

INTERNATIONAL CRIMINAL LAW

THE CONVICTION OF SADDAM HUSSEIN FOR THE CRIME AGAINST HUMANITY OF "OTHER INHUMANE ACTS"

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1. INTRODUCTION

Legal scholars and practitioners have spilled much ink analyzing the Iraqi High Tribunal's ("IHT") work and (more particularly) the trial, sentence, and execution of Saddam Hussein for crimes perpetrated against the civilian population of Ad-Dujayl.¹ For anyone who participated in or was familiar with this

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¹ See generally MICHAEL A. NEWTON & MICHAEL P. SCHARF, *ENEMY OF THE STATE* (2008) (documenting events of Dujail trial); Eric H. Blinderman, *Judging*

historic trial, the outcome was not the watershed moment of legal triumph that was expected. Multiple participants in the trial, including defense counsel,² judges, court staff, and family members of court staff were murdered because of their decision to work with the IHT.³ In addition, Iraqi politicians willfully trampled upon basic notions of judicial independence and due process rights owed to the defendants such that the trial's basic integrity was undermined.⁴

This Article does not discuss or examine the totality of the political and legal issues surrounding the Ad-Dujayl trial, as that has been done elsewhere.⁵ Rather, this Article focuses on a small piece of legal jurisprudence that arose from the Ad-Dujayl trial that went largely unnoticed in the general news coverage of the trial

Human Rights Watch: An Appraisal of Human Rights Watch's Analysis of the Ad-Dujayl Trial, 39 CASE W. RES. J. INT'L L. 99 (2007) (addressing legal and factual errors in Human Rights Watch report on fairness of Ad-Dujayl trial); Eric H. Blinderman, *The Execution of Saddam Hussein: A Legal Analysis*, 9 Y.B. INT'L HUMANITARIAN L. 153 (2008); HUMAN RIGHTS WATCH, JUDGING DUJAIL: THE FIRST TRIAL BEFORE THE IRAQI HIGH TRIBUNAL (2006) (raising concerns arising from both observance of Ad-Dujayl trial and research of the tribunal).

² Sa'doun al-Janabi, an attorney for defendant Awad al-Bandar, was abducted from his office in Baghdad and killed on October 20, 2005. John F. Burns, *Lawyer's Slaying Raises Questions on Hussein Trial*, N.Y. TIMES, Oct. 22, 2005, at A1. On November 9, 2005, gunmen attacked Adel Muhammad al-Zubaidi and Thamiir Mahmoud al-Khuzai, attorneys who represented defendants Taha Ramadan and Barzan al-Tikriti. John F. Burns, *Ambush of Defense Lawyers in Hussein Trial Kills One*, N.Y. TIMES, Nov. 9, 2005, at A8. Adel al-Zubaidi was killed; Thamiir al-Khuzai was wounded and subsequently fled Iraq. *Id.* Khamees al-Obeidi, a lawyer for defendant Hussein was abducted from his home on June 21, 2006, and executed in Sadr City. John F. Burns, *Hussein Lawyer Seized and Slain in Baghdad Raid*, N.Y. TIMES, June 22, 2006, at A1.

³ See Robert F. Worth, *2 From Tribunal for Hussein Case are Assassinated*, N.Y. TIMES, Mar. 2, 2005, at A1 (describing how investigative judge Parwiz Muhammad Mahmoud al-Merani and his son, who also worked for the IHT, were killed in Baghdad); see also Sabrina Tavernise & Oais Mizher, *Iraqi Linked to Sunni Bloc is Held in Plot, Military Says*, N.Y. TIMES, Sept. 30, 2006, at A6 (stating that "on Friday, Iraqi authorities announced the killing of the brother-in-law of the judge who is presiding over the trial of Saddam Hussein"); see also Michael Luo, *Iraqis Ask Why U.S. Forces Didn't Intervene in Baghdad*, N.Y. TIMES, Oct. 17, 2006, at A8 (stating that "the older brother of Munkith al-Faroun, chief prosecutor in the so-called Anfal trial that began in Baghdad in August, was shot dead by unknown assailants at his home in the western Baghdad suburb of Jammaa").

⁴ See John F. Burns, *Western Lawyers Say Iraq Discarded Due Process in Hussein Trial*, N.Y. TIMES, Sept. 25, 2008, at A17 (reporting on new disclosures of procedural irregularities during trial).

⁵ See sources cited *supra* note 1.

but that the academic community alternately criticized or praised.⁶ More specifically, this Article analyzes whether the IHT's conviction of Hussein for the crime against humanity of "other inhumane acts" was proper under relevant standards of international criminal law.

To accomplish this goal, this Article: (1) outlines the charge and conviction of Hussein in the Ad-Dujayl trial for "other inhumane acts;" (2) discusses the history and preexisting jurisprudence of this crime under international criminal law; (3) applies that history and jurisprudence to the facts charged against Hussein in the Ad-Dujayl trial; and (4) argues that (at least with respect to this one particular portion of the trial) the IHT's conviction of Hussein for other inhumane acts—although stepping slightly outside a strict interpretation of the law of crimes against humanity—was a positive contribution to international criminal law.

2. CHARGES AND CONVICTIONS AGAINST HUSSEIN IN THE AD-DUJAYL TRIAL

2.1. *The Attack Against Ad-Dujayl*

The first trial before Trial Chamber 1 of the IHT involved allegations that the former Iraqi regime engaged in a widespread and systematic attack against the civilian population of the city of Ad-Dujayl.⁷ The former Iraqi regime allegedly launched this attack against Ad-Dujayl in retaliation for a failed assassination attempt

⁶ Compare Michael A. Newton, *A Near Term Retrospective on the Al-Dujail Trial & The Death of Saddam Hussein*, 17 *TRANSNAT'L. L. & CONTEMP. PROBS.* 31, 67 (2008) (arguing that convicting defendants for their role in destroying Ad-Dujayl's infrastructure, date palms, and orchards under Article 12, First, (j) of the Statute of the Iraqi High Criminal Court is "the very embodiment of that catch-all crime"), with Nehal Bhuta, *Fatal Errors: The Trial and Appeal Judgments in the Dujail Case*, 6 *J. INT'L CRIM. JUST.* 39, 54 (2008) (arguing that the IHT may have violated the "principle of *nullum crimen* by convicting some defendants of 'other inhumane acts' for the razing of lands in Dujail").

⁷ See generally Iraqi High Tribunal, Case No. 1/C/1/2005, Final Decision and Judgment, Trial Chamber 1 (Nov. 22, 2006) [hereinafter Trial Chamber Judgment] (describing the Iraqi government's attacks on civilian populations), translated in Case Western Reserve Univ. Sch. of Law, *English Translation of the Dujail Judgment*, Dec. 2006, Grotian Moment: The International War Crimes Trial Blog, Dec. 3, 2006, <http://law.case.edu/saddamtrial/dujail/opinion.asp>.

against Hussein which occurred there on July 8, 1982.⁸ In response to the assassination attempt, Hussein allegedly ordered military units, intelligence operatives, and others to descend upon the town.⁹ Hundreds of people were arrested and detained for years without trial in a desert camp located near the Saudi border.¹⁰ Hussein also referred approximately 148 men and boys for trial before Iraq's Revolutionary Command Council Court ("RCCC") whereupon they were sentenced to death after a summary trial and executed.¹¹ In addition, large portions of the town were razed—including the town's infrastructure, orchards, and date palms—upon Hussein's orders.¹² This action, razing the town's infrastructure, orchards and date palms, led the IHT to charge Hussein with the crime against humanity of "other inhumane acts" under Article 12(1)(j) of the IHT Statute.¹³

2.2. Charging "Other Inhumane Acts"

To understand why the IHT charged Hussein under Article 12(1)(j) of the IHT Statute, as opposed to any other provisions, one

⁸ See Borzou Daragahi, *A Tragic Test Case in Iraq*, L.A. TIMES, Oct. 18, 2005, at A1 (describing the events of the attack on Dujayl).

⁹ *Id.*

¹⁰ See *Minutes of Joint Committee Meeting of Iraqi Intelligence Services and Iraq's Department of General Intelligence* I.S.T. Doc. IST/A4021/001/053-057, Dec. 28, 1982 (discussing the transfer of 687 men, women, and children from Ad-Dujayl to a prison camp located in Muthanna Governorate).

¹¹ See Memorandum from Saddam Hussein, President, Iraq, to Revolutionary Command Council Court I.S.T. Doc. IST/A4019/008/031-034, May 27, 1984 (on file with author) [hereinafter Referral Memorandum]; see also Presidential Decree No. 778 from Saddam Hussein, President, Iraq I.S.T. Doc. IST/A0480/002/002-003, June 16, 1984 (on file with author) (approving the execution of those condemned to death).

¹² See Trial Chamber Judgment, *supra* note 7, pt. 5, at 10 (stating that Taha Yaseen Ramadan was seen "supervising the acts of razing the orchards in [the] Dujayl area"); see also Ad-Dujail Trial, Transcript of Record, at 18 (2006) (No. 2) (on file with author) (noting that Hussein declared that he ordered the orchards in Dujayl razed in retaliation for the failed 1982 assassination attempt against him).

¹³ Besides Hussein, the IHT charged seven other individuals (Barzan Al-Tikriti, Awad al-Bandar, Taha Yaseen Ramadan, and four others) for crimes arising out of this widespread and systematic attack against the civilian population of Ad-Dujayl. Of these eight total defendants, all except Awad al-Bandar were alleged to have participated in the decision to raze the town's orchards and date palms. Due to space limitations and other constraints, this Article focuses only on the propriety of charging and convicting Hussein for this crime.

needs to examine the text of Article 12(1)(J) in conjunction with the other provisions of Article 12. To that end Article 12(1) states:

For the purposes of this Law, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- A. Willful Killing;
- 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, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity;
- H. Persecution against any specific party or population on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to as a form of sexual violence of comparable gravity;
- I. Enforced disappearance of persons; and
- 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.

In other words, Article 12(1) criminalizes a series of nine enumerated acts that become "crimes against humanity" when they are perpetrated as part of a "widespread or systematic attack directed against any civilian population."¹⁴

Because these nine enumerated acts could not possibly encapsulate the entire range of other inhumane acts constituting crimes against humanity, the drafters of the IHT Statute added Article 12(1)(J). That provision, which was borrowed (like many

¹⁴ Statute of the Iraqi High Tribunal, Law No. 10 of 2005, art. 12(1) (Oct. 18, 2005) [hereinafter IHT Statute].

other substantive provisions of the IHT Statute) from the Rome Statute for the International Criminal Court ("Rome Statute") and acts as a "catch-all," permits the IHT to hold a criminal accountable for "any other inhumane acts of a similar character [to the other nine enumerated acts] intentionally causing great suffering, or serious injury to the body or to mental or physical health."¹⁵ Because willful destruction of property did not fall neatly into any of the nine enumerated acts set forth under Articles 12(1)(A)-(I), the IHT charged Hussein for his role in uprooting Ad-Dujayl's infrastructure, date palms, and orchards under the catch-all of Article 12(1)(J).

2.3. Legal Requirements Needed to Convict Hussein for the Crime Against Humanity of "Other Inhumane Acts"

To convict Hussein for the crime against humanity of "other inhumane acts," the IHT was required to find that the specific elements of the crime were met under Article 12(1)(J) and that Hussein bore individual criminal responsibility for the crime under Article 15 of the IHT Statute.

With respect to the elements of the crime against humanity of "other inhumane acts" under Article 12(1)(J), the IHT's draft elements of crimes provide that a conviction could not lie unless the prosecution demonstrated that: (1) Hussein willfully inflicted great suffering, or serious injury to the body, or to mental or physical health, by means of an inhumane act; (2) the act was of a character similar (in terms of the nature and gravity of the act) to the offenses contained in Articles 12(1)(A)-12(1)(I) of the IHT Statute; (3) Hussein was aware of the factual circumstances establishing the character of the act; (4) the conduct was perpetrated as part of a widespread or systematic attack directed against a civilian population; and (5) Hussein knew that the conduct was part of or intended the conduct to be part of a

¹⁵ See generally MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 529-30 (2002) (describing how the crime against humanity of "other inhumane acts" was included in the Nuremberg Charter, Tokyo Charter, Control Council Law No. 10, and the Nuremberg Principles because the list of "enumerated acts" that might constitute a crime against humanity was not exhaustive); Newton, *supra* note 6, at 66 (describing Article 12(1)(J) as a "catch-all" crime).

widespread or systematic attack directed against a civilian population.¹⁶

With respect to proving individual criminal responsibility under Article 15 of the IHT Statute, the prosecution was required to establish that Hussein: (1) committed the crime, whether as an individual, jointly with another, or through another person; (2) ordered, solicited, or induced the commission of the crime which was in fact committed or attempted; (3) facilitated the commission of the crime, aided, abetted, or otherwise assisted in its commission or its attempted commission; (4) contributed to the commission or attempted commission of the crime along with a group of persons acting with a common purpose; or (5) attempted to commit the crime by taking action that commenced its execution.¹⁷

The next sections of this Article detail the factual findings that Trial Chamber 1 made regarding the elements of Article 12(1)(f). The Article then examines the factual findings that Trial Chamber 1 made with respect to Article 15.

2.4. *Factual Findings With Respect to Article 12(1)(f)*

In convicting Hussein for the crime against humanity of "other inhumane acts" under Article 12(1)(f), the IHT found as a matter of fact that each of the necessary elements of the crime were met.

2.4.1. *Willful Infliction of Great Suffering*

For example, to meet the first element (i.e., that the destruction of the town's infrastructure, orchards, and date palms willfully inflicted great suffering, or serious injury to the body or to mental or physical health of the victims in Ad-Dujayl) the IHT found that the former regime "devastat[ed] . . . properties, [such] as houses, furniture, autos, water pumps, and canals of water drawn from the Tigris [that the citizens of Ad-Dujayl used] to irrigate gardens."¹⁸ The Court further found that, prior to this organized destruction of property, Ad-Dujayl was "rich in fruit gardens irrigated [sic] from the Tigris river through canals and water pumps" and that Ad-Dujayl's citizens enjoyed a good standard of living.¹⁹ When

¹⁶ Iraqi Special Tribunal, Draft Elements of Crimes, § 3, pt. 15, available at http://law.case.edu/saddamtrial/documents/IST_Elements.pdf.

¹⁷ IHT Statute, *supra* note 14, art. 15(2).

¹⁸ Trial Chamber Judgment, *supra* note 7, pt. 1, at 9.

¹⁹ *Id.*

combined with witness testimony that described the tremendous suffering and hardships the residents faced after their property was confiscated and destroyed,²⁰ the IHT ruled that destroying large swaths of Ad-Dujayl caused great suffering to its inhabitants.²¹

With respect to the willful nature of Hussein's actions, the Court relied upon several pieces of circumstantial and direct evidence to conclude that Hussein's policy of property destruction was deliberately done to inflict harm. First, the Court observed that, although seven to eight people were involved in the alleged assassination attempt and ten to twelve shots were fired at Hussein's convoy,²² the scope of the regime's property destruction extended to the "plundering and destroying of properties and houses of the imprisoned and exiled families" who had nothing whatsoever to do with the failed assassination attempt.²³ Confirming the tremendous breadth of destruction, the IHT admitted into evidence satellite imagery that compared the town's physical layout in the days immediately preceding the attack on Ad-Dujayl and the months immediately following the attack.²⁴ This imagery revealed that an enormous percentage of the town's infrastructure had disappeared. To the IHT, this tremendous level of destruction, when compared against the known number of perpetrators, provided stark evidence of the willful nature of the crime.²⁵

The IHT also relied upon Hussein's own words in determining his intent to harm the town. For example, during the March 11, 2005 court session, Hussein himself testified that he ordered the orchards destroyed in order "to punish the citizens" of Ad-Dujayl for the decision to assassinate him.²⁶ In view of this admission, and the lack of any legitimate justification for the level of destruction

²⁰ See *id.* pt. 3, at 44 (describing the testimony).

²¹ *Id.* at 44-45.

²² See *id.* pt. 1, at 17; *id.* pt. 4, at 9 (describing the circumstantial evidence).

²³ *Id.* pt. 1, at 18-19.

²⁴ *Id.* pt. 3, at 44.

²⁵ See, e.g., *id.* pt. 1, at 18-19 (describing the mechanics of killings, round-ups, destruction of Ad-Dujayl's infrastructure, orchards, and date palms which the former regime deliberately perpetrated against the town of Ad-Dujayl for the "cost of ten to twelve bullets that were fired from inside the fields [and that] hurt [nobody]" so that Hussein could ensure the loyalty of his fellow Iraqis through fear).

²⁶ *Id.* pt. 4, at 3.

that was inflicted upon Ad-Dujayl.²⁷ Trial Chamber 1 accepted that Hussein's motivation in destroying the property was to exact "révenge" and to inflict "collective punishment on the people of the town."²⁸ These twin findings satisfied the requirement that the destruction of the town's infrastructure, orchards, and date palms was willfully designed to inflict great suffering, or serious injury to the body or to mental or physical health of the victims in Ad-Dujayl.²⁹

2.4.2. *Similarity of Act to Other Offences Contained in Articles 12(1)(A)-(I) of the IHT Statute*

To meet the second element of this crime (i.e., that the offense of uprooting the orchards and date palms in Ad-Dujayl was similar to the other enumerated offenses set forth in Article 12), Trial Chamber 1 observed that the physical destruction of the victims' property was an integral part of the overall attack and was "intertwined" with the other elements of that attack which included murder, enforced disappearance, false imprisonment, and torture—which are among the enumerated offenses in Article 12(1) of the IHT Statute.³⁰ In other words, the Court traced the suffering of the townspeople in Ad-Dujayl from the moment the attack commenced in 1982 (i.e., with massive round-ups of villagers following the failed assassination attempt), through the days and months of interrogations, torture, summary executions, and forcible detentions without trial that followed, to the attack's

²⁷ At trial, Hussein alternately tried to justify his decision to destroy the town's infrastructure, date palms, and orchards by claiming that the actions were needed because the town "could not enjoy proper security and reduction in crimes unless these orchards were removed" along with their hidden "arms depots" and "training halls" that outlaws had used to destabilize Iraq. *Id.* pt. 2, at 49. When the Court rejected that justification because of the overwhelming level of destruction that was inflicted upon the town's infrastructure in comparison to the assassination attempt which involved only ten to twelve shots fired at Hussein's convoy, Hussein changed course and argued that the destruction was part of a civil reconstruction project and that the citizens of Ad-Dujayl had received compensation for their property. *See Id.* pt. 3, at 1-2 (addressing defense witness's testimony to that effect). The Court rejected this assertion, in part by observing that, even if certain townspeople had received compensation for their confiscated and destroyed land, the vast majority had not. *Id.* pt. 3, at 10. As such, the Court found Hussein's justification for the destruction of the town's land not credible. *Id.*

²⁸ *Id.* pt. 3, at 10, 47.

²⁹ *Id.* pt. 3, at 44-45.

³⁰ *Id.* pt. 3, at 44.

conclusion when survivors returned home in 1985 to find their homes and properties barren and destroyed.³¹ Because the town's physical destruction was integral to the multi-year campaign of brutal retribution that was inflicted upon Ad-Dujayl's civilian population, the court held that destroying the town's infrastructure, orchards, and date palms was similar in nature to the murder, enforced, disappearance, and torture that was also part of this attack and that was specifically outlawed under Article 12(1).³²

In an important precedent that reflected well on the IHT's ability to link the town's physical destruction to the cultural and religious context in which it occurred, Trial Chamber I cited the Koran to support the proposition that "[a]ffluence [or physical property] to humans has an equivalent value that is not less than the value of one's own child."³³ Similarly, the Court cited a well known Iraqi proverb regarding the ties that one has to his property as precedent for the serious nature of Hussein's decision to destroy the town's infrastructure.³⁴ Thus, the Court was able to compare the alleged crime (*i.e.*, the destruction of the town's infrastructure, orchards, and date palms) against the cultural and religious expectations of the victims, thereby buttressing its finding with respect to the serious nature of this act in comparison to the other acts outlawed under Article 12(1).³⁵

2.4.3. *Hussein's Awareness of the Factual Circumstances Establishing the Character of the Act*

Under the third element of Article 12(1)(J) element, the Court was required to find that Hussein knew that destruction of the town's orchards was similar in its criminal nature to the other

³¹ See *id.* pt. 3, at 44 (describing the treatment of the people of Dujayl at the hands of the Iraqi government).

³² See *id.* pt. 3, at 44-45 (likening the uprooting of gardens and farms of the civilian population of Ad-Dujayl to the other crimes against humanity perpetrated against the civilians because they are all acts of "destruction of the sources of living").

³³ *Id.* pt. 3 at 45.

³⁴ See *id.* (It is "[b]etter to separate one's head than to separate [one] from making [a] living.").

³⁵ See *id.* (holding that Hussein had committed international crimes because he was aware of the serious and systematic nature of the attacks and he had criminal intent).

enumerated crimes contained in Article 12.³⁶ The evidence establishing Hussein's awareness of the nature of his act was contained in audiotape that was played in open court.

On that tape, Hussein addressed a regional commander in southern Iraq following the 1991 war.³⁷ The context of this tape is important because, at that time, various cities and provinces in southern Iraq had rebelled against Hussein. Hussein's military units were trying to regain control over southern Iraq, including the commercially and strategically important city of Basra. In ordering his commander to retake the city, Hussein reminded him of how he had ordered the infrastructure, date palms, and orchards destroyed in Ad-Dujayl and how this retribution on the city had disemboweled any further resistance there.³⁸ As such, Hussein ordered his southern commander to follow the lesson he learned in Ad-Dujayl and to destroy the trees and farmland surrounding Basra as part of his campaign to retake the city and to end any further resistance there.³⁹

This tape provided a critical window into the mindset of Hussein when he ordered his units to destroy Basra's forests and farms at the end of the First Gulf War and when he ordered the destruction of Ad-Dujayl's infrastructure, date palms, and orchards in the 1980s. It showed that Hussein was aware that the destruction of physical property (when combined with other enumerated elements of an attack) was a crucial part of his planned attacks against Ad-Dujayl and Basra and that it was integral to eliminating dissent in these cities. Given Hussein's admission about the import of this "lesson" and his testimony in open court that destruction of the Ad-Dujayl's orchards and date palms was part of his campaign to "punish the town,"⁴⁰ the Court was justified in holding that Hussein was "cognizant" that destruction of the town's infrastructure, date palms, and orchards

³⁶ See Draft Elements of Crimes, *supra* note 16, § 3, para. 15 (enumerating the elements of other inhumane acts that qualify as crimes against humanity).

³⁷ Trial Chamber Judgment, *supra* note 7, pt. 4, at 2.

³⁸ See *id.* (explaining that Hussein was cognizant of the previous economic and psychological damage caused by the destruction of Dujayl orchards).

³⁹ See *id.* (addressing 'Abd-al-Ghani 'Abd-al-Ghafur, Hussein stated that "he borrowed the removal of orchards in Dujail [sic] from the removal of forests in Basra [sic]").

⁴⁰ See *supra* note 27 and accompanying text (explaining that Hussein testified that he issued the destruction of fields because of the Ad-Dujayls' attack against him).

was similar in nature to the other specifically outlawed elements of that attack.⁴¹

2.4.4. *The Conduct was Perpetrated as Part of a Widespread or Systematic Attack Directed Against a Civilian Population*

To meet the requirements of this element of the crime against humanity of other inhumane acts, the IHT was required to find that the town's orchards and date palms were destroyed during: (1) an "attack" that was (2) "directed against a civilian population" and that was (3) "widespread" or "systematic." The sections of this Article that follow detail Trial Chamber I's findings with respect to these elements.⁴²

2.4.4.1. *Attack against Citizens of Ad-Dujayl*

Under Article 12(2) of the IHT Statute, an "attack" occurs when there exists a course of conduct involving the multiple commissions of certain acts against any civilian population, "pursuant to or in furtherance of a state or organizational policy to commit such attack."⁴³ In concluding that an attack against the citizens of Ad-Dujayl had occurred, the IHT observed that the former Iraqi regime had brutalized the citizens of Ad-Dujayl by murdering, imprisoning, torturing, and forcibly transferring them and by physically destroying large portions of the town.⁴⁴

With respect to the requirement that the attack be made "pursuant to or in furtherance of a state or organizational policy to commit such attack," the IHT found that such a plan existed.⁴⁵ In so finding, Trial Chamber I noted that Iraqi Intelligence Services ("IIS") leadership, spearheaded by Barzan Al-Tikriti, met to organize the state response to Ad-Dujayl shortly after learning of the attempt on Hussein's life.⁴⁶ The force of the IIS, and other state

⁴¹ See Trial Chamber Judgment, *supra* note 7, pt. 3, at 45 (finding Hussein aware of the "wealth value" of the destroyed lands to the farmers and owners, who had as much spiritual stake in the lands as they did in their children).

⁴² IHT Statute, *supra* note 14, art. 12.

⁴³ *Id.* art. 12(2)(a).

⁴⁴ See Trial Chamber Judgment, *supra* note 7, pt. 1, at 18-19 (detailing the acts Hussein committed against the people of Al-Dujayl in response to an isolated incident where stray bullets entered the Hussein's presidential procession through the territory).

⁴⁵ *Id.* pt. 1, at 19.

⁴⁶ See *id.* pt. 1, at 20 (describing the swift response of Hussein and Barzan Ibrahim Hassan to punish the town for the perceived attempted assassination).

police agencies, was coordinated to respond to the incident, and arrived in the town within hours of the event.⁴⁷

The IHT further found that Barzan Al-Tikriti had issued orders to subordinates on how the operation should proceed.⁴⁸ A wide variety of assets, including helicopters and Army units, were managed through a central command.⁴⁹ Local informants, working with Barzan, were used to make additional arrests.⁵⁰ House to house searches and arrests also occurred.⁵¹ Arrangements were made by IIS to transport large numbers of prisoners from Ad-Dujayl to Baghdad (and beyond) for imprisonment while the Popular Army and other units conducted a large scale campaign to destroy the physical infrastructure of the town.⁵²

In ruling that these coordinated efforts qualified as an attack on the citizens of Ad-Dujayl, the IHT observed correctly that while Barzan's orders may not have been written, they nonetheless were issued and followed.⁵³ In addition, Hussein's orders demanding the execution of 148 townspeople as a result of the failed assassination attempt and demanding the destruction of the town's date palms and orchards were written.⁵⁴ To the court, this collective evidence was proof of "some kind of preconceived plan or policy" directed towards the civilian population of Ad-Dujayl, sufficient to demonstrate state action.⁵⁵ In short, the Court ruled that, because these events could not have occurred "accidentally" or "randomly," the state action requirement was met.⁵⁶

⁴⁷ *Id.*

⁴⁸ *Id.* pt. 1, at 16.

⁴⁹ *Id.* pt. 1, at 19.

⁵⁰ *Id.* pt. 1, at 20.

⁵¹ *Id.* pt. 1, at 16.

⁵² *Id.* pt. 1, at 19-20.

⁵³ *Id.* pt. 1, at 20.

⁵⁴ See *id.* pt. 3, at 44 (referring to the two revolutionary command council orders authorizing the destruction of property and citizens ratified by Hussein).

⁵⁵ See *id.* pt. 1, at 16; see also Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 580 (Sept. 2, 1998) (holding that an attack is systematic if it follows "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 . . . that there must only] be some kind of preconceived plan or policy").

⁵⁶ See Trial Chamber Judgment, *supra* note 7, pt. 1, at 16; see also Prosecutor v. Ndindabahiza, Case No. ICTR-2001-72-1 Judgment & Sentence, ¶ 477 (July 15, 2004) (holding that an attack is systematic if it occurs as part of "an organized pattern of conduct, as distinguished from random or unconnected acts committed by independent actors").

2.4.4.2. *Directed against the Civilian Population of Ad-Dujayl*

In concluding that the attack against the citizens of Ad-Dujayl was directed against a civilian population, Trial Chamber I noted several facts. First, while Barzan al-Tikriti's investigative reports to Hussein indicated that only ten people took part in the failed assassination attempt against Hussein, the regime's punitive actions reached far beyond the small number of attackers against Hussein.⁵⁷ Ultimately, over one thousand people were imprisoned or killed even though they had no relationship whatsoever with any military or civil group and were not in any way involved in the failed assassination attempt against Hussein.⁵⁸

Although many people the regime initially arrested were subsequently released, the Court still noted that over 543 people were viciously imprisoned, killed, or displaced in the days and months following the failed assassination attempt notwithstanding that these people also had no "connection" with the attack on Hussein.⁵⁹ When juxtaposed against the fact that, at most, ten people were involved in the failed assassination attempt, the IHT readily concluded that the regime directed its attack against the entire civilian population of Ad-Dujayl so that what happened there could serve as an example to "instill terror and fear among the Iraqi people in general."⁶⁰ For these reasons, the Court concluded that the attack at issue was directed against the population of civilians living in Ad-Dujayl at that time.

2.4.4.3. *"Widespread or Systematic"*

Having defined the civilian population subject to attack as residents of Ad-Dujayl (as opposed to a subset of the civilian population of Ad-Dujayl), Trial Chamber I analyzed whether the attack at issue was widespread or systematic.⁶¹ Trial Chamber I held that the former regime's attack against this defined population was widespread because the town was taken over by military forces for several days, a sizeable percentage of its population was arrested (and later detained and executed), and the ultimate penalties against the

⁵⁷ Trial Chamber Judgment, *supra* note 7, pt. 1, at 16.

⁵⁸ *Id.*

⁵⁹ *Id.* pt. 1, at 17.

⁶⁰ *Id.* pt. 1, at 18.

⁶¹ See *id.* pt. 3, at 44 (evaluating Hussein's accountability with regard to the attacks).

population were inflicted over a several year period.⁶² These penalties included unjust imprisonment in prisons across Iraq, execution of arrestees, and the wide-scale razing of the population's assets. Trial Chamber I also held that these actions were systematic because they were coordinated from a central point at the US, and involved the mustering of significant assets of the state.

2.5. *Factual Findings With Respect to Article 15*

In terms of establishing Hussein's individual criminal responsibility under Article 15 of the IHT Statute for the crime of "other inhumane acts," the Court relied upon Revolutionary Command Council Decree Number 1283, dated October 14, 1982, and Revolutionary Command Council decree Number 100, dated January 23, 1985.⁶³ Those decrees were important for several reasons. First, Hussein issued and signed them.⁶⁴ Indeed, the IHT conducted a forensic analysis of the signature on the decrees and confirmed at trial that the signature was that of Hussein.⁶⁵ Second, in those decrees, Hussein ordered Iraqi governmental units to confiscate agricultural and other lands around Ad-Dujayl without compensation.⁶⁶ As a result of Hussein's decision to issue at least two written orders to raze large portions of the town (and because large portions of the town were actually razed), the IHT found that Article 15(2)(B) of the IHT Statute was also satisfied.⁶⁷ This finding is of critical importance because, without individual criminal responsibility for Hussein resting on Article 15(2)(B), a conviction for the crime against humanity of "other inhumane acts" could not stand.

⁶² See *id.* pt. 1, at 19 (describing how the town and its people were targeted for years).

⁶³ *Id.* pt. 3, at 11, 44-45.

⁶⁴ *Id.* pt. 3, at 11-12.

⁶⁵ *Id.* pt. 3, at 12.

⁶⁶ *Id.* pt. 3, at 11.

⁶⁷ Article 15(2)(B) of the IHT Statutes imposes criminal liability on any defendant who "orders, solicits or induces the commission of such a crime." Statute of the Iraqi High Tribunal, *supra* note 14, art. 15(2)(B).

3. INTERNATIONAL CRIMINAL LAW JURISPRUDENCE CONCERNING THE CRIME OF EXTENSIVE DESTRUCTION OF PROPERTY

Having outlined the charges and factual underpinnings surrounding Hussein's conviction for the crime against humanity of "other inhumane acts" for his role in destroying Ad-Dujayl's infrastructure, date palms, and orchards, this Article now provides a brief overview of the relevant jurisprudence from other criminal tribunals regarding this crime so that a reasoned analysis can be made as to whether the IHT's conviction of Hussein was legally sound. To accomplish this goal, the remaining sections of this Article: (1) analyze how extensive destruction of property is criminalized as a war crime; (2) analyze how extensive destruction of property is criminalized as a crime against humanity of persecution; (3) analyze how extensive destruction of property is criminalized under domestic Iraqi law; (4) analyze the jurisprudence regarding the crime against humanity of "other inhumane acts"; and (5) compare these four different bodies of law to demonstrate that the IHT's ruling with respect to the destruction of Ad-Dujayl's infrastructure, orchards, and date palms was proper.

3.1. *Extensive Destruction of Property as a War Crime*

Article 147 of the Fourth Geneva Convention prohibits a "High Contracting Party"⁶⁸ during an international armed conflict or while occupying the territory of another High Contracting Party from: (1) willful killing; (2) torture or inhuman treatment, including biological experiments; (3) willfully causing great suffering, or serious injury to body or health; (4) unlawful deportation or transfer; (5) unlawful confinement; (6) compelling a prisoner of war or other protected person to serve in the military forces of a hostile power; (7) willfully depriving a protected person of the rights of a fair and regular trial; (8) taking of hostages; and (9) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.⁶⁹ Since the Fourth Geneva Convention came into effect,

⁶⁸ A High Contracting Party is a state signatory to the Fourth Geneva Convention.

⁶⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 3613, 75 U.N.T.S. 287, 388 [hereinafter Fourth Geneva Convention].

international humanitarian law has expanded liability for breaches of Article 147 from "High Contracting Parties" to individuals.⁷⁰ For purposes of this Article, it is this last enumerated war crime that is at issue.

To qualify as a war crime of "extensive destruction . . . of property," the property at issue must be protected under the Fourth Geneva Convention.⁷¹ Protected property includes civilian hospitals, ambulances, or medical aircraft.⁷² Real or personal property, however, is only protected under the Geneva Conventions during a military occupation.⁷³ As described in *Prosecutor v. Kordic & Cerkez*, "if an air force bombs factories in an enemy country, such destruction [is not a war crime] . . . [o]n the other hand, if the enemy Power occupies the territory where the factories are situated, it may not destroy them unless military operations make it absolutely necessary."⁷⁴ Assuming the property is protected, criminal liability for its destruction will then attach if: (1) the property destruction occurs on a large scale; (2) the destruction is not justified by military necessity; and (3) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.⁷⁵

3.2. Extensive Destruction of Property as a Crime Against Humanity

Liability for any crime against humanity cannot attach absent evidence that the act occurred as part of a "widespread or systematic attack against a civilian population."⁷⁶ There is no requirement that the attack occur during an international armed conflict or a time of occupation. With respect to the specific crime of property destruction, unlike Article 147 of the Fourth Geneva

⁷⁰ See, e.g., *Prosecutor v. Blaskić*, Case No. IT-95-14-T, Judgment, ¶ 808 (Mar. 3, 2000) (convicting defendant for the war crime of extensive destruction of property).

⁷¹ *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-T, Judgment, ¶ 335 (Feb. 26, 2001) (discussing the crime of "extensive destruction").

⁷² See *id.* ("The Fourth Convention forbids the destruction of civilian hospitals and their property or damage to ambulances or medical aircraft.").

⁷³ See *id.* ("[T]he Occupying Power may not destroy in occupied territory real or personal property except where such destruction is rendered absolutely necessary by military operations.").

⁷⁴ *Id.*

⁷⁵ *Id.* ¶ 346.

⁷⁶ *Prosecutor v. Blaskić*, Case No. IT-95-14-T, Judgment, ¶ 244 (Mar. 3, 2000).

Convention which specifically outlaws extensive destruction of protected property in an occupied territory or during an international armed conflict,⁷⁷ there is no such enumerated crime against humanity.

Because there is no enumerated crime against humanity for extensive destruction of property, the International Criminal Tribunals have generally penalized this crime (when occurring as part of a widespread or systematic attack against a civilian population) under the enumerated act of persecution.⁷⁸ However, a conviction for persecution can only occur if the defendant is found to have perpetrated the act with the intent to discriminate against his victims on racial, religious, or political grounds.⁷⁹ In other words, unlike the war crimes context where the perpetrator's mens rea is limited to whether he acted with the intent to destroy the property,⁸⁰ the mens rea to convict a perpetrator for extensive destruction of property as a crime against humanity of persecution requires that the prosecution prove discriminatory intent.

3.3. *Extensive Destruction of Property Under Iraqi Law*

Iraqi law criminalizes property destruction under paragraphs 477–480 of the Iraqi Penal Code.⁸¹ Paragraphs 477 and 479 prohibit individuals from destroying moveable and immovable property, unharvested crops, and sown fields that do not belong to them.⁸² Similarly, paragraph 480 outlaws the cutting down, uprooting, or

⁷⁷ See Fourth Geneva Convention, *supra* note 69 ("Grave breaches to which the preceding Article relates shall be . . . extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.").

⁷⁸ See e.g., *Prosecutor v. Blaskić*, Case No. IT-95-14-T, Judgment, ¶ 227 (Mar. 3, 2000) (holding that "persecution may . . . take the form of confiscation or destruction of private dwellings or businesses, symbolic buildings or means of subsistence belonging to the Muslim population of Bosnia-Herzegovina").

⁷⁹ See *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1071 (Dec. 3, 2003) (holding that the crime of persecution "specifically requires a finding of discriminatory intent on racial, religious or political grounds").

⁸⁰ See *supra* note 75 and accompanying text.

⁸¹ See, e.g., PENAL CODE WITH AMENDMENTS [PEN. C.] para. 477–80 (1969) (Iraq) (prohibiting individuals from destroying moveable and immovable property, unharvested crops, and sown fields that do not belong to them and also prohibiting individuals from cutting down, uprooting, or destroying any tree or any greenery planted in a place of worship or in a street or public square or recreational area or public garden without permission).

⁸² *Id.* para. 477–79.

destroying of any tree "or any greenery planted in a place of worship or in a street or public square or recreational area or public garden . . . without permission."⁸³

The mens rea required to convict a defendant for these crimes is set forth in paragraph 33 of Iraq's Penal Code.⁸⁴ Under paragraph 33, criminal intent is defined as "the existence in the mind of the offender of an intention to commit the criminal act with a view to realising [sic] the consequence of the offence [sic] that has occurred or any other criminal consequence."⁸⁵ Accordingly, a conviction under domestic Iraqi law for the crime of extensive destruction of property may stand if a defendant destroys property in violation of paragraphs 477 to 480 with the intent to do so and with knowledge of the consequences of his action. There is therefore no domestic Iraqi legal requirement that a defendant (charged with destroying property) intend to discriminate on racial, religious, or political grounds as would exist if the act were charged as a crime against humanity of persecution. Rather, the mens rea that is required for a property destruction conviction under domestic Iraqi law is similar, if not identical, to the mens rea that is required for conviction as a war crime, *i.e.*, that the perpetrator acted with the intent to destroy the property at issue.⁸⁶

3.4. Other Inhumane Acts as a Crime Against Humanity

After World War II, both the Nuremberg and Tokyo Charters set forth a list of specific acts that might qualify as a crime against humanity.⁸⁷ After setting forth the list, the drafters also included the words "other inhumane acts."⁸⁸ Similarly, the Statutes of the International Criminal Tribunal for the Former Yugoslavia ("ICTY")⁸⁹ and the International Criminal Tribunal for Rwanda

⁸³ *Id.* para. 480.

⁸⁴ *Id.* para. 33.

⁸⁵ *Id.*

⁸⁶ See *supra* note 75 and accompanying text.

⁸⁷ BOOT, *supra* note 15, at 529-30. (discussing the expressly enumerated acts listed as crimes against humanity in the charters).

⁸⁸ *Id.* (noting that the inclusion of "other inhumane acts" indicated that the lists of expressly enumerated acts were "not exhaustive").

⁸⁹ Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 5(i), U.N. Doc. S/RES/827 (May 25, 1993), reprinted in 32 I.L.M. 1192 [hereinafter ICTY Statute].

("ICTR")⁹⁰ included this same formulation of the crime against humanity of other inhumane acts. Curiously, the drafters of the Rome Statute (the text of which was borrowed to create the IHT Statute) were fearful that, if the crime against humanity of "other inhumane acts" remained open-ended, convictions for such crimes might violate the principle of *nullum crimen sine lege*.⁹¹ They therefore modified the text of the statute by incorporating the phrase "willfully causing great suffering, or serious injury to body or to mental or physical health" from Article 147 of the Fourth Geneva Convention into the text of Article 7(1)(K) of the Rome Statute.⁹² This phrase found its way into Article 12(1)(A)(J) of the IHT Statute.⁹³

Commentators have pointed out that, because the phrase "willfully causing great suffering, or serious injury to body or to mental or physical health" set forth in Article 7(1)(K) of the Rome Statute is identical to the language contained in Article 147 of the Fourth Geneva Convention, cases interpreting this language in the latter context are instructive regarding its meaning in the former.⁹⁴ In other words, case law interpreting the phrase "willfully causing great suffering, or serious injury to body or to mental or physical health" as a grave breach of the Geneva Convention in the war crimes context bears upon how this phrase should be interpreted when applied to a crime against humanity of other inhumane acts.

To that end, the ICTY when interpreting Article 147 of the Fourth Geneva Convention has observed that an offense willfully causes great suffering, or serious injury to body or to mental or physical health when the act in question is "inflicted without ends . . . for other motives such as punishment, revenge or out of sadism, and could also cover moral sadism."⁹⁵ Importantly, the

⁹⁰ Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Annex, art. 3(i), U.N. Doc. S/RES/955 (Nov. 8, 1994).

⁹¹ BOOT, *supra* note 15, at 530. The doctrine of *nullum crimen sine lege* prohibits a court from trying a defendant for a crime that was not criminal at the time it occurred. See generally Rome Statute of the International Criminal Court art. 22(1), July 17, 1998, 2187 U.N.T.S. 90 (entered into force on July 1, 2002) (stating that "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court").

⁹² BOOT, *supra* note 15, at 530.

⁹³ *Id.*

⁹⁴ See *id.* at 531-32 (discussing Prosecutor v. Delalić, Mucić, Delić & Landzo).

⁹⁵ Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-T, Judgment, ¶ 340 (Mar. 31, 2003).

ICTY has noted that the "harm inflicted need not be permanent and irreparable, but it must involve harm that . . . results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life."⁹⁶ Usually, in the war crimes context, this phrase requires that physical harm to a victim arise through torture or some other form of direct physical abuse.⁹⁷ Accordingly, destruction of property would not fall within this category of precluded acts unless the act is intended to and does result in starvation or exposure to the elements or some other similar type of harm to the victims.

Secondary sources and case law from the international tribunals interpreting crimes against humanity seem to support the idea that extensive destruction of property may constitute "other inhumane acts," although the law is a bit muddled. For example, the International Law Commission has long interpreted "other inhumane acts" to mean that the act in question must in fact cause injury to the physical or mental integrity, health, or well-being of the victim.⁹⁸ In line with this interpretation, courts have found that the elements of this crime are met when there is:

- (i) the occurrence of an act or omission of similar seriousness to the other enumerated acts [of a crime against humanity]; (ii) the act or omission caused serious mental or physical suffering or constituted a serious attack on human dignity; and (iii) the act or omission was performed deliberately by the accused or a person for whose acts and omissions he bears criminal responsibility.⁹⁹

Thus, international tribunals have concluded that enforced disappearance,¹⁰⁰ sexual violence,¹⁰¹ mutilation, beatings and other

⁹⁶ *Id.* ¶ 342.

⁹⁷ See, e.g., *id.* ¶ 340 (explaining how the Commentary to Article 147 of Geneva Convention IV describes the "offence of willfully causing great suffering as referring to suffering which is inflicted without ends in view for which torture or biological experiments are carried out").

⁹⁸ See, e.g., 1996 Draft Code of Crimes, art. 18(k), U.N. Doc. A/51/10 (1996) (providing that "other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm" constitute a crime against humanity).

⁹⁹ Prosecutor v. Vasiljevic, Case No. IT-98-32, Judgment, ¶ 234 (Nov. 29, 2002).

¹⁰⁰ Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-T, Judgment, ¶ 566 (Feb. 26, 2001).

types of severe bodily harm,¹⁰² and forcible transfer of groups of civilians constitute "other inhumane acts."¹⁰³ To date, however, no cases have held that extensive destruction of property constitutes the crime of other inhumane acts.

4. APPLICATION OF WAR CRIMES, CRIMES AGAINST HUMANITY, AND DOMESTIC IRAQI LEGAL PRECEDENTS TO THE DESTRUCTION OF PROPERTY IN AD-DUJAYL

At first blush, the above-described legal rules seem to indicate that the IHT's decision to convict Hussein for the crime against humanity of "other inhumane acts" was not judicially sound. This is so because the destruction of property in Ad-Dujayl did not result in starvation, exposure to the elements, or some other similar type of harm to the victims. Such a conclusion, however, is incorrect for many reasons.

First, Hussein's motive for destroying the infrastructure, orchards, and date palms in Ad-Dujayl was purely malicious. He wanted to teach the residents of Ad-Dujayl (and by extension all of Iraq) a lesson—those who opposed his regime would face dire consequences.¹⁰⁴ Because Hussein had such a wanton motive when destroying Ad-Dujayl's property, the IHT's decision to convict him under Article 12(1)(j) complied with the ICTY's teachings in *Prosecutor v. Naletilic and Martinovic* that a conviction for other inhumane acts is proper when the defendant's motive arises out of "punishment, revenge or out of sadism."¹⁰⁵

¹⁰¹ See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 688 (Sept. 2, 1998) (holding that "[s]exual violence falls within the scope of 'other inhumane acts'").

¹⁰² See *Prosecutor v. Niyitegeka*, Case No. ICTR 96-14-T, Judgment, ¶ 465-67 (May 16, 2003) (holding that "the acts committed with respect to Kabanda [decapitation, castration, and piercing his skull with a spike] and the sexual violence to the dead woman's body [insertion of a sharpened piece of wood into her genitalia] are acts of seriousness comparable to other acts enumerated in the Article, and would cause mental suffering to civilians, in particular, Tutsi civilians, and constitute a serious attack on the human dignity of the Tutsi community as a whole").

¹⁰³ See *Prosecutor v. Krstić*, IT-98-33-T, Judgment, ¶ 523 (Aug. 2, 2001) (noting that "forcible displacement within or between national borders is included as an inhumane act under Article 5(i) defining crimes against humanity").

¹⁰⁴ See *supra* note 40 and accompanying text.

¹⁰⁵ *Prosecutor v. Naletilic & Martinovic*, IT-98-34-T, Trial Judgment, ¶ 340 (Mar. 31, 2003).

Second, Hussein's decision to destroy Ad-Dujayl's date palms, orchards, and infrastructure eliminated the victims' ability to earn a livelihood. This, in turn, put these people at a long-term disadvantage to lead a normal life as they struggled to support themselves for years following the attack against them. Given these facts, the IHT's conviction under Article 12(1)(j) also complied with the ICTY's requirement that the harm penalized as an "other inhumane act" result in a grave and long-term disadvantage to the victims.

Third, the character of what occurred in Ad-Dujayl is similar to the character of crimes that are typically outlawed in the war crimes context. As previously noted, Article 147 of the Fourth Geneva Convention—immediately criminalizing willful infliction of suffering—specifically criminalizes "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."¹⁰⁶ This crime, however, was not incorporated into the list of enumerated acts that constitute crimes against humanity. Stated differently, the Fourth Geneva Convention specifically criminalizes extensive destruction of property not justified by military necessity, while the drafters of the Rome Statute omitted that crime when setting forth the enumerated acts that might comprise a crime against humanity.

This gap placed the IHT in a difficult position. It could have charged Hussein for this crime under the crime against humanity of persecution, but doing so would have required the prosecution to prove that Hussein perpetrated the act with the intent to discriminate against the victims on racial, religious, or political grounds.¹⁰⁷ Had this occurred, the IHT would have had to acquit Hussein because Hussein (when destroying Ad-Dujayl's infrastructure, orchards, and date palms) did not intend to discriminate against the citizens of Ad-Dujayl because of their racial, religious, or political identity.¹⁰⁸ Rather, he intended to punish the citizens of Ad-Dujayl as a result of the failed assassination attempt that occurred against him there.

¹⁰⁶ Fourth Geneva Convention, *supra* note 69.

¹⁰⁷ See *Prosecutor v. Nahimana, Barayagwiza, & Ngeze*, Case No. ICTR 99-52-A, Judgment & Sentence, ¶ 1071 (Dec. 3, 2003) (holding that the crime of persecution "specifically requires a finding of discriminatory intent on racial, religious or political grounds").

¹⁰⁸ See *supra* note 28 and accompanying text.

To prevent this injustice, the IHT relied upon the catch-all provision of Article 12(1)(J) to charge and convict Hussein for his decision to destroy property in Ad-Dujayl. This decision was critical as it avoided the heightened mens rea requirement that would have attached had the Court charged Hussein with the crime against humanity of persecution. In accomplishing this goal, the Court was therefore able to hold Hussein accountable for actions that were intended to and did cause severe and deliberate harm to the citizens of Ad-Dujayl even though they did not occur during a military occupation or international armed conflict and even though these actions were not perpetrated with the intent to discriminate because the victims fell within a protected class.¹⁰⁹

In so holding, the Court corrected a gap in the context of a crime against humanity. If a state actor can suffer punishment for extensively destroying property without justification while occupying territory or while engaged in a military conflict, it seems to follow that this same person should suffer equal punishment for extensively destroying property without justification when perpetrating a wide-spread or systematic attack against a civilian population. This holding, although slightly expanding the existing jurisprudence of the crime against humanity of "other inhumane acts" was in accordance with the teachings of ICTY and ICTR regarding extensive destruction of property as a war crime. This is so because convictions for these actions as a war crime do not require any heightened mens rea requirement.¹¹⁰

Furthermore, Iraqi domestic law outlawed extensive destruction of property under paragraphs 477–80 of Iraq's Penal Code without reference to any heightened mens rea requirement.¹¹¹ Thus, when convicting Hussein for the crime against humanity of other inhumane acts for his decision to destroy the infrastructure, orchards, and date palms of Ad-Dujayl, the IHT held Hussein accountable for a both longstanding crime that existed in the war

¹⁰⁹ See *supra* notes 26, 28 and accompanying text.

¹¹⁰ See *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-T, Judgment, ¶ 346–47 (Feb. 26, 2001) (holding that "the elements for the crime of wanton destruction not justified by military necessity . . . are satisfied where: (i) the destruction of property occurs on a large scale; (ii) the destruction is not justified by military necessity; and (iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction").

¹¹¹ See *supra* note 79 and accompanying text.

crimes context and a long standing crime that existed under domestic Iraqi law.¹¹²

That Hussein did not possess any intent to discriminate against the citizens of Ad-Dujayl on the basis of their race, religion, or political affiliation does not negate the severity of this crime—particularly in view of the cultural context in which it occurred and that the Court noted in its opinion—or the tremendous suffering that this criminal act caused its victims. Accordingly, the IHT's holding on this point appeared to expand slightly the existing case law with respect to the crime against humanity of other inhumane acts but did so in a manner that was fully consistent with international criminal and domestic Iraqi legal principles. Other courts and tribunals would be well-served to follow this important holding when analyzing similar conduct occurring as part of a widespread or systematic attack against a civilian population.

5. CONCLUSION

The IHT's decision to convict Hussein for the crime against humanity of other inhumane acts represented a departure from the teachings found in the general jurisprudence of the international criminal tribunals. This departure, however, is consistent with the underlying principles set forth in international humanitarian law as well as the teachings of domestic Iraqi law. In fact, the IHT's holding on this point seems to have remedied a discrepancy in the way that the law of war crimes criminalizes extensive destruction of property without justification, and the way the law of crimes against humanity treats this conduct.

Prior to the IHT's holding, the crime against humanity of excessive destruction of property was criminalized solely under the enumerated act of persecution.¹¹³ Because a conviction for the crime against humanity of persecution requires that a defendant intend to harm a class of people based upon their political, racial, national, ethnic, cultural, religious, gender, or other grounds, a conviction for excessive destruction of property could not lie unless the destruction was done to harm a protected class of

¹¹² Because these crimes were outlawed under domestic law (with the mens rea that would otherwise attach if charged as domestic crimes), the IHT also avoided any problem with respect to *nullum crimen sine lege* when it relied upon Article 12(1)(f) to convict Hussein for destroying the infrastructure, orchards, and date palms of Ad-Dujayl.

¹¹³ See *supra* note 77 and accompanying text.

individuals.¹¹⁴ This stands in contrast to the manner in which the Geneva Conventions treat the crime of excessive destruction of property. Under the Conventions, extensive destruction of property is criminal so long as it is not justified by military necessity.¹¹⁵ There is no heightened mens rea requirement as is required to convict someone for the crime of persecution.

This means that the IHT, by utilizing the catch-all provision of "other inhumane acts" to convict Hussein for the crime against humanity of excessive destruction of property—as opposed to relying on the crime of persecution—ensured that this particular act—destroying people's homes, orchards, and date palms—was punishable because it was done as part of a widespread and systematic attack against a civilian population and done without justification. By not relying upon the crime against humanity of persecution to convict Hussein of this crime, the IHT circumvented the heightened mens rea requirement. In charging the crime this way, the court ensured that Hussein's actions were penalized in the exact same way as exists under Article 147 of the Fourth Geneva Convention (which does not have a heightened mens rea requirement) and under Paragraphs 477–80 of the Iraqi Penal Code (which also do not have a heightened mens rea requirement).¹¹⁶

The end result of the IHT's decision to charge and convict Hussein under the crime against humanity of other inhumane acts is that the law of crimes against humanity was amended effectively to add a tenth enumerated act that now qualifies as criminal: extensive destruction of property. Moreover, because Hussein's conduct was criminal under domestic Iraqi law and—had it occurred during an international armed conflict or an occupation—under the Fourth Geneva Convention, the Court did not violate *nullum crimen sine lege* and—in fact—ensured that all three bodies of law operate in harmony with one another.

¹¹⁴ See *supra* note 78 and accompanying text.

¹¹⁵ See *supra* note 76 and accompanying text.

¹¹⁶ See *supra* notes 79–81 and accompanying text.