

Federal Law Academy International Criminal Law Course Day 3

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International Criminal Law in Practice: Lessons from Iraqi Prosecutions

Module 3

International Criminal Law in Domestic Courts: Iraqi High Tribunal (IHT)

- IHT Statute passed by Iraq's Parliament in 2005
 - Mandate to prosecute Saddam-era crimes perpetrated between 1968 and 2003
 - First Iraqi domestic law on international crimes
 - Based on the Rome Statute (ICC)
 - IHT judges were instructed to use international criminal law jurisprudence as precedents
- Major cases include: Dujail, Anfal and Halabja (Marsh Arab)

IHT: Four Categories of Crimes

- Three are the same as ICC crimes:
 - Genocide
 - Crimes against humanity
 - War crimes
- Rape and sexual violence are included under each category of crimes
- The 4th category covers specific crimes under Iraqi law:
 - Examples: intervention in the judiciary, wastage or spoilage of natural resources, and aggression

Global Justice Center Training of IHT Judges 2006



Janet and Judge Mohammed, Chief IHT Judge in the Anfal Genocide Case and Author of Opinion Supporting Women's Rights - December 8, 2007



Anfal Widows who testified

**Arriving
in Iraq
with
CAROL**



Why was the Iraq Tribunal Historic?

- First tribunal prosecuting international crimes in the Middle East
- Provides for domestic prosecution of international crimes
- Prosecution of President/Commander in Chief
- Prosecution of Former Chief Judge
- First time destruction of property found to be a crime against humanity
- First prosecution of rape under international criminal law in the Middle East
- Historic example of successful dialogues between civil society and judges



Focus on the IHT

**THE PUBLIC PROSECUTOR IN
THE HIGH IRAQI COURT ET AL.
V. SADDAM HUSSEIN AL
MAJEED, ET AL. (DUJAIL)**

Prosecuting Saddam Hussein: Heads of State as War Criminals

- Heads of state have increasingly been prosecuted for international crimes since the 1990s
- Saddam Hussein was the first former head of state to be prosecuted in his country for international crimes

Dujail: The Facts

- July 1982: shots were fired at a convoy containing Saddam Hussein (Iraqi dictator 1968-2003) in the town of Al-Dujail
 - Residents of Dujail were Shia Muslim who were persecuted by Hussein's Sunni Muslim Ba'athist regime
- Oct.-December 1982: Hussein ordered reprisals against the citizens of Dujail (civilians)
 - Razed farmland & orchards and confiscated land
 - Arrested and detained in a camp approx. 800 citizens, many tortured
- 1984: "148" survivors of the camp tried and sentenced to death by the Revolutionary Court

Dujail: Who & What

- Hussein and seven co-defendants indicted for crimes against humanity (CAH), including under a theory of joint criminal enterprise (JCE)
- Charges against Hussein, CAH:
 - Murder
 - Deportation & forced transfer
 - Deprivation of liberty
 - Enforced disappearance
 - Torture
 - Other inhumane acts (destruction of property)
- Charges against Judge Al-Bandar, CAH:
 - Murder

Convicting Saddam Hussein: Joint Criminal Enterprise

Elements of JCE

1. A group;
2. A common plan, design, or purpose which amounts to or involves committing a crime; and
3. Accused must participate in the common design involving the perpetration of the crime.

Applied to Hussein

1. Ba'ath Party;
2. Plan to kill the residents of Dujail as malicious revenge for attempted assassination;
3. As head of the Ba'ath Party, Hussein was aware of the plan and his acts, including explicit orders, furthered the criminal purpose to kill Dujail's residents.

Convicting Saddam Hussein: Crimes against Humanity

Elements of a Crime against Humanity (Chapeau)

1. Widespread or systematic attack;
2. Directed against a civilian population;
3. With knowledge.

Applied to Dujail

1. Land confiscation, razing of orchards and home demolitions were a part of the “sweeping and methodical assault”;
2. Against the civilian citizens of Dujail;
3. Hussein ordered (in writing), personally oversaw and made statements about the underlying acts.

Convicting Saddam Hussein: Crimes against Humanity

Elements of “Other Inhumane Acts”

1. Willfully inflicted great suffering, or serious injury to body or mental or physical health;
2. Act is of a similar nature and gravity of the act) to other CAH in the IHT statute; and
3. Perpetrator has awareness of factual circumstances that establish character of act.

Applied to Dujail

1. Razing and confiscations resulted in severe hardship to Dujail’s residents, extreme harm and damages;
2. Acts are similar to other CAH resulting from the same facts: forcible displacement, execution, imprisonment and torture; and
3. Hussein knew the sweeping nature of the acts, knew his conduct was a part of it & intended for it to be collective punishment for Dujail’s citizens.

Convicting Saddam Hussein: Rejected Defenses

- IHT rejected head of state immunity for Hussein on two grounds
 - “The crimes that this trial is concerned with are crimes against humanity, and anyone who has perpetrated such crimes may not claim immunity”
 - Waiver by creation of the IHT
- IHT rejected the assertion that the acts were necessary to stop an immediate and imminent danger posed by Dujail’s residents

Dujail Trial: IHT Advances ICL

- Example of IHT advances:
 - Hussein, a former President, convicted in his national court for international crimes
 - Hussein conviction of willful destruction of property as a crime against humanity under category of “other inhumane acts”
 - First
 - By prosecuting as “other inhumane acts”, IHT Judges avoided the heightened intent requirements of the crime against humanity of persecution

Convicting Judge Al-Bandar: Court Orders as International Crimes

- Germany (1948)
 - 16 Judges and lawyers were convicted of crimes against humanity for furthering Nazi policy
- Japan (1946)
 - Judges associated with a sham prosecution of US POWs were convicted of war crimes
- Argentina (2015)
 - Judge Manlio Martinez convicted of crimes against humanity for crimes during Pinochet's dictatorship
- Judge Al-Bandar (2005)
 - Chief judge of the Iraqi Revolutionary Court
 - Issued death sentences for 148 Dujail residents in a sham trial

Convicting Judge Al-Bandar: Joint Criminal Enterprise

Elements of JCE

1. A group;
2. A common plan, design, or purpose which amounts to or involves committing a crime; and;
3. Accused must participate in the common design involving the perpetration of the crime.

Applied to Al-Bandar

1. Ba'ath Party;
2. Plan to kill the residents of Dujail;
3. Chief judge of the Revolutionary Court, personally oversaw the trial, conviction and verdict to kill 148 Dujail residents.

Convicting Judge Al-Bandar: Crimes against Humanity

Elements of a Crime against Humanity of Murder

1. Willfully killed one or more persons;
2. Widespread or systematic attack;
3. Directed against a civilian population; and
4. With knowledge.

Applied to Al-Bandar

1. Al-Bandar issued the order to execute surviving Dujail residents in a sham trial;
2. Trial and subsequent murders were a part of the large-scale and methodical assault against Dujail residents;
3. Victims were civilian owners of orchards and farms, as well as their children and wives; and
4. As chief judge of the Revolutionary Court, he was aware that his actions were a part of the wide-scale against the civilian residents of Dujail.

Convicting Al-Bandar: Rejected Defenses

Al-Bandar's Defenses

- Complied with all legal procedures
- Based his conviction on evidence that the residents were responsible for an assassination attempt on President Hussein
- Took into account in the conviction that the attempt took place during the Iraq-Iran War

Court Findings

- Trial could not have followed proper criminal procedures:
 - Many of the victims sentenced to death without evidence and without criminal exhibits
 - Court room only large enough to hold 96 persons—but 148 persons sentenced
 - Whole trial took two-weeks and included official holidays
 - At most, two shooters responsible for the “attack” on Hussein

Convicting Al-Bandar as a Judge

- IHT Judges stated major factual issue before them was whether the trials of the Dujail survivors were real or illusory
- IHT found the trial was a sham, including that:
 - Many of the victims sentenced to death without evidence and without criminal exhibits
 - Court room only large enough to hold 96 persons—but 148 persons sentenced
 - Whole trial took two-weeks and included official holidays
 - No attempt was made to verify age of defendants resulting in children being hung
- Rejected Al-Bandar's defense that he complied with all legal procedures

Than Shwe's Acts: International Crimes?

- Than Shwe
 - Prime Minister & Commander-in-Chief
 - Oversaw & responsible for the commission of international crimes
 - Armed conflicts against ethnic armed groups which were carried out with rampant human rights abuses
 - Repression of political freedoms, the systematic imprisonment of political dissidents, including monks involved in the Saffron Revolution
 - Under ICL, Burma's constitutional amnesty cannot shield Than Shwe from prosecution

Judicial Orders by Burma Judges: Crimes against Humanity?

- Court orders were key to SPDC's criminal acts
 - *Junta* judges can be held liable for murder, torture and false imprisonment
- Ex. 2008 Trials—Saffron Revolution
 - Sham trials
 - Sham charges and convictions
 - Secret hearings in Insein Prison
 - Defendants had no legal representation, could not meet with attorneys in private, could not question witnesses
 - Attorneys who challenged unfair trials were arrested and prosecuted
 - 280 political activists, including monks and nuns, were convicted and sentenced in 2008
 - Subjected to degrading conditions and inhuman treatment
 - Tortured
 - 84 year old Buddhist nun convicted of pornography
 - U Thilavantha, deputy abbot of a monestary

QUESTIONS?