

WHEN PHOTOS ARE GENOCIDE: MAKING A CLAIM UNDER THE ALIEN TORT STATUTE FOR THE ABU GHRAIB PRISON SCANDAL

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It is the ambiguity of our ideas of representation that lies at the heart of the Abu Ghraib torture scandal and prevents us from seeing how the act of photographing naked detainees would in itself have been seen as rape by Iraqis, even aside from the specific use intended for the photographs . . . [I]t is our distinction between physical rape and “virtual” rape that may be questionable.¹

[T]he horror of what is shown in the photographs cannot be separated from the horror that the photographs were taken.²

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2. Susan Sontag, *Regarding the Torture of Others*, N.Y. TIMES, May 23, 2004, available at <http://donsaim.com/nytimes.sontag.htm>.

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I. INTRODUCTION

In late 2003, shocking pictures surfaced from Iraq's Abu Ghraib prison documenting American soldiers' sexual abuse and torture of Iraqi prisoners in their custody.³ A short time after their release, in a special report for the *Guardian*, military historian Joanna Bourke cautioned viewers "not to see these sadistic images as unique . . . [as] torture and sexual violence are endemic in wartime."⁴ However, the documentation of torture and abuse at Abu Ghraib has added a new and distinct form to 'routine' wartime atrocities. With the aid of relatively inexpensive digital cameras, computers, and the internet, soldiers are able to produce, capture, and replay each victim's torture and sexual violation and to create powerful visual messages about American domination and destruction of Iraqi people for a potentially worldwide audience. The emergence of the Abu Ghraib photos has raised a question that has lain dormant since the pornography debates that raged twenty years ago: might the production and dissemination of photos of actual torture and sexual violence be a harm independent of the documented violence?

Beginning in the late 1970's and continuing into the 1980's, the United States was caught in debate over how pornography should be defined and whether it should be protected or sanctioned. Harms associated with the business were investigated and documented by a wide range of government actors. At the federal level, the Presidential Commission on Obscenity and Pornography in 1970 and the Attorney General's Commission on Pornography in the mid-1980's investigated and issued reports on the topic. At the local level, municipal and state hearings on pornography took place in Minneapolis, Indianapolis, Los Angeles, and throughout Massachusetts

3. See Joan Walsh, *The Abu Ghraib Files*, March 14, 2006, at http://www.salon.com/news/abu_ghraib/2006/03/14/introduction/index.htm.

4. Joanna Burke, *Torture as Pornography*, *The Guardian*, May 7, 2004, available at <http://www.guardian.co.uk/women/story/0,3604,1211261,00.htm>.

during the 1980's.⁵ The legal debate focused on whether pornography was *speech* – and therefore afforded the broad constitutional protections of the First Amendment – or *action* – and subject to proscription similar to sexual harassment and prostitution.⁶ *American Booksellers, Inc. v. Hudnut*⁷ settled the legal debate by holding that pornography was speech subject to full First Amendment protections.

Two developments in national and international jurisprudence re-open the question as to whether the production and dissemination of images of violence might be actionable in some circumstances in U.S. courts under international law. First, a 1980 opinion in *Filartiga v. Pena-Irala*⁸ revived the dormant Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, a federal law originally passed in 1787, as a means to hold violators of international law civilly liable in U.S. courts. Subsequently, *Prosecutor v. Ferdinand Nahimana Jean-Bosco Barayagwiza Hassan Ngeze* (the “*Media Case*”),⁹ a case decided by the International Criminal Tribunal for Rwanda (ICTR) in 2003, held owners and managers of media outlets criminally liable for genocide, direct and public incitement to genocide, and crimes against humanity for messages purveyed through those outlets. Though ICTR jurisdiction is limited to claims arising from the Rwandan conflict during 1994,¹⁰ its decisions may be persuasive in determining the scope, contours, and definition of international law. Taken together, ATS and the *Media Case* may create an opportunity to hold the photographers and distributors of the Abu Ghraib photos civilly liable in the United States for violation of international law.

In this paper, I will examine recent case law to determine whether a prisoner in Abu Ghraib who had been sexually abused and had the abuse photographed and circulated within the prison could bring a civil claim against the producers and distributors of those images in U.S. courts for violation of international law, even though similar images, taken within the United States, might be protected by the First Amendment. Also, I will examine what elements a plaintiff would have to meet to make such a claim under the Alien Tort Claims Act.

5. See CATHARINE MACKINNON AND ANDREA DWORKIN, IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS (1997).

6. See CATHARINE MACKINNON, ONLY WORDS 22 (1999). In contrast to the *Hudnut* holding and definition of pornography, some legal scholars have contended that pornography is speech *and* action.

7. *American Booksellers, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

8. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

9. *Prosecutor v. Nahimana, Barayagwiza, and Ngeze* (The Media Case), Case No. ICTR-99-52-T, Judgment, ¶ 8 (Dec. 3, 2003).

10. See Statute for the International Criminal Tribunal for Rwanda, art. 1 (2004), available at <http://196.45.185.38/ENGLISH/basicdocs/statute.html>.

II. AMERICAN BOOKSELLERS, INC. V. HUDNUT

In its decision in *American Booksellers, Inc. v. Hudnut*, the Seventh Circuit Court of Appeals struck down as unconstitutional an Indianapolis ordinance making coerced participation in, forced consumption of, trafficking in, and assault arising from pornography, acts for which pornography producers and vendors could be civilly liable.¹¹ The Indianapolis ordinance had defined pornography as a form of gender discrimination involving “the graphic sexually explicit subordination of women [men, children, or transsexuals], whether in pictures or in words.”¹² Unlike anti-obscenity laws, which prohibit all sexually explicit and offensive speech, the Indianapolis ordinance targeted those sexual depictions that dehumanized persons or showed them experiencing sexual pleasure from violent and unwanted physical acts.

The Court found the ordinance overbroad and held it impermissibly prohibited graphic sexual depictions based on the viewpoint expressed.¹³ The Court adopted a two-part response to appellant’s contention that women were harmed in the production and consumption of pornography: (1) that any sexual torture occurring during the production of pornographic films was independently proscribable and not specific to, nor necessary for, the materials’ production¹⁴ and (2) that images of harm are not actually harm.¹⁵ The argument that “pornography is not an idea; pornography is the injury”¹⁶ was rejected; though the Court acknowledged pornography’s harmful socializing effects and ability to influence social relations in the workplace, the home, and on the streets.¹⁷ Still, it maintained that moving depicted gendered subordination from idea to action and harm required the viewer’s “mental intermediation.”¹⁸ In so doing, the Court effectively placed responsibility, and potential liability, for pornography’s harmful effects on those that received and acted on its messages rather than the purveyors of the message. Having separated the speech from the harm, the Court was able to narrowly analyze the ordinance in terms of its impact on freedom of speech. The ability to advocate and influence, it found, was the heart of what the First Amendment was created to protect: “[i]f the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation that would be the end of speech.”¹⁹ Given this, the

11. *American Booksellers, Inc. v. Hudnut*, 771 F.2d 323.

12. *Id.* at 324.

13. *Id.* at 328.

14. *Id.* at 330.

15. *Id.*

16. *American Booksellers, Inc. v. Hudnut*, 771 F.2d at 330.

17. *Id.* at 329.

18. *Id.*

19. *Id.*

Court held the ordinance unconstitutionally limited the First Amendment rights of creators and distributors of pornography in holding them civilly liable for the acts their product conditioned its audience to perform.

III. THE ALIEN TORT STATUTE

The Alien Tort Statute or the Alien Tort Claims Act (“ATS”, “ATCA” or the “Act”),²⁰ reads, “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²¹ Little used since its passage, the law was revived in the 1980 case, *Filartiga v. Pena-Irala*,²² in which two Paraguayan citizens sued a former Paraguayan policeman for torturing and murdering a family member. Since *Filartiga*, the Act has been used to hold foreign governments, corporations, and individuals civilly liable in U.S. courts for violations of the law of nations or U.S. treaty.

Almost all ATCA litigation has taken place at the federal district and appellate court levels. The Supreme Court has reviewed an ATCA claim only once in *Argentine Republic v. Amerada Hess Shipping Corp.*²³ The claim in *Argentine Republic*, brought by Liberian corporations against the Liberian government, was dismissed on sovereign immunity grounds. Interpretation of the scope and application of the Act has varied across circuits, but there has been consensus on the basic requirements for bringing suit under ATCA. To sue under ATCA, plaintiffs must establish three elements to their claim; that the claim is: “(1) by aliens, (2) alleging torts, [and] (3) committed in violation of the law of nations.”²⁴ While it is clear that the first element refers to any person who is not a citizen of the United States of America, the second and third elements require some elucidation.

A. What Is A “Tort”?

In reasoning out the meaning of ‘tort’ under the ATS, the *Filartiga* court queried: “Does the ‘tort’ to which the statute refers mean a wrong ‘in violation of the law of nations’ or merely a wrong actionable under the law of the appropriate sovereign state?”²⁵ The court determined that a tort, within the meaning of ATCA, was definable by the law of nations,²⁶ meaning that an ATCA tort was a violation of international law.

20. 28 U.S.C. § 1350 (2006).

21. *Id.*

22. *Filartiga v. Pena-Irala*, 630 F.2d 876.

23. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 429 (1989).

24. *See Miner v. Begum*, 8 F. Supp. 2d 643, 644 (S.D. Tex. 1998); *Filartiga v. Pena-Irala*, 630 F.2d at 887; *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343, 348 (S.D. Tex. 1989).

25. *Filartiga v. Pena-Irala*, 630 F. 2d at 882.

26. *See id.*

Courts have differed on what rises to the level of a tort under the Act. The Ninth Circuit Court of Appeals wrote in *Hilao v. Estate of Marcos*²⁷ that under ATCA, “actionable violations of international law must be of a norm that is specific, universal, and obligatory.”²⁸ The district court in *Mendonca v. Tidewater, Inc.* set a higher standard, finding that the Act applies, “only to shockingly egregious violations of universally recognized principles of international law . . . [which] enjoy universal acceptance in the international community.”²⁹ Across circuits, courts have differed on whether to apply the *Mendonca* standard – requiring that the plaintiff demonstrate a “shockingly egregious” violation of a universal, though perhaps only hortatory, norm – or the Ninth Circuit’s “specific, universal, and obligatory” standard, which merely requires violation without specifying a necessary degree of violation.

Generally, violations of *jus cogens* law, such as torture, genocide, slavery, and piracy, have been recognized as torts under ATCA.³⁰ *Jus cogens* law is comprised of “peremptory norms” or “universally-recognized norms of international law.”³¹ The District Court for the Southern District of New York has written that “[s]tates may exercise universal jurisdiction over acts committed in violation of *jus cogens* norms, [which] . . . extends not merely to criminal liability but may also extend to civil liability . . . [for] *jus cogens* violations may entail not only state but individual responsibility.”³² On the other hand, violations of non-*jus cogens* law have often not been considered torts for the purposes of ATCA. Courts have rejected claims that the following actions are torts under ATCA: violating the U.S. Constitutional First Amendment right to free speech;³³ threatening the ‘right to life’ and the ‘right to health’ by polluting;³⁴ causing

27. *Hilao v. Estate of Marcos* (In re Estate of Marcos, Human Rights Litig.), 25 F.3d 1467 (9th Cir. 1994).

28. *Hilao*, 25 F.3d at 1475; *see also* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987) (stating that an “‘international tort’ must be one which is definable, obligatory (rather than hortatory), and universally condemned”).

29. *Mendonca v. Tidewater, Inc.*, 159 F. Supp. 2d 299, 302 (E.D. La. 2001) (quoting *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999)).

30. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 305 (S.D.N.Y. 2003); *United States v. Matta-Ballesteros*, 71 F.3d 754, 764 n.5 (9th Cir. 1996), *as amended*, 98 F.3d 1100 (1996) (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993)).

31. *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 305-06; *see also* Nat’l Coalition Gov’t of Burma v. Unocal, Inc., 176 F.R.D. 329, 345 n.18 (C.D. Cal. 1997) (quoting *Siderman de Blake*, 965 F.2d at 714).

32. *Id.* at 306.

33. *See* *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (“a violation of the First Amendment right of free speech does not rise to the level of such universally recognized rights and so does not constitute a ‘law of nations’”).

34. *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 160 (2nd Cir. 2003), *republished at* 414 F.3d 233, 254 (2d Cir. 2003).

disappearance, inflicting cruel, inhuman and degrading treatment;³⁵ expropriating a citizen's property;³⁶ and aiding and abetting.³⁷

B. The Law of Nations

What constitutes the 'law of nations', also referred to as international or customary international law, under ATCA? Two standards emerge from ATCA jurisprudence, best exemplified in the *Tel-Oren*³⁸ opinion. Agreeing on outcome but not on reasoning, D.C. Court of Appeals judges Edwards and Bork presented two distinct visions of ATCA application.³⁹ Judge Edwards described an evolving international law "construed as it exists today among the nations of the world," conferring "fundamental rights upon all people," and allowing "adjudication of the rights already recognized by international law" in federal courts under ATS.⁴⁰ In contrast, Judge Bork advocated a much narrower definition of the law of nations under the Act, including only the three violations envisioned at the time of ATCA's passage: "1. violation of safe-conducts; 2. infringement of the rights of ambassadors; and 3. piracy."⁴¹ Further, fearing that an expansive view of ATCA would run contrary to the framers' original intent and place the U.S. in the untenable position of standing in judgment of other nations' actions, Judge Bork maintained that ATCA did not grant plaintiffs a cause of action for violations of the law of nations.⁴² Instead, to enforce "principles of international law in a federal tribunal," plaintiffs had to show that Congress had made "an explicit grant of a cause of action" under the specified international law.⁴³

Though most courts have adopted Judge Edwards' and the *Filartiga* court's vision of an evolving international law standard that can be adjudicated under ATCA in federal courts, when applying a *Filartiga* standard, the question remains as to what sources a court should look when defining international law. Courts have specified that international law can be drawn from,

35. Forti v. Suarez-Mason, 672 F. Supp. at 1542-43.

36. Chuidian v. Phillipine Nat'l Bank, 912 F.2d 1095, 1105 (9th Cir. 1990).

37. In re S. African Apartheid Litig., 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004) ("this Court declines . . . [to find] that aider and abettor liability is recognized under the ATCA").

38. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).

39. *Id.* at 777.

40. *Id.*

41. *Id.* at 813.

42. *Id.*

43. *Id.* at 801; *but see* Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996) ("the 'committed in violation' language of the [ATCA] suggests that Congress did not intend to require an alien plaintiff to invoke a separate enabling statute as a precondition to relief under the [ATCA]").

[I]nternational conventions, whether general or particular, establishing rules expressly recognized by the contesting states; . . . international custom, as evidence of a general practice accepted as law; . . . the general principles of law recognized by civilized nations; . . . [and] judicial decisions and the teachings of the most highly qualified publicists of the various nations, . . . [as well as] interpretations of international law of superior courts.”⁴⁴

To determine whether a plaintiff had a valid claim, the court in *In re Estate of Marcos Human Rights Litig.* looked at “whether there is an applicable norm of international law, whether it is recognized by the United States, what its status is, and whether it has been violated.”⁴⁵ The degree of acceptance a particular treaty or convention has in the U.S. and among first-world nations has also been considered determinative, in some instances, of international law. An international law is most likely to be recognized as such by courts in the United States if it has been ratified by the U.S. Congress. If unratified, the law may be accepted as international law in some courts but it is less likely that it will be seen as such across circuits. In *In re S. African Apartheid Litig.*, the Court did not recognize the Apartheid Convention as international law because it “was not ratified by a number of major world powers, including the United States, Great Britain, Germany, France, Canada, and Japan” and “without the backing of so many major world powers . . . is not binding international law.”⁴⁶ However, the California Central District Court upheld an ATCA claim under the United Nations Convention on the Law of the Sea (UNCLOS) even though UNCLOS had not been ratified. The court reasoned that “although the United States has not ratified UNCLOS, it has signed the treaty; moreover, the document has been ratified by 166 nations and thus appears to represent the law of nations.”⁴⁷ The Court therefore determined that an ATCA claim could be brought under UNCLOS because it reflected international customary law.⁴⁸

C. Who Can Commit A Tort?

Courts have also looked at the defendant accused of committing the tort when evaluating whether a tort has been committed. Though always acknowledged as applying to states, jurisprudence prior to ATCA varied on whether individuals could be held liable under international law. In *Willy Dreyfus v. August Von Finck and Merck, Finck & Co.*, the Second Circuit

44. Presbyterian Church of Sudan, 244 F. Supp. 2d at 304-06.

45. *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 502 (9th Cir. 1992).

46. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 550.

47. *Sarei v. Rio Tinto Plc*, 221 F. Supp. 2d 1116, 1161-62 (C.D. Cal. 2002).

48. *Id.* at 1162.

Court of Appeals held that the law of nations did not apply to individuals.⁴⁹ According to the Second Circuit Court, the law of nations “deals primarily with the relationship among nations rather than among individuals.”⁵⁰ Four years after the *Dreyfus* decision, the Second Circuit reversed itself in *Filartiga*, finding that ATCA granted jurisdiction over a claim brought by a Paraguayan citizen against a former Paraguayan official for the torture and murder of a family member.⁵¹ In *Kadic v. Karadzic*,⁵² the Second Circuit pushed the boundaries of ATCA even further, holding that private citizens could both have their rights violated under international law and violate international law:

We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.⁵³

Since *Kadic*, courts have also held that corporations may be liable under ATCA.⁵⁴

IV. THE MEDIA CASE

*“The power of the media to create and destroy fundamental human values comes with great responsibility. Those who control such media are accountable for its consequences.”*⁵⁵

From April 6, 1994 to July 4, 1994, extremist members of Rwanda’s Hutu ethnic group mobilized the mass murders of nearly 800,000 minority Tutsis and members of the Hutu opposition and forced thousands more to flee their homes and the country.⁵⁶ The International Criminal Tribunal for Rwanda (ICTR) was established by United Nations (U.N.) statute to prosecute individuals accused of committing violations of international humanitarian law in Rwanda between January 1, 1994 and December 31, 1994.⁵⁷

49. *Dreyfus v. Von Finck*, 534 F.2d 24 (2d Cir. 1976).

50. *Id.* at 30-31.

51. *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984).

52. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

53. *Id.* at 239.

54. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

55. Nahimana, Case No. ICTR-99-52-T at ¶ 8.

56. Recent Case, *Prosecutor v. Nahimana, Barayagwiza, and Ngeze (The Media Case)*, Case No. ICTR-99-52-T, Judgment, ¶ 8 (Dec. 3, 2003), 117 HARV. L. REV. 2769, 2769 (2004) [hereinafter Recent Case].

57. *See* Statute for the International Criminal Tribunal for Rwanda, *supra* note 10.

In *The Prosecutor v. Ferdinand Nahimana Jean-Bosco Barayagwiza Hassan Ngeze*, Trial Chamber I of the ICTR held Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze guilty of genocide, among other crimes,⁵⁸ for their control and ownership of Radio Television Libre des Mille Collines (*RTLM*), a popular Rwandan radio station, and *Kangura*, a Rwandan newspaper, which operated during and around the time of the genocide, respectively. Genocide is defined under the ICTR statute as:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁵⁹

This definition is identical to the definition of genocide found in the Rome Statute and the Convention on the Prevention and Punishment of Genocide (CPPG), as discussed in Section V below.

A. *The Accused*

Ferdinand Nahimana and Jean-Bosco Barayagwiza were “respectively ‘number one’ and ‘number two’ in the top management”⁶⁰ of *RTLM*, a privately owned radio station⁶¹ which broadcast in Rwanda during 1993 and 1994. Nahimana was an *RTLM* founder, Steering Committee member, and Program Committee chair who “played an active role in determining the content of *RTLM* broadcasts, writing editorials and giving journalists texts to read”⁶² in addition to holding a supervisory role over all station activities. Barayagwiza was also a member of *RTLM*’s Steering Committee and sat as chair of the station’s Legal Committee.⁶³ Together, they oversaw the financial and editorial activities of the station as well as acting as *RTLM*’s official representatives in meetings with government officials.⁶⁴

58. See Recent Case, *supra* note 56, at 2769.

59. See Statute for the International Criminal Tribunal for Rwanda, art. 2, *supra* note 10.

60. Nahimana, Case No. ICTR-99-52-T at ¶ 79.

61. *Id.* at ¶ 30.

62. *Id.* at ¶ 31.

63. *Id.* at ¶ 79.

64. *Id.* at ¶ 79.

Hassan Ngeze was “owner, founder and editor”⁶⁵ of *Kangura*, a Rwandan political journal which published news articles and editorials from May 1990 to 1995 (though not continuously during that period).

B. RTLM

In its factual findings, the Trial Chamber stated that, beginning with its initial broadcasts in 1993, RTLM enjoyed a widespread popularity among both Rwandan civilians and militia members⁶⁶ and was the “medium of mass communication with the broadest reach in Rwanda.”⁶⁷ The judgment records that “[a]lmost everyone had a radio and listened to RTLM” and that “radios and weapons were the two key objects to be seen at the [militia] roadblocks.”⁶⁸ In its broadcasts, RTLM promoted Tutsi ethnic stereotypes and hatred and identified Tutsis as the enemy.⁶⁹ The broadcasts, particularly during the genocide, “called explicitly for the extermination of the Tutsi ethnic group,”⁷⁰ announced the names of Tutsi individuals and their families (many of whom were subsequently killed as a result), and encouraged hiding Tutsi civilians “to return home or to go to the roadblocks” and then tracked their movements on air, in many cases, facilitating their subsequent murders.⁷¹

C. *Kangura*

Founded in 1990, *Kangura* published no issues between April and July 1994, when the Rwandan genocide was at its height,⁷² though its “fear-mongering and hate propaganda” were considered to have “paved the way for genocide in Rwanda.”⁷³ The Trial Chamber characterized several of the publication’s articles as having a two-fold aim: “the promotion of fear and hatred among the Hutu population of the Tutsi minority and the mobilization of the Hutu population against them.”⁷⁴ The judgment refers to two particular articles, “The Ten Commandments of the Hutu” and “The Appeal to the Conscience of the Hutu” as particularly egregious examples of the journal’s hate-mongering. In the former, *Kangura* warned readers of Tutsi ambitions to re-take control and to kill Hutus.⁷⁵ It urged Hutus to “wake up!” and to use every available means to prevent “the enemy from

65. Nahimana, Case No. ICTR-99-52-T at ¶ 11.

66. *Id.* at ¶ 24.

67. *Id.* at ¶ 29.

68. *Id.* at ¶ 24.

69. *Id.* at ¶ 26.

70. Nahimana, Case No. ICTR-99-52-T at ¶ 26.

71. *Id.* at ¶ 28.

72. *Id.* at ¶ 10.

73. *Id.* at ¶ 64.

74. *Id.* at ¶ 16.

75. Nahimana, Case No. ICTR-99-52-T at ¶ 12.

launching a fresh attack.”⁷⁶ Both articles drew on and manipulated Rwandan history to paint the Tutsis as a ruthless, money-hungry community;⁷⁷ depicted Tutsi women as spies and emissaries used to gather information and to gain important political and economic positions for Tutsi men by fostering sexual or romantic relationships with Hutu men;⁷⁸ and cast “as a traitor any Hutu man who enters into business with Tutsi partners, invests his or state money in a Tutsi company, or lends to or borrows from a Tutsi.”⁷⁹ The Trial Chamber found that *Kangura* used language in its articles, “clearly intended to fan the flames of resentment and anger, against the Tutsi population.”⁸⁰

D. Genocide

The Trial Chamber found Barayagwiza and Nahimana guilty of genocide for their roles at *RTLM* under Article 6(3) and Article 6(1) respectively of the ICTR statute.⁸¹ The defendants were found criminally liable both for their use of the radio station to promote anti-Tutsi hatred and violence as well as their failure to use their authority to prevent genocidal programming.⁸² Though the defendants did not make decisions with regard to “each particular broadcast of *RTLM*,” they set editorial policy for *RTLM* programming which condoned and advocated genocidal propaganda and actions. In addition, they knew “the hate being spewed by these programs was of concern and failed to take effective measures to stop their evolution into the deadly weapon of war and genocide that was unleashed in full force after 6 April 1994.”⁸³ Indeed, Nahimana’s claim that he had not been with the radio program during the genocide was dismissed by the Chamber, which found that though he,

may have been less actively involved in the daily affairs of *RTLM* after 6 April 1994, . . . *RTLM* did not deviate from the course he had set for it before 6 April 1994. The programming of *RTLM*

76. *Id.* at ¶ 12.

77. *Id.* at ¶ 13.

78. *Id.* at ¶ 13.

79. *Id.* at ¶ 14.

80. Nahimana, Case No. ICTR-99-52-T at ¶ 17.

81. *Id.* at ¶ 82, 83. This section of the Statute for the International Criminal Tribunal for Rwanda, *supra* note 10, art. 6.1, reads: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.”

82. Nahimana, Case No. ICTR-99-52-T at ¶ 81.

83. *Id.* at ¶ 80.

after 6 April built on the foundations created for it before 6 April 1994.⁸⁴

In explaining the guilty decision, the Chamber found that *RTLM* broadcasts 1) promoted hatred and contempt of the Tutsi ethnic group through ethnic stereotyping;⁸⁵ 2) called for listeners to “seek out and take up arms against the enemy . . . defined to be the Tutsi ethnic group and Hutu opponents;”⁸⁶ 3) gave the names of Tutsi individuals, their families, and Hutu opponents thereby causing in several instances their subsequent murders;⁸⁷ 4) encouraged “Tutsi civilians to come out of hiding and to return home or go to the roadblocks, where they were subsequently killed in accordance with the direction of subsequent *RTLM* broadcasts tracking their movements;”⁸⁸ and 5) called for the extermination of the Tutsi populace.⁸⁹

Hassan Ngeze was also found guilty of genocide under Article 6(1) of the ICTR Statute⁹⁰ for his role in *Kangura*. Though no issues were published during the height of the Rwandan genocide, the Chamber found that, “[t]hrough fear-mongering and hate propaganda, [*Kangura*] paved the way for genocide in Rwanda . . . [by] whipping the Hutu population into a killing frenzy.”⁹¹ A *Kangura* cover which “answered the question ‘What weapons shall we use to conquer the Inyenzi [Tutsi] once and for all?’ with the depiction of a machete”⁹² was found to be “a call for the destruction of the Tutsi ethnic group”⁹³ and cited in the Trial Chamber’s judgment as an example of the journal’s contributing role in the genocide.

V. HOLDING PRODUCERS AND DISTRIBUTORS OF THE ABU GHRAIB PHOTOS CIVILLY LIABLE UNDER ATCA

Two questions emerge from review of ATCA and the above cases. First, does the *Media Case* establish a precedent of international law under which producers and distributors of the Abu Ghraib photos could be held civilly liable under the Alien Tort Statute for harms caused by the photographing and distributing the Abu Ghraib photos? Second, what would a plaintiff need to show to make that claim under ATCA?

84. *Id.* at ¶ 82.

85. *Id.* at ¶ 26.

86. *Id.* at ¶ 63.

87. Nahimana, Case No. ICTR-99-52-T at ¶ 28.

88. *Id.* at ¶ 28.

89. *Id.* at ¶ 26.

90. *Id.* at ¶ 85.

91. *Id.* at ¶ 64.

92. Nahimana, Case No. ICTR-99-52-T at ¶ 17.

93. *Id.* at ¶ 64.

A. *Creating Precedent: Does the Media Case Establish a Precedent Under International Law With Which To Hold the Producers and Distributors of the Abu Ghraib Photos Civilly Liable Under ATCA for Violation of International Law?*

The *Media Case* might give serve as precedent providing basis for an ATS claim of genocide against producers and distributors of the Abu Ghraib photos.⁹⁴ While the *Hudnut* decision found the production and distribution of pornography protected from civil liability by the First Amendment, a federal court would not necessarily be prevented from holding a defendant civilly liable for the production and distribution of the Abu Ghraib photos under ATCA. As the cause of action did not occur in the United States, First Amendment protections would not apply and the *Hudnut* precedent would not control. Furthermore, should a genocide claim be brought under ATCA for the production and circulation of the Abu Ghraib photos, the international character of the law to be applied gives the *Media Case* important precedential value as it is a recent case and the sole instance in which this law has been applied to mediatic acts. I have chosen to focus on a potential claim for genocide, a crime for which the *Media Case* defendants were found guilty, in order to best show the parallels between the *Media*

94. In several cases, U.S. courts have looked to international judgments as persuasive indicators of whether a non-jus cogens rule has become international law within the meaning of ATCA. For example, in *Presbyterian Church of Sudan*, the District Court cited the Third Restatement of Foreign Relations Law in finding that the “judgments and opinions of international judicial and arbitral tribunals” are accorded “‘substantial weight’ . . . [when] determining whether a rule has become international law.” *Presbyterian Church of Sudan*, 226 F.R.D. at 478. Moreover, if the law of nations is composed of ‘substantive principles,’ as described in the *Filartiga* opinion, 577 F. Supp. at 863, then certainly judgments of international courts, while not law themselves, are important guideposts for understanding how those principles apply in a real-life context and may set precedent for their interpretation.

However, at least two courts have held that ICTR judgments are *not* international law within the meaning of ATCA. The Court in *In re South African Apartheid Litigation* refused to recognize judgments of international tribunals and courts as international law, writing: “The International Criminal Tribunals and rulings pursuant thereto, besides dealing with criminal and not civil matters, are not binding sources of international law.” *In re South African Apartheid Litig.*, 346 F. Supp. 2d at 549-50.

The Second Circuit Court of Appeals has also rejected arguments that judgments of international tribunals are binding or reflective of international law. In *Flores*, the Court found that neither the International Court of Justice nor the European Court of Human Rights “is empowered to create binding norms of customary international law.” *Flores*, 343 F.3d at 169. The European Court of Human Rights was deemed a regional court, “only empowered to ‘interpret’ and ‘apply’ the rules set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . an instrument applicable only to its regional States parties – not to create new rules of customary international law.” *Id.* at 170.

However, unlike the claims brought in *In re South Africa* and *Flores* (for, respectively, aiding and abetting and interference with right to health), which international tribunals would have been one of few international sources to recognize as international law violations.

Case and a potential case brought under ATCA for the Abu Ghraib photos.⁹⁵

Genocide is a *jus cogens* violation of international law recognized by the United States through its ratification of the Convention on the Prevention and Punishment of Genocide (“CPPG” or the “Convention”)⁹⁶ in 1988,⁹⁷ as well as by international courts and legislative bodies. The Convention, passed by the United Nations General Assembly in 1948⁹⁸ and ratified by 133 countries in total,⁹⁹ prohibits genocide whether committed by state officials or private individuals; during war or peacetime.¹⁰⁰ When it ratified the CPPG, the U.S. maintained reservations and understandings to the document; which include not being subject to the jurisdiction of any international tribunal for a claim brought against it under the Convention without its consent and that intent within the definition of genocide refers to *specific* intent.¹⁰¹ Though the U.S. reservation prevents a claim for genocide being brought against it in an international court or tribunal without its consent, there is nothing to prevent a plaintiff from bringing such a claim in U.S. federal court against American soldiers and officials. The Rome Statute, establishing the International Criminal Court and to which the United States, along with 139 other countries (including all of the “major world powers” referred to in the *In re S. African* opinion cited above with the exception of Japan¹⁰²), is a signatory, also recognizes genocide as a

95. Natalie L. Bridgeman, *Human Rights Litigation under the ATCA as a proxy for Environmental Claims*, YALE HUM. RTS. & DEV. L.J. (2003) available at http://www.accessmylibrary.com/coms2/summary_0286-23417032_ITM.

The use and creation of photos of sexual violence as torture could arguably also give rise to a claim for torture; proscribed in the Geneva Convention, the Universal Declaration of Human Rights, and the UN Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, for this paper, I have chosen to look only at those crimes which were addressed in the *Media Case*.

96. Office of the High Commissioner for Human Rights, *Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948, available at http://www.unhchr.ch/html/menu3/b/p_genoci.htm.

97. Office of the High Commissioner for Human Rights, *Convention on the Prevention and Punishment of the Crime of Genocide*, art. 2 & 3, available at http://www.unhchr.ch/html/menu3/b/p_genoci.htm.

98. *Id.*

99. See Office of the High Commissioner for Human Rights, *Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948, available at <http://www.unhchr.ch/html/menu3/b/treaty1gen.htm>.

100. *Id.* at art. 1 & 4.

101. See Office of the High Commissioner for Human Rights, *Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948, available at <http://www.unhchr.ch/html/menu3/b/treaty1gen.htm>.

102. See Rome Statute of the International Criminal Court, Ratification Status, available at <http://www.un.org/law/icc/statute/status.htm>.

violation of international law.¹⁰³ Identical definitions of the violation are found in the ICTR statute, the CPPG, and the Rome Statute.

B. Making the Claim: What Would a Plaintiff Need to Show to Make an ATCA Claim Against Producers and Distributors of the Abu Ghraib Photos?

A plaintiff bringing a suit under ATCA against a producer or distributor of photos of prisoner-targeted sexual violence and torture in Abu Ghraib would need to meet the three basic elements of every ATS claim: 1) that she or he is an alien, 2) that international law prohibits the actions specified in the suit, and 3) that there has been a violation of that international law. If the plaintiff were one of the photographed Iraqi prisoners, an ATS claim for genocide for harms associated with the production and distribution of the Abu Ghraib photos would meet two of the three ATCA elements: a claim under international law brought by an alien. To meet the third element of an ATCA claim, the plaintiff would need to show that there had been a violation of the *jus cogens* norm proscribing genocide, to which there are three parts: (1) intent to destroy (2) a recognized group (3) by commission of an act enumerated in the definition.¹⁰⁴

In the *Media Case*, the judges looked at the defendants' "individual statements and acts, as well as the message they conveyed through the media they controlled"¹⁰⁵ to determine whether they had the requisite intent to destroy. The opinion states the "editorial policies evidenced by the writing of *Kangura* and the broadcasts of *RTL*M . . . constitute, in the Chamber's view, conclusive evidence of genocidal intent."¹⁰⁶ These editorial policies, "propagat[ed] ethnic hatred and call[ed] for violence."¹⁰⁷ The opinion points to *Kangura's* "graphic expression[s] of genocidal intent"¹⁰⁸ in presenting a picture of a machete after asking the question about what to do with the Tutsis as exemplary of this intent, as well as articles and editorials presenting Tutsis as evil and calling on readers to kill them.¹⁰⁹

Of the two media sources looked at in the *Media Case*, the Abu Ghraib photos are most similar to *Kangura* in terms of reach, method, and impact. Whereas *RTL*M had a national reach, was able to directly deliver its message, and had a potency derived from the immediacy with which it could touch potential perpetrators and victims, the Abu Ghraib photos,

103. Rome Statute of the International Criminal Court, art. 6, available at http://www.un.org/law/icc/statute/99_corr/cstatute.htm.

104. Bridgeman, *supra* note 95.

105. Nahimana, Case No. ICTR-99-52-T at ¶ 69.

106. *Id.* at ¶ 74.

107. *Id.* at ¶ 26.

108. *Id.* at ¶ 71.

109. *Id.* at ¶ 77.

initially circulated within the prison itself, were intended for a more circumscribed audience, crafted their message using visual imagery, and were more prospective in intended and actual impact (i.e., post-filming and circulation rather than simultaneously); similar to *Kangura*. Like *Kangura's* graphic depictions, the Abu Ghraib photos speak through allusion. The positions of the Iraqi prisoners, the postures and facial expressions of American soldiers as they engage in activities, and the acts of torture that are captured in the photos clarify the intent of the photographers and speak volumes about the intended relationship between soldiers and prisoners, appropriate treatment of prisoners, and the sexualized character of prisoners; though they do not carry *Kangura's* verbal commentary to direct and inform the viewer of their message. An intent to destroy is strikingly clear in the macabre photos of prisoner corpses. A photo of a dead Iraqi prisoner, face brutally beaten and body covered by a body bag, with a smiling female and male soldier giving the thumbs up over his face does not need words to convey advocacy of prisoner abuse and death to viewing soldiers. Similarly, videos capturing the rapes of underage Iraqi boys at the prison present a shockingly gruesome example of the soldiers' desire to destroy the bodies, minds, and spirits of the inmates and promote this purpose for their viewing audience. Photos of naked men – faces, stomachs, and genitals covered in feces – or of male prisoners wearing female underwear on their faces; of Iraqi female prisoners baring their breasts; and of naked male prisoners stacked naked atop each other, performing fellatio, or masturbating as a jeering female guard points at their genitals all convey a derisive disgust of the prisoners and advocacy of their torture that evidence a genocidal and specific intent to destroy.

Making a genocide claim under ATCA would further require showing that the alleged acts targeted members of a group recognized within the genocide definition on the basis of their group membership. Of the four categories specified under the CPPG – ethnic, racial, religious, and national – the affected prisoners could be grouped along ethnic, religious, or national lines. However, nationality is the photographed prisoners' unifying characteristic. Citing the International Court of Justice, the ICTR defined national groups in the following way in the *Akayesu* decision: “a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.”¹¹⁰ It is difficult to determine definitively by looking at the pictures whether the photographed abuse was targeted at the prisoners on the basis of their nationality and this aspect of the case has been less investigated by journalists. Attacks by American soldiers on Iraqis on the basis of their nationality have occurred since the U.S. occupation; the most widely covered incidents being the rape of a 14-year old Iraqi girl and the murder of

110. *Id.* at ¶ 512.

her family by four U.S. soldiers¹¹¹ and the Haditha massacre.¹¹² In order to make the genocide claim, a plaintiff would need to show that indeed the attacks were on this basis.

Lastly, to establish a genocide claim, a plaintiff would need to show that photographing and circulating photos of graphic sexual violence, torture, and death constitutes one of the acts enumerated under the genocide definition. Photographing violence and then disseminating those images can serve multiple purposes: erotic, documentary, informational, entertainment, commercial, extortionist, propagandistic, or exhortatory. Prior to the *The Prosecutor v. Jean-Paul Akayesu*,¹¹³ a case brought against a Rwandan regional official for sex crimes committed during the Rwandan genocide, the sexual violence depicted in the Abu Ghraib photos might not have seemed exemplary of a genocidal act. In *Akayesu*, Trial Chamber I of the ICTR issued a seminal judgment designating rape and other forms of sexual violence, in some circumstances, acts of genocide. The Chamber held that,

[R]ape and sexual violence . . . constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways to inflict harm on the victim as he or she suffers both bodily and mental harm.¹¹⁴

While the international community has focused on the *Akayesu* decision for its holding that rape may be an act of genocide, the opinion went much further in finding that other forms of sexual violence may also be genocide.¹¹⁵ Examples given in the opinion of sexual violence that constitutes genocide include forcing women to undress in front of large numbers of people, to march naked publicly, and to publicly perform exercises while naked.¹¹⁶

In light of *Akayesu*'s broad definition of genocide, the content of the photos discussed above, and the context of Abu Ghraib, where prisoner abuse is wide-ranging and commonplace, the photographing and circulation of the Abu Ghraib photos may constitute genocide for causing serious

111. See *Troops 'took turns' to rape Iraqi*, BBC NEWS, August 7, 2006, available at http://news.bbc.co.uk/2/hi/middle_east/5253160.stm.

112. See *In Haditha Killings, Details Came Slowly: Official Version is at Odds with Evidence*, THE WASHINGTON POST, June 4, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/06/03/AR2006060300710_pf.html.

113. *Akayesu*, Case No. ICTR-96-4-T.

114. *Id.* at ¶ 731.

115. *Id.* at ¶ 706.

116. *Id.* at ¶ 697.

mental harm, as proscribed in Article II (b) of the CPPG, as well as advocacy of murder of Iraqi prisoners, as proscribed in Article II (a) of the CPPG¹¹⁷ though, like radio broadcasting before the *Media Case* or rape before *Akayesu*, they differ greatly from a traditional notion of genocide. Just as forcing female detainees to publicly parade and perform exercises while naked was considered a genocidal act for the extreme and destructive mental anguish it caused the detainees in *Akayesu*, so too the filming and circulation of sexual violence committed against prisoners in Abu Ghraib is a forced public display of prisoners' nakedness and a sexual violation that may cause severe mental harm. Given the sexual mores of Iraq, photographing prisoners as they are being sexually violated is an additional and independent act of torture and sexual violence as it could have been used to further humiliate, coerce, or extort prisoners, fearful of public dishonoring. Bernard Haykel, a professor of Middle Eastern Studies at New York University, provided the following commentary on the Abu Ghraib incident in an article in the *New Yorker*:

Such dehumanization is unacceptable in any culture, but it is especially so in the Arab world. Homosexual acts are against Islamic law and it is humiliating for men to be naked in front of other men Being put on top of each other and forced to masturbate, being naked in front of each other—it's all a form of torture.¹¹⁸

For women prisoners at Abu Ghraib, photos documenting their sexual violation can provide evidence that could destroy their honor and their lives. A 2004 *Christian Science Monitor* article about Farah Azzawi, the first Iraqi woman to speak out about being sexually abused while in Abu Ghraib, highlighted this issue:

[I]n Iraq, where rumors alone can destroy a woman's reputation, the consequences of US detention are much more severe for women than for men. . . . [T]he real photos of abuse at Abu Ghraib gave all rumors, both true and false, instant credibility. . . . In Iraq, even a whisper of rape is enough to dishonor a woman - and her family. Sometimes families will even kill women who have been raped to "wash" the stain from the family name.¹¹⁹

117. Office of the High Commissioner for Human Rights, *Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948, available at http://www.unhchr.ch/html/menu3/b/p_genoci.htm.

118. Seymour Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, available at http://www.newyorker.com/archive/2004/05/10/040510fa_fact?currentPage=1.

119. Annia Ciezadl, *For Iraqi Women, Abu Ghraib's Taint*, CHRISTIAN SCIENCE MONITOR, May 28, 2004, available at <http://www.csmonitor.com/2004/0528/p01s02-woiq.html>

Photographing and distributing photos of sexual violation in such a context inflicts severe mental harm upon the photographed victims that may rise to the level proscribed under Article II(b) of the CPPG.

Likewise, the endorsement of Iraqi death seen in the photos of prisoner corpses may amount to advocacy to kill Iraqis similar to that expressed in *Kangura's* dramatic cover art and proscribed under Article II (a) of the CPPG. The photos of grotesquely brutalized corpses of prisoners and men stacked upon each other at Abu Ghraib with attendant soldiers making approving gestures were in many ways a call to the viewer to enact an equally violent end upon other Iraqi prisoners at Abu Ghraib. The question these images pose is similar to that written next to the machete on the *Kangura* cover: what shall we do to conquer the Iraqi? The answer is the dead body, approved by with a joking thumbs up and gleeful grins from the pictured soldiers. If indeed a call to murderous action, these photos and their dissemination may be proscribed by the CPPG, which defines killing members of a specified group, on the basis of their group membership, with the intent to destroy the group as an act of genocide.

Jurisprudence in the United States, epitomized in the *Hudnut* decision, has distinguished the photographing of (actual or dramatized) harm from the commission of harm. To the contrary, the *Media Case* court found that while,

[t]he nature of media is such that causation of killing and other acts of genocide will necessarily be effected by an immediately proximate cause in addition to the communication itself . . . this does not diminish the causation to be attributed to the media, or the criminal accountability of those responsible for its communication.¹²⁰

Certainly, given the cultural context and current conflict in Iraq that give particular potency to the images, the filming and circulation of the Abu Ghraib photos may be an injury that both is independent of the harm depicted in the photos and rises to the level of genocide; and for a which an ATCA claim may be brought.

VI. CONCLUSION

Nine soldiers were criminally charged following the U.S. publication of the first batch of photos from Abu Ghraib. Six struck plea bargains that excused them from going to prison. The remaining three defendants were given sentences of between three and ten years in prison. Private Lynndie England, perhaps the most recognized of all of the implicated soldiers and notorious for a now iconic photo in which she held a crawling, naked

120. Nahimana, Case No. ICTR-99-52-T at ¶ 65.

prisoner by a leash, was given a three-year prison sentence with the potential of early release after one and a half years for good behavior.¹²¹ Meanwhile, high-ranking military officials, the C.I.A., and other involved parties who have been implicated have yet to be tried or brought to justice, despite evidence that the treatment depicted in the photos was approved at the highest levels and was an approved form of interrogation.¹²² Many of the photographed victims may continue to suffer without legal recourse to hold American soldiers, officials, and other implicated persons accountable, as they are immune from prosecution in Iraq.¹²³

Unable to obtain justice at home, an Iraqi who suffered torture and abuse in Abu Ghraib and had it photographed and subsequently distributed may turn to ATCA to try to hold the perpetrators of the crimes fully accountable. If they do, the ICTR judgments in the *Media Case* may allow them to vindicate a claim not only for the torture exhibited in the photos but for another, as yet unrecognized crime: the production and circulation of the Abu Ghraib photos.

121. *England Sentenced to 3 Years for Prison Abuse*, Sept. 28, 2005, at <http://www.msnbc.msn.com/id/9492624>.

122. Joan Walsh, *The Abu Ghraib Files*, March 16, 2006, at http://www.salon.com/new/s/abu_ghraib/2006/03/14/introduction/.

123. Kate Randall, *Five more U.S. Soldiers charged in rape-murder atrocity in Iraq*, July 10, 2006 available at <http://www.wsws.org/articles/2006/jul2006/iraq-j10.shtml>.