Defendants wiped out an entire Iraqi village is sufficient to make satisfy this requirement. While the Defendants may also claim that they feared for the safety of their lives if they disobeyed Hussein's orders such as in *Erdemovic*, the prosecution can highlight the fact that the Defendants knew that the conduct of these orders were illegal and that they had a duty to prevent this massacre. The prosecution should request that the Tribunal invoke the rationale of the *Erdemovic* case and find this defense is inapplicable. And finally the prosecution should apply the rule set out by the *Calley* case to show that since Defendants knew their acts of murder, detainment and destruction were illegal and that common sense as well as the law dictates as such, they do not have a viable defense when obedience to superior orders is asserted. While Tribunals such as the ones mentioned above have disfavored the defense of obedience to the orders of a superior, they have nevertheless applied the defense as a consideration in sentencing. Therefore, the IST may rightfully consider this defense as a justification to mitigate the sentences of the Defendants.

PART THREE

VI. CRIMINAL CULPABILITY OF SADDAM HUSSEIN

A. Introduction

Although the Iraqi Special Tribunal did not include the Defendants' superior, Saddam Hussein in the indictments for the case against the Defendants in connection with their treatment of the villagers of Al-Dujayl, the IST add his participation in the event to his indictment and be able to find Hussein culpable for his participation in the attacks. Hussein responded to the

attempted assassination attempt against him by allegedly ordering the Defendants to conduct the reprisals against the villagers of Al-Dujayl. While the Defendants may try to claim that they were following their superior's orders, a corollary to this doctrine is command responsibility which will provide a means to find Hussein culpable for the crimes detailed above.

B. Command Responsibility

The Iraqi Special Tribunal's Statute, Article 15 addresses the issue of individual criminal responsibility as follows:

The fact that any of the acts referred to in Articles 11 to 14 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to submit the matter to the competent authorities for investigation and prosecution.¹⁶³

Command responsibility also has a component of constructive knowledge. When the superior claims that he did not order the alleged crimes and had no knowledge of their commission, the legal fiction of constructive knowledge is generally implemented. This component is reflected in the statutes of the ICTY and the ICTR. The correct formulation of the doctrine of command responsibility appears in Article 7 (3) of the Statute of the International Criminal Tribunal for the former Yugoslavia¹⁶⁴ and in Article 6 (3) of the Statute for the International Criminal Tribunal for Rwanda. These articles provide as follows:

The fact that a crime was committed by a subordinate does not relieve his or her superior of criminal liability if he or she knew or had reason to know that the subordinate was about to commit such acts and had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.¹⁶⁵

¹⁶³ IST Statute, *supra* note 19. {Reproduced in the accompanying Notebook 1 at Tab 1}.

¹⁶⁴ ICTY Statute, *supra* note 56, art 7(3). . {Reproduced in the accompanying Notebook 1 at Tab 4}.

¹⁶⁵ ICTR Statute, *supra* note 55, art. 6 (3). {Reproduced in the accompanying Notebook 1 at Tab 3}.

Command responsibility has evolved to include both military and non-military personnel. The development of the law is not based on strict liability, but rather reflects the clear understanding that every case is to be decided on its own particular set of facts. The concept of command responsibility is now based on the clear inference that those who occupy the position of superior, in a superior-subordinate relationship, are, or may be deemed to have:

- (a) the knowledge of the criminal actions of the subordinates,
- (b) the authority to deal with the criminal actions of the subordinates; and
- (c) the power to deal, by with punishment or prevention with the criminal acts of subordinates.¹⁶⁶

A look at other Tribunal cases is helpful in understanding the doctrine of command responsibility. The ICTY successfully invoked this doctrine on November 16, 1998 when the Tribunal entered its judgment in the *Case of the Prosecutor of the Tribunal Against Zejnil Delalic, Zdravko Mucic*.¹⁶⁷ The Tribunal found the de facto commander of the Celebici prison camp liable under the principle of command responsibility for various acts of torture and ill treatment at the camp.¹⁶⁸ It also found two other accused guilty of grave breaches of the Geneva Conventions and violations of the laws or customs of war for their actions at the camp.¹⁶⁹ A fourth accused, indicted only under the principle of command responsibility, was found not guilty on all counts owing to the lack of a superior-subordinate relationship.¹⁷⁰ In making its

¹⁶⁶ Hendin, Stuart, *Command Responsibility and Superior Orders in the Twentieth Century - A Century of Evolution* Available at http://www.murdoch.edu.au/elaw/issues/v10n1/hendin101_text.html, {Reproduced in the accompanying Notebook 3 at Tab 72}.

¹⁶⁷ Prosecutor v. Zdravko Mucic, Hazim Delic and Esad Landzo, *supra* note 77 {Reproduced in the accompanying Notebook 2 at Tab 24}.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

findings on command responsibility, the chamber noted that three elements are required for its application:

- (1) the accused was involved in a superior-subordinate relationship;
- (2) the superior knew or had reason to know that the criminal act was about to be committed; and
- (3) the superior had failed to take necessary and reasonable measures to prevent the criminal act or punish its perpetrator.¹⁷¹

The Tribunal emphasized that direct command responsibility applies to civilians holding positions of authority as well as military commanders and that the superior must have "effective control" over the individuals committing the underlying criminal acts "in the sense of having the material ability to prevent and punish the commission of these offenses."¹⁷² Applying these criteria, the Tribunal deemed only *Mucic*, the camp commander, to have had the authority to prevent violations of international humanitarian law in the camp. He was found criminally responsible for having failed to make any serious effort to prevent the violations or to punish his subordinates for those crimes.¹⁷³

The first required element to prosecute a defendant under the doctrine of command responsibility is a superior-subordinate relationship must exist. The ICTY in the *Case of the Prosecutor v. Furundzija* stated that the cumulative effect of evidence showing both subjugation to orders and respect for the authority of the accused is necessary to convince a tribunal of the existence of a superior-subordinate relationship.¹⁷⁴ The Tribunal found that the commander of the local Croatian Defense Council was called the boss by members of his camp but while this implied that he was in charge and they respected him, it was not alone sufficient to infer

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Prosecutor v. Furundzija* Case No. IT-95-17/1 (July 21, 2000) {Reproduced in the accompanying Notebook 2 at Tab 32}.

subordination.¹⁷⁵ The Tribunal states that it required evidence of subjugation through the overall behavior by camp personal and the commander's duties.¹⁷⁶

Turning to the issue of actual knowledge, the term denotes awareness as to the existence of a circumstance or awareness of it occurring.¹⁷⁷ In the absence of direct evidence, constructive knowledge may be established through circumstantial evidence.¹⁷⁸ To determine whether or not a commander must have known about the acts of his subordinates, the following factors are to be considered:

- 1) The number of illegal acts;
- 2) The type of illegal acts;
- 3) The scope of illegal acts;
- 4) The time during which the illegal acts occurred;
- 5) The number and type of troops involved;
- 6) The logistics involved, if any;
- 7) The geographical location of the acts;
- 8) The widespread occurrence of the acts;
- 9) The tactical tempo of operations;
- 10) The modus operandi of similar illegal acts;
- 11) The officers and staff involved; and
- 12) The location of the commander at the time.¹⁷⁹

In the Far East Military Tribunal case of *Tomoyuki Yamashita, General Yamashita* attempted to escape culpability by claiming that he had in no way ordered, authorized or had knowledge of the attacks.¹⁸⁰ The charges stemmed from the killing of twenty-five thousand

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ ICC Prep-Com, 11-21 Feb. 1997, Decisions Taken by the Preparatory Committee, UN Doc. A/AC.249/1997/L.5 Art. H (Mar. 12, 1997). {Reproduced in the accompanying Notebook 1 at Tab 16}.

¹⁷⁸ *Id.*

¹⁷⁹ Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), available at <http://www.his.com/~twarrick/commxyu1.htm> {Reproduced in the accompanying Notebook 1 at Tab 18}.

¹⁸⁰ Trial of General Tomoyuki Yamashita Case No. 21 (Feb. 4 1945) {Reproduced in the accompanying Notebook 2 at Tab 31}

innocent civilians. The allegations stated that *Yamashita* had committed a substantial number of war crimes and commanded his troops to demolish homes, churches, and towns without military necessity.¹⁸¹ *Yamashita* claimed that he had lost contact with his troops, that his subordinates had disregarded his orders to abandon the attacks, and acted individually. Nevertheless, the Tribunal found that alleged acts were so widespread that *General Yamashita* must have knowledge of them, and that if he did not, that this lack of knowledge was deliberate in that he must have taken some positive step to avoid acquiring knowledge.¹⁸² The Tribunal stated that he must have condoned the crimes and had known and ordered the crimes because the crimes were so pervasive. The Tribunal also found him liable for failing to punish the perpetrators of the acts that were committed under this command.¹⁸³

In the *Case of the Special Court of Sierra Leone v. Santigie Borbor Kanu*, the Tribunal accused *Kanu* of crimes against humanity, violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II and other serious violations of international humanitarian law, in conformity with Articles 2, 3 and 4 of the Statute of the SCSL.¹⁸⁴ *Kanu* was alleged to have been Commander of the AFRC/RUF forces in the district of Kono in the east of Sierra Leone which led attacks against the civilian population in the regions of Kailahun, Kono, Koinagugu and Bombali between February and December of 1998.¹⁸⁵ *Kanu* was also alleged to have to have been one of the three Commanders who led the attack against Freetown and who directed all ground operations against the civilian population of Freetown as well as

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Santigie Borbor Kanu, Case No. SCSL-2004-16-PT. {Reproduced in the accompanying Notebook 2 at Tab 33}.

¹⁸⁵ *Id.*

against the civilian population living in the region surrounding the capital.¹⁸⁶ All of these acts amounted to summary executions, mutilations, looting and burning of villages, violations of sexual integrity, forced marriages, abductions and forced labor, particularly in the diamond mines, and the enlistment and use of child soldiers.¹⁸⁷

Kanu is alleged to be criminally responsible for the above mentioned crimes, whether it be for his personal contribution to their planning, instigating, and organizing in which he would have participated in one way or another, or alternatively where they are alleged to have been committed as part of a common criminal conspiracy in which he participated.¹⁸⁸ The indictment holds him to have equal or additional responsibility in his role as hierarchical superior, for crimes committed by his subordinates, for which he had, or should have had knowledge and also because he did not take the necessary measures aimed at the prevention or punishment of such crimes.¹⁸⁹ On 27 January 2004 the SCSL ordered the joint trial of Santigie Borbor Kanu, Alex Tamba Brima and Brima Bazzy Kamara. The trial is scheduled to begin during the first few months of 2005.¹⁹⁰ The indictments make clear that the defense of command responsibility will be disfavored for the Defendants.¹⁹¹ The SCSL will apply precedents set by the ICTY and ICTR.

C. Application of Command Responsibility

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

Saddam Hussein may advance the defense that his subordinates carried out the attacks on the village of Al-Dujayl, relieving him of culpability for the offense. The first issue that the prosecution must address is whether he ordered the specific attacks in retaliation of the assassination attempt against him. If the prosecution can prove that Hussein ordered the attacks, then the IST could convict him for the crime because he would then be criminally responsible for those crimes. Hussein would then not be able to shield himself from responsibility by claiming that he in fact did not commit any of the alleged atrocities.

Saddam Hussein may also claim that he in fact did not order the attacks against the village and that he did not have knowledge of the attacks. In that case, the prosecution will have to show that Hussein had constructive knowledge of the criminal acts of his subordinates. Under the 1998 statute of the new International Criminal Court, a military commander is liable for crimes that he "knew or should have known" about under circumstances at the time, and only for those crimes committed by forces under his "effective command and control." He is liable if he "failed to take all necessary and reasonable measures" to prevent and repress such crimes that subordinates "were committing or about to commit" or for failing to report such crimes to proper authorities.¹⁹² Based on this standard, if the IST makes a finding that Hussein did not have actual knowledge of the attacks, the prosecution can still counter this defense and find him liable. The prosecution should claim that he should have known about the attacks that were occurring in the village, should have taken reasonable measures to prevent the alleged violence and failed to reprimand his subordinates for carrying out these brutal crimes against the people of Al-Dujayl.

Hussein's possible claim that he lacked the requisite knowledge of the alleged crimes would fail under the precedent of *Yamashita*. The landmark case of *General Yamashita* addressing command responsibility is directly on point with the case of Saddam Hussein before

¹⁹² ICC Statute, *supra* note 53. {Reproduced in the accompanying Notebook 1 at Tab 2}

the IST. Hussein may claim that he did not order, authorize or have knowledge of the attacks against the people of Al-Dujayl similar to *General Yamashita's* claim that he had no knowledge of the killing of twenty-five thousand civilians.¹⁹³ Hussein's defense of lack of knowledge will fail based on the precedent set out by the Far East Tribunal. The alleged attacks on the village of Al-Dujayl were widespread in nature in that the entire village disappeared over a period of time. Hussein will be unable to claim that he was unaware of these occurrences. The prosecution can also set forth the argument that Hussein failed to prevent any of the atrocities or punish his subordinates as in *Kanu*. Once the IST finds that Hussein had actual or constructive knowledge of the Defendants' actions, it can find him culpable for failing to punish his subordinates for allegedly destroying the village of Al-Dujayl.

VII. CONCLUSION

When the Defendants are brought before the Iraqi Special Tribunal for war crimes, crimes against humanity and genocide in connection with their treatment of the villagers of Al-Dujayl and the facts alleged are proved by the prosecution, there is a viable claim for war crimes and crimes against humanity. The charge of alleged genocide will fail because the Defendants did not target a national, ethnic, racial or religious group as required by Article II of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide. International Humanitarian Law does not support a finding of genocide in the case at hand because the villagers do not qualify as a protected class of people.

The Defendants can be held culpable for war crimes in violation of Article 3 of the Geneva Conventions. The Defendants implemented a large-scale hostile attack against the villagers of Al-Dujayl where they murdered, deported and detained them, and finally destroying all of their land. They did so during a period of an internal armed conflict. The conduct of the Defendants

¹⁹³ Yamashita, *supra* note 143, {Reproduced in the accompanying Notebook 2 at Tab 31}.

satisfies the standards set by the international community for culpability for a war crime. Additionally, the Defendants' actions were conducted in a widespread and systematic method with the intent to inflict harm upon the village giving rise to a viable charge of a crime against humanity. A viable defense that the Defendants may attempt to raise is doctrine of obedience to superior orders. This may serve as successful means to reduce their sentence.

Additionally, if the Iraqi Special Tribunal chooses to add the charges brought against the Defendants to the indictment against Saddam Hussein, Hussein may be held criminally culpable for the mistreatment and murder of the villagers of Al-Dujayl. The prosecution would have to prove the Hussein had a position of superiority over the Defendants, that he ordered the attacks or had knowledge, actual or constructive knowledge of the conduct of the Defendants and that he failed to take any measures to prevent the attack. This would then allow the successful application of the doctrine of command responsible to find Saddam Hussein criminally culpable.