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**Did The Forcible Transfer, Active Concealment, Torture And Murder Of Non-Combatant Kuwaiti Citizens And Third Party Nationals In August Of 1991 To March Of 1992 Constitute Any Crime Within The Jurisdiction Of The Iraqi High Tribunal? Did The Capture, Torture And Public Murder Of Captive Coalition Troops By Iraqi Troops During The 1991 War Constitute A Crime Within The Jurisdiction Of The Iraqi High Tribunal? Did The Seizure And Placement Of Non-Combatant Foreigners In Direct Proximity To Military Targets Constitute A Crime Within The Jurisdiction Of The Iraqi High Tribunal?**

Gregory S. McNeal

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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  
(Formerly Iraqi Special Tribunal)**

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**ISSUES:**

DID THE FORCIBLE TRANSFER, ACTIVE CONCEALMENT, TORTURE AND MURDER OF NON-COMBATANT KUWAITI CITIZENS AND THIRD PARTY NATIONALS IN AUGUST OF 1991 TO MARCH OF 1992 CONSTITUTE ANY CRIME WITHIN THE JURISDICTION OF THE IRAQI HIGH TRIBUNAL?

DID THE CAPTURE, TORTURE AND PUBLIC MURDER OF CAPTIVE COALITION TROOPS BY IRAQI TROOPS DURING THE 1991 WAR CONSTITUTE A CRIME WITHIN THE JURISDICTION OF THE IRAQI HIGH TRIBUNAL?

DID THE SEIZURE AND PLACEMENT OF NON-COMBATANT FOREIGNERS IN DIRECT PROXIMITY TO MILITARY TARGETS CONSTITUTE A CRIME WITHIN THE JURISDICTION OF THE IRAQI HIGH TRIBUNAL?

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Spring 2006

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

### **A. Issues\***

The Iraqi High Tribunal is one of limited jurisdiction, constituted to hear four types of crimes. These crimes include genocide, crimes against humanity, war crimes and a limited set of violations of Iraqi Law.<sup>1</sup> During the 1991 war, Iraqi troops are accused of: the forcible transfer, concealment and murder of non-combatants; the capture, torture and public murder of Coalition military personnel, and human shielding. This memorandum addresses whether any of these acts by the former regime are within the jurisdiction of the Iraqi High Tribunal.

#### **1. Issue One: Forcible transfer, concealment, and murder of non-Combatants**

Iraqi troops forcibly transferred non-combatant Kuwaiti citizens and third country nationals from Kuwait to Iraq where they were tortured and eventually murdered. Iraq actively concealed the whereabouts and condition of these persons from Kuwait and the international community so successfully that their condition was not made known until after Coalition troops entered Iraq in 2003.

#### **2. Issue Two: Capture, torture and public murder of Coalition military personnel**

During the 1991 war, Iraqi troops captured between 100-200 Coalition military personnel in Kuwait and Iraq. Iraqi troops subsequently tortured these Coalition

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\***Issue One:** Did the forcible transfer, active concealment, torture and murder of non-combatant Kuwaiti citizens and third party nationals in August of 1991 to March of 1991 constitute any crime with the jurisdiction of the Iraqi High Tribunal?

**Issue Two:** Did the capture, torture and public murder of captive coalition troops by Iraqi troops during the 1991 war constitute a crime within the jurisdiction of the Iraqi High Criminal Court?

**Issue Three:** Did the seizure and placement of non-combatant foreigners in direct proximity to military targets constitute a crime within the jurisdiction of the Iraqi High Tribunal?

<sup>1</sup> See, Statute of the Iraqi High Tribunal, (hereinafter IHT Statute) [Reproduced in the accompanying notebook at Tab 1].

personnel, murdered several in full view of others in order to intimidate the remainder and extract information. Iraq concealed information about the status of these prisoners of war and refused to let the International Committee of the Red Cross visit them.

### **3. Issue Three: Human Shielding**

During Iraq's invasion and occupation of Kuwait in August of 1990 to March of 1991, non-combatant foreigners, including women and children, were seized and placed in direct proximity to military targets. This human shield policy was designed to deter Coalition troops from destroying military targets of value.

## **B. Summary of Conclusions**

### **1. Conclusions Regarding Issue One: Forcible Transfer, Concealment, and Murder of Non-Combatant Civilians**

The acts specified in Issue One (Forcible transfer, concealment, and murder of non-Combatants) constitutes genocide only if it can be shown that there was intent to abolish, in whole or in part the Kuwaitis as a national, ethnic, racial or religious group. They also constitute crimes against humanity. A series of specified offenses occurred to include torture, willful murder, inhuman or degrading treatment, rape, forcible transfer, and taking of hostages. All of these offenses occurred within the context of a widespread attack upon a civilian population of which the members of the regime were likely aware.

### **2. Conclusions Regarding Issue Two: Capture, torture and public murder of Coalition military personnel**

The acts detailed in Issue Two constitute war crimes for it is clearly that coalition troops were treated in a manner inconsistent with the Geneva Conventions. Evidence publicly available and provided by the tribunal proves that torture and inhuman treatment

occurred. In addition there was evidence of beatings, the use of medical technology, and sexual assaults.

### **3. Conclusions Regarding Issue Three: Human Shielding**

The acts in Issue Three arguably constitute crimes against humanity. To make the case that human shielding constitutes a crime against humanity, the prosecution will have to prove that human shielding is an attack, and that the attack is widespread or systematic. The acts meet the requirements for war crimes because the following prohibited acts occurred: willful killing, willfully causing great suffering or serious injury to bodily health, unlawful confinement and taking of hostages.

## **II. FACTUAL BACKGROUND**

### **A. The 1990 Invasion**

On August 2, 1990 Iraq invaded Kuwait after talks broke down between the countries over oil production and debt repayment issues. As part of the invasion Iraqi troops seized oil fields and reserves in Kuwait and invaded Kuwait's capital.<sup>2</sup> Witnesses at the time reported hundreds of casualties and President Bush called the invasion "naked aggression." Shortly thereafter the United Nations Security Council voted to condemn Iraq and demand an Iraqi withdrawal.<sup>3</sup>

One day after the invasion Iraqi troops moved into position for a possible attack on Saudi Arabia, at the same time Baghdad announced that its troops would begin withdrawing on August 5, unless the security of Iraq or of occupied Kuwait was

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<sup>2</sup> The Boston Globe, *From Kuwait, Grisly Tales of Plunder, Terror*, September 30, 1990. [Reproduced in the accompanying notebook at Tab 39].

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

threatened. On August 4, Iraqi troops within Kuwait began fortifying their positions. Twelve European nations imposed an embargo on oil imports from Iraq and Kuwait. On August 5, the United States announced that the Iraqi assault would be countered by military force if necessary and that total withdrawal was the only acceptable resolution to the conflict.<sup>4</sup> The next day the United Nations Security Council ordered a trade and financial boycott on Iraq and occupied Kuwait.<sup>5</sup>

By August 7, Iraqi forces overran Kuwait posing a threat to Saudi Arabia. In response American troops were sent to Saudi Arabia to protect the Saudi Kingdom, United States and allied naval forces in the Red Sea, Indian Ocean, Mediterranean Sea and Persian Gulf also began enforcing a blockade on Iraqi Trade. <sup>6</sup>

In response, Iraq began seizing foreigners and holding them hostage in Iraq and Kuwait to deter the United States from taking action against Iraqi troops. By August 19, Saddam Hussein announced that he would free the foreigners that he was holding hostage in return for a complete military pullout by the United States from the gulf region.<sup>7</sup> The next day, Iraq began moving Americans and other non-Iraqis to industrial and military sites for use as human shields against attack. <sup>8</sup>President Bush declared that the people being held in Iraq were hostages.<sup>9</sup> By August 28<sup>th</sup> Saddam Hussein announced that he

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<sup>4</sup> The New York Times, *Confrontation in the Gulf: A Month of Crisis in the Persian Gulf*, September 2, 1990 (Setting forth a timeline of significant events in the Gulf crisis). [Reproduced in the accompanying notebook at Tab 38].

<sup>5</sup>*Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

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

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

would allow all foreign women and children to leave, this announcement came after he had earlier barred their departure.

By the end of September, media accounts detailed various atrocities occurring within occupied Kuwait. These included summary street executions, the torching of homes and businesses, and the plunder of everything from art treasures to hospital incubator. The policy was aimed less at subjugating Kuwait than eradicating it.<sup>10</sup> One witness declared, "My impression was the Iraqis were looting whatever they could and destroying whatever was left." An intelligence source said, "Saddam Hussein has 'adopted a new Kuwait strategy of systematic pillage and depopulation. Our best estimate is that nearly half of all ethnic Kuwaitis have been driven out.'"<sup>11</sup>

"The forces of Hussein swiftly established a provisional government in Kuwait made up of Iraqi army officers. The Iraqi reign over Kuwait was marked by brutality. Iraqi forces systemically tortured Kuwaiti citizens to extract intelligence and to punish those unwilling to renounce their Kuwaiti allegiance."<sup>12</sup>

Amnesty International described the atrocities in Iraq as having two categories of targets. First, were those identified for severe torture, which was reserved for members of the military, security and police forces and those believed to have been participating in armed resistance against Iraqi forces.<sup>13</sup> Second were those tortured for involvement in

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<sup>10</sup> *Supra* Note 2.

<sup>11</sup> *Id.*

<sup>12</sup> Christopher Clarke Posteraro, *Intervention in Iraq: Towards A Doctrine of Anticipatory Counterterrorism, Counter-Proliferation Intervention*, 15 Fla. J. Int'l L. 151 (2002) 162 -163. [Reproduced in the accompanying notebook at Tab 29].

<sup>13</sup> *Id.*

non-violent activities such as "peaceful demonstrations, . . . writing anti-Iraq slogans on walls, possessing opposition leaflets and raising the Kuwaiti flag . . . [t]orture in these cases was aimed at extracting information about the identity of persons involved in opposition activities. . . ." <sup>14</sup>

Other Kuwaitis were forced to cooperate with Iraqis by acting as informers, making statements against the Kuwaiti ruling family, and making declarations of allegiance to Saddam Hussein. <sup>15</sup> "Finally, the sheer brutality of the torture inflicted on [Kuwaitis] was designed to terrorize the population at large and to discourage others from expressing . . . their opposition to the Iraqi presence in Kuwait. This brutality escalated over the seven-month occupation culminating in an Iraqi rampage of 'torture, kidnapping, rape and pillage over the final days of occupation.'" <sup>16</sup> To end the occupation, the United States led a coalition of forces in a war to oust the Iraqis from Kuwait and to defend Saudi Arabia.

## **B. Public records regarding the specified offenses**

### **1. Reports Regarding Issue One: Forcible transfer, concealment, and murder of non-combatants**

During their occupation of Kuwait, Iraqi forces forcibly transferred non-combatant detainees, concealed their whereabouts and murdered them. "From early in the occupation of Kuwait, Iraq seized people in Kuwait (including U.S. and UK citizens), took them to Iraq, and in many cases used them as hostages and human shields." <sup>17</sup> Iraqis obliterated

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Adam Roberts, *The Laws of War in the 1990-1991 Gulf Conflict*, 18 Int'l Sec. 3, 153. (Hereinafter *The Laws of War*) [Reproduced in the accompanying notebook at Tab 30].

computerized data banks containing birth, citizenship, financial and real estate records. Refugees permitted to flee the country were stripped of passports, driver's licenses, cash and whatever other assets or valuables they carried.<sup>18</sup> Kuwait City was renamed Kathima, and most streets were given Iraqi names.<sup>19</sup> There were also accounts of robberies, assaults and other reports of Iraqi soldiers who entered homes and held family members at gunpoint while others raped women in front of their families.<sup>20</sup> The U.S. Army concluded that Iraq forced U.S. hostages from Kuwait to Iraq.<sup>21</sup> The numbers provided by the U.S. Army indicate an astounding 4,900 U.S. hostages were taken by Iraq and establish a "prima facie case of grave breaches of the Fourth Geneva Convention committed against U.S. citizens by Iraq."<sup>22</sup> The U.S. Army's investigation further uncovered "the massive scope of the offenses committed against the citizens and residents of Kuwait."<sup>23</sup> According to the summary report: "the evidence includes written and videotaped accounts from rape and torture victims, photographs of murdered Kuwaitis, and videotapes of burial sites and torture implements."<sup>24</sup> "Although U.S. hostages in Iraq were released in

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<sup>18</sup> *Supra* Note 2.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> U.S. Army Report on Iraqi War Crimes (Desert Shield/Desert Storm) Unclassified Summary, November 19, 1992. Paragraph I.B.3. (hereinafter Summary Report) [Reproduced in the accompanying notebook at Tab 45].

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* Paragraph I.B.6.

<sup>24</sup> *Id.*

December 1990, Iraqi destruction of the national identity of Kuwait and abuse of civilians in Kuwait did not abate."<sup>25</sup>

## **2. Reports Regarding Issue Two: Capture, torture and public murder of Coalition military personnel**

According to the U.S. army summary report, a total of "twenty-one individuals were captured and held as prisoners of war by Iraq."<sup>26</sup> "All of the prisoners of war were the victims of war crimes committed by Iraq."<sup>27</sup> "A prima facie case [exists to show] that the mistreatment of U.S. prisoners of war occurred with at least the acquiescence, and probably at the direction of the Iraqi leadership."<sup>28</sup> Iraq abused coalition prisoners, treated many Kuwaiti civilians cruelly, and executed others. They violated the rules of surrender at Kafji, sponsored two major ecological disasters, and, perhaps worst of all, tolerated horrendous casualties among their own troops for no apparent military purpose. If one seeks injustice in the war, it can easily be found in Iraqi behavior, not in the behavior of coalition forces."<sup>29</sup>

The main problem during the conflict "was getting Iraq to observe the 1949 Geneva Convention." Iraq refused International Committee of the Red Cross members from visiting with prisoners throughout the land war.<sup>30</sup> "Coalition prisoners in Iraqi hands were treated in a manner inconsistent with the Convention; and many, perhaps even most, were

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<sup>25</sup> *Id.* Paragraph I.B.

<sup>26</sup> *Id.* Paragraph I.B.2.

<sup>27</sup> *Id.*

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

<sup>29</sup> Nicholas G. Fotion, *Cleanly Fought*, 47 Bulletin of the Atomic Scientists 7 (1991). [Reproduced in the accompanying notebook at Tab 28].

<sup>30</sup> The Laws of War, Page 160.



evidently tortured."<sup>31</sup> Members of the Iraqi regime committed grave acts upon coalition troops to include sexual assault, torture, and beatings.<sup>32</sup> Members of the Iraqi regime unlawfully held coalition military personnel, keeping their status as prisoners concealed from international organizations in inhumane conditions<sup>33</sup> and used them as human shields.<sup>34</sup>

### **3. Reports Regarding Issue Three: Human Shielding**

"The most famous use of human shields occurred in Iraq in 1990, following the Iraqi invasion of Kuwait in advance of the first Gulf War. Saddam Hussein's government detained hundreds of Western citizens who were visiting or living in Iraq to try to deter nations from participating in military operations against the country. A number of these hostages were filmed meeting Saddam, and kept with him to deter any targeted attacks, whilst others were held in or near military and industrial targets."<sup>35</sup>

Of the hostages taken by Iraq, at least 106 were used by Iraq as human shields near military objectives in Iraq.<sup>36</sup> More than two million foreigners, among them an estimated 4,000 Britons and 3,500 Americans, were caught in Iraq and Kuwait when Iraq invaded its neighbor.<sup>37</sup> The Iraqi Government placed conditions on the departure from the country of

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

<sup>32</sup> *Acree v. Iraq*, 271 F. Supp. 2d 179, July 7, 2003 Complaint. [Reproduced in the accompanying notebook at Tab 13].

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Wikipedia- Human Shield [Reproduced in the accompanying notebook at Tab 49].

<sup>36</sup> Summary Report Paragraph I.B.3.

<sup>37</sup> *Supra* Note 4.

237 foreign women and children, among those were 14 Americans.<sup>38</sup> The government also announced that it had sent foreign citizens to potential military targets across the country for use as shields against attack, of those, the U.S. stated that 75 Americans were missing and likely were being used as human shields.<sup>39</sup>

### **III. LEGAL DISCUSSION**

#### **A. Jurisdiction**

According to the Iraqi High Tribunal Statute of October 18, 2005 the jurisdiction of the Iraqi High Tribunal extends to the crime of genocide, crimes against humanity, war crimes, and violations of Iraqi law.<sup>40</sup> Based on the facts provided by the tribunal and publicly available, it appears that members of the former regime can be prosecuted for genocide, crimes against humanity and war crimes.

##### **1. The Crime of Genocide**

Under the Iraqi High Tribunal Statute, Part One, Article 11, genocide means prohibited conduct and specified acts committed with the intent to abolish, in whole or in part, a national, ethnic, racial or religious group as such.<sup>41</sup> The prohibited conduct specified by the statute includes killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group living conditions calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children of the group

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Supra* note 1.

<sup>41</sup> *Id.* Part One Art. 11.

to another group.<sup>42</sup> Such prohibited conduct when coupled with punishable acts (such as genocide, or its derivative crimes such as: conspiracy to commit genocide, public incitement to commit genocide, and complicity in genocide) carried out with the intent to abolish a group, form the elements necessary for a genocide prosecution.

## **2. Crimes Against Humanity**

Under the Iraqi High Tribunal Statute, Part Two, Article 12, "Crimes Against Humanity" means any of the prohibited acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.<sup>43</sup>

"In order to amount to a crime against humanity, the acts of an accused must be part of a widespread or systematic attack 'directed against any civilian population.' This phrase has been interpreted by the international tribunals as encompassing the following five elements: (1) there must be an attack; (2) the acts of the perpetrator must be part of the attack; (3) the attack must be directed against any civilian population; (4) the attack must be widespread or systematic; (5) the perpetrator must know that the acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that the acts fit into such a pattern."<sup>44</sup>

The prohibited acts relevant to this memorandum include willful murder, deportation or forcible transfer of population,<sup>45</sup> imprisonment or other severe deprivation of physical liberty in violation of fundamental norms of international law, torture, rape...or

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<sup>42</sup> *Id.*

<sup>43</sup> *See*, IHT Statute Part Two, Article 12 "Attack directed against any civilian population" means a course of conduct involving the multiple panel of acts referred to in the above paragraph "First" against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack.

<sup>44</sup> Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 San Diego Int'l L.J. 73, 91 (2004) (Citing Prosecutor v. Kunarac, Case No. IT-96-23/1-A) [Reproduced in the accompanying notebook at Tab 31].

<sup>45</sup> *See*, IHT Statute, "Deportation or forcible transfer of population" means forced displacement of the concerned persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.

any other form of sexual violence of comparable gravity, enforced disappearance of persons,<sup>46</sup> and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to the mental or physical health..

### **3. War Crimes**

Under the Iraqi High Tribunal Statute, Part Three, Article 13 "War Crimes" means any grave breaches of the Geneva Conventions of August 12, 1949, namely, any of the prohibited acts against person or property under the provisions of the relevant Geneva Conventions<sup>47</sup> or customary international law.<sup>48</sup>

### **4. Prohibited Acts In Contravention of the Laws of War Against Persons Taking No Active Part In Hostilities**

Under the Iraqi High Tribunal Statute, relevant prohibited acts in contravention of the Laws of War include those acts "committed against 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."<sup>49</sup>

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<sup>46</sup> See, IHT Statute, "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, the State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

<sup>47</sup> See, IHT Statute, Prohibited acts relevant to Geneva applicable to this memorandum include willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, unlawful confinement, unlawful deportation or transfer, and taking of hostages.

<sup>48</sup> See, IHT Statute, Part Three, Article 13, (Other violations of International Law includes directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities, killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion, killing or wounding treacherously individuals belonging to the hostile nation or army, committing outrages upon personal dignity, in particular humiliating and degrading treatment, committing rape, and utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations).

<sup>49</sup> See, IHT Statute, Part Three, Article 13, Third, (Prohibited acts include i) Use of violence against life and persons, in particular murder of all kinds, mutilation, cruel treatment and torture, ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment, iii) Taking of hostages, iv) The

**B. DO THE ACTS IN ISSUE ONE (FORCIBLE TRANSFER, CONCEALMENT AND MURDER OF NON-COMBATANTS) CONSTITUTE A CRIME UNDER IHT JURISDICTION?**

**1. The Acts Only Constitute the Crime of Genocide if the intent requirement can be proven**

The acts specified in Issue One (forcible transfer, concealment, and murder of non-Combatants) constitutes genocide only if it can be shown that there was intent to abolish, in whole or in part the Kuwaitis as a national, ethnic, racial or religious group. Genocide requires the killing, harming, or moving of a national ethnical, racial or religious group with the intent to destroy the group.<sup>50</sup> Thus, there are four elements required for genocide: 1) one or more prohibited acts, 2) against members of a protected group, 3) committed with the intent to destroy, in whole or in part, the group, 4) as part of a pattern of such conduct.<sup>51</sup>

The first element is satisfied because murder and transfer of individuals are prohibited acts. Facts publicly available prove that individuals were forcibly transferred or murdered during the invasion and occupation of Kuwait. Iraq plundered Kuwait, stripped its people of their citizenship, abused innocent civilians and executed thousands.<sup>52</sup> The second element is satisfied if Kuwaitis can be deemed a protected group within the meaning of Article 11 of the IHT Statute. Under this definition Kuwaiti's meet the criterion for members of a national group on their face because Kuwaiti's are in fact a

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passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.).

<sup>50</sup> IHT Statute, Part One, Article 11, First.

<sup>51</sup> IHT Elements of Crimes, Section 2, The Crime of Genocide: Article 11.

<sup>52</sup> *Hill v. Republic of Iraq*, 175 F.Supp.2d 36 (2001), (D.D.C., 2001). [Reproduced in accompanying notebook at Tab 17].

national group. The third element can be met if it is proven that there was an intent to destroy Kuwaitis as a group, and the fourth element can be met only if it can be proven that the conduct in question was not an isolated incident, but took place as part of a "pattern of similar conduct."<sup>53</sup>

A critical hurdle for the prosecution is that the facts provided by the tribunal do not indicate that there was any intent on the part of the Iraqi regime to destroy Kuwaitis as a group, suggesting that the prosecution may not possess such evidence. However, media reports do indicate that there may have been such an intent. The reports though contain conflicting information, one the one hand suggesting a widespread attempt to wipe out Kuwaitis and on the other hand indicating that the scope and intent of atrocities was much narrower. One report states "[a] ranking U.S. military officer who is documenting war crimes described them as 'widespread but shallow.' 'There were pockets of intense cruelty,' said the officer, who spoke on condition of anonymity. 'But we have seen nothing so far that would approach anything close to genocide of the type we saw in World War II.' During its exile, the Kuwaiti government claimed that 25,000 citizens were killed or missing. However, those figures appear too high."<sup>54</sup> Other reports though indicate a systematic effort to wipe out citizenship records and other indicators of Kuwaiti government to include orders to put Iraqi license tags on cars, orders to use Iraqi currency, and orders to change citizenship from Kuwaiti to Iraqi.<sup>55</sup>

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<sup>53</sup> IHT Elements of Crimes, Section 2, The Crime of Genocide: Article 11.

<sup>54</sup> Pittsburgh Post- Gazette, *Kuwait Seeking Death for POWs*, March 19, 1991. [Reproduced in accompanying notebook at Tab 41].

<sup>55</sup> The Baltimore Sun, *Kuwaitis Quickly Found Strategies of Resistance*, March 2, 1991. [Reproduced in accompanying notebook at Tab 42].

Based on the facts provided by the tribunal and available publicly, it is possible that the crime of genocide occurred. There was a systematic process in place to destroy birth and citizenship records of Kuwaitis, to rename streets and to destroy elements of the group in whole or in part.<sup>56</sup> The facts provided by the tribunal and publicly available do not directly parallel cases where other tribunals have dealt with charges of genocide. A prosecution based on these facts will be unique in that the facts which suggest intent, and the scale of the alleged genocide targeted a relatively small portion of the entire population of Kuwaitis.

The other offenses associated with genocide, (e.g. conspiracy, incitement, attempt and complicity)<sup>57</sup> are derivative offenses and all require that the intent to commit genocide be first proven. For example, complicity in genocide "is a separate offense from Genocide, yet to be convicted of the crime of Complicity in Genocide it has to be proven that an act of Genocide has been committed. A way to understand the distinction between the two crimes is to see Genocide as requiring the *intent* to commit the crime and Complicity in Genocide as requiring the *knowledge* that an individual's actions (or inactions) would facilitate the activities of the principal perpetrators."<sup>58</sup> Thus, the intent requirement will be the critical hurdle for the prosecution to overcome.

## **2. The Acts Constitute Crimes Against Humanity**

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<sup>56</sup> The Baltimore Sun, *Kuwaitis Quickly Found Strategies of Resistance*, March 2, 1991. [Reproduced in the accompanying notebook at Tab 42].

<sup>57</sup> See IHT Statute, Article 11, Second.

<sup>58</sup> Memorandum for the Office of the Prosecutor for the ICTR, Can An Omission Fulfill the Actus Reus Requirement for Complicity in Genocide, and To What Degree Does Article 6(3) of the ICTR Statute Impute Criminal Liability For the Crime To A Superior Officer? Available at: <http://law.case.edu/war-crimes-research-portal/memoranda/OmissionGenocide.pdf>. [Reproduced in the accompanying notebook at Tab \_\_\_].

The acts specified in Issue One (forcible transfer, concealment, and murder of non-combatants) constitute crimes against humanity. As specified above, Crimes against humanity have five distinct elements: (1) an attack, (2) the prohibited acts must occur as part of the attack<sup>59</sup>, (3) the attack must be directed against any civilian population, (4) the attack must be widespread or systematic, and (5) the perpetrator must have knowledge that his acts were part of widespread or systematic conduct.<sup>60</sup>

**a. Armed Attack**

First, the requirement that there be an attack is satisfied by the facts provided by the tribunal. An attack is defined as a course of conduct involving the acts referred to in Section III A 2 above, directed "against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack."<sup>61</sup> The 1991 invasion and occupation clearly constituted attacks upon Kuwait which satisfies the definition.

**b. Prohibited Acts as Part of the Attack**

Based on the facts provided by the tribunal and publicly available, of the ten prohibited acts which constitute crimes against humanity members of the regime committed a series of acts which satisfy the element of prohibited acts as part of an attack.

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<sup>59</sup> Prohibited acts under Article 12, include: A. Willful Murder; B. Extermination; C. Enslavement; D. Deportation or forcible transfer of population; E. Imprisonment or other severe deprivation of physical liberty in violation of fundamental norms of international law; F. Torture; G. Rape, sexual slavery, forcible prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity; H. Persecution against any specific party or group of the population on political, racial, national, ethnic, cultural, religious, gender or other grounds that are impermissible under international law, in connection with any act referred to as a form of sexual violence of comparable gravity. I. Enforced disappearance of persons. J. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to the mental or physical health.

<sup>60</sup> See e.g., IHT Elements of Crimes, Section 3, Crimes Against Humanity: Article 12. [Reproduced in the accompanying notebook at Tab 2].

<sup>61</sup> IHT Statute, Article 12, Second.



For example, some of those acts include willful murder, and torture. Torture as defined by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment is any act by which:

severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>62</sup>

A factual account below, demonstrates how the acts squarely fit within the definition of torture and the definition of murder. In this report a Kuwaiti named Ali Basa describes his and others treatment while detained by Iraqi's. "They wanted names, resistance leaders, people they could go after...[o]ne fellow had his genitals prodded with an electric rod. After that he was made to sit on a broken Pepsi bottle. Then, working very slowly, they ripped the fingernails off his right hand. He broke, of course. Who wouldn't? He gave them some names. And then they killed him. A single shot between the eyes."<sup>63</sup>

This example of a killing meets the international standard for willful murder. In *Prosecutor v. Erdemovic*, the appeals chamber stated, "as far as this issue is concerned, it makes [no] difference whether one refers to such an offence as 'killing', 'unlawful killing', or 'murder' provided that it is understood that it is the killing of innocents without lawful

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<sup>62</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GOAR, 39<sup>th</sup> Sess., Supp. No. 51 at 197 U.N. Doc. A/39/51, art. 1(1). [Reproduced in accompanying notebook at Tab 4].

<sup>63</sup> Time, *Toward A New Kuwait*, December 24, 1990. [Reproduced in accompanying notebook at Tab 43].

excuse or justification...”<sup>64</sup> Later in *Prosecutor v. Akayesu*<sup>65</sup> the definition was clarified as an “unlawful, intentional killing of a human being” in which:

- a. the victim is dead;
- b. the death resulted from an unlawful act or omission of the perpetrator or a subordinate; and
- c. at the time of killing [but presumably not before the killing] the perpetrator or a subordinate had the intention to kill or to inflict grievous bodily harm on the deceased having know that such bodily harm is likely to cause the victim’s death, and is reckless whether death ensues or not.<sup>66</sup>

The information publicly available and provided by the tribunal meets the *Akayesu* standard for willful murder.

In addition to murder, there also was evidence of rapes, as detailed in this account by a U.S. Army captain, "Fleeing Iraqis left numerous 'shoot-to-kill' orders, death warrants and other incriminating records...[i]n one case, we found an order stopping rapes in a certain area of town...[t]he order 'gave the names of officers, the places, the dates.'"<sup>67</sup>.

Another account of rape was detailed in the case of *Hill v. Iraq*, where one of the plaintiffs Charles Joseph Kolb detailed how he was "detained in a small house for about a month, during which he was homosexually molested by a guard."<sup>68</sup>

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<sup>64</sup> *Prosecutor v. Erdemovic*, IT-96-22, 7 October 1997, Appeals Chamber, Separate and Dissenting Opinion of Judge Antonio Cassese, para. 12 fn. 8 [Reproduced in accompanying notebook at Tab 15].

<sup>65</sup> *Prosecutor v. Akayesu*, ICTR-96-4-T, 9 February 1998, Trial Chamber II. [Reproduced in accompanying Notebook at Tab 16].

<sup>66</sup> *Id.* Paragraph 589.

<sup>67</sup> St. Louis Post- Dispatch, *Kuwaitis Push For War Trial*, March 20, 1991. [Reproduced in accompanying notebook at Tab 37].

<sup>68</sup> *Hill v. Iraq*, 175 F.Supp.2d 36.

Other "inhumane acts of a similar character" occurred whereby the Iraqi regime caused "great suffering or serious injury to the body or to the mental or physical health"<sup>69</sup> of civilians and combatants alike. One example of such inhumane acts was documented by Amnesty International, they described how "more than 300 premature babies in Kuwait were left to die when their incubators were looted by the Iraqi military forces."<sup>70</sup> Amnesty's "investigation team interviewed several doctors and nurses who worked in the hospitals where the babies died. All had seen the dead bodies and one doctor had helped to bury 72 of them in a cemetery near the hospital. In some hospitals unofficial records were kept of the number of people who had been killed, including the babies."<sup>71</sup>

Other reports detailed the forcible transfer of noncombatant civilians and their detention in violation of fundamental norms of international law. Following Iraq's invasion of Kuwait "thousands of people were reportedly arrested...by Iraqi forces, and either detained in Kuwait or taken to prisons in Iraq . . . they included Iraqi exiles...hundreds of Kuwaitis, including children, were also arrested."<sup>72</sup>

According to official Kuwaiti figures, the "total number of hostages and missing was about 605 hostages. Among them were 570 Kuwaitis, which represents 94% of the hostages, and 35 of other nationalities who were living in Kuwait during the Iraqi occupation. Most of the hostages were civilians: 389 or 65% of them. Soldiers numbered

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<sup>69</sup> IHT Statute, Part Two, Article 12, First, J.

<sup>70</sup> Times (UK), *Amnesty Details Brutalities of Invaders; Gulf Crisis*, December 19, 1990. [Reproduced in accompanying notebook at Tab 44].

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

<sup>72</sup> Ghanim Alnajjar, *Human Rights in A Crisis Situation: The Case of Kuwait after Occupation*, 23 Human Rights Quarterly 188, 194 (2001). [Reproduced in the accompanying notebook at Tab 34].

216 or 35% of hostages. The following tables show that 99% of hostages were men and that most of them were less than 51 years old."<sup>73</sup>

**Table 1<sup>74</sup> shows the distribution of hostages and the missing by gender:**

<b>Gender</b>	<b>Number</b>	<b>Percentage</b>
Male	598	98.8%
Femal	7	1.2%
Total	605	100%

**Table 2<sup>75</sup> shows the distribution of hostages and the missing by age:**

<b>Age</b>	<b>Number</b>	<b>Percentage</b>
From 16 - 30 years	345	56.9%
From 31 - 51 years	232	38.5%
From 51 - 80 years	28	4.6%
Total	605	100%

**c. Directed Against A Civilian Population**

As the media accounts and official statistics above make clear, these attacks and associated prohibited acts met the third element, that of being "directed against a civilian population" which based on the facts provided by the tribunal (e.g. "non-combatant Kuwaiti citizens...").and explained above, is clearly established.

**d. Widespread Systematic Conduct and Knowledge of Such Conduct**

The fourth element, which requires that the attacks occurred on such a scale as to constitute widespread and systematic conduct, and the fifth element which requires

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<sup>73</sup> The Official Website of the State of Kuwait [Reproduced in the accompanying notebook at Tab 50].

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

knowledge will be the most difficult to prove. However, the media reports and facts provided by the tribunal suggest that the acts did occur on a widespread scale. Also, given the scale of the atrocities it is unlikely that the regime can claim that they were unaware of the prohibited acts. The various accounts available publicly, plus the fact provided by the tribunal that the forcible transfer, torture, detention, murder was concealed from international agencies suggests that these prohibited acts could not have occurred without the tacit support of the regime. As the U.S. Army Investigative Team pointed out in its Summary Report: "The evidence collected during this investigation establishes a prima facie case that the violations of the law of war committed against Kuwaiti civilians and property, and against third party nationals, were so widespread and methodical that they could not have occurred without the authority or knowledge of Saddam Husayn. They are war crimes for which Saddam Husayn, officials of the Ba'ath Party, and his subordinates bear responsibility."<sup>76</sup>

**e. International Criminal Tribunals Treatment of Crimes Against Humanity**

Other international tribunals have dealt with the forcible transfer, concealment and murder of non-combatants. The International Criminal Tribunal for the Former Yugoslavia (ICTY) prosecuted one of the highest-ranking civilians to be convicted for crimes against humanity under circumstances somewhat analogous to the facts alleged by the IHT. Blagoje Simic, was the defendant in the case *Prosecutor v. Simic*.<sup>77</sup> Simic was the first Yugoslav citizen indicted by the ICTY. Specifically, his indictment charged him

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<sup>76</sup> Summary Report, Page 6.

<sup>77</sup> *Prosecutor v. Simic et al.*, Case No. IT-95-9-T, 3 September 1995 (hereinafter *Simic*) [Reproduced in the accompanying notebook at Tab 18].

and his co-defendants with crimes against humanity for the forcible takeover of cities; unlawful arrest and detention of civilians; cruel and inhumane treatment including beatings and torture; forced labor; deportation and forcible transfer; and plundering of Bosnian cities.<sup>78</sup>

The ICTY found that the general requirements for crimes against humanity had been satisfied by Simic's conduct. Specifically it found that a civilian population was under attack, that attack occurred during a state of armed conflict within the country and there was the requisite relationship between the armed conflict and the acts of defendant (and his co-defendants). The attack was both widespread and systematic, and followed with persecution of civilians. The trial chamber also found that the defendants were aware of and their actions were part of the armed attack against the civilians.<sup>79</sup>

According to the Rome Statute of the International Criminal Court, forcible transfer is defined as "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law."<sup>80</sup> Furthermore, the Preparatory Commission for the ICC clarified these provisions by stating that the term "forcible" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or

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<sup>78</sup> *Id.* p. 8.

<sup>79</sup> See Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 MICH. J. INT'L L. 1013, 1056 (Summer2005) [Reproduced in the accompanying notebook at Tab 32].

<sup>80</sup> Art 7(2)(d) of the Rome Statute of the International Criminal Court [Reproduced in the accompanying notebook at Tab 3].

another person, or by taking advantage of a coercive environment.<sup>81</sup> "The Rome Statute also does not require proof of crossing international borders, but only that the civilian population was displaced."<sup>82</sup>

Not all tribunals are in agreement on how to deal with deportation versus forcible transfer. For example "the Branin Trial Chamber found that 'deportation' consists of the forced displacement of individuals beyond internationally recognized state borders, while 'forcible transfer' consists of forced displacement within state borders. This finding is in accordance with the preponderance of ICTY jurisprudence, and is not in agreement with the Stakic Trial Chamber's view that deportation could be defined as the forced displacement of persons by expulsion or other coercive acts for reasons not permitted under international law from an area in which they are lawfully present to an area under the control of another party."<sup>83</sup>

In Rwanda Samuel Imanishimwe, who issued an order "authorizing the arrest, detention, mistreatment, and execution of individuals..." was found guilty for crimes against humanity including imprisonment and murder.<sup>84</sup> He was also found guilty of

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<sup>81</sup> Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Elements of the Crimes, United Nations Document PCNICC/2000/1/Add.2. [Reproduced in the accompanying notebook at Tab 46].

<sup>82</sup> Tom Obokata, *Trafficking of Human Beings As A Crime Against Humanity: Some Implications For The International Legal System*, 54 INT'L & COMP. L. QUARTERLY 445, 467 (2005). [Reproduced in the accompanying notebook at Tab 33].

<sup>83</sup> Daryl A. Mundis and Fergal Gaynor, *Current Developments at the Ad Hoc Criminal Tribunals*, 3 J. INT'L CRIM. JUST. 268, 275 (2005). [Reproduced in the accompanying notebook at Tab 36].

<sup>84</sup> *Prosecutor v. Andre Ntagerura et al.* Case No. ICTR-99-46-T, 25 February 2004, Paragraph 131. [Reproduced in the accompanying notebook at Tab 19].

ordering and aiding and abetting the torture of several civilian detainees who had been mistreated in his presence.<sup>85</sup>

### **3. The Acts Constitute War Crimes**

#### **a. Specific Acts**

The acts detailed in Issue One constitute war crimes. The IHT Statute grants the tribunal jurisdiction over four types of war crimes, those in violation of the Geneva Conventions of 1949, those which constitute "serious violations of the laws and customs applicable in international armed conflicts, within the established framework of international law," those directed against individuals not taking part in the armed conflict, and other serious violations of the laws and customs of war applicable in armed conflict not of an international character.

To prove war crimes the prosecution must *first* prove the common element of an armed conflict was occurring at the time of the offenses. Based on the facts provided by the tribunal and publicly available, the first element requiring an armed conflict seems proven.

Second, the prosecution must prove that any of a series of prohibited offenses occurred. For war crimes in violation of Geneva, there are nine prohibited offenses, a series of these violations occurred. For example, the Kuwaiti government points out that "All evidence indicates the guilt of Iraqi troops, at all levels, of torturing the captives. Amnesty International believes that Iraqis tortured captives on a regular basis to extract information such as names and locations of active resistance members and also as a means

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<sup>85</sup> *Id.*



of punishment. Torturing was inhumane to the point of causing physical and mental disability. Such cases were made worse by not receiving proper medical treatment."<sup>86</sup>

Other evidence of torture includes the U.S. Army's Summary Report which graphically detailed the scope of the Iraqi torture operation:

The evidence establishes that there were at least two dozen torture sites in Kuwait City, most of which were located in either police stations or sports facilities. The gruesome evidence confirms torture by amputation of or injury to various body parts, to include limbs, eyes, tongues, ears, noses, lips, and genitalia. Electric shock was applied to sensitive parts of the body (nose, mouth, genitalia); electric drills were used to penetrate the chest, leg(s), or arm(s) of victims. Victims were beaten until bones were broken, skulls were crushed, and faces disfigured. Some victims were killed in acid baths. Women taken hostage were raped repeatedly. Eyewitnesses described the murder of Kuwaitis by Iraqi military personnel who forced family members to watch. Eyewitnesses reported Iraqis torturing a woman by making her eat her own flesh as it was cut from her body. Other eyewitness accounts describe Iraqi execution of Kuwaiti civilians by dismemberment and beatings while victims were suspended from ceilings and with implements such as axes. The accounts also describe psychological terror inflicted by mock executions.<sup>87</sup>

The U.S. Army report further concluded that specific Iraqi war crimes were extensively documented, to include "[t]he taking of Kuwaiti nationals as hostages, and their individual and mass forcible deportation to Iraq,"<sup>88</sup> "[t]he taking of third country nationals in Kuwait as hostages, and their individual and mass forcible deportation to Iraq,"<sup>89</sup> "The taking of third country nationals in Iraq as hostages, and their individual and mass forcible

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<sup>86</sup> Official Website of the Kuwait Government.

<sup>87</sup> Summary Report.

<sup>88</sup> Summary Report at C.1.a. (describing acts as in violation of Articles 34, 49, and 147 of the Geneva Conventions).

<sup>89</sup> *Id at C.1.b.*: (describing acts as in violation of Articles 34, 49, and 147 of the Geneva Conventions).

transfer within Iraq,"<sup>90</sup> "[u]se of Kuwaiti and third country nationals as human shields,"<sup>91</sup>, "[i]nhumane treatment of Kuwaiti and third country civilians, to include rape and willful killing,"<sup>92</sup> "[t]orture and other inhumane treatment of Coalition and U.S. prisoners of war."<sup>93</sup>

Other offenses included the transfer of all or parts of the population of the occupied territory within or outside this territory. As the Kuwaiti government summarized the situation

Living under the control of the invaders who terrorized, robbed, killed and oppressed them was a new experience for the Kuwaitis, as they had been used to living in peace and security. As a result, many Kuwaitis found no way but to leave their homeland to the Gulf and Arab countries. They kept on worrying about their future. The Kuwaitis were separated from their lands and families and became lonely strangers with no means of getting in touch with their people. In January 1991, about 393,400 people, more than half of the Kuwaitis, were forced to leave their country.<sup>94</sup>

The Kuwaiti government also uncovered an order instructing Iraqi forces to use violence against protesters to quell their speech.<sup>95</sup> Such an act constitutes the "use of violence against life and persons, in particular murder of all kinds."

### **C. DO THE ACTS IN ISSUE TWO (CAPTURE, TORTURE, AND MURDER OF COALITION MILITARY PERSONNEL) CONSTITUTE A CRIME UNDER IHT JURISDICTION?**

#### **1. The Acts Constitute War Crimes**

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<sup>90</sup> *Id at* C.1.c: (describing acts as in violation of Articles 34, 35, and 147 of the Geneva Conventions).

<sup>91</sup> *Id at* C.1.e. (describing acts as in violation of Articles 28, and 38(4) of the Geneva Conventions).

<sup>92</sup> *Id at* C.1.f.: (describing acts as in violation of Articles 27, 32, and 147 of the Geneva Conventions).

<sup>93</sup> *Id at* C.1.h. (describing acts as in violation Articles 13, 17, 22, 25, 26, 27, and 130, GPW).

<sup>94</sup> *Id at*:

[http://www.kuwait.kw/diwan/emain/Story\\_Of\\_Kuwait/Occupation/Iraqi\\_regime\\_Crimes/expodization.html](http://www.kuwait.kw/diwan/emain/Story_Of_Kuwait/Occupation/Iraqi_regime_Crimes/expodization.html)

<sup>95</sup> *See* Official Iraqi Order (in Arabic) [Reproduced in the accompanying notebook at Tab 47].

The acts detailed in Issue Two constitute war crimes. The IHT Statute grants the tribunal jurisdiction over four types of war crimes, those in violation of the Geneva Conventions of 1949, those which constitute "serious violations of the laws and customs applicable in international armed conflicts, within the established framework of international law," those directed against individuals not taking part in the armed conflict, and other serious violations of the laws and customs of war applicable in armed conflict not of an international character.

To prove war crimes the prosecution must *first* prove the common element of an armed conflict was occurring at the time of the offenses. Based on the facts provided by the tribunal and publicly available, the first element requiring an armed conflict seems proven. *Second*, the prosecution must prove that any of a series of prohibited offenses occurred.

To prove war crimes in violation of Geneva, the prosecution must prove that any of nine prohibited offenses occurred. Of these it is clearly proven that torture or inhuman treatment occurred. "The publicly available evidence consistently shows that Iraq's infliction of severe and prolonged pain and suffering on the American POWs in Iraq's custody and physical control was intentionally inflicted for the purpose of obtaining information or a confession, punishing them for being members of the United Nations coalition defending against Iraq's aggression, or discriminating against them as Americans or members of the coalition armed forces."<sup>96</sup>

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<sup>96</sup> *Acree v. Iraq*, 271 F. Supp. 2d 179, July 7, 2003 Complaint. [Reproduced in the accompanying notebook at Tab 13].

Among the tortured were Lieutenant Colonel Clifford Acree who was shot down over Kuwait on January 18, 1991.<sup>97</sup> Acree was transported to Iraq with his hands bound so tightly that they swelled to three times their size.<sup>98</sup> During the entire trip he was beaten with blackjacks and the butts of rifles.<sup>99</sup> Once in Baghdad he was interrogated "round the clock, separated into episodes of twenty minutes to an hour each. During the interrogations, Acree endured violent beatings from hands, feet, and instruments. He sustained blows and kicks to his head and torso."<sup>100</sup> Several times he faced the fear of a mock execution, designed to extract information from him.<sup>101</sup> Acree was also subjected to drugs during his interrogation, on his "third day in Baghdad, he felt someone rubbing his left arm, and then a needle being injected into it. The left side of his body grew warm and he entered a drugged state. He was determined to reveal no information that could hurt allied forces and it required all his mental effort to discern which answers contained classified information. Only through extreme effort and sacrifice was he able to withstand their efforts to extract such information."<sup>102</sup> Acree's status was concealed from international authorities for the entirety of his capture, and "At no point during his forty-seven days in captivity did Iraq notify the ICRC, or any other organization of his status as a POW."<sup>103</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

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

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

Another coalition member who was tortured and injured while in custody was Captain Craig Berryman. Berryman was interrogated by Iraqis who never informed the ICRC or any other organization of his status as a POW, and when he refused to answer questions he was severely beaten.<sup>104</sup> After breaking his leg with an axe handle guards pinned Berryman to a wall and kicked his broken leg.<sup>105</sup> "One guard used a steel-toed boot to kick a chunk of muscle out of Berryman's leg...One guard lit a cigarette and pressed it against Capt. Berryman's forehead. He repeated this three times and then burned Berryman's nose with the lit cigarette."<sup>106</sup> Eventually the cigarette was extinguished in a wound on Berryman's neck.<sup>107</sup>

Other coalition military personnel underwent similar treatment, for example U.S. Army Staff Sergeant Troy Dunlap was locked to a chair and had his face covered with a kerosene soaked blanket.<sup>108</sup> Dunlap was beaten, interrogated, and burned with scorching hot spoons.<sup>109</sup> "The unsanitary conditions he endured also resulted in severe intestinal problems, including dysentery, which manifested itself several days before his release...At no point did Iraq notify the ICRC or any other organization of Sgt. Dunlap's status as a POW. While Dunlap requested the opportunity to send a card or a letter to his family to let them know his whereabouts, Iraq never allowed him to do so."<sup>110</sup> Another Coalition

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

<sup>105</sup> *Id.*

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

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

prisoner Colonel David Eberly was similarly tortured, and at times paraded through a small town and exposed to angry mobs who attacked him with sticks and rocks.<sup>111</sup>

Coalition prisoner Lieutenant Colonel Jeffrey Fox, in addition to being interrogated, beaten, and sexually humiliated was, "as with other American and allied POWs, was held as a human shield to guard against prospective bombing by Allied forces."<sup>112</sup> Chief Warrant Officer Guy Hunter, also tortured and beaten was subject to four "mock executions wherein [his captors] pushed his head to the side with a gun, paused for about ten seconds, and pulled the trigger."<sup>113</sup> He was also "forced...to make a video making statements about 'peaceful Iraq' to be broadcast on international television."<sup>114</sup>

Shot upon capture Specialist David Lockett was beaten and interrogated, and then subject to abusive medical treatment when "guards tried to remove the bullet from [his] abdomen without anesthesia. The pain was so intense that Lockett told them to leave it alone. Spc. Lockett did not receive any other medical attention for this injury for the rest of his time in Iraq."<sup>115</sup> Captain Russel Sanborn was also beaten, tortured, interrogated and subjected to sexual humiliation and other degrading treatment such as requiring him to stand whenever guards came to his cell, and if he did not he was beaten and kicked until he did stand. His captors "used these and other tactics to dehumanize and degrade Capt.

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

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

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

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

Sanborn generally."<sup>116</sup> "U.S. Army Staff Sergeant Daniel Stamaris was shot down in a Blackhawk helicopter on February 27, 1991, and endured severe injuries in the crash."<sup>117</sup> After crashing, Iraqi troops approached and stripped Stamaris of his weapons, ammunition and other things he had in his pockets.<sup>118</sup> They made no effort to give him medical attention as required by the Geneva Conventions.<sup>119</sup>

Other violations of the Geneva Conventions were evident in the case of Major Jeffrey Tice who was beaten, tortured, interrogated, and used as a human shield.<sup>120</sup> He was also forced to make a video tape denouncing the U.N. operation against Iraq, in that tape "he voiced a coded message which, when deciphered, would let the world know he was being tortured."<sup>121</sup> Later, "Tice was taken to a television studio and put on the stage of an Iraqi talk show. When he refused to voice the statements they wanted, he was removed from the stage, thrown to the ground, kicked in the groin, punched, and hit in the head, shoulders, and ankles with a club and rifle butts."<sup>122</sup>

#### **D. DO THE ACTS IN ISSUE THREE (HUMAN SHIELDING) CONSTITUTE A CRIME UNDER IHT JURISDICTION?**

##### **1. The Act Arguably Constitute Crimes Against Humanity**

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

The acts specified in issue three arguably constitute crimes against humanity. As stated above, crimes against humanity are widespread or systematic attacks on a civilian population with five distinct elements. To make the case that human shielding constitutes a crime against humanity, the prosecution will have to prove that human shielding is an attack, and that the attack is widespread or systematic. The term *human shield* has a few meanings, and it can be used to describe instances where individuals are used to protect military assets, or where individuals are used collectively, for example where the shield is not an individual but the whole population. "In this case, one party in a conflict intentionally positions its military assets amongst a civilian population or close to civilian facilities such as hospitals or schools in the hope that the other party will be reluctant to attack them."<sup>123</sup>

## **2. The Act of Human Shielding Constitutes a War Crime**

The acts detailed in Issue Three constitute war crimes. To prove war crimes the prosecution must first prove the common element of an armed conflict was occurring at the time of the offenses. Based on the facts provided by the tribunal and publicly available, the first element requiring an armed conflict seems proven.

Second, the prosecution must prove that any of a series of prohibited offenses occurred. Of the prohibited offenses at least the following occurred: willful killing, willfully causing great suffering or serious injury to bodily health, unlawful confinement and taking of hostages.

Iraq seized individuals in a manner which constituted an illegal hostage taking. Specifically, Iraq is known to have illegally seized Robert Simon a news reporter for CBS

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<sup>123</sup> Wikipedia- Human Shielding. [Reproduced in the accompanying notebook at Tab 49].



News, and Roberto Alvarez a cameraman for CBS News.<sup>124</sup> This seizure occurred in violation of international law as defined in Article 1 of the International Convention Against the Taking of Hostages.<sup>125</sup> Article 1 of The International Convention Against the Taking of Hostages specifies the requirements for hostage taking as: "Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State... to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention"<sup>126</sup> Simon and Alvarez were held as hostages for use as human shields "in accordance with the announced policy of the government of Iraq, transmitted on January 21, 1991, by Radio Baghdad."<sup>127</sup> The purpose of this policy was to detain Allied coalition prisoners at strategic military sites in an effort to dissuade the Allied governments from enforcing the United Nations mandate, and not attack military sites and targets of value to the Iraqi regime.<sup>128</sup>

In *Hill v. Republic of Iraq*,<sup>129</sup> approximately twenty U.S. citizens, who were taken hostage by Iraqi officials during the Gulf War and used as human shields, sued Iraq and Saddam Hussein. The United States District Court for the District of Columbia described

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<sup>124</sup> *Simon & Alvarez v. The Republic of Iraq*, Case: 1:03CV00691, Complaint. [Reproduced in the accompanying notebook at Tab 20].

<sup>125</sup> International Convention Against the Taking of Hostages, December 17, 1979 TIAS No. 11,081. [Reproduced in the accompanying notebook at Tab 6].

<sup>126</sup> *Id.*

<sup>127</sup> *Simon & Alvarez*, Page 5.

<sup>128</sup> *Id.*

<sup>129</sup> 175 F.Supp.2d 36

Iraq's hostage taking policy as a reaction to the threat of military action whereby "Iraq declared that the foreign nationals would be detained indefinitely 'so long as Iraq remains threatened by an aggressive war.' The detainees were promptly characterized as hostages-"innocent people, citizens of many nations, held against their will in return for concessions"-by the President of the United States who announced that Iraq would be held responsible for "the safety and well-being" of those who were Americans."<sup>130</sup> Many of the hostages were subsequently " transported to various industrial or military sites throughout Iraq and confined in close proximity to anticipated targets of air strikes by allied aircraft once military operations by coalition forces against Iraq commenced."<sup>131</sup>

Ambassador Barbara Bodine described Iraq's human shield policy as one in which Iraq "...designated Brits, Americans, French, Germans, and Japanese to be human shields at Iraqi installations, originally women and children and later just adult men. The men in the city went into deep hiding. They needed food, they needed water, they needed books and videos. Australians, Canadians, New Zealanders, Danes, etc., were in an anomalous situation where they were not subject to being picked up and made human shields, but they couldn't leave Iraq and Kuwait."<sup>132</sup> United Nations accounts also detailed the plight of the hostages as human shields, describing how nearly 13,000 third-state nationals (mostly

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<sup>130</sup> *Id.* at 38

<sup>131</sup> *Id.*

<sup>132</sup> Fletcher Forum of World Affairs, Summer 2004, *Interview With Ambassador Barbara Bodine*, 28 FLETCHER F.WORLD AFF. 17. (2004). [Reproduced in the accompanying notebook at Tab 26].

Americans and Europeans) "were subsequently placed at strategic sites as 'human shields' against the threat of foreign military attacks."<sup>133</sup>

#### **b. International Criminal Tribunal's Treatment of Human Shielding As a War Crime**

The statute of the International Criminal Court declares that the use of human shields is unlawful, specifically "Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations."<sup>134</sup> Various international criminal law cases have interpreted the term "human shielding" and applied it in diverse circumstances. While Iraq's actions described above were instances of human shielding aimed at protecting industrial facilities from bombings, even the use of human shields to protect areas from far more discriminate weapons such as sniper fire rises to the level of human shielding.

This fact was demonstrated in the ICTY case *Prosecutor v. Miroslav Bralo*.<sup>135</sup> In *Bralo*, the defendant was responsible for overseeing the forced labor of Bosnian Muslim civilian detainees. The trial chamber found that "the detainees were...at risk of being struck by sniper-fire from the Army of Bosnia and Herzegovina, as their positioning was such that they were used, by Bralo and others, as 'human shields' to protect the HVO forces from such sniper attack. Bralo was aware of the prospect that the detainees under his control might be injured or killed as a result of their positioning in this way, and yet did

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<sup>133</sup> Dieter Fleck, *Developments of the Law of Arms Control As A Result of the Iraq-Kuwait Conflict*, 13 EUR. JOUR. INT'L LAW 105 (2002). [Reproduced in the accompanying notebook at Tab 27].

<sup>134</sup> ICC Statute Article (8)(2)(b)(xxiii).

<sup>135</sup> *Prosecutor v. Bralo*, Case No. IT-95-17-S, Judgment of: 7 December 2005 [Reproduced in the accompanying notebook at Tab 23].

nothing to alleviate the situation."<sup>136</sup> Thus even the mere placement of individuals in the line of fire from highly accurate direct fire weapons such as sniper rifles, if done with knowledge that injury can result may rise to the level of human shielding.

Moreover, the ICTY has found that merely placing detainees in a position where they are exposed to "the risk of harm" constitutes human shielding, regardless of whether the target intended to be protected was ever attacked or harmed. In an appeals chamber judgment in the case of *The Prosecutor v. Tihomir Blaskic*<sup>137</sup> the chamber found that the use of detainees as human shields to protect the appellant's headquarters rose to the level of human shielding. The chamber stated: "The use of prisoners of war or civilian detainees as human shields is prohibited by the provisions of the Geneva Conventions... Using protected detainees as human shields constitutes a violation of the provisions of the Geneva Conventions regardless of whether those human shields were actually attacked or harmed. Indeed, the prohibition is designed to protect detainees from being exposed to the risk of harm, and not only to the harm itself."<sup>138</sup> Thus the facts as detailed above regarding Iraq's repeated transfer of detainees to sites which may have been targeted by Allied forces constitutes human shielding under the precedent of *Blaskic*.

A possible defense that the accused may assert is that they did not exercise control over the individuals who were directing the detainees to be used as human shields. As the ICTY has pointed out "[e]ven though arguably effective control may be achieved through substantial influence, a demonstration of such powers of influence will not be sufficient in

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<sup>136</sup> *Id.* at Paragraph 35

<sup>137</sup> *Prosecutor v. Blaskic*, Case No. T/P.I.S./875-e, 29 July 2004. [Reproduced in the accompanying at Tab 24].

<sup>138</sup> *Id.* Paragraph 9(c).

the absence of a showing that [the accused] had effective control over subordinates, in the sense of possessing the material ability to prevent subordinate offences or punish subordinate offenders after the commission of the crimes...A showing that the official merely was generally an influential person will not be sufficient.<sup>139</sup> However, a "government official specifically in charge of the treatment of prisoners used...as human shields, as well as a military commander in command of formations which are holding the prisoners, may be held liable on the basis of superior responsibility because of the existence of a chain of command."<sup>140</sup> This assertion was reaffirmed in the case of *Prosecutor v. Zejnil Delajic et al.*, where the trial chamber stated: "that the accused 'cannot be held responsible...in circumstances where he does not have direct authority over the main perpetrators of the crimes.'"<sup>141</sup>

The use of violence against life and persons, in particular murder of all kinds and taking of hostages constitutes a crime under the jurisdiction of the tribunal. Using detainees as human shields in the circumstances described above constitutes murder under international criminal law precedent. As the ICTY has held, "the use of detainees... as human shields may amount to inhumane acts, inhuman treatment, [and] cruel treatment. Using detainees as human shields rises to the level of murder or willful killing where the elements specific to these offences are also met."<sup>142</sup>

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<sup>139</sup> *Prosecutor v. Dario Kordic & Mario Cerkez, Case No. IT-95-14/2-T, 8 September 1995* Paragraph 415. [Reproduced in the accompanying notebook at Tab 14].

<sup>140</sup> *Id.*

<sup>141</sup> *Prosecutor v. Zejnil Delajic, et al, Case No.: IT-96-21-A. Paragraph 536, (citing Aleksovski Appeal Judgement, para 170). [Reproduced in the accompanying notebook at Tab 25].*

<sup>142</sup> *Prosecutor v. Mladen Naletilic, Case No. IT-98-34-T, 7 Mar 2003, P. 47 Case No. IT-98-34-T. [Reproduced in the accompanying notebook at Tab 22].*

The use of human shields also constitutes outrages upon personal dignity, in particular humiliating and degrading treatment.<sup>143</sup> International tribunals have found that the use of detainees as human shields rises to the level of "outrages upon personal dignity". The International Criminal Tribunal for Rwanda, for example found that outrages upon personal dignity includes those acts "which cause serious humiliation, degradation or [are] otherwise [] a serious attack on human dignity" Specifically, "[T]he humiliation of the victim must be so intense that any reasonable person would be outraged"). The crime has been found to have been committed for using detainees as human shields..."<sup>144</sup>

#### **IV. CONCLUSION**

The acts specified in Issue One (Forcible transfer, concealment, and murder of non-Combatants) constitutes genocide only if it can be shown that there was intent to abolish, in whole or in part the Kuwaitis as a national, ethnic, racial or religious group. They also constitute crimes against humanity. A series of specified offenses occurred to include torture, willful murder, inhuman or degrading treatment, rape, forcible transfer, and taking of hostages. All of these offenses occurred within the context of a widespread attack upon a civilian population of which the members of the regime were likely aware.

The acts detailed in Issue Two constitute war crimes for it is clearly that coalition troops were treated in a manner inconsistent with the Geneva Conventions. Evidence publicly available and provided by the tribunal proves that torture and inhuman treatment

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<sup>143</sup> IHT Statute.

<sup>144</sup> *Prosecutor v. Bagosoro et al.*, ICTR-98-41-T, 2 November 2001., (citing *Aleksovski*, Judgement (TC), 25 June 1999, para. 229; and *Kvočka et al.*, Judgement, (TC), 2 November 2001, para. 173.) [Reproduced in the accompanying notebook at Tab 21].

occurred. In addition there was evidence of beatings, the use of medical technology, and sexual assaults.

The acts in Issue Three arguably constitute crimes against humanity. To make the case that human shielding constitutes a crime against humanity, the prosecution will have to prove that human shielding is an attack, and that the attack is widespread or systematic. The acts meet the requirements for war crimes because the following prohibited acts occurred: willful killing, willfully causing great suffering or serious injury to bodily health, unlawful confinement and taking of hostages.