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## Are Civilian Informants From Al Dujayl Liable Before The IHT?

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

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MEMORANDUM FOR THE  
IRAQI HIGH TRIBUNAL

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ISSUE:

ARE CIVILIAN INFORMANTS FROM AL DUJAYL LIABLE BEFORE THE IHT?

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Prepared by Kevin Pendergast  
Spring 2006

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14. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (ICTR Chamber 1 Sept. 2, 1998).
15. *Prosecutor v. Furundzija*, *Judgment*, Case No. IT-95-17/1-T10 at para. 232 (ICTY Trial Chamber Dec. 10, 1998).
16. *Prosecutor v. Kambanda*, Case No. ICTR-97-23-A (ICTR Appeals Chamber Oct. 19, 2000).
17. *Prosecutor v. Kvočka, Kos, Radic, Zigic, & Prcać*, Case No. IT-98-30-1T, Judgment (ICTY Trial Chamber November 2, 2001).
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4. Elaine Sciolino, *After the War; Iraq's Shiite Majority: A Painful History of Revolt and Schism*, NEW YORK TIMES, March 30, 1991.
5. Elies van Sliedregt, *Defenses in International Criminal Law*, from the 17<sup>th</sup> Int'l Conference of the Int'l Society for the Reform of Criminal Law (Aug. 25 2003).
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## **I. INTRODUCTION AND SUMMARY OF CONCLUSIONS**

### **A. Issue<sup>1</sup>**

On July 8<sup>th</sup>, 1982, several assassins in the village on al Dujayl, Iraq tried to take Saddam Hussein's life during his visit there. After his escape, but during the same day, Saddam's forces entered the village and began the process of seizing about 1,500 residents,<sup>2</sup> taking them away for detention, torture, killing, or some combination of those three.<sup>3</sup> Several of the villagers spared by the forces belonged to the Baath Party, including current IHT defendants Abdullah Ruwayid and Ali Daih Ali.<sup>4</sup> A few days after the July 8<sup>th</sup> assassination attempt, those Baath Party members wrote letters to the Baath regime informing on villagers with familial connections to a Shiite opposition group called the Dawa Party.<sup>5</sup> The letters both identified those families as disloyal to

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<sup>1</sup> The Prosecutor has framed the issue thus: "Several of the defendants in the al Dujayl case are local residents of the town. They are alleged to have pointed out fellow residents from Dujayl who were disloyal to the regime. The residents whom these defendants identified were taken to various interrogation centers and tortured, killed, or detained for many years without charge. When these detained individuals returned to Dujayl, they found their homes were destroyed and orchards leveled. Does the decision of the informants to collaborate with the former Iraqi regime and identify people subject them to liability before the IHT?" [hereinafter "Message from the Prosecutor"].

<sup>2</sup> John F. Burns, *Trial Plan for Saddam Accelerated; Government Drops U.S. Strategy Proposal*, THE INT'L HERALD TRIBUNE, June 7, 2005, at 7 [hereinafter "HERALD TRIBUNE"]; reproduced in accompanying Notebook 2 at Tab 3].

<sup>3</sup> Grotian Moment Blog, Issue#34: Michael P. Scharf & Gregory S. McNeal, *Show Trial or Real Trial?: A Digest of the Evidence Submitted During the Prosecution's Case-in-Chief*, (March 9<sup>th</sup>, 2006), at <http://law.case.edu/grotian-moment-blog/>. [hereinafter "Issue#34"] [reproduced in accompanying Notebook 2 at Tab 10].

<sup>4</sup> *3<sup>rd</sup> LD Saddam Hussein Trial Resumes with Hearing Defendants Individually*, XINHUA GENERAL NEWS SERVICE, March 12, 2006, at 1 [hereinafter "XINHUA"]; reproduced in accompanying Notebook 2 at Tab 7].

<sup>5</sup> *Saddam Admits to Dujail Order*, THE AUSTRALIAN, March 3, 2006, at 9 [hereinafter "THE AUSTRALIAN"]; reproduced in accompanying Notebook 2 at Tab 2].



Saddam's regime and provided information as to their whereabouts.<sup>6</sup> Using that information, Saddam's forces found those families, detained them without a proper criminal procedure, and tortured some of them.<sup>7</sup> Many of those victims returned later to al Dujayl only to discover that their homes and crops had been destroyed.<sup>8</sup> Do the resident-defendants' acts of identification and collaboration subject them to criminal liability before the IHT?

## **B. Summary of Conclusions**

### **1. Civilians can be held liable for the most serious crimes in international law.**

The Iraqi High Tribunal Statute ("IHT Statute") states that the IHT possesses jurisdiction over "any Iraqi national," a category that includes all of the informant-defendants in the al Dujayl case.<sup>9</sup> Also, Article 15 of that Statute provides for individual criminal liability in the case of any "person" who violates the crimes within the IHT's jurisdiction.<sup>10</sup> The IHT Statute therefore provides an adequate basis for assigning criminal liability to the al Dujayl informants.

Even in the absence of that statutory framework, though, international law has long assigned criminal liability to civilians. The post-Nuremberg courts, the International Criminal Tribunal for Rwanda ("ICTR"), and the International Criminal Tribunal for

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<sup>6</sup> See Issue#34 [reproduced in accompanying Notebook 2 at Tab 10].

<sup>7</sup> See Message from the Prosecutor, *supra* note 1.

<sup>8</sup> *Id.*

<sup>9</sup> Law of the Iraqi Higher Criminal Court (2005) [hereinafter "IHT Statute"] (emphasis added). Articles 11-14 address, respectively, genocide, crimes against humanity, war crimes, and "Violations of Iraqi Laws". [reproduced in accompanying Notebook 1 at Tab 7].

<sup>10</sup> *Id.* at art.15.

Yugoslavia (“ICTY”) all held civilians liable for violating the most serious international criminal laws, or the “law of nations”. The al Dujayl informants therefore cannot invoke their status as civilians to shield themselves from liability before the IHT.

## **2. The al Dujayl informants are liable for crimes against humanity.**

The informants acted as aiders to the Saddam regime’s crime against humanity at al Dujayl. To establish their liability as aiders, the Prosecution must first establish that the crime against humanity itself occurred. The Prosecution will succeed in doing so because the evidence already submitted satisfies the three elements listed for a crime against humanity in Article 12 of the IHT Statute: (a) a widespread or systematic attack (b) directed against a civilian population (c) with knowledge of the attack.<sup>11</sup>

Once the crime itself has been established to the court’s satisfaction, the Prosecution will then prove that the informants acted as aiders to the crime. To do so, the Prosecution need not identify the principal in the crime or prove that Saddam and his current co-defendants acted as the principals.<sup>12</sup> Also, since the *mens rea* requirement for aiders and abettors is not as high as the corresponding requirement for principals,<sup>13</sup> the Prosecution should not encounter much difficulty in proving the informants to be aiders. Since other war crimes tribunals have held informants to be liable for aiding and abetting crimes against humanity, the IHT will likely follow suit.<sup>14</sup>

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<sup>11</sup> *Id.* at art.12.

<sup>12</sup> *See Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (ICTR Chamber 1 Sept. 2, 1998), where the court held the civilian defendant guilty of genocide and of crimes against humanity [reproduced in accompanying Notebook 1 at Tab 14].

<sup>13</sup> *Id.* at para. 484.

<sup>14</sup> *See Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment (ICTY Trial Chamber May 7, 1997) at para.657 and para.687 [hereinafter *Tadic*; reproduced in accompanying Notebook 1 at Tab 18] (citing *Case 16*, Vol. I Entscheidungen des Obersten Gerichtshofes Fur Die Britische Zone in Strafsachen,

### **3. The informants are *not* liable for genocide, war crimes, or violations of Iraqi law.**

The IHT Prosecutor would encounter much more difficulty establishing the civilian defendants' liability for genocide, war crimes, and violations of Iraqi laws. The IHT Statute assigns a high *mens rea* requirement for a genocide charge, an element of intent that would be impossible to demonstrate in the case of the informants.<sup>15</sup> The informants also cannot be assigned liability for war crimes, as the events in al Dujayl do not qualify as an "armed conflict."<sup>16</sup> Lastly, to pursue liability for violations of Iraqi law would also lead to a dead end, as the IHT's elements for crimes and the Iraqi Penal Code itself would provide a successful defense for the informants against any of the charges under that broad category.<sup>17</sup>

The Prosecutor therefore should focus strictly on the charge of crimes against humanity, and only on the theory of aiding or abetting. The theory of a joint criminal enterprise will not succeed as readily as the aiding/abetting one. The difficulty here echoes the problem in obtaining a genocide conviction: the *mens rea* requirement for a joint criminal enterprise is intent, while the requirement for aiding or abetting is simply

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at 60 (1948) [reproduced in accompanying Notebook 1 at Tab 13]; *Gustav Becker, Wilhelm Weber, and 18 Others*, Vol. VII *Law reports* 67).

<sup>15</sup> Iraqi Special Tribunal, *Elements of Crimes*, at 2, available at <http://law.case.edu/grotian-moment-blog/> [hereinafter "*Elements of Crimes*"; reproduced in accompanying Notebook 1 at Tab 5].

<sup>16</sup> IHT Statute, *supra* note 9, at art.13 [reproduced in accompanying Notebook 1 at Tab 7].

<sup>17</sup> *Elements of Crimes*, *supra* note 17, at 7, 10 [reproduced in accompanying Notebook 1 at Tab 5].

knowledge.<sup>18</sup> Despite these difficulties, the Prosecutor should find success in securing liability for aiding crimes against humanity.

#### **4. The informants' likely defenses will not succeed.**

The informants might invoke the defense of superior orders and of playing too small a role to be liable. The first one, following superior orders, is available only to soldiers, not to civilians.<sup>19</sup> The second defense has proven futile in several war crimes tribunals.

In summary, as all three elements of a crime against humanity are present in this case, the Prosecution will be able to establish the informants' role as aiders to that crime, and the probable defenses will not likely prove effective. Given those three facts, the Prosecution should feel confident in prosecuting the informants. The IHT will likely find those defendants criminally liable.

## **II. FACTUAL BACKGROUND**

In July 1982, armed gunmen attempted to assassinate Iraqi head of state Saddam Hussein as he visited the town of al Dujayl. In response, Saddam and his regime spent the next several years conducting a violent "investigation" of the incident, a process resulting in the detention of about 700 residents of al Dujayl and the deaths of more than 150 of them.<sup>20</sup> The first step in the campaign involved house raids by Saddam's troops. Uniformed soldiers beat residents, and agents in civilian attire entered homes to gather

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<sup>18</sup> *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgment (ICTY Appeals Chamber February 25, 2004), at para.102 [reproduced in accompanying Notebook 1 at Tab 19].

<sup>19</sup> Elies van Sliedregt, *Defenses in International Criminal Law*, from the 17<sup>th</sup> Int'l Conference of the Int'l Society for the Reform of Criminal Law, at 42 (Aug. 25 2003) [reproduced in accompanying Notebook 2 at Tab 5].

<sup>20</sup> Issue#34, *supra* note 3 [reproduced in accompanying Notebook 2 at Tab 10].

intelligence.<sup>21</sup> After military officers arrested the 700 townspeople, Saddam personally interviewed some of them and discovered that only ten people had participated in the assassination attempt.<sup>22</sup>

Out of the hundreds of civilians killed in the campaign, 148 received at least an ostensible criminal procedure involving documented arrest and execution.<sup>23</sup> Yet, no evidence has come to light indicating that a trial preceded these executions.<sup>24</sup> Many of the detainees who survived their imprisonment nonetheless endured violent torture.<sup>25</sup> The group of detainees included children under the age of thirteen.<sup>26</sup> Some of the underage detainees were killed without any judicial procedure, and state officers buried their bodies in secret.<sup>27</sup> In recent trial testimony, Saddam declared that he personally ordered “the arrest, interrogation, trial, and execution of townspeople.”<sup>28</sup> As part of the al Dujayl campaign, Saddam’s forces also bombed and bulldozed the orchards on which the townspeople depended for their sustenance.<sup>29</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> See Prosecution’s 0228 Exhibit 01 [reproduced in accompanying Notebook 2 at Tab 11].

<sup>23</sup> Prosecution’s 0228 Exhibit 13 [reproduced in accompanying Notebook 2 at Tab 12].

<sup>24</sup> Grotian Moment Blog, Issue#33: Michael A. Newton, *What is the Significance of the Documents Entered into Evidence by the Prosecution?*, (March 7<sup>th</sup>, 2006), at <http://law.case.edu/grotian-moment-blog/>. [hereinafter “Issue#33”, reproduced in accompanying Notebook 2 at Tab 9].

<sup>25</sup> See Issue#34, *supra* note 3 [reproduced in accompanying Notebook 2 at Tab 10].

<sup>26</sup> *Id.*

<sup>27</sup> Issue#33, *supra* note 24 [reproduced in accompanying Notebook 2 at Tab 9]; see also Prosecution’s 0228 Exhibit 16 [reproduced in accompanying Notebook 2, at Tab 13].

<sup>28</sup> Grotian Moment Blog, Issue#32: Michael Scharf, *What is the Significance of Saddam’s Admission?*, (March 6<sup>th</sup>, 2006), at <http://law.case.edu/grotian-moment-blog/>. [hereinafter “Issue # 32”] [reproduced in accompanying Notebook 2 at Tab 8].

<sup>29</sup> Issue#34, *supra* note 3 [reproduced in accompanying Notebook 2 at Tab 10].

The civilian defendants from al Dujayl played a central role in this campaign. Three of those defendants wrote letters to the Baath Party's central command, informing on fellow villagers supposedly linked to a Shiite political party with a militia wing.<sup>30</sup> The letters led directly to the arrests of later victims of the campaign, as the Iraqi Intelligence Service detained the families identified in those missives.<sup>31</sup> Some of those victims were "brought to show trials and executed" while others survived only to see their farms destroyed by Saddam's troops.<sup>32</sup>

### **III. CIVILIANS CAN BE HELD LIABLE FOR THE MOST SERIOUS CRIMES IN INTERNATIONAL LAW.**

#### **A. Civilians who violate the crimes listed in the IHT Statute subject themselves to that tribunal's jurisdiction.**

Article 1, §2 of the IHT Statute states that the tribunal possesses jurisdiction over "any Iraqi national" or resident accused of the crimes described in the Statute's Articles 11-14, so long as the alleged crimes occurred between July 17, 1968 and May 1, 2003.<sup>33</sup> Similarly, Article 14 assigns individual criminal liability to "[a] *person* who commits a crime within the jurisdiction of this Court...."<sup>34</sup> Such a person "shall be liable for punishment in accordance with this Statute."<sup>35</sup> Therefore, the fact that the al Dujayl informants are civilians does not protect them from liability for the four categories of

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<sup>30</sup> THE AUSTRALIAN, *supra* note 5, at 9 [reproduced in accompanying Notebook 2 at Tab 2].

<sup>31</sup> HERALD TRIBUNE, *supra* note 2, at 7 [reproduced in accompanying Notebook 2 at Tab 3].

<sup>32</sup> *Id.* (interior quotation marks omitted).

<sup>33</sup> IHT Statute, *supra* note 9, at art.1, §2 [reproduced in accompanying Notebook 1 at Tab 7].

<sup>34</sup> *Id.* at Art. 15, §1 (emphasis added).

<sup>35</sup> *Id.*

crimes under the IHT Statute: genocide, crimes against humanity, war crimes, and violations of Iraqi laws. Liability for IHT crimes extends to all Iraqis.

**B. The basis for civilian liability can be found in the modern development of international law.**

Even if the wording of the IHT Statute had been less clear, precedents from international law establish that civilians can be held liable for the most extreme international crimes. In 1961, the court in the trial of Adolph Eichmann quoted approvingly from an international legal scholar who asserted that the “judicial power of every state...extends...to the punishment...of offenses against the law of nations, by whomsoever...committed.”<sup>36</sup> In the spirit of that principle, the Genocide Convention requires all states parties to the treaty to punish any genocide perpetrators, “whether they are constitutionally responsible rulers, public officials, or private individuals.”<sup>37</sup> The Torture Convention uses fewer words but conveys the same rule. Simply, any “national” of a state party who commits torture will be liable for the act under the jurisdiction of that state’s courts.<sup>38</sup>

More specifically, the other current international criminal tribunals have assigned liability to civilians. The ICTY has held civilians liable for the same crimes listed in the IHT Statute.<sup>39</sup> Similarly, the ICTR has held civilians guilty of those crimes.<sup>40</sup> In

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<sup>36</sup> Henry Wheaton, *ELEMENTS OF INTERNATIONAL LAW* 104 (1916) [reproduced in accompanying Notebook 2 at Tab 6] (citing *Attorney General v. Adolph Eichmann*, Criminal Case No. 40/61, at para.15 (Dist. Ct. of Jerusalem 1961) [reproduced in accompanying Notebook 1 at Tab 12]).

<sup>37</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, art. 4 [hereinafter “Genocide Convention”]; reproduced in accompanying Notebook 1 at Tab 2].

<sup>38</sup> Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, June 26, 1987, at. 5 [reproduced in accompanying Notebook 1 at Tab 1].

<sup>39</sup> See *Prosecutor v. Kvočka, Kos, Radic, Zigic, & Prcac*, Case No. IT-98-30-1T, Judgment (ICTY Trial Chamber November 2, 2001), at para.4. [reproduced in accompanying Notebook 1 at Tab 17]. The defendant Zigic was a civilian taxi-driver ordered to deliver supplies to the Omarska camp.

assigning liability to civilians, both of those tribunals acted from statutory language nearly identical to the text of the IHT's Articles 1 and 15. The ICTY devotes Article 7 to individual criminal responsibility (the topic of the IHT Statute's Art. 15), assigning liability to a "*person* who planned, instigated, ordered, committed, or otherwise aided and abetted" a crime under that Statute's jurisdiction (emphasis added).<sup>41</sup> The IHT Statute employs the same word, "person," to assign individual criminal responsibility.<sup>42</sup> Just as the Yugoslavia Tribunal has implicitly applied that word to encompass civilians, so too will the Iraqi Tribunal likely consider civilians to fall within the category of the word "person" in Article 15.

The statute for the Rwanda Tribunal uses the same word, "persons", at four different points. "Persons" are subject to that tribunal's personal jurisdiction, and "persons" can be held liable for genocide and crimes against humanity.<sup>43</sup> Most importantly, the ICTR possesses jurisdiction generally over "persons responsible for serious violations of international humanitarian law...."<sup>44</sup> By convicting civilians for

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<sup>40</sup> See *Akayesu*, *supra* note 12. [Reproduced in accompanying Notebook 1 at Tab 14]; see also *Prosecutor v. Kambanda*, Case No. ICTR-97-23-A (ICTR Appeals Chamber Oct. 19, 2000) (holding the civilian defendant guilty for the same crimes) [reproduced in accompanying Notebook 1 at Tab 16].

<sup>41</sup> Statute of the Int'l Criminal Trib. for the Former Yugoslavia, U.N.S.C. Res. 827, U.N. SCOR, 48<sup>th</sup> Sess., 3217<sup>th</sup> mtg., U.N. Doc. S/RES/827 (1993), amended by U.N.S.C. Res. 1660, U.N. SCOR, 60<sup>th</sup> Sess., at art. 7, U.N. Doc. S/RES/1660 (2005) [hereinafter "ICTY Statute"] [reproduced in accompanying Notebook 1 at Tab 10].

<sup>42</sup> IHT Statute, *supra* note 9, at art. 15 [reproduced in accompanying Notebook 1 at Tab 7].

<sup>43</sup> Statute of the Int'l Criminal Trib. for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Int'l Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring Territories Between 1 January 1994 and 31 December 1994, U.N.S.C. Res. 955, U.N. SCOR, 49<sup>th</sup> Sess., U.N. Doc. S/RES/955 (1994), amended by U.N.S.C. Res. 1329, U.N. SCOR, 55<sup>th</sup> Sess., at arts. 2, 3, and 5, U.N. Doc. S/RES/1329 (2005). [hereinafter "ICTR Statute"] [reproduced in accompanying Notebook 1 at Tab 11].

<sup>44</sup> *Id.* at art. 1.



such violations, the ICTR, like the ICTY, has tacitly acknowledged that civilians qualify as “persons” liable for international crimes of a serious nature. The theory that civilians are liable under the same wording in the IHT Statute follows logically from the statutory and case law history of those two other tribunals.

#### **IV. THE AL DUJAYL INFORMANTS ARE LIABLE FOR CRIMES AGAINST HUMANITY.**

##### **A. The fact of the crime must first be established.**

In order for the Al Dujayl informants to be held liable for crimes against humanity, as aiders and abettors, the Prosecution must establish that a principal committed the primary crime itself. Although the Prosecution does not have to establish that Saddam and his officers *were* the principals, the occurrence of the principal crime must first be established to the Tribunal’s satisfaction. The ICTR stated this rule in *Akayesu* thus: “an accomplice may...be tried even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be proven.”<sup>45</sup>

The rulings of the other international tribunals, particularly when addressing such topics as crimes against humanity, play a significant role in the determinations of the Iraqi High Tribunal. Article 17 of the IHT Statute states that the decisions of other international criminal courts may assist the IHT when it interprets the parts of the IHT Statute dealing with the same crime and with genocide and war crimes (Articles 11-13 of the IHT Statute).<sup>46</sup> Therefore, given the *Akayesu* rule (that accomplices may be held liable in the absence of the principal’s liability), the al Dujayl informants may be liable for crimes against humanity even if Saddam and his current co-defendants are found

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<sup>45</sup> *Akayesu*, *supra* note 12, at para. 531 [reproduced in accompanying Notebook 1 at Tab 14].

<sup>46</sup> IHT Statute, *supra* note 9, art. 17 [reproduced in accompanying Notebook 1 at Tab 7].

innocent of that crime. Nonetheless, for the informants to be liable, the Prosecution in the al Dujayl case must establish that a crime against humanity did occur.

### **B. Elements of “crimes against humanity,” under the IHT Statute.**

Just as in the Rome Statute for the International Criminal Court, the IHT version of a crime against humanity can take one of a variety of forms, including “willful murder,” torture, forced disappearance of persons, and “imprisonment or other severe deprivation of liberty” in violation of the norms of law.<sup>47</sup> If the perpetrator of any of those acts commits them (a) “as part of a widespread or systematic attack” (b) “directed against any civilian population,” and (c) “with knowledge of the attack,” then, and only then, will he be guilty of a crime against humanity under Article 12.<sup>48</sup>

#### *1. A Widespread or Systematic Attack*

##### *a. A Disjunctive Element*

The al Dujayl campaign constitutes a systematic attack against the people of that town. Since the IHT Statute requires only that the attack be widespread *or* systematic, the informants would not be able to claim that Saddam’s attack does not satisfy this element. The ICTY’s decision in *Tadic* bolsters this view.<sup>49</sup> The ICTY Statute’s section on crimes against humanity makes no mention of the “widespread/systematic” element.<sup>50</sup> Yet, that element had become a part of the ICTY’s jurisprudence by the time that court

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<sup>47</sup> IHT Statute, *supra* note 9, at art. 12 [reproduced in accompanying Notebook 1 at Tab 7].

<sup>48</sup> *Id.* Those same three elements establish a crime against humanity under the Rome Statute. *See* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, art. 7 (1998) [hereinafter “Rome Statute”] [reproduced in accompanying Notebook 1 at Tab 8] (“For the purposes of this Statute, ‘crime against humanity’ means [any of a long list of violent acts] committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack...”).

<sup>49</sup> *Tadic*, *supra* note 14 [reproduced in accompanying Notebook 1 at Tab 18].

<sup>50</sup> ICTY Statute, *supra* note 41, at art. 5 [reproduced in accompanying Notebook 1 at Tab 10].

heard the *Tadic* case.<sup>51</sup> That case dealt primarily with the defendant's activities at the Omarska Camp, and he apparently did not participate in a widespread campaign against a general population.<sup>52</sup> Due to the narrow scope of his own involvement within the broader Serbian onslaught against Croats and Bosnian Muslims, Tadic argued before the ICTY that his actions did not reflect a "widespread" attack.<sup>53</sup> To support his argument, he asserted that the "widespread/systematic" element required that the attack be widespread *and* systematic.<sup>54</sup> The ICTY Trial Chamber rejected this interpretation of the element, holding that those words constitute two *alternative* requirements: the element requires that the attack be widespread *or* systematic.<sup>55</sup> Even in the absence of the *Tadic* holding, though, the IHT statute explicitly separates the two words with an "or" and thus clarifies the requirement for meeting that element. The Prosecution need only show that the attack on al Dujayl was widespread *or* systematic.

The al Dujayl informants may argue that Saddam's attack on their neighbors did not satisfy the "widespread" part of the element, due to the limited geographical area of the attack. The informant defendants may also argue that the hundreds of victims constitute a small number relative to other groups victimized by crimes against humanity in history. However, the informants will not be able to make such a compelling argument on the "systematic" prong of the element. The Prosecution's exhibits (entered into evidence on February 28 and March 1, 2006) indicate a long and carefully executed

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<sup>51</sup> *Tadic*, *supra* note 14, at 234 [reproduced in accompanying Notebook 1 at Tab 18].

<sup>52</sup> *Id.* at 9.

<sup>53</sup> *Id.* at 233-234.

<sup>54</sup> *Id.* at 234.

<sup>55</sup> *Id.*

attack on the townspeople of al Dujayl. Saddam and his forces did not stop their campaign with the arrest and execution of hundreds of the town's residents. The campaign took another sinister turn when Saddam ordered the destruction of the town's orchards, in what he called a "modernization" program.<sup>56</sup> The ICTY held in *Tadic* that, as long as "a pattern *or* methodical plan is evident," the attack is "systematic."<sup>57</sup> The documented and premeditated steps of the al Dujayl campaign, from the arrests and the "investigation," to the "executions," the secret burials ordered by the state, and the two-part decimation of the orchards, all establish the systematic nature of the attack. Since the "widespread" and "systematic" prongs are disjunctive under *Tadic* and under the IHT Statute, the attack on al Dujayl satisfies the first element for a crime against humanity in Article 12.

b. A "Preconceived Plan"

The ICTR has taken a similar approach to the "systematic" part of that element.

In *Akayesu*, that tribunal held that:

The concept of "systematic" may be defined as thoroughly organised and following a regular pattern, on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy.<sup>58</sup>

The "preconceived plan," in the case of al Dujayl, can be found in the ample documentary evidence already submitted by the prosecutor, including the many internal state memos and reports on the handling of the matter.<sup>59</sup> That evidence of a preconceived

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<sup>56</sup> Issue # 32, *supra* note 28 [reproduced in accompanying Notebook 1 at Tab 8].

<sup>57</sup> *Tadic*, *supra* note 14, at 235 [reproduced in accompanying Notebook 1 at Tab 18].

<sup>58</sup> *Akayesu*, *supra* note 18, at para. 580 [reproduced in accompanying Notebook 1 at Tab 12].

<sup>59</sup> Issue # 34, *supra* note 3 [reproduced in accompanying Notebook 2 at Tab 210].

plan satisfies the element's "systematic" prong. Therefore, the evidence already submitted by the Prosecution establishes the first element of Article 12's "crimes against humanity."

## 2. *Directed Against Any Civilian Population*

### a. Discriminatory Intent

Saddam's forces did direct the al Dujayl attacks at a civilian population. Article 12's use of the adjective "any" before "civilian population" may seem to indicate that the attacked population need not consist of a particular religious, ethnic, or political group for this second element to be satisfied. However, the ICTY *has* interpreted the phrase "any civilian population" to mean that the attack must be motivated by a discriminatory intent on the part of the attacker.<sup>60</sup>

Article 5 of the ICTY Statute contains the same phrase as the one in the IHT Statute's Article 12: "any civilian population."<sup>61</sup> The ICTR Statute, on the other hand, expressly requires that the attack occur on racial, religious, or ethnic grounds.<sup>62</sup> Amnesty International has criticized the ICTR for including this component within the "civilian population" element.<sup>63</sup> Nonetheless, France, the United States, and Russia have all issued statements defining "civilian population" as one whose status in a particular demographic group makes those civilians the target of the attack.<sup>64</sup> In the most authoritative

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<sup>60</sup> *Tadic*, *supra* note 14, at 238 [reproduced in accompanying Notebook 1 at Tab 18].

<sup>61</sup> ICTY Statute, *supra* note 41, at art. 5 [reproduced in accompanying Notebook 1 at Tab 10].

<sup>62</sup> ICTR Statute, *supra* note 43, at art. 3 [reproduced in accompanying Notebook 1 at Tab 11].

<sup>63</sup> Amnesty International, *The Int'l Criminal Court: Making the Right Choices-Part I*, at 46 (1997) [reproduced in accompanying Notebook 2 at Tab 1].

<sup>64</sup> *Tadic*, *supra* note 14, at 238 [reproduced in accompanying Notebook 1 at Tab 18].

expression of this view, the U.N. Secretary General has also interpreted the ICTY's Article 5 as requiring a discriminatory intent on the part of the perpetrator.<sup>65</sup> Bowing under the pressure from the Secretary General, the ICTY ruled, despite the plain wording of its own statute, that an attack on civilians must be discriminatory in order to be a crime against humanity.<sup>66</sup>

The Prosecution in the al Dujayl informants' case therefore needs to take one of two approaches to this problem. The Prosecution needs either to establish that Saddam's forces attacked al Dujayl on discriminatory grounds or to argue that the IHT's Article 12 should not be interpreted the way that the Secretary-General or the ICTY would. To succeed with either tactic would be challenging but not impossible.

The informants might argue that Saddam's intent in attacking the town was retaliatory and not discriminatory. They will argue that, had the assassination attempt not occurred, no attack would have ensued. To defeat this argument, the Prosecution will have to show that the victims of the attack belonged to a particular ethnicity or religious sect. Some media reports on the campaign indicate that Shiites were specifically targeted in the forced detentions and crop destruction.<sup>67</sup> Yet, since the town consisted mostly of Shiites,<sup>68</sup> the Prosecutor may face difficulty in establishing that Saddam's regime targeted Shiites as Shiites, and not as villagers collectively responsible for the assassination attempt. The fact that some of those villagers belonged to a militia opposed to Saddam

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> HERALD TRIBUNE, *supra* note 2, at 7 [reproduced in accompanying Notebook 2 at Tab 3].

<sup>68</sup> Elaine Sciolino, *After the War; Iraq's Shiite Majority: A Painful History of Revolt and Schism*, NEW YORK TIMES, March 30, 1991, §1, at 4 [reproduced in accompanying Notebook 2 at Tab 4].

would only bolster the informant-defendants' claim that the campaign against al Dujayl was retaliatory and not discriminatory.<sup>69</sup> The Prosecutor therefore may find the discriminatory intent element an impossible one to satisfy. The evidence may simply not support the Prosecutor's position.

If the evidence does not support that position, the Prosecution will have to assert that *Tadic's* requirement of discriminatory intent does *not* apply to the IHT Statute. That statute was drafted long *after* both the enactment of the ICTR Statute (eleven years) and the judgment in the *Tadic* case (seven years). Assuming that the drafters of the IHT Statute knew about the controversy over the issue of discriminatory intent, the wording of Article 12 indicates that the drafters did not intend for discrimination to be a necessary component for a crime against humanity. Even a cursory reading of the four major tribunal statutes (ICTY, ICTR, the Rome Statute, and the IHT), will reveal that the first three of those statutes heavily influenced the wording of the IHT one. The drafters of the IHT Statute surely knew of the Secretary-General's interpretation of Article 5 in the ICTY Statute. The same drafters also must have known about the rule from *Tadic* and about the distinction between the ICTR Statute and the ICTY one on this issue. In other words, the drafters of the IHT Statute knew that the ICTR Statute required discrimination for the second element and that the ICTY Statute did not require it. The IHT Statute drafters therefore had to make a choice, and they chose to omit the requirement from Article 12 and use the words "any civilian population" instead. Under this argument, that choice must have been deliberate. If so, discrimination need not be present for the second element of Article 12 to be satisfied.

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<sup>69</sup> *Id.*

The “Elements of Crimes” manual issued for the Iraqi High Tribunal seems to support this line of reasoning. The manual provides three detailed paragraphs explaining the meaning of the “civilian population” element. Nowhere in that exegesis will one find a requirement of discriminatory intent.<sup>70</sup>

The informants will counter-argue that the drafters’ awareness of the controversy *proves* that discrimination must be established. Under this argument, the fact that the drafters knew about *Tadic* and about the different statutory interpretations would logically lead them to specify that discrimination need not be present as a motive. Given the reasonableness of this counter-argument, the preferable course for the Prosecution would be to demonstrate that the al Dujayl attack *did* arise from discriminatory grounds. If the Prosecution determines that it lacks the evidence to support that claim, only then should it resort to the “framers’ intent” argument.

b. No armed conflict necessary

An attack on a civilian population need not arise from armed conflict in order to be a crime against humanity. The “Elements of Crimes” manual for the Iraqi High Tribunal states this rule clearly: “Attack directed against a civilian population’ is understood to mean a course of conduct involving the commission of multiple acts...The acts need not constitute a military attack.”<sup>71</sup>

Some of the evidence submitted by the Prosecution indicates that part of Saddam’s campaign against al-Dujayl *does* amount to an armed, military attack.<sup>72</sup> Yet, in

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<sup>70</sup> *Elements of Crimes*, *supra* note 15, at 2-3 [reproduced in accompanying Notebook 1 at Tab 5].

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

<sup>72</sup> Issue # 34, *supra* note 3 [reproduced in accompanying Notebook 2 at Tab 10].



the event that the Prosecution does not acquire enough evidence to establish an “armed conflict” in al Dujayl, that evidence will not be necessary to demonstrate that a crime against humanity occurred. The armed conflict requirement for crimes against humanity first lost favor in the period immediately following the Nuremberg trials. Control Council Law No. 10 made plain that an attack on a civilian population need not take the form of an armed conflict to rise to the level of such a crime.<sup>73</sup> Since that Control Council rule went into effect, the separation between the armed conflict element and crimes against humanity has become settled international law.

c. Part of a state policy

The campaign against al Dujayl stemmed from an official state policy against that town’s civilians. Article 12 of the IHT Statute defines an “attack directed against any civilian population” as one that occurs “pursuant to...a state...policy to commit such attack.”<sup>74</sup> Although this requirement does not appear in the text of the ICTR Statute, the Rwanda Tribunal itself has applied that state policy requirement in its analysis of crimes against humanity. As noted earlier, the *Akayesu* court held that the state policy need not “be adopted formally as the policy of the state. There must however be some preconceived plan *or* policy” (emphasis added).<sup>75</sup> This application of the rule suggests that the existence of a mere preconceived plan will satisfy the “state policy” requirement. Since the documentary evidence submitted previously by the Prosecution establishes the

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<sup>73</sup> *Tadic*, *supra* note 14, at 226 [reproduced in accompanying Notebook 1 at Tab 18].

<sup>74</sup> IHT Statute, *supra* note 9, at art. 12 [reproduced in accompanying Notebook 1 at Tab 7].

<sup>75</sup> *Akayesu*, *supra* note 12, at para.580 [reproduced in accompanying Notebook 1 at Tab 14].

existence of that plan, the al Dujayl campaign qualifies an attack conducted “pursuant to a state policy.”<sup>76</sup>

Just like the ICTR Statute, the ICTY one contains no textual requirement of a state policy for a charge of crimes against humanity. Just like the ICTR, though, the ICTY has nonetheless developed the requirement through its case law. In language similar to the *Akayesu* opinion, the *Tadic* court held that the state policy “need not be formalized and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis, that demonstrates a policy to commit those acts, whether formalized or not.”<sup>77</sup> As discussed earlier in this memo, the documentary evidence submitted on February 28<sup>th</sup> and March 1<sup>st</sup> reveals the systematic quality of the al Dujayl attacks.<sup>78</sup> Under *Tadic*, establishing that systematic nature establishes a state policy as well.

The *Tadic* opinion goes on to specify the kinds of acts that would satisfy this test. Quoting another ICTY case, the *Tadic* court ruled that, although the attacks “need not be related to a policy established at State level, in the conventional sense of the term, they cannot be the work of isolated individuals alone.”<sup>79</sup> The attackers of al Dujayl obviously did not act alone, and no official state policy need be shown under *Tadic*, even though the evidence of February 18<sup>th</sup> and March 1<sup>st</sup> indicates such a policy. The work of Saddam’s regime in al Dujayl therefore adequately meets the “state policy” requirement of an

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<sup>76</sup> IHT Statute, *supra* note 9, at art. 12 [reproduced in accompanying Notebook 1 at Tab 7].

<sup>77</sup> *Tadic*, *supra* note 14, at 239 [reproduced in accompanying Notebook 1 at Tab 18].

<sup>78</sup> See Prosecution’s Exhibits 1, 13, and 16, *supra* notes 22, 23, and 27 [reproduced in accompanying Notebook 2 at Tabs 11-13] and accompanying text.

<sup>79</sup> *Id.* at 240.

“attack on any civilian population” in Article 12. The assaults on the lives and livelihood of the people of al Dujayl therefore satisfy the second element for crimes against humanity.

### 3. *With Knowledge of the Attack*

This element simply sets knowledge as the requisite *mens rea* for a perpetrator of a crime against humanity. While not all of the attackers among Saddam’s forces at al Dujayl necessarily knew that they were engaged in a *systematic* plan to attack innocent civilians, the Prosecution does not need to prove that extent of knowledge. The *Elements of Crimes* manual for the IHT states that this knowledge requirement “should not be interpreted as requiring proof that the perpetrator had knowledge of all the characteristics of the attack or the precise details of the plan or policy of the State...”<sup>80</sup>

The Prosecution therefore should face no difficulty in establishing this third and last element of a crime against humanity. The second element (attack on any civilian population) raises more doubt as to the best strategy, for it may require a discriminatory intent that may be lacking in this case. Yet, given the two avenues through which this problem can be solved, even this uncertainty should not preclude a judicial finding that the evidence satisfies the second element. The lack of an armed conflict requirement and the ease with which the Prosecution will demonstrate the state policy behind the attacks will both make that result highly likely. The first element (the existence of a systematic plan) and the third (the knowledge of the attackers) will be established even more easily. With all three elements satisfied, the Prosecution will have established that a crime

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<sup>80</sup> *Elements of Crimes*, *supra* note 15, at §3 [reproduced in accompanying Notebook 1 at Tab 5].

against humanity did indeed occur in al Dujayl, regardless of the result of Saddam's current trial.

**C. The informants are liable as aiders and abettors of a crime against humanity.**

The residents of al Dujayl who informed on the victims have brought liability onto themselves through that act. In helping Saddam's agents identify and locate the residents who would soon become detainees, torture victims, and casualties, the informants served as aiders and abettors to one of the most serious of international crimes: the crime against humanity. Under Article 15 of the IHT Statute, a person who "aids, abets, *or* otherwise assists in the commission" of a crime against humanity subjects herself to criminal liability, even if she only "provid[es] the means" for the principal crime.<sup>81</sup> That language describes well the activities of the informants. They assisted in the commission of the regime's acts by providing the means for them to occur. The "or" in the phrase quoted above indicates that the informants can be held liable as accomplices simply for assisting the principal perpetrators of the al Dujayl attacks. Therefore, even if the Prosecution could not establish that the informants are aiders and abettors, their assistance to the regime alone would trigger their liability as accomplices.

Yet, the Prosecution will not have hang its case on that theory, for the aiding/abetting charge can be proven as well. The same "or" that makes the informants liable for merely assisting in the crime also makes them liable for either aiding *or* abetting it. The distinction between aiding and abetting could prove meaningful in the al Dujayl case. In *Akayesu*, the ICTR defined "abetting" as "facilitating the commission of

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<sup>81</sup> IHT Statute, *supra* note 9, at art.15 [reproduced in accompanying Notebook 1 at Tab 7].

an act by being sympathetic thereto.”<sup>82</sup> The court defined “aiding”, on the other hand, as simply “giving assistance to someone.”<sup>83</sup> Since the al Dujayl informants will likely assert that they bore no wish for the victims to be harmed, the Prosecution may encounter some difficulty in proving the abetting charge, as *Akayesu* defined it. Yet, no such difficulty will arise in establishing that the informants aided the attackers. The work of the “aider” does not even have to be vital to the criminal enterprise for him to incur liability. The ICTY held that the “assistance need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal.”<sup>84</sup> Given this low threshold for proving that a person aided in a crime of international law, the al Dujayl informants certainly “aided” in Saddam’s crime against humanity.

1. *Informing constitutes an act of aiding and abetting.*

Even if the “aiding” charge could not be proven so readily, several precedents establish that an informant specifically qualifies as an aider and abettor. In a German domestic case dealing with Nazi collaborators, a civilian employer had supposedly criticized Hitler in the presence of his employees.<sup>85</sup> Two of the civilian employees informed on him to the Nazi authorities, who ultimately sent the employer to a concentration camp to die. After the war, the two employees stood trial for the murder of their former boss. The trial court held them not guilty, partly due to the attenuated

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<sup>82</sup> *Akayesu*, *supra* note 12, at para. 484 [reproduced in accompanying Notebook 1 at Tab 14].

<sup>83</sup> *Id.*

<sup>84</sup> *Prosecutor v. Furundzija, Judgment*, Case No. IT-95-17/1-T10 at para. 232 (ICTY Trial Chamber Dec. 10, 1998) [reproduced in accompanying Notebook 1 at Tab 15].

<sup>85</sup> *Case No. 16, supra* note 14 [reproduced in accompanying Notebook 1 at Tab 13].

connection between the act of informing and the killing at the concentration camp.<sup>86</sup> The appeals court reversed and remanded the case, though, finding that the informing intimately related to the death.<sup>87</sup>

Similarly, a French military tribunal convicted a civilian informer for the Nazis in that country.<sup>88</sup> The informer had reported the resistance activities of a number of fellow civilians to the Nazi regime, and those members of the resistance (like the al Dujayl victims) were then subjected to arrest, torture, and deportation.<sup>89</sup> The informer-defendant argued at trial that he should not be held responsible for the deaths and deportations, as they happened outside of his control and far away from him geographically. The tribunal rejected this argument and held that “the connection between the act contributing to the commission and the act of commission itself can be geographically and temporally distanced.”<sup>90</sup>

These two cases do not specifically address the international law charge of “crimes against humanity.” The cases were decided by the domestic courts of two European countries, and the French Tribunal did not address the specific charge of crimes against humanity. Yet, the German court *did* find the two informers in that case guilty of a crime against humanity. Also, the facts of the cases resemble the facts of the al Dujayl informants enough to make the two courts’ analyses illustrative of the legal connection

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 62.

<sup>88</sup> *Tadic*, *supra* note 14, at para.687 (citing *Gustav Becker, Wilhelm Weber, and 18 Others*, Vol. VII *Law reports* 67) [reproduced in accompanying Notebook 1 at Tab 18].

<sup>89</sup> *Id.* at 71.

<sup>90</sup> *Id.*

between informing and criminal liability. Both the German informant-defendants were civilians who did not participate in the principal crime, and the principal crime in both cases happened in a setting removed from the informants themselves. Yet, those facts did not save those defendants from criminal liability for the principal crime. Likewise, the IHT will not likely let the al Dujayl informants shield themselves from liability with that argument. Additionally, these two cases will carry some persuasive authority in the IHT because the ICTR endorsed both holdings in *Akayesu* and applied *both* the holdings to its analysis of crimes against humanity in that case.<sup>91</sup> The IHT will therefore likely be persuaded that informing constitutes an act of aiding or abetting and therefore triggers liability under Article 15.

## 2. A low mens rea requirement

The Prosecution will succeed in proving the informants' liability for a variety of reasons, but one of those reasons is the minimal *mens rea* requirement called for by the IHT Statute and by precedent. As noted earlier,<sup>92</sup> the *mens rea* element for a crime against humanity, under Article 12, is mere knowledge, not intent.<sup>93</sup> Also as noted earlier, the perpetrator himself need not know all the details of the attack plan in order to be guilty of the crime. If even the principal need not possess extensive knowledge, then the *mens rea* requirement for the aiders will amount to a low evidentiary threshold.

The IHT Statute does not specify a separate *mens rea* for aiders in Article 15. Yet, other tribunals have set a lower *mens rea* standard for aiders/abettors than for principals.

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<sup>91</sup> *Akayesu*, *supra* note 12, at 241-242, 255-256 [reproduced in accompanying Notebook 1 at Tab 14].

<sup>92</sup> See IHT Statute, *supra* note 9, at art.12 [reproduced in accompanying Notebook 1 at Tab 7] and accompanying text.

<sup>93</sup> *Id.*

In *Akayesu*, the ICTR ruled that “if the accused knowingly aided and abetted in the commission of...a murder while he knew or had reason to know that the principal was acting with genocidal intent, the accused would be an accomplice to genocide, even though he did not share the murderer’s intent to destroy the group.”<sup>94</sup> In similar language, the ICTY held Dusko Tadic guilty of crimes against humanity in part because he “knew or had reason to know that, by his acts or omission, he was participating in the attack on the population.”<sup>95</sup>

The Prosecution should encounter little difficulty in establishing that the al Dujayl informers had reason to know that their act of informing would contribute to the illegal imprisonment and murder of innocent fellow civilians. The documents and video already entered into evidence show that Saddam’s forces rampaged through the town and conducted their investigation with indiscriminate violence.<sup>96</sup> The IHT will need to hear little more evidence to conclude that the informers knew or should have known that a crime against humanity would befall the neighbors on whom they informed. In fact, the *Tadic* court also held that such knowledge “can be inferred from the circumstances.”<sup>97</sup> The house-to-house intrusions and beatings occurring in al Dujayl on the day of the informing constitute all the circumstances necessary for the IHT to infer the informers’ knowledge. Given that loose standard for establishing the *mens rea* element, the Prosecution will almost undoubtedly succeed in proving that the informers acted as aiders in the al Dujayl crime against humanity.

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<sup>94</sup> *Akayesu*, *supra* note 12, at para.54 [reproduced in accompanying Notebook 1 at Tab 14].

<sup>95</sup> *Tadic*, *supra* note 14, at 225 [reproduced in accompanying Notebook 1 at Tab 18].

<sup>96</sup> Issue # 34, *supra* note 3 [reproduced in accompanying Notebook 2 at Tab 10].

<sup>97</sup> *Tadic*, *supra* note 14, at 250 [reproduced in accompanying Notebook 1 at Tab 18].



**D. The informant-defendants are not liable for genocide, war crimes, or violations of Iraqi law.**

1. *Genocide*

The IHT will not likely assign liability to the informants for genocide. Although Article 11 of the IHT Statute lists various acts that constitute genocide, all of them require that the perpetrator “intended to destroy, in whole or in part,” a particular national, ethnic, racial, or religious group.<sup>98</sup> As discussed earlier,<sup>99</sup> the Prosecution would find great difficulty in establishing that discriminatory intent even for the principals in the campaign against al Dujayl. To ascribe that same intent to the informant aiders would pose a nearly impossible challenge.

The ICTR provided precedent for this view in *Akayesu*, holding that “when dealing with a person Accused of having aided and abetted in...genocide, it must be proven that such a person did have the specific intent to commit genocide.”<sup>100</sup> The court in that case went on to explain that this “specific intent” requirement does *not* arise in a charge of crimes against humanity.<sup>101</sup> Therefore, even though the Genocide Convention allows for prosecution of civilians for genocide,<sup>102</sup> the IHT Prosecutor should not pursue this charge against the al Dujayl informants.

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<sup>98</sup> *Elements of Crimes*, *supra* note 15, at 2-4 [reproduced in accompanying Notebook 1 at Tab 5].

<sup>99</sup> See NEW YORK TIMES, *supra* note 68 [reproduced in accompanying Notebook 2 at Tab 4] and accompanying text.

<sup>100</sup> *Akayesu*, *supra* note 12, at para.485 [reproduced in accompanying Notebook 1 at Tab 14].

<sup>101</sup> *Id.* at para.568.

<sup>102</sup> Genocide Convention, *supra* note 37, at art.3-4 [reproduced in accompanying Notebook 1 at Tab 2].

## 2. War Crimes

The charge of “War Crimes” requires an armed conflict missing from the al Dujayl case. The *Elements of Crimes* manual for the IHT begins with the clear rule that “elements for war crimes under Article 13 shall be interpreted within the established framework of the international law of armed conflict...”<sup>103</sup> Although residents of al Dujayl apparently fired upon Saddam’s entourage during his July 8<sup>th</sup> visit, that isolated event would hardly satisfy the “armed conflict” element under the IHT’s rules.

## 3. Violations of Iraqi Laws

The Prosecution will not be able to win a conviction for this Article 14 category of crimes because the informants actually *followed* Iraqi law (although they were under no compulsion to do so). The Iraqi Penal Code in existence at the time of the al Dujayl campaign prescribed detention or a fine for any official who fails to notify his superiors as to events important to the regime.<sup>104</sup> By notifying Saddam’s regime of the presence of Dawa Party families in al Dujayl, the informants acted according to the spirit and wording of the Penal Code’s Paragraph 247. An Article 14 charge that the informants violated Iraqi law will therefore not succeed.

## 4. Joint Criminal Enterprise

Given the futility of pursuing a conviction for genocide, war crimes, or violations of Iraqi laws, the Prosecution should focus solely on the charge of crimes against humanity, and only through the vehicle of aider/abettor theory. The joint criminal enterprise theory will not withstand scrutiny by the IHT. The same intent element that

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<sup>103</sup> *Elements of Crimes*, *supra* note 15, at 12 [reproduced in accompanying Notebook 1 at Tab 5].

<sup>104</sup> The Penal Code, STS 251/88 (1969) at para.247 [hereinafter “Penal Code”]; reproduced in accompanying Notebook 1 at Tab 4].

makes the genocide charge impossible also precludes the joint criminal enterprise approach. The ICTY addressed this issue in *Prosecutor v. Vasiljevic*, assigning the *mens rea* of intent to a joint criminal enterprise while applying a mere knowledge *mens rea* to aiding and abetting. In light of this law, the IHT Prosecutor should limit the informants' case to the aider and abettor theory, and only for crimes against humanity.

#### **IV. DEFENSES**

##### **A. Following Orders**

The informant-defendants may invoke the defense of following orders. Unfortunately for the informants, though, only soldiers may employ that defense.<sup>105</sup> As the scholar Elies van Sliedregt has pointed out, the “reason for being more lenient towards a soldier than an ordinary citizen, in allowing the defence of superior orders, lies in the special relationship between a subordinate and a superior.”<sup>106</sup> The factors contributing to that rule are the central role of following orders in a soldier's training and the safety concerns raised when a soldier disobeys an order.<sup>107</sup> The al Dujayl informants therefore cannot avail themselves of this defense.

The informant-defendants may nonetheless insist that their acts were lawful because of the Iraqi Penal Code's requirement that officials report information important to the government.<sup>108</sup> Yet, the defense of following the law, like the defense of superior orders, only applies to soldiers, and only when such a soldier follows a law pursuant to a

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<sup>105</sup> van Sliedregt, *supra* note 19, at 42 [reproduced in accompanying Notebook 2 at Tab 5].

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 40-42.

<sup>108</sup> Penal Code, *supra* note 104, at para.247 [reproduced in accompanying Notebook 1 at Tab 4].

direct command from a superior officer.<sup>109</sup> Thus, even if the “soldiers only” rule did not apply to the al Dujayl informants, this defense still would not help their case, for no superior officer in the Baath Party ordered them to write the letters identifying the “disloyal” villagers. According to the media reports, the defendants wrote these letters on their own initiative.<sup>110</sup> Any defense related to superior orders or the Iraqi Penal Code will therefore fall flat.

### **B. The “small cog in the wheel” defense**

One of the informant defendants has already argued, as a defense, that he played too small a role in the al Dujayl campaign to be liable before the IHT.<sup>111</sup> This defense has failed too often to be taken seriously. Two prominent cases illustrate the point. Adolph Eichmann’s use of it met with sharp rebuke at his trial, where the court held that parties who play even a small role in crimes against humanity must be held accountable for them.<sup>112</sup> By implication, the German Appeals Court’s *Case No.16* also sets a persuasive precedent for forbidding such a defense. The defendants in that case did not even possess the minor government positions held by the al Dujayl informants.<sup>113</sup> The *Case No. 16* defendants were merely regular civilians employed by the victim of their crime against humanity.<sup>114</sup> Yet, that low-level status did not prevent the court in that case

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<sup>109</sup> van Sliedregt, *supra* note 19, at 33 [reproduced in accompanying Notebook 2 at Tab 5].

<sup>110</sup> XINHUA, *supra* note 4, at 1 [reproduced in accompanying Notebook 2 at Tab 7].

<sup>111</sup> *Id.*

<sup>112</sup> *Attorney General v. Eichmann*, *supra* note 36, at paras. 179-180 (Dist. Ct. of Jerusalem 1961) [reproduced in accompanying Notebook 1 at Tab 12].

<sup>113</sup> *Case No. 16*, *supra* note 14, at 60 [reproduced in accompanying Notebook 1 at Tab 13].

<sup>114</sup> *Id.* at 61.

from holding those defendants liable.<sup>115</sup> The al Dujayl defendants therefore will not get far with their “small cog in the wheel” defense.

## **V. CONCLUSION**

The IHT will likely assign criminal liability to the al Dujayl informants for crimes against humanity. Those defendants acted as aiders and abettors to Saddam’s forces during the attack on the town. The Prosecution will be able to establish that a crime against humanity occurred because the evidence already submitted satisfies the three elements of that crime in the IHT’s Article 12.

Once that crime is established, demonstrating that the informants aided that crime will prove to be an even easier affair. Precedent shows that informing amounts to aiding a crime, even for crimes against humanity. Also, the *mens rea* element for aiding that crime requires relatively little evidence. Given that the informers will not succeed in their probable defenses, the IHT will likely assign liability to those civilians.

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<sup>115</sup> *Id.* at 62.