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Ceding the High Ground: The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein

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**CEDING THE HIGH GROUND: THE IRAQI HIGH CRIMINAL COURT
STATUTE AND THE TRIAL OF SADDAM HUSSEIN**

M. Cherif Bassiouni & Michael Wahid Hanna†*

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INTRODUCTION

On July 1, 2004, Saddam Hussein and eleven of his co-defendants were brought before Ra'id Juhi, an Iraqi investigative judge, who was selected to preside over the initial hearing held in a specially designed courtroom in the U.S. military headquarters for Iraq, Camp Victory.¹ Millions of Iraqi, Arab, and international viewers watched the televised proceedings as the defendants were read indictments and instructed to submit a plea to the investigative judge.² The scene was reminiscent of an American television legal drama. This first appearance of Hussein following his capture by U.S. forces on December 13, 2003 established worldwide the strong and positive impression that a judicial process to reckon with the crimes and atrocities of the former regime had been launched. The Iraqi Criminal Procedure Law was conspicuously displayed on the left side of the table in front of Judge Juhi, symbolically asserting the Iraqi nature of the proceedings and their grounding in Iraqi law, in spite of the fact that the proceedings were carefully choreographed and carried out in the fashion of an arraignment before a U.S. court, a hearing wholly alien to the Iraqi legal system. While the legal infrastructure that would later undertake and support the much-anticipated and scrutinized al-Dujail³ and al-Anfal⁴ trials of Hussein and

¹ For a description of the proceedings, see John F. Burns, *Defiant Hussein Rebukes Iraqi Court for Trying Him: Tells Judge He is Still Lawful President*, N.Y. TIMES, July 2, 2004, at A1.

² See *id.*

³ The al-Dujail trial of former Iraqi leader, Saddam Hussein, and seven former Iraqi officials began on October 19, 2005. See Martin Asser, *Opening Salvoes of Saddam Trial*, BBC NEWS, http://news.bbc.co.uk/2/hi/middle_east/4356754.stm. The proceedings of the al-Dujail trial were completed on July 27, 2006, and a verdict was announced on November 5, 2006. *Timeline: Saddam Hussein Dujail Trial*, BBC NEWS, Dec. 4, 2006, http://news.bbc.co.uk/2/hi/middle_east/4507568.stm. Saddam Hussein and Barzan al-Tikriti,

the former intelligence chief and the half-brother of Hussein, were found guilty of willful killing, forcible deportation and torture and were sentenced to two ten-year prison terms and death by hanging; Awad Hamed al-Bandar, the head of the Revolutionary Court, was found guilty of willful killing and was sentenced to death by hanging; Taha Yassin Ramadan, the former vice president, was found guilty of willful killing, deportation, torture, and other inhumane acts and was sentenced to life imprisonment and to three other prison terms; former Ba'ath party officials from the al-Dujail region, 'Abdallah al-Ruwaid and 'Ali Dayih 'Ali, were found guilty of willful killing and sentenced to fifteen years in prison; former Ba'ath party official from the al-Dujail region, Mizher al-Ruwaid, was found guilty of willful killing and torture and was sentenced to fifteen years' and seven years' imprisonment. These crimes are crimes against humanity under the Iraqi High Criminal Court Statute. See Qanun al-Mahkama al-Jina'iya al-'Iraqiya al-'Uliya [Statute of the Iraqi High Criminal Court], No. 10 art. 19 Oct. 18, 2005, available at www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf (Iraq). The charges against Muhammad 'Azzawi 'Ali, a former Ba'ath party official from the region of al-Dujail, were dismissed due to a lack of evidence. For a discussion of the verdicts and the trial, see Marieke Wierda & Miranda Sissons, *Dujail: Trial and Error*, INT'L CENTER FOR TRANSITIONAL JUST., Nov. 2006, available at <http://www.ictj.org/images/content/5/9/597.pdf>; HUMAN RIGHTS WATCH, *JUDGING DUJAIL: THE FIRST TRIAL BEFORE THE IRAQI HIGH TRIBUNAL* (2006), available at <http://hrw.org/reports/2006/iraqi1106/>. The final written judgment of the trial court was released on November 22, 2006. al-Mahkama al-Jina'iya al-'Iraqiya al-'Uliya [The Iraqi High Criminal Court], al-Dujail Trial Opinion, available at <http://www.iraq-ihc.org/ar/doc/finalcour.pdf>, translated in *Grotian Moment: The Saddam Hussein Trial Blog*, English Translation of the Dujail Judgment (Dec. 2006), available at <http://www.law.case.edu/saddamtrial/dujail/opinion.asp>. An automatic appeal of the verdict was initiated and heard by a nine-judge Cassation Panel, which issued its opinion on December 26, 2006. al-Hay'a al-Tamyiziya, al-Mahkama al-Jina'iya al-'Iraqiya al-'Uliya [Cassation Panel, Iraqi High Criminal Court], al-Dujail Final Opinion, available at <http://www.iraq-ihc.org/ar/doc/ihtco.pdf>, translated in *Grotian Moment: The Saddam Hussein Trial Blog*, Unofficial English Translation of the Dujail Trial IHT Appellate Chamber Opinion (Dec. 2006), available at http://www.law.case.edu/saddamtrial/documents/20070103_dujail_appellate_chamber_opinion.pdf. The Cassation Panel upheld the sentences issued by the trial court except with respect to the life sentence issued to Taha Yassin Ramadan, which was remanded to the trial court for reconsideration in an attempt to impose the death penalty. *Id.* Hussein was handed over by U.S. authorities to the custody of the Iraqi National Police on December 30, 2006, and was executed by hanging several hours later. *Saddam Death 'Ends Dark Chapter*, BBC NEWS, Dec. 30, 2006, http://news.bbc.co.uk/2/hi/middle_east/6219861.stm. Following the outcry and controversy surrounding the execution of Hussein, President Jalal Talabani, an opponent of the death penalty, publicly called for a delay in the executions of Barzan al-Tikriti and Awad Hamed al-Bandar. *Talabani Seeks Executions Delay*, BBC NEWS, Jan. 10, 2007, http://news.bbc.co.uk/2/hi/middle_east/6248915.stm. Notwithstanding these public comments, al-Tikriti and al-Bandar were executed by hanging on January 15, 2007. See John F. Burns, *Confusion in Baghdad After Reports 2 Hussein Allies Were Hanged*, N.Y. TIMES, Jan. 15, 2007, at A7.

⁴ Proceedings against Hussein, Ali Hassan al-Majid, Hussein's cousin and the former head of the Northern Bureau of the Ba'ath party, and five other defendants in connection with the al-Anfal campaign began on August 21, 2006. See *No Saddam Plea at Genocide Trial*, BBC NEWS, Aug. 21, 2006, http://news.bbc.co.uk/2/hi/middle_east/5268900.stm. At the start of the proceedings, Hussein and al-Majid faced charges of genocide, war crimes, and crimes against humanity; Sultan Hashem Ahmed, military commander of the campaign, Sabir Abdul-Aziz al-Duri, director of military intelligence, Hussein Rashid al-Tikriti, deputy

other former high-level Ba'athist leaders was still in the process of being organized, these subtle and conflicting signs during the first public glimpse of court proceedings were indicative of the tensions inherent in the ill-advised attempt to blend two distinct legal systems in a single specialized institution. The shortcomings of this blending process bedeviled the work of the Iraqi High Criminal Court (IHCC),⁵ the successor of the Iraqi Special Tribunal (IST).⁶

These shortcomings do not in any way diminish the valid justifications for prosecuting Hussein and other former high-level Ba'athist leaders. The widespread and systematic violence and atrocities of the Ba'athist regime, which resulted in an estimated five hundred thousand deaths and hundreds of thousands of other victims of repression and abuse, necessitated broad-based post-conflict justice.⁷ The discussions, debates and proposals on this issue long predated the U.S.-led invasion of Iraq in March of 2003, evidencing the centrality of post-conflict justice to the future of Iraq.⁸

of operations for the Iraqi forces, and Farhan Mutlak al-Jubouri, head of military intelligence in Northern Iraq, faced charges of war crimes and crimes against humanity; Tahir Tawfiq al-Ani, governor of Mosul, faced charges of crimes against humanity. See Human Rights Watch, *The Anfal Trial: Questions and Answers*, <http://hrw.org/english/docs/2006/08/14/iraq13982.htm> (last visited May 18, 2007). Following Hussein's execution on December 30, 2006, trial court proceedings resumed on January 8, 2007, after a 21-day recess, at which point the charges against Hussein were dropped. *Timeline: Saddam Hussein Anfal Trial*, BBC NEWS, Jan. 8, 2007, http://news.bbc.co.uk/2/hi/middle_east/5272224.stm. For a description of the crimes and atrocities committed during the al-Anfal campaign of 1988, see HUMAN RIGHTS WATCH, *GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS* (1993) [hereinafter HUMAN RIGHTS WATCH, *GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS*], available at <http://www.hrw.org/reports/1993/iraqanfal/>.

⁵ While often referred to as the Iraqi High Tribunal by observers and U.S. government officials, the precise translation of the official name of this tribunal from the Arabic, *al-Mahkama al-Jina'iya al-'Iraqiya al-'Uliya*, is the Iraqi High Criminal Court.

⁶ See Statute of the Iraqi Special Tribunal art. 38, Dec. 10, 2003, 43 I.L.M. 231, reprinted in Coalition Provisional Authority Order No. 48, CPA/ORD/9 Dec. 2003/48 (Dec. 10, 2003) [hereinafter CPA Order No. 48], available at http://www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf.

⁷ See *Justice for Iraq: A Human Rights Watch Policy Paper*, HUMAN RTS. WATCH, Dec. 2002, <http://www.hrw.org/backgrounder/mena/iraq1217bg.htm> (describing the atrocities and crimes of the Ba'athist regime, including attacks against Iraqi Kurds, the forced expulsion of ethnic minorities from Kirkuk, repression of the Marsh Arabs and other Shi'a, general repression, large scale disappearances and other crimes); see also HUMAN RIGHTS WATCH, *GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS*, *supra* note 4; Press Release, The White House Office of the Press Secretary, Fact Sheet: Past Repression and Atrocities by Saddam Hussein's Regime (Apr. 4, 2003), available at <http://www.whitehouse.gov/infocus/iraq/news/20030404-1.html>.

⁸ For a discussion of the history of post-conflict justice proposals for Iraq from 1991 to 2004, see M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraqi Special Tribunal*, 38 CORNELL INT'L L. J. 327, 338-45 (2005) [hereinafter Bassiouni, *Post-Conflict Justice in Iraq*].

The symbolic importance of prosecuting Hussein and the senior leaders of the Ba'ath party for genocide, crimes against humanity, war crimes, and other crimes specified under Iraqi law cannot be underestimated in light of the history of impunity for such crimes that has long plagued the Arab world. At the very least, bringing Hussein to trial to answer for these crimes must be considered a significant achievement, the implications of which will likely be judged to be more significant in retrospect. However, the intrinsic value of prosecuting Hussein and his fellow regime leaders does not independently establish the legitimacy, credibility, and legacy of the IHCC.

The IHCC has faced many hurdles not of its own making, not the least of which have been a burgeoning insurgency and a nascent sectarian civil war that escalated after the establishment of the tribunal.⁹ The further fact that the tribunal was founded following a foreign invasion and turbulent occupation meant that the establishment and work of the tribunal has been scrutinized and has often been assessed based on the political convictions of observers to the proceedings and their judgments regarding the propriety of the Iraq war itself. Due to this highly politicized context, it was paramount that the establishment of the tribunal and the statutory authority on which the tribunal was established adhere to the rule of law and provide a basis for carrying out prosecutions in a manner that accorded with domestic and international legal standards and processes.

Many critics of the IHCC and its proceedings would never have been satisfied with this type of judicial process regardless of the propriety in which such an institution was established. However, even sympathetic observers who advocated prosecutions of former high-ranking Ba'athists have been forced to acknowledge and address the technical and legal infirmities associated with the IHCC and its statute (IHCC Statute). The historical importance of the IHCC for Iraq and the Arab world demanded that the statutory framework of the tribunal be established in a procedurally and substantively proper fashion that could withstand the stringent scrutiny that it has inevitably faced. While the IHCC Statute represents an improvement on its predecessor, the statute of the IST (IST Statute), the IHCC Statute does not

⁹ For discussions of the various types of violence and conflict that have plagued Iraq since March 2003, see NAT'L INTELLIGENCE COUNCIL, NATIONAL INTELLIGENCE ESTIMATE, PROSPECTS FOR IRAQ'S STABILITY: A CHALLENGING ROAD AHEAD (2007), *available at* http://www.dni.gov/press_releases/20070202_release.pdf (noting that "the term 'civil war' does not adequately capture the complexity of the conflict in Iraq" but also indicating that the term does accurately describe "key elements of the Iraq conflict"); INT'L CRISIS GROUP, IN THEIR OWN WORDS: READING THE IRAQI INSURGENCY (2006), *available at* <http://www.crisisgroup.org/home/index.cfm?id=3953&l=1>; INT'L CRISIS GROUP, THE NEXT IRAQI WAR? SECTARIANISM AND CIVIL CONFLICT (2006), *available at* <http://www.crisisgroup.org/home/index.cfm?id=3980&l=1>; NIR ROSEN, IN THE BELLY OF THE GREEN BIRD: THE TRIUMPH OF THE MARTYRS IN IRAQ (2005).

address many of the major flaws that plagued the IST Statute. This is particularly troublesome in light of the fact that one of the authors of this article personally briefed the Iraqi judges, investigative judges and prosecutors on the IST Statute's flaws and potential solutions to address these infirmities—recommendations that most of the Iraqi participants agreed with at the time.¹⁰

In assessing the shortcomings of the IHCC, some degree of blame must be apportioned to the constant meddling, undue pressure, and interference of certain Iraqi political actors. However, a much larger share of blame must be assigned to the occupation authorities who have shaped the contents and processes of post-conflict justice in Iraq.

All too often U.S. individuals assessing the situation in Iraq, whether politically or in connection with the IHCC, have done so with a limited perspective that never accounted for the realities of Iraqi culture and society. During the period prior to the launch of military operations in Iraq, officials in the White House and the Department of Defense (DOD) exhibited little interest in the issues of post-conflict justice. The Department of State's Future of Iraq Project's "Working Group on Transitional Justice" dealt extensively with post-conflict justice in Iraq for more than a year prior to the invasion. However, the National Security Council (NSC), ostensibly at the request of senior DOD leadership, did not circulate its final report. Thus, those in the administration who would later decide on post-conflict justice in Iraq never had the opportunity to study the work product of many thoughtful Iraqi expatriate jurists and other non-Iraqi experts on this vital issue. The politics of inter-agency rivalry prevailed over sound legal judgment. Instead, the NSC, in an unwise attempt to craft a Solomonic solution, handed over Iraqi post-conflict justice to the Department of Justice (DOJ). As a result, the Regime Crimes Liaison Office (RCLO), consisting of capable and dedicated U.S. prosecutors, was established to take over the task of crafting a post-conflict justice strategy, a project that the senior DOD leadership sought to keep out of the reach of the Department of State.

The DOJ staff, which had considerable experience in the American criminal justice system, lacked the legal and practical expertise necessary to deal with the realities of the Iraqi legal system. Those charged with dealing with post-conflict justice issues in Iraq did not know Arabic and had limited knowledge of the Iraqi legal system or its culture and traditions. The same criticism must also be directed at many of the non-governmental organizations (NGOs) and academics whose expertise and opinion were solicited with respect to post-conflict justice in Iraq. Almost all of those involved in either creating or critiquing the post-conflict justice framework, within the administration and in the non-governmental sector, were not well versed in

¹⁰ See *infra* note 91.

the history of the Iraqi legal system, its performance over the past thirty years, or the competency levels of those operating the criminal justice system. This did not deter policy-makers and commentators from opining on the proper course of action with respect to post-conflict justice and the manner in which the tribunal should be structured and administered.

The IHCC represents a good-faith effort to grapple with the grim legacy of Ba'athist rule and to carry out prosecutions through proper judicial channels and procedures. The IHCC also represents the first serious precedent in the Arab world for holding officials responsible for systematic repression and abuse. However, the institutional flaws of the process have needlessly compromised the courageous efforts of the many brave Iraqi participants in the IHCC who have risked their lives to bring about post-conflict justice and to help establish a rule of law culture in Iraq.

The critical appraisal that follows should not be read to support those Ba'athist leaders who have so far been brought to trial. Indeed, they deserve to be tried and punished for their crimes. It should also not be read in a way that is deprecatory of the genuine, good faith efforts of those Iraqis and Americans who have worked so hard to make post-conflict justice in Iraq a reality. Instead, it should be read as an honest and sincere legal critique. For one of the authors of this article, who has spent a lifetime involved in the evolution of international criminal justice and who sought to assist the Iraqis in shaping their approach to post-conflict justice, it is particularly painful to write about mistakes that were predicted and could have easily been avoided. In criticizing those whose ignorance and perhaps hubris led to the outcomes discussed below, there is only the sadness of regret. So much was at stake and so little was needed to put Iraqi post-conflict justice on par with the most successful historical precedents. A comprehensive post-conflict justice scheme based on legal legitimacy that drew upon the experiences and lessons of other international criminal prosecutions, war crimes trials, and post-conflict justice institutions would have been a great achievement in the history of international criminal justice. Along with rendering a sense of justice, such a process could have imparted closure for many of the victims and instilled hope for a future Iraqi society based on the rule of law.

I. THE LEGAL AND POLITICAL STRUCTURES IN IRAQ FROM MARCH 19, 2003 TO OCTOBER 15, 2005

On March 19, 2003, following months of furious diplomatic maneuvering that created a substantial degree of acrimony and discord in the international community and among many of the United States' allies, the United States commenced military strikes against Iraqi regime targets, lead-

ing to an invasion of Iraq by the United States and its coalition partners.¹¹ The initial phase of the invasion proceeded rapidly and resulted in the disintegration of the Ba'athist regime of Saddam Hussein.¹² The overwhelming U.S. military success led to the precipitous fall of the regime, but thereafter the Bush administration failed to implement a comprehensive plan to meet the needs of nation-building. President George W. Bush declared the end of major combat operations in Iraq on May 1, 2003,¹³ and this marked the beginning of the coalition's role as an occupying power.¹⁴ Initial responsibility for the provision of humanitarian assistance and the coordination of reconstruction in Iraq was assigned to the Office of Reconstruction and Humanitarian Assistance (ORHA) led by retired General Jay M. Garner.¹⁵

The United States and the United Kingdom sought to ground their occupation in international legal authority. In connection with these efforts, the United States and the United Kingdom delivered a letter to the United Nations Security Council on May 8, 2003, outlining their intention to establish an authority to exercise temporary governing power in Iraq.¹⁶ The letter

¹¹ Following the onset of military operations in Iraq, the United States claimed forty-nine countries were publicly committed to the coalition. Press Release, The White House, Who Are the Current Coalition Members? (Mar. 27, 2003), available at <http://www.whitehouse.gov/infocus/iraq/news/20030327-10.html>. The United States expansively defined the commitment of coalition members to include direct military participation or the provision of logistical and intelligence support, specialized chemical/biological response teams, over-flight rights, humanitarian and reconstruction aid, or political support. *Id.* However, the vast majority of troops that participated in the invasion were provided by the United States and the United Kingdom. For further discussion of the political, diplomatic and military buildup to the invasion and its ramifications for international relations, see GEORGE PACKER, *THE ASSASSINS' GATE* 39–135 (2005). The faulty assumptions and excessive unilateralism that marked the period prior to the invasion informed the direction of post-conflict justice efforts in Iraq as well.

¹² United States military forces first entered Baghdad, the Iraqi capital, on April 9, 2003. The DOD declared an end to major hostilities in Iraq on April 14, 2003. Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 202 (2005).

¹³ See President George W. Bush, Remarks by the President from the USS Abraham Lincoln (May 1, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/20030501-15.html>.

¹⁴ Determining the exact moment when the occupation began is perhaps impossible and not particularly helpful. As Adam Roberts points out, “[t]he occupation had already begun during the course of fighting, when progressively more areas of Iraq came under coalition control.” Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 609 (2006).

¹⁵ ORHA was established pursuant to National Security Presidential Directive 24, which was issued in January 2003. This document has not been released to the public. ORHA was later dissolved or subsumed by the Coalition Provisional Authority. See L. ELAINE HALCHIN, CONG. RESEARCH SERV., *THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES* 1–3 (2004).

¹⁶ Letter from Jeremy Greenstock, the Permanent Representative of the U.K., & John D. Negroponte, the Permanent Representative of the U.S., to the President of the Security

stated that the occupying powers had established the Coalition Provisional Authority (CPA).¹⁷ The United Nations Security Council then passed Resolution 1483, which acknowledged the letter sent to the United Nations Security Council and recognized the United States and the United Kingdom as temporary occupying powers under international law.¹⁸ The resolution affirmed the applicability of international humanitarian law and its binding obligations on the occupying powers until the establishment of an interim government.¹⁹ The CPA later issued Regulation No. 1, which established the CPA's basic authority and the scope of its obligations.²⁰ CPA Regulation No. 1 stated that the CPA was "vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war."²¹ The regulation also established that CPA Regulations and Orders would "take precedence over all other laws and publications to the extent such other laws and publications are inconsistent."²² CPA Regulation No. 1 did not identify how the CPA was established, and it is unclear under what

Council, U.N. (May 8, 2003). The U.N. document number for this letter is U.N. Doc. S/2003/538. *Id.*

¹⁷ *Id.* ("[T]he United States, the United Kingdom and Coalition partners, acting under existing command and control arrangements through the Commander of Coalition Forces, have created the Coalition Provisional Authority, which includes the Office of Reconstruction and Humanitarian Assistance, to exercise powers of government temporarily, and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction.").

¹⁸ S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (May 22, 2003). For a discussion of the relationship between Security Resolution 1483 and the authority of the occupying powers, see generally Thomas D. Grant, *The Security Council and Iraq: An Incremental Practice*, 97 AM. J. INT'L L. 823 (2003).

¹⁹ See S.C. Res. 1483, *supra* note 18, ¶ 5 (highlighting the obligations of the occupying powers under the Geneva Conventions of 1949 and the Hague Regulations of 1907).

²⁰ Coalition Provisional Authority Regulation No. 1, CPA/REG/16 May 2003/01 (May 16, 2003) [hereinafter CPA Reg. No. 1], available at http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf. As Gregory Fox has pointed out, the timing of events leading to the establishment of the CPA is unclear: "CPA Regulation No. 1 bears a date of May 16, 2003, but it makes reference to Security Council Resolution 1483, which was passed almost one week later on May 22, 2003. I will assume that Regulation No. 1 was back-dated for reasons not explained in official CPA documents." Fox, *supra* note 12 at 203 n.28; see also Roberts *supra* note 14, at 612 (noting that the contradiction of dates could have resulted from the fact that the principal terms of Resolution 1483 had been discussed for two weeks prior to its adoption).

²¹ CPA Reg. No. 1, *supra* note 20, § 1(2).

²² *Id.* § 3(1).

authority the establishment took place.²³ While questions have persisted with respect to the CPA's organizational status,²⁴ the civilian administrator of the CPA, Ambassador L. Paul Bremer III, reported to the DOD, and the CPA's activities in Iraq were closely linked to the DOD.²⁵

On July 13, 2003, the CPA issued CPA Regulation No. 6, which recognized the formation of the Iraqi Governing Council (IGC).²⁶ In accordance with Security Council Resolution 1483, the CPA established the IGC "as the principal body of the Iraqi interim administration, pending the establishment of an internationally recognized, representative government by the people of Iraq."²⁷ The members of the IGC were selected after intense negotiations among representatives of the major political, ethnic and religious groups of Iraq and the CPA.²⁸ The authority of the IGC to issue orders and directives and to appoint personnel was subject to the CPA's approval; as such, the IGC functioned as a subordinate local administrative body operating under the authority of an occupying power. Shortly after the establishment of the IGC, the United Nations Security Council adopted Resolution 1500, which welcomed "the establishment of the broadly representative Governing Council of Iraq."²⁹ While the actual powers of the IGC were fairly limited in scope and practice, Security Council Resolution 1511, adopted in October 2003, reaffirmed Security Council Resolution 1483's recognition of the CPA as the temporary occupying authority under international law and determined that the Governing Council and its ministers were "the principal bodies of the Iraqi interim administration, which, without

²³ See HALCHIN, *supra* note 15, at 4. Questions surrounding the organizational status of the CPA remained unclear throughout its existence as the temporary governing authority in Iraq. These questions persisted and impacted oversight of CPA expenditures. *Id.* at 8; see also Roberts, *supra* note 14 (discussing questions regarding the process by which the CPA emerged and was established). A federal lawsuit brought under the False Claims Act further clouded the issue. The federal district court ruled that that the authority was not a federal agency and was instead an international entity. Erik Eckholm, *On Technical Grounds, Judge Sets Aside Verdict of Billing Fraud in Iraq Rebuilding*, N.Y. TIMES, Aug. 19, 2006, at A6.

²⁴ See HALCHIN, *supra* note 15, at 35.

²⁵ See NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING* 4 (2004).

²⁶ Coalition Provisional Authority Regulation No. 6, CPA/REG/13 July 2003/06 (July 13, 2003), available at http://www.iraqcoalition.org/regulations/20030713_CPAREG_6_Governing_Council_of_Iraq_.pdf (establishing the Iraqi Governing Council).

²⁷ *Id.* § 1.

²⁸ Patrick E. Tyler, *Iraqis Set to Form an Interim Council with Wide Power*, N.Y. TIMES, July 11, 2003, at A1.

²⁹ S.C. Res. 1500, U.N. SCOR, 58th Sess., 4808th mtg., ¶ 1, U.N. Doc. S/RES/1500 (Aug. 14, 2003).

prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period.”³⁰

Perhaps the most significant task delegated to the IGC was the preparation of the Law of Administration for the State of Iraq for the Transitional Period, commonly referred to as the “TAL.”³¹ The TAL served as an interim constitution to guide the governance of Iraq following the restoration of sovereignty on June 30, 2004, and until legislative elections were held and a permanent constitution was drafted and adopted.³² The TAL was approved by the IGC on March 8, 2004 and published by the CPA.³³ Notwithstanding the approval of the TAL, the CPA continued to exercise the full mandate laid out in CPA Regulation No.1 and exercised a veto power over all IGC decisions and appointments.³⁴

The formal occupation of Iraq lasted for thirteen months and ended on June 28, 2004.³⁵ Security Council Resolution 1546, which was unani-

³⁰ S.C. Res. 1511, U.N. SCOR, 58th Sess., 4844th mtg., ¶ 4, U.N. Doc. S/RES/1511 (Oct. 16, 2003). As Gregory H. Fox has pointed out, “[n]either the CPA nor the Security Council described with any precision how the Governing Council would fit into the governing structure of the occupation. No public document states whether the CPA or the Governing Council (or both) would initiate changes in Iraqi law, whether the approval of both bodies was necessary, or how conflicts between the two bodies would be resolved.” Fox, *supra* note 12, at 205. However, as CPA Regulation No. 1 remained in effect even after the creation of the IGC, the CPA’s executive, legislative and judicial authority was undiminished. See CPA Reg. No. 1, *supra* note 20, § 1. Fox goes on to explain that unconfirmed sources endorsed this description of the CPA’s “‘veto’ power over all Governing Council actions.” Fox, *supra* note 12, at 206 (citing *Iraq’s Governing Council*, COUNCIL ON FOREIGN REL., May 17, 2004, <http://www.cfr.org/publication/7665/>).

³¹ LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD [Constitution] (Iraq), available at <http://www.iraqcoalition.org/government/TAL.html>.

³² While the TAL functioned as an interim constitution, the law was not referred to as such for important symbolic and political reasons. As His Excellency Feisal Amin al-Istrabadi, the Ambassador and Deputy Permanent Representative of Iraq to the United Nations, explains, “nothing became law in Iraq unless it was signed by U.S. Ambassador L. Paul Bremer, the civil administrator of Iraq. It was the Civil Administrator, not the IGC, who had the power to legislate. No Iraqi wanted the American Civil Administrator to sign a document called an Iraqi constitution. Thus the rather cumbersome title for what in fact is Iraq’s interim constitution.” Feisal Amin al-Istrabadi, *Reviving Constitutionalism in Iraq: Key Provisions of the Transitional Administrative Law*, 50 N.Y.L. SCH. L. REV. 269, 270 (2005) (footnotes omitted).

³³ NATHAN J. BROWN, TRANSITIONAL ADMINISTRATIVE LAW: COMMENTARY AND ANALYSIS (2004), <http://www.geocities.com/nathanbrown1/interimiraqconstitution.html>. An Annex to the TAL was approved by the IGC on June 1, 2004, prior to the IGC’s dissolution. The Annex attempts to define the structure and powers of the interim Iraqi government. ANNEX TO THE LAW OF ADMINISTRATION FOR THE STATE OF IRAQ IN THE TRANSITIONAL PERIOD [Constitution], available at http://www.cpa-iraq.org/government/TAL_Annex.html.

³⁴ See CPA Reg. No. 1, *supra* note 20.

³⁵ The much-anticipated deadline for the transfer of sovereignty was June 30, 2004, however, sovereignty was formally transferred in a surprise ceremony conducted by Bremer on

mously adopted by the United Nations Security Council on June 8, 2004, endorsed the transfer of sovereignty and approved a detailed plan for Iraq's transition to full sovereignty and future legislative elections.³⁶ Representatives of the major political, ethnic and religious groups of Iraq; the United States and the United Kingdom, as the principal occupying powers; and the Special Adviser on Iraq to the Secretary General of the United Nations, Lakhdar Brahimi undertook extensive negotiations to appoint the Interim Iraqi Government (IIG).³⁷ The negotiations process resulted in the appointment of a president, two vice presidents, a prime minister, and cabinet officers.³⁸ Under Resolution 1546, the IIG was appointed until such time as

June 28th. Adam Roberts, *The End of Occupation: Iraq 2004*, 54 INT'L & COMP. L.Q. 27, 37 (2005).

³⁶ S.C. Res. 1546, U.N. SCOR, 59th Sess., 4987th mtg., ¶ 1, 9, U.N. Doc. S/RES/1546 (June 8, 2004) (endorsing a June 30, 2004 transfer of sovereignty and authorizing a U.S.-led multinational force). In characterizing the transfer of sovereignty, Adam Roberts writes:

The new situation after June 28, 2004, was not just an occupation by another name. There were real differences, including the fact that the Interim Government had an explicitly recognized right to demand the withdrawal of the U.S.-led forces in Iraq. . . .

Yet the prospect that there would be continuing significant similarities with an occupation found reflection in certain provisions of the [Security Council] resolution [1546] about the application of international rules. A preambular clause inserted fairly late in the long negotiations over the text recognized the continued application of international humanitarian law The inclusion of this clause can be interpreted as one way of conceding that, even if the occupation was theoretically over, the likelihood remained that uses of force, perhaps even exercises of administrative authority, that closely resembled a situation of occupation would occur.

Roberts, *supra* note 35, at 617 (footnotes omitted).

³⁷ Brahimi was first invited to visit Iraq in February 2004 by the IGC to conduct a fact-finding mission to determine whether national elections could be held by June 30, 2004. The need for the visit was precipitated by Grand Ayatollah 'Ali al-Sistani's rejection of the caucus system that had been proposed by the CPA to create an Iraqi interim government and his subsequent demand that elections be held to choose the representatives of an Iraqi interim government. Brahimi determined that it would not be possible to hold national elections prior to the June 30, 2004 transfer of sovereignty. The Bush Administration later welcomed the intercession of the United Nations to help oversee the process by which the IGC would be dissolved and replaced by the IIG, which was appointed by the United Nations after consultations with the United States, the IGC and other Iraqis. See Steven R. Weisman & David E. Sanger, *U.S. Open to Plan That Supplants Council in Iraq*, N.Y. TIMES, Apr. 16, 2004, at A1.

³⁸ The major appointees in the Iraqi interim government were Dr. 'Iyad 'Allawi, Prime Minister, Sheikh Ghazi Ajil al-Yawar, President, Dr. Ibrahim Ja'afari, Deputy President, Dr. Rowsch Shaways, Deputy President, Dr. Barham Salih, Deputy Prime Minister, Hazem Sha'alan, Minister of Defense, Hoshiyar Zebari, Minister of Foreign Affairs, and Falah al-Nakib, Minister of Interior. For a description of the negotiations leading to the appointment of the IIG and the frustrations of Brahimi with the approach of the CPA, see Rajiv Chandrasekaran, *Envoy Bowed to Pressure in Choosing Leaders*, WASH. POST, June 3, 2004, at A10. In August 2004, a National Conference was held to elect a 100-member Interim National Council that largely served as an advisory body for the IIG. While over a thousand delegates attended the conference, significant political groups chose not to attend.

national elections could be held.³⁹ The resolution specified that national elections would be held on December 31, 2004, if possible, and in any event, no later than January 31, 2005.⁴⁰ As Adam Roberts points out, the resolution implicitly recognized the limitations of the IIG by acknowledging that it would “assume full responsibility and authority . . . for governing Iraq while refraining from taking any actions affecting Iraq’s destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office”⁴¹

During this interim period, the Independent Electoral Commission of Iraq was vested with exclusive jurisdiction over the organization, management and oversight of elections for the Transitional National Assembly (TNA), eighteen governorate councils and a Kurdistan National Assembly.⁴² The Commission oversaw the elections of January 30, 2005, which produced a 275-member TNA. The TNA was tasked with drafting a permanent constitution by August 15, 2005,⁴³ to be presented for general referendum no later than October 15, 2005.⁴⁴ Following the general referendum, elections for a permanent government were to be held by December 15, 2005.⁴⁵

The constitutional drafting process and the submission of a permanent constitution were marked by considerable confusion and procedural

³⁹ S.C. Res. 1546, *supra* note 36, ¶ 1.

⁴⁰ *Id.* ¶ 4(c).

⁴¹ Roberts, *supra* note 35, at 617 (quoting S.C. Res. 1546, *supra* note 36, ¶ 1). It should also be noted that this same limiting language was based on the text of the TAL Annex. ANNEX TO THE LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 1, available at http://www.cpa-iraq.org/government/TAL_Annex.html.

⁴² Richard Soudriette, *What Iraq’s Elections Teach Us About Democracy Building*, 32 HUM. RTS. MAG. 22, 23 (2005), available at <http://www.abanet.org/irr/hr/spring05/iraq.html>. The Independent Electoral Commission of Iraq comprised nine members including “seven voting members and two nonvoting members (the chief electoral officer and an international member).” *Id.* The Commission received training and assistance from various organs of the United Nations, including the United Nations Assistance Mission for Iraq (UNAMI), which was established pursuant to Security Council Resolution 1500. See S.C. Res. 1500, U.N. SCOR, 58th Sess. 4808th mtg., U.N. Doc. S/RES/1500 (Aug. 14, 2003).

⁴³ Under Article 61(F), the TNA could request a six-month extension of the constitutional drafting process. LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 61(F), available at <http://www.iraqcoalition.org/government/TAL.html>.

⁴⁴ Under Article 61(C) of the TAL, a referendum for a permanent constitution would be defeated if it were rejected by two-thirds of the voters in three or more of Iraq’s eighteen governorates. *Id.* art. 61(C). This provision was widely seen as protecting the interests of regional minorities, particularly the Kurds. U.S. INST. OF PEACE, IRAQ’S CONSTITUTIONAL PROCESS: SHAPING A VISION FOR THE COUNTRY’S FUTURE 2–3 (2005), available at <http://www.usip.org/pubs/specialreports/sr132.html>.

⁴⁵ LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 61(D), available at <http://www.iraqcoalition.org/government/TAL.html>.

irregularities, largely as a result of the Sunni Arabs' January 2005 election boycott⁴⁶ and the short timeframe in which a permanent constitution was to be drafted. The boycott resulted in the election of only seventeen Sunni Arabs to the TNA.⁴⁷ This figure is far below the proportion of Sunni Arabs in Iraq, estimated at fifteen to twenty percent of the general population.⁴⁸ In an attempt to remedy this lack of proportionate representation, the fifty-five-member Constitution Drafting Committee, formed in May of 2005 without substantial Sunni Arab representation, was expanded to include Sunni Arab political representatives. However, as Jonathan Morrow notes, "[i]t was late June [2005] before the fifteen Sunni Arab members of the committee had been invited onto the committee, and it was later still, July 8, before they attended their first meeting."⁴⁹ Under intense diplomatic pressure from the United States to meet the August 15th deadline, the committee did not request a six-month extension to continue the drafting process,⁵⁰ and the TNA was then forced to enact an ad hoc one-week extension when the committee was unable to agree upon a draft constitution.⁵¹ Following several additional ad hoc extensions,⁵² the committee approved a draft constitution on August

⁴⁶ Sunni Arab participation was further suppressed by the campaign of intimidation of Sunni Arab voters by insurgents. JONATHAN MORROW, *IRAQ'S CONSTITUTIONAL PROCESS II: AN OPPORTUNITY LOST*, U.S. INST. OF PEACE 6 (2005) available at <http://www.usip.org/pubs/specialreports/sr155.html>.

⁴⁷ *Id.*

⁴⁸ *Id.* Not surprisingly, the major Shi'a and Kurdish parties were over-represented in the TNA. The Shi'a coalition, the United Iraqi Alliance, held one hundred and forty seats, while the Kurdistan Alliance held seventy-five seats. The party led by interim Prime Minister 'Iyad 'Allawi held forty seats, with the remaining twenty seats held by nine smaller parties.

⁴⁹ *Id.* at 9. The role of the Sunni Arab representatives was further complicated by the July 19th assassination of two Sunni Arab committee members, which resulted in a temporary boycott of the committee by its Sunni Arab members. Edward Wong, *Sunnis Boycott Panel Drafting Charter for Iraq*, N.Y. TIMES, July 21, 2005, at A1.

⁵⁰ See *supra* note 43; see also Dexter Filkins & Joel Brinkley, *Iraqis Promising a Constitution by the Deadline*, N.Y. TIMES, Aug. 1, 2005, at A1.

⁵¹ The TNA extended the August 15 deadline by amending the TAL. While this amendment was technically legal under Article 3(A), which allows amendment of the TAL, the ad hoc nature of the amendment process raised questions as to the legality of the extension. This perception was further reinforced since the extension seemed to contradict the spirit of the text, which states that "[i]f the National Assembly does not complete writing the draft permanent constitution by 15 August 2005 and does not request extension of the deadline in Article 61(F) above, the provisions of Article 61(E), above, shall be applied." LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 6(G), available at <http://www.iraqcoalition.org/government/TAL.html>. Article 6(E) directs that the TNA be dissolved. *Id.* art. 6(E).

⁵² An ad hoc three-day extension was enacted on August 22nd and an indefinite extension was enacted on August 25th. See Morrow, *supra* note 46, at 2, 15. Additionally, it appears that these extensions were not enacted through a formal amendment of the TAL by the TNA, which would render such actions illegitimate. *Id.*

28th, which was then submitted to the TNA.⁵³ The October 15th constitutional referendum subsequently approved the constitution.⁵⁴

II. THE IRAQI SPECIAL TRIBUNAL

Prior to assessing the IHCC statute, it is helpful to review the establishment of the IST, the predecessor tribunal to the IHCC. The manner in which the IST was created and the extensive debate over its shortcomings and merits highlight the ways that the IHCC subsequently improved upon certain discrete flaws in the statute, yet failed to remedy the major deficiencies that plagued the IST and undermined its credibility.

A. *The Establishment of the Iraqi Special Tribunal*

The issue of post-conflict justice in Iraq and the debate about how to best reckon with the repressive legacy of the Ba'athist regime were topics that had been discussed extensively by Iraqi expatriates, international observers, non-governmental organizations, and others for many years prior to the invasion of Iraq.⁵⁵ After the U.S.-led coalition forces took control of

⁵³ NATHAN J. BROWN, CARNEGIE ENDOWMENT FOR INT'L PEACE, THE FINAL DRAFT OF THE IRAQI CONSTITUTION: ANALYSIS AND COMMENTARY (2005), available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=17423>. On September 13th and September 18th, modified drafts of the constitution were submitted to the TNA, and the final draft was then submitted to UNAMI for printing in preparation for the October 15th referendum. INT'L CRISIS GROUP, UNMAKING IRAQ: A CONSTITUTIONAL PROCESS GONE AWRY (2005), available at <http://www.crisisgroup.org/home/index.cfm?id=3703>; Morrow, *supra* note 46. Prior to the referendum, in an effort to gain greater support among Sunni Arabs, an agreement was reached with a number of Sunni Arab political parties to allow for amendment of the constitution following elections for a permanent National Assembly. The draft constitution was amended by the TNA to reflect this revision. Dexter Filkins, *After Changes to Iraqi Charter, Sunni Leaders Still Differ on Support*, N.Y. TIMES, Oct. 13, 2005, at A10.

⁵⁴ While the constitution was approved by sixteen of Iraq's eighteen governorates, two of the governorates rejected the constitution by more than two-thirds of the vote.

⁵⁵ For a brief summary of the evolution of thought on post-conflict justice in Iraq from the first Gulf War to the March 2003 invasion of Iraq by coalition forces, see Bassiouni, *Post-Conflict Justice in Iraq*, *supra* note 8, at 338–42. In the buildup to the U.S.-led military action, officials in the Department of State brought attention to the issue of post-conflict justice as part of the Department's Future of Iraq Project. This yearlong effort involved over one hundred Iraqi expatriates and a group of non-Iraqi experts. One of the authors of this article, M. Cherif Bassiouni, served as an expert to one of the project's working groups, the "Working Group on Transitional Justice," which comprised forty-one Iraqi expatriate jurists and a number of U.S. experts. In this capacity, Bassiouni prepared a comprehensive post-conflict justice plan in January 2003. See M. CHERIF BASSIOUNI, IRAQ POST-CONFLICT JUSTICE: A PROPOSED COMPREHENSIVE PLAN (2004) [hereinafter BASSIOUNI, IRAQ POST-CONFLICT JUSTICE: A PROPOSED COMPREHENSIVE PLAN], available at http://www.law.depaul.edu/institutes_centers/ihrli/downloads/Iraq_Proposal_04.pdf. For further discussion of the work of the Future of Iraq Project, see James Fallows, *Blind into Baghdad*, ATLANTIC MONTHLY,

Iraq, it became increasingly clear that some form of tribunal would have to be established to properly address the crimes and atrocities of the Ba'athist regime. The Bush administration, the United Nations, and the NGO community considered three major proposals for establishing a tribunal⁵⁶: (i) an international tribunal established by the United Nations Security Council similar to the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda;⁵⁷ (ii) a hybrid international and national tribunal similar to the Special Court for Sierra Leone, which was established jointly by the Government of Sierra Leone and the United Nations Security Council;⁵⁸ and (iii) a national Iraqi tribunal, which would receive some degree of international support and assistance. The Bush administration favored the last-named option.⁵⁹

The NGO community overwhelmingly favored some form of international tribunal to deal with the atrocities of the Ba'ath era.⁶⁰ Indicative of this outlook were meetings among NGOs held in New York during April and June 2003 to discuss post-conflict justice options for Iraq. The meetings were led by Human Rights Watch and the Open Society Institute, with informal participation by United Nations representatives, and the preference of most of the attendees was for an ad hoc international criminal tribunal established by the United Nations Security Council with jurisdiction over crimes committed against Iraqis, crimes committed during the Iran-Iraq War of 1980 to 1988, and crimes committed during the invasion and occupation

Jan.–Feb. 2004, at 56–58; Packer, *supra* note 11, at 124–26; David Rieff, *Blueprint for a Mess*, N.Y. TIMES MAG. Nov. 2, 2003, at 28; Eric Schmitt & Joel Brinkley, *State Department Study Foresaw Trouble Now Plaguing Iraq*, N.Y. TIMES, Oct. 19, 2003, at A1.

⁵⁶ These three proposals with respect to prosecuting former high-ranking Ba'athists mirrored the alternatives proposed by the Working Group on Transitional Justice. See BASSIOUNI, *IRAQ POST-CONFLICT JUSTICE: A PROPOSED COMPREHENSIVE PLAN*, *supra* note 55, at 48.

⁵⁷ See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994).

⁵⁸ See Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.-Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 138, available at <http://www.sierra-leone.org/specialcourtagreement.html>. For a general discussion of the features and advantages of hybrid tribunals, see Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003).

⁵⁹ Bassiouni, *Post-Conflict Justice in Iraq*, *supra* note 8, at 342.

⁶⁰ See, e.g., Letter from Richard Dicker, Director Int'l Justice Program, Human Rights Watch, & Hanny Megally, Executive Director Middle East and North African Division, Human Rights Watch, to Colin J. Powell, U.S. Sec'y of State (Apr. 15, 2003), available at <http://www.hrw.org/press/2003/04/iraqtribunal041503ltr.htm> (endorsing the creation of an international tribunal for Iraq as the best option to prosecute past crimes in Iraq and indicating that a "mixed" national-international tribunal would be a second-best alternative).

of Kuwait from 1990 to 1991.⁶¹ The NGO community believed that the scope and severity of the crimes committed by the Ba'athist regime required the creation of a specialized international tribunal and also expressed serious reservations about the capacity of the degraded Iraqi judiciary to undertake such complex prosecutions.⁶²

While the Bush administration intended to prosecute Hussein and other high-ranking Ba'athists, the issue of post-conflict justice was overshadowed by the quickening pace of events in Iraq, particularly, the search for Hussein and other high-ranking Ba'athists, the beginnings of anti-coalition violence, and the ultimately unsuccessful search for weapons of mass destruction. While the issue of post-conflict justice suffered from a lack of high-level attention, within the CPA the Office of Human Rights and Transitional Justice (OHRTJ) initially took responsibility for addressing the major issues arising out of the crimes of the Ba'athist regime.⁶³ The initial research conducted by the U.S. and British civilian and military staff of the OHRTJ indicated a clear preference by Iraqis for an Iraqi national court that would have the authority to try Hussein and other high-level Ba'athists.⁶⁴

Further complicating these initial efforts, the significant preparatory work of the Future of Iraq Project was overlooked due to political considerations and institutional rivalries.⁶⁵ As a result, the Bush administration and the CPA wholly ignored the recommendations of the Future of Iraq Pro-

⁶¹ A hybrid international and national tribunal was also seen as a viable alternative by some of the participants. See OPEN SOC'Y INST. & THE U.N. FOUND., *IRAQ IN TRANSITION, POST-CONFLICT CHALLENGES AND OPPORTUNITIES* 85–87 (2004); Bassiouni, *Post-Conflict Justice in Iraq*, *supra* note 8, at 343.

⁶² See, e.g., Press Release, Human Rights Watch, Iraq: Justice Needs International Role (July 15, 2003), available at <http://hrw.org/press/2003/07/iraq071503.htm>.

⁶³ Tom Parker, *Prosecuting Saddam: The Coalition Provisional Authority and the Evolution of the Iraqi Special Tribunal*, 30 CORNELL INT'L L.J. 899, 899–900 (2005).

⁶⁴ *Id.* at 900–01. Research conducted during the summer of 2003 by the International Center for Transitional Justice and the Human Rights Center at the University of California, Berkeley indicated that Iraqi participants in their study expressed a “clear and emphatic preference for any court to be established in Iraq and to operate under Iraqi control. International ‘assistance’ was seen as desirable, even welcome, but most respondents found international participation that might derogate from Iraqis’ final decision-making power to be unacceptable.” Nehal Bhuta, *Iraqi Voices: Attitudes Toward Transitional Justice and Social Reconstruction*, INT'L CENTER FOR TRANSITIONAL JUST., May 2004, at 31, available at <http://www.ictj.org/images/content/1/0/108.pdf>.

⁶⁵ The hostility of the Bush Administration to the work of the Future of Iraq Project is exemplified by the removal of Thomas Warrick, the coordinator of the Project, from the ORHA planning team by Secretary of Defense Donald Rumsfeld despite his extensive knowledge of conditions in Iraq and his experience dealing with Iraqi expatriates throughout the Future of Iraq Project. Jay M. Garner, the retired general who briefly headed ORHA prior to being replaced following the establishment of the CPA, was specifically told to ignore the work of the Future of Iraq Project. See Rieff, *supra* note 55, at 32; Fallows, *supra* note 55, at 72.

ject's "Working Group on Transitional Justice" for a comprehensive plan for post-conflict justice.⁶⁶ Additionally, the possibility of establishing an international or hybrid tribunal under U.N. auspices was limited as a result of a confluence of factors, namely, the limited role in Iraq afforded the United Nations by the Bush administration⁶⁷; the opposition of the United Nations to the death penalty for convicted perpetrators, a position at odds with the views of the vast majority of Iraqis⁶⁸; the reluctance of the United Nations to engage in Iraq following the August 2003 killing of Sergio Vieira de Mello,⁶⁹ the U.N. Secretary General's Special Representative in

⁶⁶ This comprehensive plan for post-conflict justice included, in addition to prosecuting Hussein and the senior leaders of the Ba'ath party, prosecuting lesser offenders before one or more specialized chambers of the Iraqi criminal court system, providing reparations for victims of Ba'athist atrocities and crimes, and empanelling a commission to help establish an objective historical record of the political violence experienced by Iraqis during the reign of Hussein and the Ba'ath party. See BASSIOUNI, *IRAQ POST-CONFLICT JUSTICE: A PROPOSED COMPREHENSIVE PLAN*, *supra* note 55. An anecdotal account of the fate of this comprehensive plan is provided by George Packer, who recalls that during his meeting in Baghdad with Iraqi-American lawyer and member of the Future of Iraq Project's Working Group on Transitional Justice, Sermid al-Sarraf, al-Sarraf "was carrying a copy of its 250-page report, trying to interest occupation officials. No one seemed to have seen it." PACKER, *supra* note 11, at 125. al-Sarraf had summarized the initial 700-page report of the Working Group, which was publicly released on May 15, 2003. al-Sarraf previously served as IHRLI's Chief of Party in Iraq and oversaw IHRLI's "Raising the Bar" Project," a broad-based legal-education reform project that completed its work in 2004.

⁶⁷ See generally LARRY DIAMOND, *SQUANDERED VICTORY: THE AMERICAN OCCUPATION AND THE BUNGLED EFFORT TO BRING DEMOCRACY TO IRAQ* 55 (2005) (stating that Bremer welcomed the United Nations' presence in Iraq "as long as [the United Nations] supported what the CPA was doing"); Eric Stover et al., *Bremer's "Gordian Knot": Transitional Justice and the US Occupation of Iraq*, 27 HUM. RTS. Q. 830, 839 (2005).

⁶⁸ While the death penalty is an extraordinarily controversial topic and both authors of this article are personally opposed to its imposition, the punishment has long been an accepted facet of the Iraqi criminal justice system. As an international issue, the trend has been towards abolition of the death penalty in law and in practice. See Amnesty Int'l, *Abolitionist and Retentionist Countries*, <http://web.amnesty.org/pages/deathpenalty-countries-eng> (last visited May 4, 2007). However, the vast majority of Iraqis favored, and continues to favor, imposition of the death penalty for Hussein and other senior Ba'athists. At the time of drafting the IST Statute, the Iraqis themselves had vehemently insisted on the death penalty. See Michael P. Scharf, *Background: Introduction*, in *SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL* 3, 6-7 (Michael P. Scharf & Gregory S. McNeil eds., 2006). As Tom Parker has also pointed out, "[o]ne can also make an argument that the inclusion of the death penalty is fully consistent with Iraqi criminal justice practice and that it is a regional norm. All Iraq's neighbors, with the relatively recent exception of Turkey, retain the death penalty." Parker, *supra* note 63, at 908. Further complicating the issue is the question of Iraqi sovereignty. Christopher Greenwood argues that "[i]t is paradoxical that some of those who have been loudest in calling for the early return of sovereignty to the people of Iraq are unwilling to see this element of sovereignty returned at all." Christopher Greenwood, *Trying Saddam*, *GUARDIAN*, Dec. 17, 2003, at 21.

⁶⁹ Diamond, *supra* note 67, at 46, 57-59.

Iraq, and several U.N. staffers; and the widespread distrust of the United Nations among Iraqis as a result of the devastating effects of U.N.-enforced sanctions.⁷⁰ In light of the foregoing, the public position of the Bush administration favoring the establishment of an Iraqi tribunal bolstered by international support was the only option that had any prospect of being realized. The Bush administration's view was also in harmony with the preferences of the IGC,⁷¹ which would have the responsibility of drafting the statute in close consultation with CPA advisors and subject to the final approval of the CPA.⁷²

The IST Statute was drafted by the IGC and the CPA between September and December 2003.⁷³ The IGC approved a decree on December 9, 2003, establishing the IST, and on the same day, the CPA issued CPA Order No. 48, which contained the IST Statute.⁷⁴ On December 10th, CPA Administrator Paul Bremer signed the order and it was published in the CPA's Official Gazette, making the IST an official institution.⁷⁵ Article 48 of the TAL subsequently confirmed the IST Statute.⁷⁶ The statute granted the IST jurisdiction over all Iraqi citizens for genocide, crimes against humanity,

⁷⁰ Parker, *supra* note 63, at 900 (“[A]fter more than a decade of punitive sanctions and widespread rumors of venal corruption in the Oil for Food Program, the Iraqis did not regard the United Nations as an honest broker.”).

⁷¹ *See id.* at 901.

⁷² *See* Asli U. Bali, *Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT'L L. 431, 457 (2005).

⁷³ *See* CPA Order No. 48, *supra* note 6, §1(1). The drafting of the IST Statute was led by IGC member Judge Dara Nur al-Din and Salem Chalabi, acting General Counsel to the IGC and member of the Future of Iraq Project's Working Group on Transitional Justice. In September of 2003, Chalabi's uncle, Ahmed Chalabi, a member of the IGC who was then serving as the rotating President of the IGC, requested that Salem Chalabi prepare a draft statute for the Iraqi tribunal that would undertake prosecutions of Hussein and other high-level Ba'athists. The draft prepared by Chalabi was largely based on a model statute prepared by one of the authors of this article, M. Cherif Bassiouni, in March of 2003 as part of the efforts of the Future of Iraq Project. This model statute was intended to serve as guidance in the event that the United Nations Security Council authorized the establishment of an international tribunal to prosecute the crimes of the Ba'athist regime. By attempting to employ this model statute, Chalabi ignored the fact that the proposed tribunal was national in character and would require a statutory basis that differed in substantial ways from the model statute. Among the major infirmities of the statute was the fact that the draft was modeled on an adversary-accusatorial model, while the Iraqi legal system is inquisitorial. *See infra* Part III.F.5. In response to these shortcomings, a meeting to review the draft IST Statute was organized by the International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy. The meeting, which was to be held from December 7–12, 2003, was cancelled at the behest of the CPA, which then directed that the statute be promulgated on December 10th.

⁷⁴ CPA Order No. 48, *supra* note 6.

⁷⁵ For a discussion of the CPA's authority to establish the IST, *see infra* Part II.B.

⁷⁶ LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 48 (Iraq), available at <http://www.iraqcoalition.org/government/TAL.html>.

war crimes, and other crimes specified under Iraqi law.⁷⁷ The IST Statute also established that this jurisdiction had extra-territorial application for crimes covered by the statute committed in Iran and Kuwait.⁷⁸

The IST was originally administered by Salem Chalabi,⁷⁹ who was appointed to the post by the IGC on May 8, 2004; Chalabi was tasked with setting up the organization and structure of the IST and selecting and vetting sitting judges, investigative judges and prosecutors.⁸⁰ The appointment of Chalabi and his association with the controversial profile of his uncle, Ahmed Chalabi, a member of the IGC and later a cabinet member who was closely identified with the DOD and neo-conservative elements in the Bush administration, had an adverse effect on the perception of the IST in Iraqi and Arab public opinion. As a result, the IST began to be seen by many Iraqis and other Arabs as an illegitimate process tailored by the Americans to seek revenge upon Ba'athists and bolster support for the war effort following the unsuccessful search for weapons of mass destruction.

The CPA was also intimately involved in supporting the early efforts of the IST. The Crimes against Humanity Investigations Unit (CAHIU) was established within the OHRTJ by the CPA to provide investigative and operational assistance and support to the IST, in an effort to overcome the lack of institutional or professional capacity to deal with an investigation of this scope.⁸¹ In January 2004, the State Department's Ambassador-at-Large for War Crimes Issues, Pierre-Richard Prosper, led a team of legal advisors on an assessment mission to Baghdad that resulted in more organized and direct U.S. involvement in supporting the IST.⁸² Bremer subsequently pledged that the United States would provide the nascent institution with seventy-five million dollars.⁸³ The DOJ dispatched a team of prosecutors and investigators to Iraq in March 2004 to assist in the gathering of evidence to be used in prosecutions, to help organize the IST's efforts, and to

⁷⁷ Statute of the Iraqi Special Tribunal arts. 10–14.

⁷⁸ *Id.*

⁷⁹ Chalabi had previously served on the Future of Iraq Project's Working Group on Transitional Justice and provided the draft of the IST statute. *See supra* note 73.

⁸⁰ Michael Rubin, *Salem Chalabi: Judging Saddam*, 11 MIDDLE E.Q. 325 (2004), available at <http://www.meforum.org/article/664>.

⁸¹ Parker, *supra* note 63, at 903. Parker, who was the head of the CAHIU, recounts that his unit discussed investigative strategy with the IGC members and IST staff and recommended that investigations be limited to a short list of twenty to twenty-five high profile perpetrators. He also notes that the CAHIU recommended that investigations and prosecutions for initial cases should "broadly involve incidents that reflect the temporal and geographical spread of the regime's crimes . . ." *Id.*

⁸² *See Stover et al., supra* note 67, at 841.

⁸³ L. Paul Bremer, Adm'r, Coalition Provisional Auth., *Turning the Page* (Apr. 23, 2004), available at http://www.iraqcoalition.org/transcripts/20040423_page_turn.html.

provide training to the IST's judges and prosecutors.⁸⁴ These advisors became part of the Regime Crimes Liaison Office (RCLO), which was established in May 2004 and evolved out of the CAHIU.⁸⁵

While these U.S. prosecutors and investigators had significant experience with complex investigations and prosecutions, as representatives of domestic prosecutorial and law enforcement agencies they had limited experience with international criminal law and little knowledge of local factors or of the Iraqi judicial system and its legal culture. The very visible and direct role assumed by U.S. advisors at this juncture furthered the perception that the occupation authorities largely orchestrated the investigatory process. The prominent role of the RCLO and the lack of appreciation or understanding of Iraqi legal procedures were on display during the disjointed "arraignment" of Hussein and eleven of his co-defendants on July 1, 2004.⁸⁶ The arraignment, which took place at Camp Victory under intense U.S. security, lacked legal clarity and had the air of an ad hoc procedure. Arraignments do not exist under the Iraqi legal system; the proceedings were carried out in the fashion of a court hearing held in the United States, with the reading of an indictment and a query to the defendant as to his plea of guilty or not guilty. While the investigative judge handled the proceedings with poise and dignity, the lack of legal clarity and the unfamiliarity with this type of proceeding undermined its credibility. The fact that the proceedings were held under the jurisdiction of the Central Criminal Court of Iraq and applied the Iraqi Criminal Procedure Law further exemplified the ad hoc nature of the proceedings.⁸⁷

In August of 2004 Zuhair Maliki, an investigative judge from the Central Criminal Court of Iraq, indicted Salem Chalabi and his uncle, Ahmed Chalabi, and forced Salem Chalabi to resign his post as administrator of the IST and flee to London. Chalabi's absence prompted the RCLO to assume an even greater role in determining prosecutorial strategy, training judges and prosecutors, providing resources and personnel for conducting investigations, gathering evidence, and establishing the IST's infrastructure.⁸⁸ In this context, even necessary assistance and support contributed to

⁸⁴ Neil A. Lewis & David Johnston, *U.S. Team Is Sent to Develop Case in Hussein Trial*, N.Y. TIMES, Mar. 7, 2004, at A1.

⁸⁵ See Parker, *supra* note 63, at 903; Press Release, U.S. Dep't of Justice, Attorney General Gonzales Travels to Baghdad to Visit DOJ Personnel, Military Troops, and Iraqi Officials (July 3, 2005), available at http://www.usdoj.gov/opa/pr/2005/July/05_ag_360.htm (noting that the RCLO is an independent office of the U.S. Embassy in Baghdad and was established in May of 2004 as the lead U.S. government agency for support of the IST).

⁸⁶ For a description of the proceedings, see Burns, *supra* note 1.

⁸⁷ Stover et al., *supra* note 67, at 842 (arguing that the proceedings were carried out in this fashion as a result of the fact that the IST's rules and procedures had not yet been finalized).

⁸⁸ See Rajiv Chandrasekaran & Carol D. Leonnig, *Chalabi Back in Iraq, Aide Says: Former U.S. Client Charged with Counterfeiting Currency*, WASH. POST, Aug. 12, 2004, at A19;

wariness regarding the role of the occupation authorities in the functioning and administration of the IST.

Various intensive training programs were held for officials involved in establishing the IST and the judges and prosecutors of the IST. The United States Institute of Peace and the Institute for International Criminal Investigation hosted the first such training program at the request of the RCLO in March of 2004 in Amsterdam.⁸⁹ In October of 2004, the RCLO held a weeklong training program in London for a large number of the IST's judges and prosecutors.⁹⁰ In February of 2005, an extensive technical training seminar for the entire team of IST judges, investigative judges and prosecutors took place with the support of the RCLO at the International Institute for Higher Studies in Criminal Sciences (ISISC) in Siracusa, Italy.⁹¹

As the IST judges and prosecutors gained experience, confidence and familiarity with the substantive and procedural framework governing the IST, they gradually took more ownership of the process. However, the initial perceptions of the maximal role of the occupying powers and the

Jim Krane, *Politics Afoot in a Bid to Rush Saddam Trial, Ousted Tribunal Director Says*, ASSOCIATED PRESS, Sept. 24, 2004; Jackie Spinner, *Premier Warns Gunmen in Najaf; Arrest Warrants Issued for Chalabi, Nephew*, WASH. POST, Aug. 9, 2004, at A1. The charges against Ahmed Chalabi were publicly dropped due to a lack of evidence in September of 2004, and the charges against Salem Chalabi were dropped for lack of evidence in December of 2004. Salem Chalabi did not reassume his position on the IST or participate in the prosecutions later conducted by the IHCC. *Iraqi Judge Drops Chalabi Charges*, BBC NEWS, Sept. 28, 2004, http://news.bbc.co.uk/2/hi/middle_east/3698444.stm.

⁸⁹ See U.S. INST. OF PEACE, *BUILDING THE IRAQI SPECIAL TRIBUNAL: LESSONS FROM EXPERIENCES IN INTERNATIONAL CRIMINAL JUSTICE 2* (2004). The training program was held for Iraqis involved in the establishment of the IST and focused on legal and technical issues in connection with the implementation of the IST Statute.

⁹⁰ See Stover et al., *supra* note 67, at 843. The trainers for the program included Michael Scharf, who served in various capacities in the Office of the Legal Adviser, U.S. Department of State; Geoffrey Robertson, Judge of the Special Court for Sierra Leone; Christopher Greenwood, professor at the London School of Economics; Joanna Korner, former senior prosecutor at the International Criminal Tribunal for the former Yugoslavia; and Michael Newton, the former Senior Advisor to the Ambassador-at-Large for War Crimes Issues, U.S. Department of State.

⁹¹ One of the authors of this article, M. Cherif Bassiouni, is the President of ISISC and helped coordinate the training seminar. Prior to the training seminar, Bassiouni published a book in Arabic that detailed many of the deficiencies of the IST Statute. See M. CHERIF BASSIOUNI, *AL-MAHKAMA AL-JINA'IYA AL-'IRAQIYA AL-MUKHTASSA BIL-JARA'IM DED AL-INSANIYA (THE IRAQI SPECIAL CRIMINAL COURT FOR CRIMES AGAINST HUMANITY)* (2004). The book was distributed to the Iraqi participants in the training seminar and was the focus of extensive discussions on various ways in which the IST Statute could be amended to further buttress the legitimacy of the tribunal. The amendments of the IST Statute by the IHCC Statute fell far short of the legislative prescriptions that were discussed in detail during the training seminar. See *infra* Parts III.C-F.

flaws of the IST Statute helped to undermine the credibility and legitimacy of the tribunal.

B. Legitimacy of the Iraqi Special Tribunal's Establishment

The need for a post-conflict judicial process to deal with the crimes and atrocities of the Ba'athist regime was clear prior to the fall of the regime,⁹² and the prosecution of key Ba'athist leaders continues to be a necessary endeavor on the path to establishing the rule of law in Iraq. The argument for establishing a domestic tribunal to undertake this task is well-grounded in international law: Article 17 of the International Criminal Court Statute recognizes the complementarity between national and international legal systems, giving priority to the national criminal jurisdictions of states parties that are willing and able to undertake prosecutions.⁹³ Several practical considerations also militated in favor of a domestic tribunal: Iraqi society and the legal system would benefit from the institutional capacity building that would inevitably result from the establishment of a domestic tribunal and the holding of trials in Iraq would increase the potential for effective community outreach programs. Additionally, the experiences of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) suggested that a domestic tribunal would avoid the exorbitant costs and extreme delays plaguing ad hoc international tribunals.⁹⁴

⁹² See *supra* notes 7–8 and accompanying text.

⁹³ See Rome Statute of the International Criminal Court art. 17, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 [hereinafter ICC Statute], available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf. In the event that a state party is “unable” or “unwilling” to prosecute, the International Criminal Court may assert jurisdiction. See also THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY (M. Cherif Bassiouni ed. 1998). For a legislative history of the ICC, see M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT 123–91 (2005) [hereinafter BASSIOUNI, THE LEGISLATIVE HISTORY OF THE ICC]. For a discussion of the concept of complementarity, see John T. Holmes, *The Principle of Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 41–78 (Roy S. Lee ed., 1999); M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 15–18 (2003) [hereinafter BASSIOUNI, INTRODUCTION TO ICL].

⁹⁴ For example, the budgets for ICTY and the ICTR in 2004–2005 alone were \$298.23 million and \$235.32 million respectively. Press Release, U.N. General Assembly, General Assembly Adopts \$3.16 Billion 2004–2005 Budget as It Concludes Main Part of Fifty-Eighth Session, U.N. Doc. GA/10225 (Dec. 23, 2003), available at <http://www.un.org/News/Press/docs/2003/ga10225.doc.htm>. Cumulatively ICTY and ICTR have cost over \$1 billion. See *id.* Both ICTY and ICTR have been criticized for their exorbitant costs and the slow pace of the trials. See, e.g., INT’L CRISIS GROUP, INTERNATIONAL CRIMINAL JUSTICE FOR RWANDA: JUSTICE DELAYED (2001), available at <http://www.icg.org/home/index.cfm?id=1649&l=1>.

However, the establishment of the IST in the context of post-war Iraq under the authority of an occupying power involved serious complications. Numerous observers and scholars have questioned the overall scope of the CPA's authority as an occupying power⁹⁵ and the legitimacy of the IST's establishment by such an occupying power.⁹⁶ The order of an occupying power provided the IST's legislative basis; no norm or precedent exists in international law that would validate the establishment of an exceptional national criminal tribunal by an occupying power. This point raises the question as to whether an occupying power has the legal authority to create such a tribunal.

As a threshold issue, it should be noted that the United States did not have subject matter jurisdiction to prosecute Hussein following his capture by U.S. forces on December 13, 2003. Following his designation as a prisoner of war⁹⁷ under the Third Geneva Convention,⁹⁸ the United States could not have prosecuted Hussein under U.S. domestic law or international law for pre-capture violations of either body of law except by asserting universal jurisdiction over genocide, crimes against humanity or war crimes. Under the Genocide Convention Implementation Act of 1987,⁹⁹ prosecutions for genocide are limited to genocidal acts committed by a U.S. national or acts committed in the United States.¹⁰⁰ No federal statute covers crimes against humanity committed overseas by non-U.S. nationals and there is no other basis for prosecuting such acts in the United States.¹⁰¹ Fi-

⁹⁵ See e.g., Bassiouni, *Post-Conflict Justice in Iraq*, *supra* note 8, at 358–66; Roberts, *supra* note 14, at 604–18; Roberts, *supra* note 35; Fox, *supra* note 12; David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842 (2003); Bali, *supra* note 72; Conor McCarthy, *The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq*, 10 J. CONFLICT & SECURITY L. 43 (2005). *But see* Brett H. McGurk, *Revisiting the Law of Nation-Building: Iraq in Transition*, 45 VA. J. INT'L L. 451 (2005).

⁹⁶ See e.g., Bali, *supra* note 72; Danillo Zolo, *The Iraq Special Tribunal: Back to the Nuremberg Paradigm?*, 2 J. INT'L CRIM. JUST. 313, 315–16 (2004); Farhad Malekian, *Emasculating the Philosophy of International Criminal Justice*, 38 CORNELL INT'L L.J. 673, 720 (2005); Ruti Teitel, *The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT'L L. J. 837, 843–44 (2005); *But see* Michael A. Newton, *The Iraqi Special Tribunal: A Human Rights Perspective*, 38 CORNELL INT'L L.J. 863 (2005).

⁹⁷ See Douglas Jehl, *Hussein Given P.O.W. Status; Access Sought*, N.Y. TIMES, Jan. 10, 2004, at A1.

⁹⁸ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]. Under article 4 of Geneva III, Hussein was determined to be a member of the armed forces because of his formal position as the leader of the Iraqi military. See *id.* art. 4.

⁹⁹ Genocide Convention Implementation Act of 1987, 18 U.S.C. §§ 1091–93 (2000).

¹⁰⁰ See JENNIFER K. ELSEA, CONG. RESEARCH SERV., *OPTIONS FOR TRYING SADDAM HUSSEIN FOR INTERNATIONAL CRIMES* 6 (2004).

¹⁰¹ Although torture, which is a crime against humanity, committed by non-U.S. nationals may be prosecuted in U.S. federal courts, such prosecutions are dependent upon the presence

nally, the War Crimes Act of 1996¹⁰² extends jurisdiction only to war crimes committed by or against U.S. nationals.¹⁰³ Hence, prosecution under Geneva III¹⁰⁴ for grave breaches of the Geneva Conventions¹⁰⁵ or prosecutions for genocide or crimes against humanity would have required an assertion of universal jurisdiction, a practice that has not yet been embraced by U.S. courts.

In light of these jurisdictional limitations, the legitimacy of the establishment of the IST is solely dependent on the authority of the United States as an occupying power. The United States is bound by the Fourth Geneva Convention of 1949¹⁰⁶ and the Hague Regulations of 1907,¹⁰⁷ as well as subsequent developments of customary international law.¹⁰⁸ According to these sources of applicable law, the United States is an occupying power, and it cannot, *inter alia*, do the following: (a) change the functioning of the administration of the occupied territory;¹⁰⁹ (b) change the existing legal system;¹¹⁰ (c) alter the status of public officials and judges;¹¹¹ (d) change the penal legislation;¹¹² (e) issue new penal provisions;¹¹³ (f) intern

of the alleged offender in the United States. See Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 § 506(b)(2), 18 U.S.C. § 2340(A)(b)(2) (2006).

¹⁰² War Crimes Act of 1996, 18 U.S.C. § 2441 (2006).

¹⁰³ See ELSEA, *supra* note 100, at 6.

¹⁰⁴ Geneva III, *supra* note 98, art. 129.

¹⁰⁵ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva III, *supra* note 98; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

¹⁰⁶ The Convention Relative to the Protection of Civilian Persons in Time of War applies to the civilian population and the administration of occupied territories. Geneva IV, *supra* note 105.

¹⁰⁷ Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2295, 1 Bevans 631 [hereinafter Hague IV].

¹⁰⁸ For the proposition that the United States is bound by customary international law, see JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* (2nd ed. 2003). For a challenge to this position, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

¹⁰⁹ See Hague IV, *supra* note 107, arts. 43, 48; Geneva IV, *supra* note 105, arts. 51, 54, 64.

¹¹⁰ See Hague IV, *supra* note 107, art. 43.

¹¹¹ Geneva IV, *supra* note 105, art. 54.

¹¹² *Id.* art. 64.

¹¹³ *Id.*

civilian populations other than on the basis of POW;¹¹⁴ (g) change the tribunals of the occupied territory;¹¹⁵ (h) prosecute inhabitants for acts committed before the occupation;¹¹⁶ or (i) enter into agreements with the governing authority of the occupied territory or make agreements on behalf of the occupied territory that "shall adversely affect the situation of the protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them."¹¹⁷

An exception to the above restrictions is that the penal laws of the occupied territory may be repealed or suspended by the occupying power in cases where they constitute a threat to its security or an obstacle to the application of the Geneva Conventions,¹¹⁸ or if the laws introduced by the occupying power are more favorable measures to the civilian population. Protocol I, Article 4¹¹⁹ confirms the above limitations on the occupying power. Although the United States has not ratified Protocol I, it is deemed to be part of customary international law.¹²⁰

In light of the foregoing, it is reasonably clear that certain aspects of the IST's establishment ran afoul of the laws governing the scope of an occupying power's authority. This is not to state that all aspects of the IST Statute were necessarily illegitimate. The procedures and guarantees of the rights of the defense in the IST Statute are arguably more favorable than existing Iraqi laws on criminal procedure under the Iraqi Criminal Procedure Law,¹²¹ and are therefore in conformity with international humanitarian law. However, these reforms cannot overcome the incongruities arising out of the co-mingling of procedural aspects of the adversary/accusatorial model of criminal procedure with those of the inquisitorial model that negatively impacted the fundamental fairness of the IHCC's proceedings; furthermore, the limitation of these reforms to a specialized forum highlights

¹¹⁴ *Id.* arts. 79–135.

¹¹⁵ *Id.* art. 64.

¹¹⁶ *Id.* art. 70.

¹¹⁷ *Id.* art. 7.

¹¹⁸ *Id.* art. 64.

¹¹⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, art. 4, 1125 U.N.T.S. 3.

¹²⁰ See PAUST, *supra* note 108.

¹²¹ Qanun Usul al-Muhakamat al-Jaza'iya [Iraqi Criminal Procedure Law], No. 23, 1971. For international human rights law standards, see M. CHERIF BASSIOUNI, *THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE: A COMPENDIUM OF UNITED NATIONS NORMS AND STANDARDS* (1994); CHRISTOPHER GANE & MARK MACKAREL, *HUMAN RIGHTS AND THE ADMINISTRATION OF JUSTICE: INTERNATIONAL INSTRUMENTS* (1997); ANNE F. BAYEFSKY, *THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS* (2001).

the “exceptional” nature of the IST.¹²² As such, it is clear that the establishment of the IST contradicted the strict limitations imposed by the Geneva Conventions.

Various arguments can be posited to justify the establishment of the IST; however, even the strongest of these arguments cannot overcome the transformative aspects of this facet of the CPA’s work and the negative perception created by the establishment of the IST during the early stages of an occupation. First among these arguments is that the IGC was substantially representative of the major political movements in Iraq. As Haider Ala Hammoudi has argued, the major figures on the IGC are leaders of their ethnic and religious communities and have dominated the electoral politics of Iraq.¹²³ However, in spite of the representative nature of the IGC, Hammoudi points out that the authority to legally issue orders resided solely with the CPA.¹²⁴ This disparity in formal authority cannot be overlooked in determining the validity of actions undertaken during the CPA’s existence.¹²⁵ A correlative argument has focused on the extent of Iraqi participation in the drafting of the IST Statute.¹²⁶ However, the very fact that the

¹²² See *infra* Parts III.F.5–6; see also Bassiouni, *Post-Conflict Justice in Iraq*, *supra* note 8, at 363–66.

¹²³ Haider Ala Hammoudi, *Money Laundering Amidst Mortars: Legislative Process and State Authority in Post-Invasion Iraq*, 16 *TRANSNAT’L L. & CONTEMP. PROBS.* 523, 529 (2007). Hammoudi writes:

Among the Governing Council Members were Jalal Talabani and Mas’ud Barazani, the leaders of the two dominant Kurdish political parties in Iraq, whose alliance won fifty-three of 275 seats in the last Iraqi election; Abdul Aziz al Hakim and Ibrahim al-Ja’fari, the two most prominent leaders of the United Iraqi Alliance, the dominant Shi’i organization, which won 128 seats in the last election; Ayad Allawi, the former Prime Minister, and Adnan Pachachi, whose secular, nationalist, and nonsectarian alliance won twenty-five seats in the last election; and the Sunni Arab leader Mohsen Abdul Hameed, former head of the Iraqi Islamic Party, whose party was a central part of the Sunni alliance that won forty-four seats in the last election.

Id. Hammoudi worked in Iraq for two years as a staff member on IHRLI’s rule of law project.

¹²⁴ *Id.*

¹²⁵ In attempting to understand the exact legal position of the IGC, it is instructive to analyze the language used by the United Nations Security Council following the IGC’s creation. Security Council Resolution 1500 welcomed “the establishment of the broadly representative Governing Council of Iraq,” but considered its creation only “a step towards the formation by the people of Iraq of an internationally recognized, representative government that will exercise the sovereignty of Iraq.” S.C. Res. 1500, *supra* note 29, ¶ 1. Implicit in this language is a recognition that the IGC cannot exercise sovereignty over Iraq.

¹²⁶ Michael P. Scharf and Ahran Kang have cited the inclusion of the crime of aggression as an instance where Iraqi preferences overcame U.S. objections and have used this episode to highlight the extensive role of Iraqis in creating the IST Statute. See Michael P. Scharf &

Iraqis who participated in the drafting process were dependent on the CPA's acceptance of their positions with respect to the contents of the IST Statute further highlights their actual reliance on the legal authority vested in the CPA.

The IHCC offered a similar, yet belated argument in defense of the legitimacy of the IST's establishment as part of the al-Dujail Trial Opinion.¹²⁷ Relying on Security Council Resolution 1511,¹²⁸ the IHCC implied that the IGC was vested with the sovereign authority to enact such a statute.¹²⁹ This argument is fundamentally flawed in two key respects. First, this argument ignores the very description of the IGC by the Security Council Resolution that it quotes, namely, that the IGC "embodies the sovereignty of Iraq during the transitional period"¹³⁰ This description falls far short of recognizing the sovereign authority of the IGC. Second, as previously discussed, the IGC did not exercise sovereign authority, as the CPA was the only body vested with the authority to issue legal orders.¹³¹ Taken together, these two points clearly establish that the IGC was not a sovereign national authority as implied by the al-Dujail Trial Opinion.

It could also be argued that the TAL, which served as an interim constitution, subsequently ratified the IST Statute and that the TAL is implicitly recognized in Security Council Resolution 1511.¹³² However, the fundamental issue as to whether the IST was established by the CPA and the IGC during a period of occupation remains. Furthermore, ratification in the TAL did not fully remedy the issue of legitimacy because the TAL largely grew out of the efforts of the IGC, an unelected body, in consultation with the CPA.

Ahran Kang, *Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL*, 38 CORNELL INT'L. L.J. 911, 912 (2005). Michael Newton has described the drafting process as "an extensive and genuine partnership that entailed months of debate, drafting, and consideration of expert advice solicited from the Coalition Provisional Authority." Newton, *supra* note 96, at 864.

¹²⁷ See al-Mahkama al-Jina'iyah al-'Iraqiyah [The Iraqi High Criminal Court], al-Dujail Trial Opinion (Part One), available at <http://www.iraq-ihc.org/ar/doc/finalcour.pdf>, translated in Grotian Moment: The Saddam Hussein Trial Blog, English Translation of Dujail Judgment Part 1 (Dec. 2006), at 30, [hereinafter al-Dujail Trial Opinion Part 1], available at http://www.law.case.edu/saddamtrial/documents/dujail_opinion_pt1.pdf.

¹²⁸ See S.C. Res. 1511, *supra* note 30.

¹²⁹ See al-Dujail Trial Opinion Part 1, *supra* note 127, at 30.

¹³⁰ See S.C. Res. 1511, *supra* note 30.

¹³¹ See CPA Reg. No. 1, *supra* note 20, § 1.

¹³² See S.C. Res. 1511, *supra* note 30. The al-Dujail Trial Opinion positively notes the inclusion of the IST in the TAL but fails to offer any further argument to support the proposition that this inclusion affected the legal status of the IST. See al-Dujail Trial Opinion Part 1, *supra* note 127, at 30.

Other arguments with respect to the CPA's mandate could conceivably rely on the breadth of the Security Council Resolutions recognizing the status of the United States and the United Kingdom as temporary occupying powers under international law.¹³³ However, although certain language in these resolutions appears to contradict the provisions of the Fourth Geneva Convention and Hague Regulation IV respecting the obligations of an occupying power,¹³⁴ these obligations cannot be amended through Security Council Resolutions, and the existence of imprecise language cannot justify any interpretation that is inconsistent with both conventional and customary international humanitarian law.¹³⁵

Lastly, it has been argued that the establishment of the IST was within the scope of the CPA's authority as an occupying power as defined by its treaty obligations under the Fourth Geneva Convention.¹³⁶ However, the CPA did not fundamentally need to transform Iraq's legal and judicial institutions to ensure that it was able to fulfill its obligations as an occupying power. Similarly, it cannot be argued that respecting existing Iraqi legal and judicial institutions would have interfered with the CPA's ability "to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them."¹³⁷ The CPA's establishment of the IST did not implicate any of the legitimate exceptions outlined by the Fourth Geneva Convention, as it was not an absolute necessity within the context of the CPA's role as an occupying power.

¹³³ See, e.g., S.C. Res. 1483, *supra* note 18; S.C. Res. 1511, *supra* note 30.

¹³⁴ Adam Roberts notes this disjunction and states that "the purposes of the occupation as outlined in Resolution 1483 went beyond the confines of the Hague Regulations and the Fourth Geneva Convention. Yet the resolution did not explain the relation between the transformative purposes of this occupation and the more conservative purposes of the existing body of law on occupations." Roberts, *supra* note 14, at 613.

¹³⁵ Beyond the necessary legal arguments regarding the inability of the United Nations Security Council to displace conventional and customary international humanitarian law, Conor McCarthy has chosen to analyze the often contradictory impulses of the relevant Security Council Resolutions by reference to the historical record surrounding the adoption of these resolutions. McCarthy rejects the argument that these resolutions provide supervening authority to the occupying power, relying on the views expressed by members of the United Nations Security Council with respect to the scope of the relevant resolutions and the reports of the Secretary General and the United Nations/World Bank Joint Iraq Needs Assessment made pursuant to Security Resolution 1483. See McCarthy, *supra* note 95, at 66–70.

¹³⁶ Newton has argued that Articles 47 and 64 of the Fourth Geneva Convention make clear that an occupying power may, in its efforts to fulfill its positive obligations, enact "sweeping changes to the domestic legal and governmental structures." Newton, *supra* note 96, at 874–75.

¹³⁷ Geneva IV, *supra* note 105, art. 64.

In retrospectively assessing the IST's establishment, it now seems clear that such momentous decisions dealing with the country's domestic legal structures and institutions would have been more properly grounded in the deliberations of a truly representative government. Even if one were to accept the novel legal arguments made in support of the IST's establishment, it is equally clear that the choice to undertake this venture during a foreign occupation was a miscalculation that inevitably undercut support for the IST and bolstered the perception that it was beholden to the United States. The IGC and the CPA could have limited their role to undertaking preparatory work to provide the future parliamentary government with suitable and well-crafted options for addressing post-conflict justice issues. Instead, by overreaching and foreclosing future decisions with respect to these essential issues, the IGC and the CPA exposed the IST to serious questions regarding its legitimacy and hampered its ability to operate as an effective institution.

III. THE IRAQI HIGH CRIMINAL COURT STATUTE

A. *The Adoption of the Iraqi High Criminal Court Statute*

Many of the Iraqis involved with the establishment of the IST were aware of the flaws of the tribunal's statutory framework at an early stage.¹³⁸ One of the authors of this article raised many of these flaws during extensive discussions with the judges, investigating judges and prosecutors of the IST, and members of the RCLO during a technical training seminar conducted in Siracusa, Italy.¹³⁹ Perhaps most disappointing is the fact that many of the questions surrounding the legitimacy of the IST's establishment and the legal shortcomings of the IST Statute could largely have been remedied if the TNA had revisited the issue in a procedurally sound and thoughtful manner, abrogated the IST Statute, and promulgated an amended law consistent with the precepts of the Iraqi legal system.¹⁴⁰ This effort would also have benefited from the issuance by the TNA of an explanatory memorandum (*mudhakkira tafsiiriya*), as is customary in the legislative processes of

¹³⁸ See *supra* note 91. See also, M. Cherif Bassiouni, *Hawla Qanun Insha'a al-Mahkama al-Jina'iya al-'Iraqiya al-Mukhtassa bi Jara'im al-Nizam al-'Iraqi al-Sabiq*, AL-SIYASSA AL-DAWLIYA (July 2004), available at <http://www.siyassa.org.eg/asiyassa/Ahram/2004/7/1/Stud1.htm> (urging that the law establishing the IST be revisited and debated by a truly representative government that could promulgate a statute that addresses those issues that undermine the legitimacy and credibility of the IST, such as the manner in which the law was passed and the form and procedures of the IST).

¹³⁹ See *supra* note 91.

¹⁴⁰ See Bassiouni, *Post-Conflict Justice in Iraq*, *supra* note 8, at 360–61 (describing how an amended statute should have been promulgated).

most Arab states.¹⁴¹ In this instance, an explanatory memorandum would have allowed the TNA to thoroughly describe the contents and context of the law, reflect upon its legislative intent, and provide guidance to the judges of the IHCC and the parties before the court. Such an explanatory memorandum could have also addressed the legacy of the IST Statute by making explicit that the transfer of sovereignty and the election of a legitimate national legislative authority necessitated the establishment of a more appropriate statutory basis upon which to operate.¹⁴² Instead, the successor statute¹⁴³ did not address many of the major flaws of the IST Statute, did not include an explanatory memorandum, and was promulgated in a manner inconsistent with the procedural requirements of Iraqi law.

Following the elections of January 30, 2005,¹⁴⁴ which produced a popularly elected TNA that clearly enjoyed greater legitimacy than the appointed IIG, the TNA was vested with the necessary lawmaking authority and credibility to promulgate a successor statute.¹⁴⁵ Although the TNA was transitional in nature, the wide mandate it enjoyed as a popularly elected body was exemplified by the fact that it was entrusted with the task of drafting a permanent constitution.¹⁴⁶

¹⁴¹ In addition to describing the contents of the law and providing a clear record of legislative intent, such an explanatory memorandum would have provided guidance to judges, defendants and defense counsel and would also have helped to ensure uniformity in the application of the IHCC Statute.

¹⁴² See *infra* Part III.A.

¹⁴³ See Statute of the Iraqi High Criminal Court.

¹⁴⁴ Due to the poor security situation in Iraq, international election monitors were forced to monitor the elections from Amman, Jordan. The International Mission for Iraqi Elections (IMIE) was formed with the support of the United Nations and the Independent Electoral Commission of Iraq and is composed of various independent electoral management bodies. The IMIE found that the elections generally met recognized standards of election law, planning and preparations and that voter turnout was approximately 58%. See International Mission for Iraqi Elections, Final Report: Assessment of the January 30, 2005, Election Process (Aug. 12, 2005), http://www.imie.ca/rep_Jan30.html.

¹⁴⁵ Article 48 of the TAL confirms the IST Statute and thereby continued its legal effect. The TAL also made clear that the IST Statute “exclusively defines the [IST’s] jurisdiction and procedures, notwithstanding the provisions of [the TAL].” As Christopher Rassi explains, “the Iraqi Transitional Government has the power to replace the 2003 Statute with a revised Statute without amending the TAL itself,” since the TAL specifically referred “back to the 2003 Statute itself for exclusive interpretive authority.” See Christopher Rassi, *Legitimacy of the August 11, 2005 Revised Iraqi High Tribunal Statute*, Scharf, Saddam at Trial, 101–02. Article 37 of the IST Statute, in combination with Article 32 of the IST Statute, which endows the executive authority in any future government with the powers conferred on the Governing Council, grants the Governing Council or the successor government “powers to establish other rules and procedures in order to implement this [2003] Statute.” *Id.*

¹⁴⁶ LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD arts. 60–61, available at <http://www.iraqcoalition.org/government/TAL.html>.

Further, whereas Security Council Resolution 1546 specifically limited the IIG's mandate for governing, the language of that Resolution clearly implied that once elections were held the TNA could take "actions affecting Iraq's destiny."¹⁴⁷ As such, it must be considered a legitimate national legislative authority endowed with lawmaking powers.

Two caveats must be noted with respect to the legitimacy of the TNA. First, the declared boycott of the elections by the majority of Sunni Arab political leaders, widespread political instability, and precarious security situation combined to limit the level of Sunni Arab participation in the elections.¹⁴⁸ While the lack of proportionate representation of Sunni Arabs was unfortunate, the high level of overall voter participation and the legal platform provided by Security Council Resolution 1546 provided a solid foundation for the legitimacy of the TNA. Second, it must be noted that the extent of Iraqi sovereignty was, and continues to be, quite obviously limited by the presence of over 125,000 members of the multinational forces under separate command and with wide decision-making latitude.¹⁴⁹ However, various Security Council Resolutions establish the legal authority for the presence of such troops, and their continued presence is dependent on the agreement of the Iraqi government.¹⁵⁰

¹⁴⁷ See S.C. Res. 1546, *supra* note 36.

¹⁴⁸ See Dexter Filkins, *Iraqis Vote Amid Tight Security and Scattered Attacks*, N.Y. TIMES, Jan. 30, 2005, at A1 (noting that in the majority Sunni Arab provinces of Anbar, Nineveh and Salahuddin voter turnout was extremely low); Lawrence Smallman, *AMS Critical of Iraq Elections*, AL-JAZEERA, Jan. 30, 2005, <http://english.aljazeera.net/English/archive/archive?ArchiveId=9233>.

¹⁴⁹ Adam Roberts distinguishes the continued presence of foreign troops from previous historical examples of foreign forces being based in client states:

Three features of the foreign troop presence in Iraq suggest that it is different from such cases as that of Hungary in 1956–7. (1) The presence of the multinational force in Iraq has been specifically approved in UN Security Council resolutions, including Resolution 1546, which lays down key provisions for the post-occupation phase. (2) The prime stated purposes of the coalition forces include assisting the process of establishing a constitutional order in the country and assisting the Iraqi people to exercise their right of self-determination. (3) Not only has the Interim Government invited the coalition forces to remain, but also the coalition States have agreed that their forces are there by invitation and would leave if requested to do so.

Roberts, *supra* note 35, at 43.

¹⁵⁰ *Id.*

As discussed above, the TNA was tasked with the drafting of a permanent constitution,¹⁵¹ which included an article dealing with the IHCC. Article 134 of the constitution that was approved through the constitutional referendum held on October 15, 2005 states that, “[t]he Iraqi High Criminal Court shall continue its duties as an independent judicial body, in examining the crimes of the defunct dictatorial regime and its symbols. The Council of Representatives shall have the right to dissolve by law the Iraqi High Criminal Court after the completion of its work.”¹⁵² Including the IHCC in the constitution is important as a matter of Iraqi law because it establishes the IHCC as an independent judicial body.¹⁵³

However, constitutional reference to the “Iraqi High Criminal Court” is incongruous, as the successor statute to the IST Statute had not yet been promulgated. This raises a broader point regarding the manner in which the IHCC Statute was adopted. The TNA first considered and adopted the law in August 2005.¹⁵⁴ In September of 2005, the TNA adopted further amendments to the law.¹⁵⁵ The law was then presented to the Presidency Council, which reviewed the legislation and ratified Law No. 10 on October 9, 2005.¹⁵⁶ Law No. 10 and the revised Rules of Procedure and Evidence were then published in the Official Gazette of Iraq (*al-Waqai’i al-Iraqiya*) on October 18, 2005.

The version of the IHCC Statute published in the Official Gazette of Iraq on October 18th clearly incorporates revisions to the version of Law No. 10 approved by the TNA and then later adopted by the Presidency Council on October 9th. Most glaring among the various revisions, which were not substantive in nature, was the fact that the original Arabic version of Law No. 10 contained forty-two articles, whereas Law No. 10 as published in the Official Gazette contained only forty articles.¹⁵⁷ The revised legislation was not resubmitted to the TNA for approval, and the process by which Law No.10 was enacted was clearly in violation of the legislative

¹⁵¹ See LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD arts. 60–61, available at <http://www.iraqcoalition.org/government/TAL.html>.

¹⁵² DUSTUR JUMHURIAT AL-‘IRAQ [Constitution] art. 134 (Iraq).

¹⁵³ See *infra* Part III.B.

¹⁵⁴ HUMAN RIGHTS WATCH, THE FORMER IRAQI GOVERNMENT ON TRIAL 3 n.8 (2005), <http://hrw.org/backgrounders/mena/iraq1005/iraq1005.pdf>.

¹⁵⁵ *Id.*

¹⁵⁶ The Presidency Council ratified the law in accordance with Article 37 of the TAL. See LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 37, available at <http://www.iraqcoalition.org/government/TAL.html>.

¹⁵⁷ Mohamed ‘Abd al-Aziz Gad al-Haq Ibrahim, al-Mahkama al-Jina’iya al-‘Iraqiya al-‘Uliya fi Do’ al-Damanat al-Muhakamat al-Munasafa, Shabakat al-Ma’lumat al-Qanuniya al-‘Arabiya (2006), available at <http://www.eastlaws.com/iglc/research/research-show.php?id=174>.

procedures established by both the TAL, which continued to govern prior to the approval of the constitution, and the newly adopted Iraqi constitution.¹⁵⁸ This haphazard approach to the establishment of the IHCC encapsulates the sloppiness and inexactitude of this legislative process and betrays a lack of respect for the procedural formalities that are the basis of the rule of law.¹⁵⁹

While the adoption of the IHCC Statute was intended to render moot any further questions regarding the IHCC's legitimacy, the manner in which the Statute dealt with the IST Statute raised the question of prior legitimacy anew. Article 37 of the IHCC Statute revokes the IST Statute and its Rules of Procedure and Evidence and Article 38 states that "[a]ll decisions and Orders on Procedure issued under the Iraqi Special Tribunal Law No.1 for the year 2003 are correct and conform to the law."¹⁶⁰ To further insulate the Court from continued questions regarding its legitimacy, it would have been prudent to reissue indictments; reappoint judges, investigative judges, prosecutors, and other personnel; and re-examine evidence based on the IHCC Statute.¹⁶¹ While this type of de novo approach may appear unnecessarily formalistic, it would have provided a further legal buffer against any remaining questions or qualms regarding the IST's legitimacy.

B. *The Iraqi High Criminal Court as a Component of the Iraqi Legal System*

As was discussed above, Article 134 of the Iraqi constitution recognizes the IHCC as an independent judicial body within the Iraqi judiciary.¹⁶² Accordingly, the IHCC is subject to general constitutional principles applicable to the judiciary and the exercise of judicial power. Article 19 of the constitution lays out a series of general principles related to the judiciary and several of these principles are critical to understanding many of the IHCC's shortcomings within the context of Iraqi law:

First: The judiciary is independent and no power is above the judiciary except the law.

Second: There is no crime or punishment except by a stipulation. The punishment shall only be for an act that the law considers a crime when pepe-

¹⁵⁸ *Id.*

¹⁵⁹ The legislative irregularities connected with the adoption of the IHCC Statute were not addressed by the al-Dujail Trial Opinion. See al-Dujail Trial Opinion Part 1, *supra* note 127, at 30–31.

¹⁶⁰ See Statute of the Iraqi High Criminal Court arts. 37–38.

¹⁶¹ The al-Dujail Trial Opinion did not offer any serious consideration of the potential negative effects arising out of Article 38 of the IHCC Statute. See al-Dujail Trial Opinion Part 1, *supra* note 127, at 30–31.

¹⁶² *Id.* art. 134.

trated. A harsher sentence than the applicable sentence at the time of the offense may not be imposed. . . .

Fourth: The right to a defense shall be sacred and guaranteed in all phases of investigations and trial. . . .

Tenth: Criminal law does not have a retroactive effect, unless it is to the benefit of the accused.¹⁶³

These articles enshrine the independence of the judiciary and the principles of legality¹⁶⁴ as guiding constitutional principles.

The constitution also specifically addresses the independence of the judiciary in those sections defining the characteristics and competencies of the judicial authorities.¹⁶⁵ Among the articles most relevant to the establishment of the IHCC are Article 95, which prohibits the establishment of special or exceptional courts¹⁶⁶; Article 96, which mandates that the courts, their jurisdiction, and the methods of appointing, disciplining and removing judges and prosecutors are to be established by law¹⁶⁷; and Article 97 that bars the removal of judges except in those instances specified by law.¹⁶⁸

While the constitution establishes the IHCC as an independent judicial body, nowhere does the constitution or the contemplated implementing legislation governing the establishment and functioning of the court delegate to the IHCC the power to derogate from the general constitutional principles governing the judicial authority. The hierarchy of laws compels that these constitutional principles be given precedence in determining the legality of various provisions of the IHCC Statute. As will be discussed in greater detail below, it is clear that aspects of the IHCC Statute violate the Iraqi constitution.

C. *Positive Revisions in the Iraqi High Criminal Court Statute*

1. Language

Under CPA Regulation No. 1, CPA Regulations and Orders were to be promulgated in the relevant languages.¹⁶⁹ Accordingly, CPA Order No.

¹⁶³ DUSTUR JUMHURIAT AL-'IRAQ [Constitution] art. 19 (Iraq).

¹⁶⁴ For a discussion of the principles of legality, see *infra* notes 244–50 and accompanying text.

¹⁶⁵ DUSTUR JUMHURIAT AL-'IRAQ [Constitution] arts. 87–88 (Iraq).

¹⁶⁶ *Id.* art. 95.

¹⁶⁷ *Id.* art. 96.

¹⁶⁸ *Id.* art. 97.

¹⁶⁹ See CPA Reg. No. 1, *supra* note 20. The CPA issued Regulations and Orders in the English language first, with Arabic translations issued subsequently. In certain instances the gap in time between the issuances was significant. In the case of CPA Order No.10 regarding the Management of Detention and Prison Facilities, the English version was issued on June 5, 2003, and the Arabic version was not issued until October 29, 2003. Coalition Provisional

48 promulgated the original IST Statute in English and Arabic.¹⁷⁰ However, CPA Regulation No. 1 went on to state that “in the case of divergence, the English text shall prevail.”¹⁷¹ This clearly violated Article 7 of the Provisional Iraqi Constitution of 1970, which stipulates that Arabic is the official language of Iraq,¹⁷² and was inconsistent with Article 34 of the IST Statute, which designated Arabic as the official language of the Tribunal.¹⁷³ Apart from its legality, this designation also amplified the role of the occupation authorities and undermined the credibility of the IST as an Iraqi institution. It also created a situation where Iraqi jurists who were not fluent in English could not be certain of the exact contents of a statute they were required to interpret, apply and uphold. Further, the proceedings and judgments took place entirely in Arabic.

The dissolution of the CPA and the subsequent promulgation of the IHCC Statute cured this infirmity, as Article 32 of the IHCC Statute designates Arabic as the official language of the Court.¹⁷⁴

2. Title of the tribunal

The IST’s title in the Arabic version of the IST Statute is *al-Mahkama al-Mukhtassa*. The appropriate translation of this title would have been the “Specialized Tribunal” or the “Competent Tribunal.” Instead, the title of the tribunal was translated as the “Special Tribunal,” which is more properly translated into Arabic as *al-Mahkama al-Khassa*. This incorrect translation from Arabic into English was compounded by the fact that, as

Authority Regulation No.10, CPA/REG/8 June 2003/10 (June 8, 2003), available at http://www.iraqcoalition.org/regulations/20030605_CPAORD10_Management_of_Detention_and_Prison_Facilities.pdf. For further discussion of this issue, see Amnesty Int’l, *Iraq: Memorandum on Concerns Related to Legislation Introduced by the Coalition Provisional Authority*, AI Index MDE 14/176/2003, Dec. 4, 2003, available at [http://web.amnesty.org/library/pdf/MDE141762003ENGLISH/\\$File/MDE1417603.pdf](http://web.amnesty.org/library/pdf/MDE141762003ENGLISH/$File/MDE1417603.pdf).

¹⁷⁰ The Arabic text was quite clearly a poor translation from the original English, indicating that the IST Statute was originally drafted in English.

¹⁷¹ CPA Reg. No. 1, *supra* note 20, §3(1).

¹⁷² Article 7 also designates Kurdish as an official language along with Arabic in the Kurdish region. AL-DUSTUR AL-MO’AKAT [Provisional Constitution] (1970) (Iraq), available at <http://www.mallat.com/iraq%20const%201970.htm> (English translation). The 1990 draft constitution was never promulgated and is of no legal effect. MASHRO’ AL-DUSTUR AL-‘IRAQ, [Draft Iraqi Constitution] (1990) (Iraq), in AL-DASATEER AL-‘IRAQIYA, available at http://www.iraqfoundation.org/projects/constitution/local_iraq1990.pdf. Subsequent to the adoption of the IST Statute, the TAL designated Arabic and Kurdish as the official languages of Iraq. See LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 9, available at <http://www.iraqcoalition.org/government/TAL.html>.

¹⁷³ See Statute of the Iraqi Special Tribunal, *supra* note 6, art. 34. While Arabic and Kurdish are the official languages of Iraq, legal education and practice is almost exclusively carried out in Arabic throughout Iraq, including in Kurdistan.

¹⁷⁴ See Statute of the Iraqi High Criminal Court art. 32.

discussed above, CPA Regulation Number 1 designated English versions of CPA Regulations or Orders as controlling in the event of inconsistencies or conflicts.¹⁷⁵

The issue of the IST's title is not merely a cosmetic one as the notion of a "special" or "exceptional" tribunal violates Article 95 of the Iraqi constitution¹⁷⁶ and contravenes the spirit of Article 14 of the International Covenant on Civil and Political Rights (ICCPR),¹⁷⁷ which requires states to guarantee the fair and public trial of individuals by a competent, independent and impartial tribunal established by law and discourages the establishment of exceptional tribunals.¹⁷⁸ An exceptional tribunal would also violate Article 5 of the 1985 United Nations' Principles of the Independence of the Judiciary, which provides that individuals have the right to be tried by ordinary courts or tribunals using established legal procedures.¹⁷⁹

Article 1 of the IHCC Statute designates the court as *al-Mahkama al-Jina'iya al-'Iraqiya al-'Uliya*, which translates to the "Iraqi High Criminal Court."¹⁸⁰ While revising the title of the tribunal is not in and of itself sufficient to overcome objections to the extraordinary character of the tribunal,¹⁸¹ it is nonetheless a positive and necessary revision.

3. Appointment of Non-Iraqi "Experts" and "Observers"

Under the IST Statute, the President of the Tribunal was required to appoint non-Iraqi nationals to "act in advisory capacities or as observers to the Trial Chambers and to the Appeals Chambers."¹⁸² Similar provisions applied to the appointment of advisors or observers with respect to investigative judges and prosecutors.¹⁸³

The IHCC Statute revised these provisions to allow for the discretionary appointment of non-Iraqi experts to act in advisory capacities with

¹⁷⁵ CPA Reg. No. 1, *supra* note 20, §3(2).

¹⁷⁶ See DUSTUR JUMHURIAT AL-'IRAQ [Constitution] art. 95 (Iraq).

¹⁷⁷ See International Covenant on Civil and Political Rights, G.A. Res. 2200A, art. 14, U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (Dec. 19, 1966), 999 U.N.T.S. 171 [hereinafter ICCPR]. Iraq signed the ICCPR on March 23, 1976.

¹⁷⁸ See *infra* Part III.F.5.

¹⁷⁹ See Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 26–Sept. 6, 1985, *Basic Principles on the Independence of the Judiciary*, art. 5, U.N. Doc. A/CONF.121/22/REV.1 (1985). For an Arab perspective on the independence of the judiciary, see FAROUK EL-KILANI, *ISTIQLAL AL-QADA'A* [INDEPENDENCE OF THE JUDICIARY] (Center for Arab Publications, Beirut, 2nd. ed. 1999).

¹⁸⁰ See Statute of the Iraqi High Criminal Court art. 1.

¹⁸¹ For further discussion of the issue of characterization as an "extraordinary" tribunal, see *infra* Part III.F.5.

¹⁸² Statute of the Iraqi Special Tribunal art. 6(b).

¹⁸³ *Id.* arts. 7(n), 8(j).

respect to the Criminal Court, the Cassation Panel, the investigative judges and the public prosecutors.¹⁸⁴ The IHCC Statute does not provide for the discretionary appointment of non-Iraqi observers with respect to any of the foregoing institutions or personnel. The Statute defines the role of such experts as providing “assistance with respect to international law and the experience of similar Courts (whether international or otherwise),” and does not include the broader role envisioned by the IST Statute, which also included monitoring the protection of general due process of law standards.¹⁸⁵ The foregoing revisions bring the IHCC Statute back in line with existing Iraqi law, as Article 166 of the Iraqi Criminal Procedure Law provides for the appointment of non-Iraqi experts.¹⁸⁶

This is not to disparage the potential role of non-Iraqi experts on the IHCC, as the appointment of non-Iraqi experts by the IHCC could have a positive impact on the work of the IHCC by assisting Iraqi jurists with complex issues of international law. The appointment of such experts could also counter the perception that the IHCC is a U.S.-dominated institution without sacrificing Iraqi control of the proceedings. However, the current formulation is more appropriate as it is in keeping with Iraqi law and is respectful of Iraqi sovereignty.

While the revisions discussed above are wholly appropriate and removed what were arguably the most offensive provisions in the IST Statute,¹⁸⁷ the IHCC Statute does not include any guidelines or explanation as to

¹⁸⁴ See Statute of the Iraqi High Criminal Court arts. 7(Second), 8(Ninth), 9(Seventh).

¹⁸⁵ *Id.*

¹⁸⁶ Article 166 of the Iraqi Criminal Procedure Law allows for the appointment of “one or more experts in relation to matters which require an opinion, and determine his [sic] compensation without excess, which shall be borne by the Treasury.” See Iraqi Criminal Procedure Law art. 166.

¹⁸⁷ Many international commentators have endorsed the opposite view. The views of Human Rights Watch are emblematic of this approach:

We believe that advisors and observers can play an important role in supporting the work of the Special Tribunal. . . .

We also believe that the advisors and observers appointed to the Chambers and Tribunal Investigative Judges should provide as much substantive assistance as possible to ensure that the Special Tribunal applies the most fully developed standards of international law. . . .

We recommend that Articles 6(b) and 7(n) of the Statute be amended to require that the advisors and observers provide assistance specifically on international human rights, criminal, and humanitarian law to the Chambers, and to the Tribunal Investigative Judges in addition to assistance in investigations and prosecution of cases. We believe that this will help enable the advisors and observers to more fully support the Special Tribunal.

the nature of or procedures relating to the advisory role that such experts would undertake if appointed by the IHCC. Defining the role of such experts and how they are to be employed by the IHCC would have made the revisions more complete.

4. Providing Legal Basis for Procedures for Removal of Judges and Prosecutors

The removal of judges under Iraqi law was the province of the Judicial Council.¹⁸⁸ However, the IST Statute delegated this authority to a decision by the majority of permanent judges of the tribunal after having conducted an appropriate investigation.¹⁸⁹ No appeals procedures for such decisions were provided. The IHCC Statute has created uniform procedures to deal with disciplinary matters related to the service of judges and prosecutors,¹⁹⁰ and has established a five-member disciplinary committee comprised of judges and prosecutors from the Court.¹⁹¹ A committee decision to terminate service is appealable to the Federal Court of Cassation.¹⁹² While these procedures represent an innovation in Iraqi law, they represent a legitimate delegation of authority by the TNA and do not contradict Iraqi constitutional provisions on the organization of the judiciary.¹⁹³

As a final note, the validity of this delegation of authority and the propriety of the statutory provisions with respect to the removal of IHCC personnel are distinct from actual practice. The overt influence of political actors in prompting the removal of judges is a major flaw in the IHCC's record.¹⁹⁴ However, it is a flaw that cannot be imputed to the actual provisions of the IHCC statute.

5. Qualifications for Appointments of Judges and Public Prosecutors

The IST Statute did not establish uniform professional qualifications for the appointment of judges and prosecutors. Articles 5(a) and 7(d) of the IST Statute provided that the permanent and reserve judges and investigative judges "shall be persons of high moral character, impartiality

¹⁸⁸ See Qanun al-Tanzim al-Qada'i [Iraqi Judicial Organization Law], No. 160 arts. 58–59 (1979); Qanun al-Khas bi Wizarat al-'Adl [Regarding the Ministry of Justice Law], No. 101 art. 4(2)(a) (1977).

¹⁸⁹ See Statute of the Iraqi Special Tribunal art. 5(f)(2).

¹⁹⁰ See Statute of the Iraqi High Criminal Court art. 6(First).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See DUSTUR JUMHURIAT AL-'IRAQ [Constitution] arts. 87–101 (Iraq).

¹⁹⁴ See HUMAN RIGHTS WATCH, JUDGING DUJAIL: THE FIRST TRIAL BEFORE THE IRAQI HIGH TRIBUNAL, *supra* note 3, at 37–42 (discussing undue Iraqi political interference and pressure resulting in the removal of judges and personnel from the IHCC).

and integrity who possess the qualifications required for appointment to the highest judicial offices.”¹⁹⁵ The IST Statute did not clearly link the appointment of judges and investigative judges to the satisfaction of the legal requirements for appointment to the judiciary stipulated under the Iraqi Judicial Organization Law.¹⁹⁶ Further, no professional qualifications were provided for the appointment of prosecutors.¹⁹⁷ The only requirement specified by the IST Statute with respect to the appointment of prosecutors was that they be nominated and appointed by the IGC or the successor government after consultation with the Judicial Council.¹⁹⁸

The IHCC Statute has created uniform professional qualifications for the appointment of judges and prosecutors. Article 4(First) states that “[j]udges and public prosecutors shall be of high moral character, integrity, and uprightness. They shall possess experience in criminal law and shall fulfill the appointment requirements stipulated in the Judicial Organization Law No.160 of 1979 and the Public Prosecution Law No.159 of 1979.”¹⁹⁹

6. Providing Legal Basis for the Appointment of Non-Lawyers to the IHCC

The appointment of practicing lawyers as judges was problematic as the practice violated established Iraqi laws governing judicial appointments.²⁰⁰ However, Article 4(Second) of the IHCC Statute specifically addressed this issue by creating an exception to this Iraqi legal requirement for Iraqi lawyers who satisfy the specific professional requirements established by the statute.²⁰¹ While these procedures contradict previously established Iraqi law, this type of revision is in line with the provisions of the Iraqi constitution establishing the IHCC as an independent judicial body, and a legitimate national parliamentary authority has promulgated these revisions. As important, these specific revisions do not contradict the constitutional provisions governing the judiciary.²⁰²

¹⁹⁵ See Statute of the Iraqi Special Tribunal arts. 5(a), 7(d).

¹⁹⁶ *Id.* arts. 5(e), 7(l). These separate articles both state that with respect to judges and investigative judges the “conditions and terms of service” shall be the conditions and terms of service established by the Iraqi Judicial Organization Law. *Id.* However, this language is vague and does not specifically address legal requirements for appointments.

¹⁹⁷ See Statute of the Iraqi Special Tribunal art. 8.

¹⁹⁸ *Id.* art. 8(d).

¹⁹⁹ See Statute of the Iraqi High Criminal Court art. 4(First).

²⁰⁰ Iraqi law requires that judges be graduates of the Judicial Institute. See Iraqi Judicial Organization Law.

²⁰¹ See Statute of the Iraqi High Criminal Court art. 4(Second).

²⁰² See DUSTUR JUMHURIAT AL-‘IRAQ [Constitution] arts. 87–101 (Iraq).

7. Deletion of Provision for Removal of Tribunal's President

Article 5(f)(3) of the IST Statute authorized the IGC or the successor government to remove the IST president.²⁰³ This provision represented a serious breach of the independence of the IHCC as a judicial institution. The provision would have allowed the removal of the IST's president on political grounds. As a matter of existing Iraqi law, the Judicial Council has the prerogative to remove and discipline judges.²⁰⁴ Furthermore, the attempt to delegate this authority to a political organ under the IHCC Statute would have violated the Iraqi constitution.²⁰⁵ This procedure also violates Article 18 of the 1985 United Nations' Basic Principles of the Independence of the Judiciary, which provides that judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties.²⁰⁶ Deletion of this provision was a necessary revision in the IHCC Statute.

D. *Technical Drafting Errors in the Iraqi High Criminal Court Statute*

The IHCC Statute contains several technical drafting errors. While these types of errors do not directly undermine the legitimacy of the IHCC, they nonetheless indicate a level of carelessness and haste in the promulgation process.

Article 3(Fifth), which deals with the appointment of non-Iraqi judges, states that such judges may be appointed who "have experience in conducting criminal trials stipulated in this law, and who are of very high moral character, honest and virtuous to work in the Court, in the event that a State is one of the parties in a complaint . . ." ²⁰⁷ The last clause is nonsensical as the IHCC Statute does not contemplate the possibility of states becoming parties to prosecutions undertaken by the IHCC.²⁰⁸ The error is not attributable to the soundness of the translation as the clause appears in both the official Arabic text and the English translation.

Article 8(Tenth) refers to "non-Iraqi experts and observers referred to in paragraph (Ninth)."²⁰⁹ However, the cross-reference is incorrect as there is no mention of non-Iraqi observers in the paragraph referenced. Article 8(Ninth) contemplates that the Chief Investigative Judge has the right to

²⁰³ See Statute of the Iraqi Special Tribunal art. 5(f)(3).

²⁰⁴ See Iraqi Judicial Organization Law arts. 58, 59; Regarding the Ministry Of Justice Law art. 4(2)(a).

²⁰⁵ See DUSTUR JUMHURIAT AL-'IRAQ [Constitution] arts. 19, 87–88 (Iraq).

²⁰⁶ See *Basic Principles on the Independence of the Judiciary*, *supra* note 179, art. 18.

²⁰⁷ See Statute of the Iraqi High Criminal Court art. 3(Fifth).

²⁰⁸ See Ibrahim, *supra* note 157.

²⁰⁹ See Statute of the Iraqi High Criminal Court art. 8(Tenth).

appoint non-Iraqi experts to assist the investigative judges in carrying out investigations conducted under the authority of the IHCC Statute.²¹⁰ No reference is made to the possibility of appointing international observers in this particular sub-section or in any other section or subsection of the IHCC Statute.

Article 29(Fourth) of the IHCC Statute also includes an incorrect cross-reference. The text states that “[a]t any stage of the proceedings, the Court may demand of any other Iraqi court to transfer any case being tried by it involving any crimes stipulated in Articles 13, 14, 15, and 16 of this statute” The cross-reference to Articles 13, 14, 15 and 16 is incorrect as the substantive crimes of the Statute are defined in Articles 11, 12, 13, and 14.²¹¹

E. Problematic Revisions in the Iraqi High Criminal Court Statute

1. Procedures for Appointment of Judges and Prosecutors

Under the IST Statute, the IGC had the power to appoint judges,²¹² investigative judges,²¹³ and prosecutors,²¹⁴ and the Judicial Council had only a limited advisory role.²¹⁵ As the IGC was a political body, this arrangement severely compromised the IST’s independence and ran contrary to Iraqi law.²¹⁶ Article 4(Third) of the IHCC Statute now provides for judges and prosecutors to be nominated by the Higher Judicial Council and for such nominations to be approved by the Council of Ministers.²¹⁷ The effort to more prominently involve the Higher Judicial Council in the appointment of IHCC personnel is laudable and more consistent with the established procedures of the Iraqi legal system. However, these revisions are compromised by the unfortunate decision to subject the nominations of the Higher Judicial Council to the further approval of the Council of Ministers.²¹⁸ This approval process endows political actors with the final authority over judicial appointments, a procedure contradicting constitutional principles of judicial independence.²¹⁹ These revised procedures are not wholly negative though,

²¹⁰ See *id.* art. 8(Ninth).

²¹¹ See Ibrahim, *supra* note 157.

²¹² See Statute of the Iraqi Special Tribunal art. 5(c).

²¹³ *Id.* art. 7(b).

²¹⁴ *Id.* art. 8(d).

²¹⁵ *Id.* arts. 5(c), 7(b), 8(d).

²¹⁶ See Iraqi Judicial Organization Law arts. 58–59.

²¹⁷ See Statute of the Iraqi High Criminal Court art. 4(Third).

²¹⁸ See *id.*

²¹⁹ See DUSTUR JUMHURIAT AL-‘IRAQ [Constitution] arts. 19(First), 87–88 (Iraq). This procedure also potentially runs afoul of the United Nations’ Basic Principles on the Independence of the Judiciary, which disfavor having judicial appointments subject to a political

as they limit the level of political involvement in judicial appointments, and create a level of transparency regarding such appointments that was wholly lacking with the appointment procedures under the IST Statute.²²⁰

2. Compensation of Judges, Investigative Judges and Prosecutors

Pursuant to Articles 5(e), 7(l), and 8(i) of the IST Statute, the IGC was solely responsible for determining the compensation for judges and prosecutors.²²¹ As a temporary political authority, the IGC was not the appropriate body to determine compensation. The determination of compensation for judges and investigative judges was further complicated by a provision that allowed the IGC to determine such compensation “in light of the increased risks associated with the position.”²²²

In an effort to correct this shortcoming, the IHCC Statute mandated that all “salaries and rewards be specified by guidelines issued by the Council of Ministers.”²²³ This alternative procedure for determining compensation is inadequate and does not ensure that such determinations are made on fair and justifiable grounds. Council of Ministers proceedings lack the transparency associated with legislative decisions, and it is unclear whether any guidelines issued by the Council of Ministers would be subject to public scrutiny.

3. Transfer of Judges and Prosecutors

Under Article 4(Fourth) of the IHCC Statute, the Presidency Council, upon receipt of a proposal from the Council of Ministers, is granted an unlimited right to transfer judges and prosecutors from the IHCC to the Higher Judicial Council for any reason whatsoever.²²⁴ The ability to transfer IHCC personnel in this manner is tantamount to granting these political actors the unfettered right to remove judges and prosecutors for political reasons. Such unlimited oversight of the affairs of a judicial body violates the independence of the IHCC²²⁵ and contravenes Articles 19(First), 87, and

authority. *See Basic Principles on the Independence of the Judiciary, supra* note 179, arts. 1–7.

²²⁰ Following the dissolution of the IGC, the Prime Minister made appointments, as the head of the successor government, presumably based on decisions made by the Council of Ministers in consultation with members of the Higher Judicial Council.

²²¹ *See* Statute of the Iraqi Special Tribunal arts. 5(e), 7(l), 8(i).

²²² *Id.* arts. 5(e), 7(l).

²²³ *See* Statute of the Iraqi High Criminal Court art. 4(Third)(A).

²²⁴ *Id.* art. 4(Fourth).

²²⁵ *See Basic Principles on the Independence of the Judiciary, supra* note 179, arts. 1–7, 18; ICCPR, *supra* note 177, art. 14 (providing that everyone indicted with a criminal charge be entitled to a “fair and public hearing by a competent, independent, and impartial tribunal established by law”) (emphasis added).

88 of the Iraqi constitution, which establish the independence of the judiciary and judicial officers. This type of transfer would expose the judges and prosecutors of the Court to political retribution and control. Further, the provision does not provide for any sort of review of this type of decision.

The political intent of this provision is apparent since the executive authority could nominate judges or prosecutors from the IHCC for a position on the Higher Judicial Council without resort to this statutorily-mandated transfer. With respect to disciplinary and removal procedures, the IHCC Statute includes specific procedures to deal with instances where judges and prosecutors have not fulfilled the requirements of their office.²²⁶ While this provision does not technically contravene the IHCC Statute's provisions limiting the circumstances under which the service of a judge or prosecutor may be terminated,²²⁷ it clearly violates the spirit of these provisions.

4. Revision of Article 12(First) Defining Crimes Against Humanity

Article 12(First)(H) of the IHCC Statute departs from the definition previously included in the IST Statute and revises the accepted definition of crimes of persecution under customary international law.²²⁸ The IHCC Statute links various types of persecution with acts "referred to as a form of sexual violence of comparable gravity,"²²⁹ whereas the provision was previously linked with acts "referred to in this paragraph or any crime within the jurisdiction of the Tribunal."²³⁰ This revision appears to be a technical drafting mistake as the language appears to be incorrectly taken from the previous provision dealing with crimes of sexual violence.²³¹ However, this revision cannot simply be categorized as a technical drafting mistake, because the provision implicates the substantive definition of one of the core international crimes within the subject matter jurisdiction of the IHCC and departs from customary international law.

Section 3 of the Vienna Convention on the Law of Treaties provides wide latitude to interpret treaty provisions in instances where the textual interpretation leaves the meaning ambiguous or obscure or leads to a result

²²⁶ See DUSTUR JUMHURIAT AL-'IRAQ [Constitution] arts. 19(First), 87–88 (Iraq).

²²⁷ See Statute of the Iraqi High Criminal Court art. 5.

²²⁸ See *id.* art. 12(First)(H); Statute of the Iraqi Special Tribunal art. 12(a)(8). The definition in the Iraqi Special Tribunal Statute tracks the definition contained in the ICC Statute. See ICC Statute, *supra* note 93, art. 7(h).

²²⁹ See Statute of the Iraqi High Criminal Court art. 12(First)(H).

²³⁰ See Statute of the Iraqi Special Tribunal art. 12(a)(8).

²³¹ See Statute of the Iraqi High Criminal Court art. 12(First)(G) (defining "rape, sexual slavery, forcible prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity" as a crime against humanity) (emphasis added).

that is manifestly absurd or unreasonable.²³² In the context of interpreting an Iraqi statute, however, resort to this type of interpretation is not applicable, as the error is of a substantive nature and the rigid positivism of the Iraqi system does not allow judges to engage in this type of statutory interpretation. Hence, an amendment to the IHCC Statute is necessary to remedy this error.

F. Statutory Shortcomings Inherited from the Iraqi Special Tribunal

1. The Jurisdictional Gap and the Lack of a Status of Forces Agreement

IHCC jurisdiction is specifically limited to Iraqi nationals and non-Iraqi residents of Iraq, and does not extend to all individuals who may be accused of the crimes established in Articles 11–14 of the Statute.²³³ All sovereign states possess the right to exercise territorial jurisdiction; generally all national criminal legal systems recognize that national criminal courts may exercise jurisdiction over all individuals committing a crime within the territory of the state, irrespective of the nationality or residence status of the offenders.²³⁴ This lack of jurisdiction is conspicuous in light of the fact that serious evidence²³⁵ has emerged indicating incidents where

²³² See Vienna Convention on the Law of Treaties, arts. 31–33, *opened for signature* May 23, 1969, 115 U.N.T.S. 331, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

²³³ Statute of the Iraqi High Criminal Court art. 1(Second).

²³⁴ These jurisdictional restraints undermine the sovereignty of the Iraqi government. See Michael Kirby, *Universal Jurisdiction and Judicial Reluctance*, in *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* 240, 246 (Stephen Macedo ed., 2004) [hereinafter *UNIVERSAL JURISDICTION*] (describing the international postulate regarding sovereignty and the exercise of jurisdiction by noting “jurisdiction is ordinarily ‘an incident of an independent nation.’ The ultimate foundation for territorial jurisdiction is sovereignty.” (quoting *Ping v. United States*, 130 U.S. 581, 603 (1889))).

²³⁵ See, e.g., ANTHONY R. JONES & GEORGE R. FAY, *INVESTIGATION OF INTELLIGENCE ACTIVITIES AT ABU GHRAIB* (2004), *available at* <http://news.findlaw.com/nytimes/docs/dod/fay82504rpt.pdf> (declaring that “[c]learly abuses occurred at the prison at Abu Ghraib”); INSPECTOR GEN., U.S. DEP’T OF THE ARMY, *DETAINEE OPERATIONS INSPECTION, THE MIKOLASHEK REPORT* (2004), at ii, *available at* <http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/DAIG%20Detainee%20Operations%20Inspection%20Report.pdf> (explaining that while U.S. military personnel committed abuses in Iraq, these abuses “are not representative of policy, doctrine, or soldier training”); ANTONIO M. TAGUBA, *MAJOR GEN., U.S. DEP’T OF THE ARMY, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE*, *reprinted in* *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 405, 416–17 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (describing in detail the types of abuse committed by U.S. military personnel at the prison at Abu Ghraib); JAMES R. SCHLESINGER, *U.S. DEP’T OF DEFENSE, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS* 80 (2004), *available at* <http://defenselink.mil/news/Aug2004/d20040824finalreport.pdf> (“[P]ursuant to the commencement of combat operations in [Op-

coalition forces in Iraq have violated the Geneva Conventions²³⁶ and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment.²³⁷ This issue has been further exacerbated by the immunity of coalition forces from Iraqi legal process under CPA Order No. 17,²³⁸ and the lack of a status of forces agreement between the coalition forces and the Iraqi government. While there are legal questions surrounding the continued application and validity of CPA Orders following the official transfer of sovereignty,²³⁹ the Iraqi government has, in practice, not contested the or-

eration Enduring Freedom], the Commander . . . issued an order instructing the Geneva Conventions were to be applied to all captured individuals in accordance with their traditional interpretation.”). Evidence of other serious violations occurring in Haditha, Hamdania and Mahmudiya also has recently emerged. See Edward Wong, *G.I.'s Investigated in Slayings of 4 and Rape in Iraq*, N.Y. TIMES, July 1, 2006, at A1; Paul von Zielbauer, *U.S. Inquiry Backs Charges of Killing by Marines in Iraq*, N.Y. TIMES, Jan. 7, 2007, at 16; David S. Cloud, *Inquiry Suggests Marines Excised Files on Killings*, N.Y. TIMES, Aug. 18, 2006, at A1. The most notorious of these incidents occurred in the village of Haditha in 2005 and involved the alleged illegal killing of 24 Iraqi civilians by Marines. See von Zielbauer, *supra* note 235, at 16. The U.S. military undertook two separate inquiries into the events in question. According to widespread press reports, the inquiry by the Naval Criminal Investigative Service determined that evidence supported the allegations by military prosecutors that marines had illegally killed Iraqi civilians during the incident. *Id.* Another inquiry revealed that the investigation undertaken by U.S. Army Major General Eldon Bargewell found serious fault with the initial investigation into the incident by Marine commanders. Cloud, *supra* note 235, at A1. Military prosecutors charged four marines with murder as a result of the incident and four Marine officers were charged with violations stemming from their initial investigation of the incident. Von Zielbauer, *supra* note 235. For a listing of the charges brought by military prosecutors, see United States Marine Corps, List of Charges and Specifications, Haditha, Iraq Investigation (Dec. 21, 2006), <http://www.usmc.mil/lapa/Iraq/Haditha/Haditha-Preferred-Charges-061221.htm>.

²³⁶ Geneva I, *supra* note 105; Geneva II, *supra* note 105; Geneva III, *supra* note 98; Geneva IV, *supra* note 105. For details of the parties to the Geneva Conventions, see International Committee of the Red Cross, State Parties to the Following International Humanitarian Law and Other Related Treaties (June 5, 2007), [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$file/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$file/IHL_and_other_related_Treaties.pdf).

²³⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted by the General Assembly of the United Nations* Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 [hereinafter CAT]. U.S. domestic law has adopted elements of the Convention Against Torture. See 18 U.S.C. §§2340–2340(B) (2006).

²³⁸ Coalition Provisional Authority Order No. 17 (Revised), CPA/ORD/27 June 2004/17 (June 27, 2004), http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf. Immediately prior to the transfer of sovereignty on June 28, 2004, CPA Order No. 17 granted coalition forces immunity from Iraqi legal process. See *id.* §2(1).

²³⁹ Article 26(c) of the TAL states: “The laws, regulations, orders, and directives issued by the Coalition Provisional Authority pursuant to its authority under international law shall remain in force until rescinded or amended by legislation duly enacted and having the force of law.” LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 26(c), available at <http://www.iraqcoalition.org/government/TAL.html>. This provision is analogous to situations where the laws of a predecessor state are applied by a successor state.

der's continued validity.²⁴⁰ Since the CPA did not previously address the issue of jurisdictional immunity, the coalition forces must conclude a status of forces agreement with the government of Iraq, clearly explicating the obligation of Coalition Forces' governments to prosecute alleged offenders.²⁴¹ This type of treaty arrangement could successfully address the issue of selective enforcement created by the truncated territorial jurisdiction of the IHCC Statute.

2. Ba'ath Party Membership Disqualification

Article 33 of the IHCC Statute mandates that "[n]o person who was previously a member of the disbanded Ba'ath party shall be appointed as a judge, investigative judge, public prosecutor, an employee or any of the personnel of the Court."²⁴² The rationale behind this exclusion is that judicial appointments made by the Ba'athist regime favored those jurists who were members of the party. However, this blanket exclusion does not consider that many Ba'ath party members were only registered as a matter of expediency and did not have active roles within the party. Many jurists who

For a discussion of the doctrine of state succession, see M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION IN U.S. LAW AND PRACTICE* 142–47 (4th ed. 2002); DANIEL PATRICK O'CONNELL, *STATE SUCCESSION IN MUNICIPAL AND INTERNATIONAL LAW* (1967); L. OPPENHEIM, *INTERNATIONAL LAW, A TREATISE* 156–69 (1955); Mathew C. R. Craven, *The Problem of State Succession and the Identity of States under International Law*, 9 *EUROPEAN J. INT'L L.* 142–62 (1998); Malcolm Shaw, *State Succession Revisited*, 6 *FINN. Y. INT'L L.* 34 (1995). The doctrine of state succession could be relied upon based on the assumption that the CPA was the de facto state successor of the Ba'ath regime or based on the fact that the CPA exercised national sovereignty as an "occupying power" pursuant to the Geneva Conventions. However, the Iraqi constitution stipulates that the TAL will be annulled following the seating of a permanent government, weakening arguments for the continued validity of CPA Orders. See DUSTUR JUMHURIAT AL-'IRAQ [Constitution] art. 143 (Iraq).

²⁴⁰ In response to accusations that U.S. forces have committed atrocities in Iraq, the order's continued validity is being publicly questioned. Accordingly, Iraqi political leaders announced their intent to revisit the validity of CPA Order No. 17 during negotiations over the renewal of the coalition forces' mandate in Iraq as provided by Security Council Resolution 1637, which expired at the end of 2006. S.C. Res. 1637, U.N. SCOR 60th Sess., 5300th mtg., U.N. Doc. S/RES/1637 (Nov. 11, 2005). Despite this public announcement, however, in a November 11, 2006 letter addressed to the President of the United Nations Security Council from the Prime Minister of Iraq, Nuri Kamal al-Maliki, requesting the extension of the mandate of the multinational force, the issue of immunity was not publicly raised, and the subsequent resolution adopted by the United Nations Security Council extending the mandate of the multinational force until December 31, 2007, did not address the issue. See S.C. Res. 1723, U.N. SCOR 61th Sess., 5574th mtg., U.N. Doc. S/RES/1723 (Nov. 28, 2006) (Letter reproduced in Annex I).

²⁴¹ For an example of a status of forces agreement, see Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67.

²⁴² See Statute of the Iraqi High Criminal Court art. 33.

joined the party did so only as a means to maintain their source of livelihood.²⁴³ The indiscriminate record of persecution under the Ba'athist regime also indicates that membership in the Ba'ath party did not immunize members from the political repression meted out by the regime. As only non-Ba'athists were qualified for appointment, the ethnic composition of IHCC personnel was severely skewed in favor of Shi'a and Kurds, which created, at the very least, an appearance of bias and a perceived lack of impartiality.

Blanket exclusions also potentially impinge on the IHCC's independence from undue political interference. This issue is further clouded by a lack of clarity with respect to the role of the National De-Ba'athification Commission and its relationship to the Court. While the office of former Prime Minister Ibrahim al-Ja'afari has publicly stated that the IHCC is not subject to the rulings of the De-Ba'athification Commission,²⁴⁴ the commission has clearly attempted to exercise authority over the IHCC,²⁴⁵ and the IHCC Statute does not clarify how commission determinations are to be treated. Furthermore, the Iraqi constitution is vague as to the exact parameters of the relationship between the commission and the judiciary, stating only that the commission would coordinate with the judiciary.²⁴⁶ Additionally, the IHCC Statute does not provide appeals procedures for commission decisions.

This process also raises practical questions regarding the competence of potential appointees, as the experience of de-Ba'athification throughout the post-war period has resulted in the "evisceration of existing [Iraqi] institutions."²⁴⁷ The negative ramifications of these policies are now being reconsidered by the National Assembly, which has received a pro-

²⁴³ For a discussion of many of the issues presented by de-Ba'athification, see Doug Struck, *My Hands Are Not Stained in Blood*, WASH. POST, Feb. 3, 2005, at A21. The experience of de-Ba'athification has been highly controversial throughout all sectors of Iraqi society and has specifically affected the work of the IHCC. Nine individuals were removed from the IST at the insistence of the De-Ba'athification Commission, and in July 2005 the Commission announced that it intended to purge 19 other members of the IST. See Edward Wong, *Iraqi Leader Vows to Block Purges on the Hussein Tribunal*, N.Y. TIMES, July 29, 2005, at A9. The announcement prompted a response from President Jalal Talabani, who stated that he would personally defend the existence of the IST and its work. *Id.* The controversy over removal of judges continued after the resignation of Rizgar Muhammad Amin, the Kurdish judge who had initially presided over the al-Dujail trial but had stepped down in January 2006. His deputy, Said al-Hamashi, was expected to replace Amin but was passed over for the post following accusations from the De-Ba'athification Commission that he was a member of the Ba'ath party. See Robert F. Worth, *Hussein Trial Delayed as Judges Dispute Appointment*, N.Y. TIMES, Jan. 25, 2006, at A3.

²⁴⁴ See Worth, *supra* note 243.

²⁴⁵ See Wong, *supra* note 243.

²⁴⁶ See DUSTUR JUMHURIAT AL-'IRAQ [Constitution] art. 135 (Iraq).

²⁴⁷ Ruti Teitel, *The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT'L. L.J. 837, 843 (2005).

posal to amend the laws on de-Ba'athification to mitigate the excessive effects of earlier purges.²⁴⁸

3. Transfer of Cases to the IHCC

Article 29(First) of the IHCC Statute grants the IHCC concurrent jurisdiction for the prosecution of crimes stipulated in Article 14,²⁴⁹ and Article 29(Second) grants the IHCC primacy regarding prosecution of crimes listed in Articles 11 through 13.²⁵⁰ Article 29(Third) extends this jurisdictional reach by providing that “[at] any stage of the proceedings, the Court may demand of any other Iraqi court to transfer any case being tried by it involving any crimes stipulated in Articles 11, 12, 13, and 14 of this statute, and such court shall be required to transfer such case upon demand.”²⁵¹ This provision arose out of the IHCC participants’ concern that other Iraqi criminal courts would attempt to preemptively exercise jurisdiction over such cases in an effort to diminish the effectiveness of the IHCC. However, this provision is overly broad, endangers the impartiality of the Iraqi judiciary, and contravenes the Iraqi constitution.²⁵² Article 84 of the Iraqi constitution establishes that the judicial authority is independent and that the various courts shall assume this authority.²⁵³ Article 85 states that judges are independent and that no authority shall have the right to interfere in the judiciary and the affairs of justice.²⁵⁴ The language of these provisions is not limited to interference by political actors and would apply equally to undue interference in the affairs of an Iraqi court by other Iraqi courts.

²⁴⁸ Ali Faysal al-Lami, the executive director of the De-Ba'athification Commission, has publicly stated that the proposals submitted to the National Assembly will reduce the number of senior ex-Ba'athists excluded from participation in public life from thirty thousand to fifteen hundred. See Alernet.org, *Iraqi Draft Law Would Reinstate Most Ex-Ba'athists*, REUTERS, Nov. 7, 2006, <http://www.alertnet.org/thenews/newsdesk/PAR733102.htm> (last visited May 22, 2007). In keeping with the realization that the de-Ba'athification process had had a negative impact on Iraqi society, the De-Ba'athification Commission allowed 700 former Ba'athists to return to their old government positions. See Damien Cave, *Iraqis Answer Global Critics by Tackling Troubling Issues*, N.Y. TIMES, Jan. 18, 2007, at A10. President Jalal Talabani has gone as far as calling for the De-Ba'athification Commission to be abolished. See *Interview with Iraqi President Jalal Talabani*, DAR AL-HAYAT, Jan. 1, 2007, <http://64.26.31.21:2010/Spec/01-2007/Article-20070122-491d86e7-c0a8-10ed-009d-421b8e6c550a/story.html>.

²⁴⁹ See Statute of the Iraqi High Criminal Court art. 29(First).

²⁵⁰ *Id.* art. 29(Second).

²⁵¹ *Id.* art. 29(Third).

²⁵² DUSTUR JUMHURIAT AL-‘IRAQ [Constitution] arts. 84–85 (Iraq).

²⁵³ *Id.* art. 84.

²⁵⁴ *Id.* art. 85.

The fact that a request for a transfer could occur at any stage of judicial proceedings exemplifies the nature of this provision, which would allow the IHCC to make a transfer request based upon its impressions of the progress or the lack thereof regarding a specific case or trial. Furthermore, based on the vague wording of the provision, one could argue that such a transfer could occur even after the rendering of a verdict or at any time prior to final resolution of the appeals process. Hence, the IHCC could intercede in any case where the trial outcome ran contrary to its perceptions of the proper course of justice. Coupled with the nearly limitless expansion in the IHCC's jurisdiction under Article 14(Fourth),²⁵⁵ this provision would enable the IHCC to intercede in any case taking place in any Iraqi criminal court.

4. Substantive Issues of Legality

Articles 11 through 14 of the IHCC Statute define the IHCC's subject matter jurisdiction.²⁵⁶ Under Articles 11 through 13, the three international core crimes are genocide, crimes against humanity, and war crimes.²⁵⁷ Article 14 extends the IHCC's jurisdiction to certain crimes under Iraqi law.²⁵⁸ The jurisdiction extends to commission of these crimes by Iraqi nationals or non-Iraqi residents of Iraq from July 17, 1968 until May 1, 2003.²⁵⁹ The jurisdictional reach of the Court is not limited geographically and extends to crimes committed outside of Iraq.²⁶⁰

The definitions of the three international core crimes are modeled on and closely follow the definitions of those crimes in the ICC Statute.²⁶¹ The expansive subject matter jurisdiction of the IHCC is problematic, as it brings the IHCC Statute in conflict with the "principles of legality" defined

²⁵⁵ See *infra* Part III.F.4.b.

²⁵⁶ See Statute of the Iraqi High Criminal Court arts. 11–14.

²⁵⁷ See *id.* at arts. 11–13. The definitions of the three international core crimes are nearly identical to the corresponding definitions in the ICC Statute. See ICC Statute, *supra* note 93, arts. 6–8 (defining the crimes of genocide, crimes against humanity and war crimes).

²⁵⁸ See Statute of the Iraqi High Criminal Court art. 14.

²⁵⁹ *Id.* art. 1(Second).

²⁶⁰ The IST Statute had specifically mentioned crimes committed by Iraqi nationals and non-Iraqi residents of Iraq related to the Iran-Iraq War and the invasion and occupation of Kuwait. See Statute of the Iraqi Special Tribunal art.1(b). This specific reference was unnecessary under the stated jurisdictional reach of the IST Statute and under existing Iraqi law, which contemplates extraterritorial jurisdiction. Article 7 of the Iraqi Criminal Code extends Iraq jurisdiction to "foreign territories occupied by the Iraqi army in relation to crimes which affect the army's safety or interests." Qanun al-'Uqubat [Iraqi Criminal Code], No. 111 art. 7 (1969). Similarly, Article 53(b) of the Iraqi Criminal Procedure Law states that, "if a crime is committed outside Iraq, the investigation thereof will be performed by one of the investigative judges [selected] by the Minister of Justice." Iraqi Criminal Procedure Law, art. 53(b).

²⁶¹ See ICC Statute, *supra* note 93, arts. 6–8.

by the legal maxims *nulla poene sine lege* and *nullum crimen sine lege*.²⁶² The principles of legality enhance the certainty of the law, provide justice and fairness for the accused, establish the deterrent function of criminal sanctions, prevent the abuse of power, and strengthen the application of the rule of law. These principles require that public notice of a crime be provided prior to the commission of the criminalized acts. Article 15 of the International Convention on Civil and Political Rights,²⁶³ Article 7 of the European Convention on Human Rights,²⁶⁴ and Article 9 of the American Convention on Human Rights embody these principles of legality.²⁶⁵ They are foundational principles in many constitutional systems.²⁶⁶ The U.S. Constitution specifically includes prohibitions against “ex post facto” laws

²⁶² See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 150–58 (2d ed. 1999) [hereinafter BASSIOUNI, *CRIMES AGAINST HUMANITY*]; BASSIOUNI, INTRODUCTION TO ICL, *supra* note 93, at 198–204; see also George P. Fletcher, *Parochial Versus Universal Criminal Law*, 3 J. INT’L CRIM. JUST. 20, 21 (2005) (“The undisputed prerequisite for legitimate punishment in all modern systems of criminal law is legislative definition prior to the commission of the offence, captured in the maxim: *nullum crimen sine lege*. The legislation might come in many forms—a statute, an international treaty or a Security Council Resolution defining the powers of an ad hoc tribunal.”). For a survey of these principles, see JULLIOT DE LA MORANDIERE, *DE LA REGLE NULLA POENA SINE LEGE* (1910); Stefan Glaser, *Le principe de la légalité en matière pénale, notamment en droit codifié et en droit coutumier*, 46 REVUE DE DROIT PENAL ET DE CRIMINOLOGIE 899 (1966); Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937); Giuliano Vassalli, *Nullum crimen sine lege*, in [APPENDICE MAGI-OB] NUOVO DIGESTO ITALIANO 1173 (1939); Giuliano Vassalli, *Nullum crimen sine lege*, in [APPENDICE MIN-PROC] NOVISSIMO DIGESTO ITALIANO 292 (1984). For national approaches, see ROGER MERLE & ANDRE VITU, *TRAITE DE DROIT CRIMINEL* 108 (1967) (documenting the historical right of the judge in the French criminal justice system to interpret principles of law); *id.* at 113 (acknowledging the decline in the 20th century of the rigid positivist approach to “principles of legality”); see also Marc Ancel, *La règle “nulla poena sine lege” dans les législations modernes*, in ANNALES DE L’INSTITUT DE DROIT COMPARE 245 (1936); Pietro Nuvolone, *Le principe de la légalité et les principes de la défense sociale*, in REVUE DE SCIENCE CRIMINELLE ET DE DROIT PENAL COMPARE 231 (1956); Sebastian Soler, *La formulation actuelle du principe “nullum crimen,”* REVUE DE SCIENCE CRIMINELLE ET DE DROIT PENAL COMPARE (1952).

²⁶³ See ICCPR, *supra* note 177, art. 15; see also ICC Statute, *supra* note 93, art. 22 (*Nullum Crimen Sine Lege*); *id.* art. 23 (*Nulla Poena Sine Lege*).

²⁶⁴ See Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 7, Nov. 4, 1950, 312 U.N.T.S. 221.

²⁶⁵ See Organization of American States, American Convention on Human Rights art. 9, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

²⁶⁶ See e.g., The 1980 Constitution of the Arab Republic of Egypt, art. 66; 1958 CONST. art. 7–8 (Fr.); COST. arts. 25–26 (Italy); see generally CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1993) (collecting and translating the constitutions of many countries).

and against "Bills of Attainder,"²⁶⁷ and its fifth and fourteenth amendments have been interpreted to prohibit statutes that are vague and ambiguous.²⁶⁸

The Iraqi legal system has traditionally been strictly positivist and stringent with respect to the principles of legality.²⁶⁹ The Iraqi Constitution reaffirms the positivist tradition of the Iraqi legal system, which enshrines the principles of legality in two separate provisions of Article 19. Article 19(Second) states that "[t]here is no crime or punishment except by a stipulation. The punishment shall only be for an act that the law considers a crime when perpetrated. A harsher sentence than the applicable sentence at the time of the offense may not be imposed."²⁷⁰ Article 19(Tenth) states that "[c]riminal law does not have a retroactive effect, unless it is to the benefit of the accused."²⁷¹ Furthermore, Iraq is a dualist state where treaties, even if ratified, must be incorporated through the adoption of national implementing legislation, which must then be published in the Official Gazette prior to domestic applicability.²⁷² This dualist approach is not atypical and has been the predominant strand in the international system.²⁷³

The three international core crimes under Articles 11 through 13 of the IHCC Statute are not contained in the Iraqi Criminal Code and have not been separately promulgated by an Iraqi legislature.²⁷⁴ The IHCC has at-

²⁶⁷ U.S. CONST. art. I, § 9, cl. 3.

²⁶⁸ See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

²⁶⁹ The "principles of legality," which prohibit crime or penalty without a specific legal textual description that is clear (i.e., not vague or ambiguous), and the retroactive application of criminal laws and penalties, are recognized in the Iraqi Criminal Code and the Provisional Constitution of 1970. Iraqi Criminal Code, arts. 1–2; Provisional Constitution art. 21 (Iraq). The TAL also included the principles of legality. See LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 15(A), available at <http://www.iraqcoalition.org/government/TAL.html>.

²⁷⁰ See DUSTUR JUMHURIAT AL- 'IRAQ [Constitution] art. 19(Second) (Iraq).

²⁷¹ *Id.* art. 19(Tenth).

²⁷² For a discussion of the differences between monist and dualist approaches to the incorporation of treaty obligations, see 1 OPPENHEIM'S INTERNATIONAL LAW 52–86 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

²⁷³ See LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 66 (1995). Debates about the incorporation of international law in the United States are far from resolved and are indicative of the reluctance of many countries to adopt a monist approach that would require domestic courts to give effect to international law even in such instances when domestic law conflicts with the mandates of international law. See, e.g., Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004) (arguing that U.S. legal tradition specifically contemplates the internalization of international law into U.S. domestic law); Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999) (arguing that long-standing principles of U.S. jurisprudence and case law conflict with scholarly arguments urging the more receptive incorporation of international law).

²⁷⁴ See Iraqi Criminal Code.

tempted to incorporate these crimes into the IHCC Statute without establishing proper foundation for their application by an Iraqi court. In so doing, the IHCC Statute arguably violates the principles of legality in the context of the Iraqi legal system.²⁷⁵

a. Genocide, War Crimes, and Crimes Against Humanity

If an international crime exists in the national criminal law of an individual's state of nationality or residence, ignorance of international criminal law cannot overcome the presumption of knowledge regarding that particular crime.²⁷⁶ However, crimes of genocide and war crimes have not been incorporated into Iraqi law through inclusion in the Iraqi Criminal Code or through the promulgation of national implementing legislation. To remedy this violation of the "principles of legality," the IHCC must rely on the fact that Iraq has previously ratified conventions containing war crimes and genocide,²⁷⁷ even though they were not included in the Iraqi Criminal Code or established as domestic crimes through national Iraqi legislation published in the Official Gazette of Iraq.

This approach requires that the IHCC interpret the principles of legality in a manner distinguishing the formal aspects of these "principles" discussed above and the substantive intent of the principles of legality, namely, ensuring that the public has notice of such crimes prior to committing the criminalized acts. In this light, the formal aspects of the principles of legality may be set aside in favor of the substantive intent. These crimes were publicly known in Iraq, and the IHCC can assume that prospective

²⁷⁵ The ICTY was forced to deal with similar questions. The Report of the Secretary General in connection with the establishment of the tribunal specifically chose not to rely on the application of domestic law and instead noted that "international humanitarian law . . . provides a sufficient basis for subject-matter jurisdiction . . ." See *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704 (May 3, 1993), 32 I.L.M. 1159 (1993). Regardless of this assertion, as a matter of legality, the tribunal's position with respect to this question was certainly buttressed by the fact that the Yugoslav federal criminal code included the crimes of genocide, crimes against humanity, and war crimes and corresponding penalties. See M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 689–705 (1996); VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER-YUGOSLAVIA* 274–76 (1995).

²⁷⁶ See BASSIOUNI, *CRIMES AGAINST HUMANITY*, *supra* note 262, at 363–64.

²⁷⁷ See Geneva I, *supra* note 105; Geneva II, *supra* note 105; Geneva III, *supra* note 98, Geneva IV, *supra* note 105. Iraq acceded to all of the Geneva Conventions on February 14, 1956. See *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*]. Iraq acceded to the *Genocide Convention* on January 20, 1959. For details of state parties to the *Convention*, see Office of the United Nations High Commissioner for Human Rights, *Ratifications and Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Apr. 19, 2007), <http://www.ohchr.org/english/countries/ratification/1.htm>.

defendants and others in the upper echelons of the regime leadership had knowledge of these crimes.²⁷⁸

To overcome challenges to the legality of these provisions though, the IHCC Statute would have had to clearly establish the basis for the inclusion of these jurisdictional provisions by issuing an Explanatory Memorandum that specifically referenced Iraq's ratification of the Genocide Convention²⁷⁹ and the four Geneva Conventions of 1949²⁸⁰ and cross-referenced the definitions of these crimes to specific contents in the Iraqi Criminal Code²⁸¹ and the Iraqi Military Penal Law.²⁸² This approach would have allowed the IHCC to rely upon these crimes in prosecutions, despite the fact that the inclusion of genocide and war crimes in the IHCC's jurisdictional provisions fails to satisfy the formal requirements of the principles of legality, namely, the inclusion of these crimes in a national law and its publication in the Official Gazette.

The IHCC Statute definition of war crimes also poses a problem due to its reliance on the broad definition of war crimes in the ICC Statute, which adopts the position that such crimes should include serious violations of international humanitarian law whether they are committed during international or non-international armed conflicts.²⁸³ This definition is problematic in the instant context because the commission of such crimes in non-international armed conflicts has only recently become an indisputable tenet of customary international law. The Geneva Conventions regulate conflicts of a non-international character by a single article, common to all four conventions—common Article 3, which does not categorically establish that

²⁷⁸ This conclusion was in substance what the Nuremberg judgment established with respect to crimes against humanity. See BASSIOUNI, *CRIMES AGAINST HUMANITY*, *supra* note 262, at 525.

²⁷⁹ See Genocide Convention, *supra* note 277; for evidence of Iraq's ratification of the Genocide Convention, see Office of the United Nations High Commissioner for Human Rights, Ratifications and Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Apr. 19, 2007), <http://www.ohchr.org/english/countries/ratification/1.htm>.

²⁸⁰ See Geneva I, *supra* note 105; Geneva II, *supra* note 105; Geneva III, *supra* note 98, Geneva IV, *supra* note 105; for evidence of Iraq's ratification of the Geneva Conventions, see International Committee of the Red Cross, State Parties to the Following International Humanitarian Law and Other Related Treaties (June 5, 2007), [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$file/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$file/IHL_and_other_related_Treaties.pdf).

²⁸¹ See Iraqi Criminal Code.

²⁸² Qanun al-'Uqubat al-Askariya [Iraqi Military Penal Law], No. 13 (1940).

²⁸³ The ICC Statute includes as war crimes serious violations of article 3 common to the four Geneva Conventions that take place in armed conflicts not of an international character. See ICC Statute, *supra* note 93, art. 8, ¶¶ 2(c)–(e).

violations of this provision are war crimes. While scholarly opinion²⁸⁴ and ICTY and ICTR decisions have overcome this jurisdictional gap and have firmly established that such violations are war crimes under customary international law,²⁸⁵ this provides an insufficient basis on which to argue that such crimes were part of customary international law during the entire period covered by the IHCC's temporal jurisdiction.

Including crimes against humanity in the IHCC Statute presents more challenging issues than those presented by war crimes and genocide, as the Iraqi Criminal Code does not include this category of international crimes, and crimes against humanity have not been the subject of a specialized international convention.²⁸⁶ Hence, unlike the crimes of genocide and war crimes, Iraq has no treaty obligations regarding this category of crimes.

However, most crimes in this category are separately included in the Iraqi Criminal Code.²⁸⁷ As such, the IHCC could establish its jurisdiction with respect to all three international core crimes and avoid violating the principles of legality by dividing the above three crimes into several lesser crimes that are found in most domestic criminal codes, including the Iraqi Criminal Code and the Iraqi Military Penal Law. For example, the Iraqi Criminal Code criminalizes: (i) unlawful detention;²⁸⁸ (ii) use of person as object of mockery;²⁸⁹ (iii) cruelty;²⁹⁰ (iv) torture;²⁹¹ (v) intentional damage of public property;²⁹² (vi) burning of petroleum wells;²⁹³ (vii) intentional spreading of dangerous diseases;²⁹⁴ (viii) persecution based on reli-

²⁸⁴ See, e.g., Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 576 (1995) (arguing that many violations of common article 3 "though not explicitly listed as grave breaches, are of universal concern and subject to universal condemnation").

²⁸⁵ See M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, in 1 INTERNATIONAL CRIMINAL LAW 205, 221-24 (M. Cherif Bassiouni ed., 2d ed. 1999) [hereinafter Bassiouni, *The Normative Framework of International Humanitarian Law*].

²⁸⁶ See M. Cherif Bassiouni, "Crimes Against Humanity": *The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457, 457 (1994) (noting that there have been no specialized conventions on "Crimes Against Humanity" since the London Charter, where the term first received definition).

²⁸⁷ See, e.g., Iraqi Criminal Code, art. 325 (prohibiting slavery); *id.* art. 333 (prohibiting torture); *id.* art. 421 (prohibiting illegal detention and torture). Despite these prohibitions, Iraq has not signed the Convention Against Torture. CAT, *supra* note 237.

²⁸⁸ Iraqi Criminal Code, art. 322.

²⁸⁹ *Id.* art. 325.

²⁹⁰ *Id.* art. 332.

²⁹¹ *Id.* art. 333.

²⁹² *Id.* art. 340.

²⁹³ *Id.* art. 342(b).

²⁹⁴ *Id.* art. 368.

gious affiliation;²⁹⁵ (ix) rape;²⁹⁶ (x) killing two people or more;²⁹⁷ (xi) causing the disappearance of bodies;²⁹⁸ (xii) embezzlement;²⁹⁹ and (xiii) destroying real estate.³⁰⁰ The Iraqi Military Penal Law references, inter alia, the following war crimes³⁰¹: (i) ordering an inferior to commit a crime;³⁰² (ii) the destruction of property;³⁰³ (iii) the destruction of property through the use of force;³⁰⁴ (iv) the unlawful taking of the property of the prisoners, wounded, and deceased;³⁰⁵ and (v) overlooking criminal acts.³⁰⁶ Accordingly, the IHCC could properly refer to these crimes as defined by Iraqi law and rely upon them as elements of the three international core crimes.³⁰⁷

While crimes against humanity have not been the subject of a specialized international convention, this category of crimes has been defined in various international instruments³⁰⁸ and various components within this category are *jus cogens*.³⁰⁹ As such, another alternative approach to establishing the jurisdiction of the IHCC with respect to crimes against humanity,

²⁹⁵ *Id.* art. 372.

²⁹⁶ *Id.* art. 393.

²⁹⁷ *Id.* art. 406(f).

²⁹⁸ *Id.* art. 420.

²⁹⁹ *Id.* art. 444.

³⁰⁰ *Id.* arts. 447, 478.

³⁰¹ The procedures relating to the trial of military personnel under Iraqi law are governed by Iraqi Law No. 13 of 1940. Qanun Usul al-Muhakamat el-Askariya [Military Trials Procedural Law], No. 13 (1940).

³⁰² Iraqi Military Penal Law, art. 98.

³⁰³ *Id.* art. 113.

³⁰⁴ *Id.* art. 114.

³⁰⁵ *Id.* art. 115.

³⁰⁶ *Id.* art. 123.

³⁰⁷ See Preparatory Comm'n for the Int'l Criminal Court, *Finalized Draft Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) (establishing the "Elements of Crimes" for the International Criminal Court).

³⁰⁸ International Military Tribunal: Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis Aug. 8, 1945, 58 Stat. 1544, 1546, 82 U.N.T.S. 279, 284 art. 6(c); Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, art. 5(c), 4 Bevans 20 (amended on Apr. 26, 1946) [hereinafter IMTFE Agreement]; Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute], available at <http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb06-e.pdf>; Statute of the International Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute], available at <http://69.94.11.53/ENGLISH/basicdocs/statute/2004.pdf>; ICC Statute, *supra* note 93, art. 7. For a discussion of these and other formulations see BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 243.

³⁰⁹ For a detailed discussion on crimes against humanity and other *jus cogens* crimes, see generally BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 262, at 210–17; BASSIOUNI, INTRODUCTION TO ICL, *supra* note 90, at 684–704.

as well as genocide and war crimes, which are also *jus cogens*,³¹⁰ is to rely on this status to argue that these international crimes penetrate national law and cannot be derogated from because they are peremptory norms of international law.³¹¹ However, state practice has not clearly supported this position even though numerous scholars and publicists have eagerly adopted it.³¹² The innovative nature of these arguments within a domestic setting

³¹⁰ See BASSIOUNI, INTRODUCTION TO ICL, *supra* note 93, at 171.

³¹¹ The role of customary international law in international criminal law has yet to be finally resolved, and the approach of scholars and commentators has often broken down based upon disciplinary background with traditional penalists and positivists at odds with international lawyers. George P. Fletcher and Jens David Ohlin argue that customary international law should not be relied upon as “means of inculcation in criminal prosecutions, whether in domestic courts or international courts.” George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT’L CRIM. JUST. 539, 556 (2006). They go on to note that “[c]ustomary law is anathema in the criminal courts of every civilized society. The reason for legislation is to drive custom from the system and to create a regime based on rules and standards declared publicly, in advance, by a competent authority.” *Id.* at 559. International lawyers advocate the opposite approach in addressing the question of whether convictions for violations of uncodified customary law can ever meet the requirements imposed by the *nullum crimen* standard. Theodor Meron argues that the “legality principle does not bar such convictions . . . if genuine care is taken to determine that the legal principle was firmly established as custom at the time of the offense so that the offender could have identified the rule he was expected to obey.” See Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT’L L. 817, 821 (2005).

³¹² See, e.g., M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligation Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63 (1996). In a different context, various European domestic courts have had the opportunity to assess arguments with respect to the application of customary international law in the absence of implementing legislation in the course of extradition hearings, and the results have been decidedly mixed. Although these cases dealt with novel legal questions arising out of attempts to exercise universal jurisdiction with respect to international crimes, they nonetheless illustrate the reluctance of certain domestic courts to rely on customary international law as the sole basis for satisfying the double criminality requirement in extradition proceedings in the absence of implementing legislation. First, the final decision of a panel of the British House of Lords in response to the Spanish extradition request for the former Chilean head of state, General Augusto Pinochet, was narrowly framed and focused on the question of statutory authority. As Richard Falk explains, “the crux of criminality associated with the Pinochet regime, even as to torture, was not accepted as a valid basis for extradition. The majority rejected the view that there was any basis for charges of criminality under international law in British courts other than what was explicitly incorporated into British positive law.” Richard Falk, *Assessing the Pinochet Litigation: Whither Universal Jurisdiction?*, in UNIVERSAL JURISDICTION, *supra* note 234, at 97, 113. In dealing with the customary law status of torture in connection with an extradition request in the Bouterse case, the Dutch Supreme Court rejected a lower court decision establishing customary international law as an independent basis for criminal prosecution. As Erika de Wet explains, the Dutch Supreme Court “rejected the decision of the Court of Appeals by curtly determining that even if a torture were a crime according to customary international law, it would not be able to neutralize the principle of legality contained in Article 16 of the Dutch Constitution and Article 1 of the Dutch Criminal Code. Thus, despite the country’s monist legal tradition, the Dutch Supreme Court was not willing to accept that customary international law could serve as an independent basis for criminal prosecution in

required that they be included in an Explanatory Memorandum, which would have enabled the IHCC to distinguish between the substantive and formal aspects of the principles of legality and demonstrate the basis of direct applicability under international law.³¹³

With respect to crimes against humanity two other discrete questions must be raised. First, prosecution of this category of crimes was originally linked to their commission during a war as evidenced by Article 6(c) of the London Charter, which excluded by definition all such crimes committed prior to the outbreak of World War II.³¹⁴ The 1950 Report of the International Law Commission removed this linkage,³¹⁵ however it is difficult to conclude that this report embodied the progressive codification of

the Netherlands. Instead, the application of such norms remains dependent on implementing legislation." Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law*, 15 EUR. J. INT'L. L. 97, 117 (2004).

³¹³ While the ICTY and the ICTR were able to exclusively rely upon international humanitarian law as an independent basis upon which to establish the subject matter jurisdiction of the respective tribunals, the ICTY and the ICTR were established by the United Nations Security Council as an enforcement measure under the binding authority of Chapter VII after the determination had been made that the serious violations of international humanitarian law that occurred in both conflicts represented a threat to international peace and security. See BASSIOUNI & MANIKAS, *supra* note 275, at 202–09; Jose E. Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 371 (1999). As Virginia Morris and Michael P. Scharf have explained, "[a] tribunal established by the Security Council, acting on behalf of the international community, to try and punish persons responsible for crimes under international law should do so on the basis of international rules and standards. . . . This approach to applicable law underscores international law as the source of the criminal responsibility incurred by perpetrators of war crimes and crimes against humanity as well as the interest of the international community in ensuring respect for the fundamental norms of international law." VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 50 (1995). The unique context and manner in which the ICTY and ICTR were established does not necessarily translate into an independent basis for overcoming the more stringent positivist national law tradition that characterizes the Iraqi legal system's approach to incorporating customary international law. A more analogous situation arose in Ethiopia with respect to the prosecution of crimes committed by the military junta led by Colonel Mengistu Haile Mariam. Diane Orentlicher has described these criminal proceedings as an example of an "internationalized national court," and prosecutions were based upon national and international crimes, however, the latter category was limited to those crimes incorporated by Ethiopian law. See Diane Orentlicher, *The Future of Universal Jurisdiction in the New Architecture of Transnational Justice*, in UNIVERSAL JURISDICTION, *supra* note 234, at 214, 223.

³¹⁴ See M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law*, *supra* note 285, at 205.

³¹⁵ See Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, U.N. Int'l Law Comm'n [ILC], U.N. Doc. A/1316 (1950), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf (without commentary); http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_1_1950.pdf (with commentary).

customary international law,³¹⁶ and the question of the appropriateness of requiring a nexus between crimes against humanity and war remained a topic of contention. While the statute adopted by the United Nations Security Council establishing the ICTY preserved the necessary connection between crimes against humanity and armed conflict,³¹⁷ the statute adopted by the United Nations Security Council establishing the ICTR dispensed with this connection.³¹⁸ Hence, it is unclear as to when the war-connection was deemed to no longer be a component of the customary international law definition of crimes against humanity. However, as evidenced by the evolution of this definition in the time period between the authorization of the ICTY Statute and the ICTR Statute, the commission of such crimes during a period when no armed conflict existed cannot be seen as a violation of customary international law for the entire period covered by the IHCC's temporal jurisdiction.

Second, when comparing Article 6(c) of the London Charter with the definition of crimes against humanity in the ICC Statute, it is clear that customary international law has evolved with respect to this international crime.³¹⁹ Further, it is also well established that Article 7 of the ICC Statute, which defines crimes against humanity, reflects the progressive evolution of

³¹⁶ Bassiouni, *The Normative Framework of International Humanitarian Law*, *supra* note 285, at 205–08 (discussing the customary international law status of crimes against humanity with respect to the requirement that such crimes take place in the context of an armed conflict).

³¹⁷ See ICTY Statute, *supra* note 308, art. 5 (“The international Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in *armed conflict*, whether international or internal in character, and directed against any civilian population”) (emphasis added). The ICTY provision differed from the London Charter definition by expanding the definition to include crimes against humanity taking place in conflicts of an internal character.

³¹⁸ ICTR Statute, *supra* note 308, art. 3 (“The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a *widespread or systematic attack against any civilian population*”) (emphasis added).

³¹⁹ It is puzzling that in critiquing the original IST Statute, Human Rights Watch specifically urged the tribunal to apply the “most fully developed definitions of serious crimes under international criminal and humanitarian law,” and specifically argued for the inclusion of a greater number of such crimes consistent with the contents of the ICC Statute. See HUMAN RIGHTS WATCH, MEMORANDUM TO THE IRAQI GOVERNING COUNCIL ON ‘THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL,’ *supra* note 187, at C.1. Amnesty International also critiqued the original IST Statute for the same perceived failing and urged incorporation of “all crimes under international law.” Amnesty Int’l, *Iraq Special Tribunal—Fair Trials Not Guaranteed*, AI Index MDE 14/007/2005, May 13, 2005, available at [http://web.amnesty.org/library/pdf/MDE140072005ENGLISH/\\$File/MDE1400705.pdf](http://web.amnesty.org/library/pdf/MDE140072005ENGLISH/$File/MDE1400705.pdf). These arguments are flawed and do not account for the many issues with respect to the principles of legality that are implicated by the inclusion of such expansive definitions.

customary international law.³²⁰ While the IHCC Statute omits several of the provisions defining crimes against humanity in the ICC Statute,³²¹ it does include crimes such as forcible transfer of population, sexual slavery, forced prostitution, and forced pregnancy, which were not part of customary international law during the entire period covered by the IHCC's temporal jurisdiction.³²²

Lastly, as was discussed above, the technical drafting error that resulted in the revision of 12(First)(H) in the definition of crimes against humanity incorrectly revised the accepted definition of crimes of persecution under customary international law and departed from the definition previously included in the IST Statute.³²³

Questions as to whether the provisions of the IHCC Statute dealing with crimes against humanity violate the principles of legality have taken on even greater importance in light of the fact that the prosecutions and judgments in the al-Dujail trial were based upon these provisions. It is unfortunate that these questions were not addressed prior to the al-Dujail trial.

The al-Dujail Trial Opinion attempted to address several of these concerns with respect to crimes against humanity. First, the IHCC argued that the underlying actions upon which the prosecutions were based are and have been illegal under the laws of "most, if not all, countries of the world as Iraq [*sic*]."³²⁴ However, apart from simply stating this fact, the IHCC did not attempt to establish its jurisdiction with respect to crimes against humanity by referring to the specific underlying lesser crimes found in the Iraqi Criminal Code and the Iraqi Military Penal Law. Accordingly, the IHCC did not create a proper basis upon which to define these crimes under Iraqi law. Second, the IHCC attempted to establish a basis for the direct applicability of crimes against humanity under customary international law. While acknowledging that the "definition of crimes under international law is not [*sic*] precise as the definition of crimes in the national laws of different countries,"³²⁵ the IHCC argued that the "requirements of justice and prevention of injustice and guarantee [*sic*] of individual freedom all require the applying of said principle in the scope of international crimes."³²⁶ However, in this effort the IHCC did not attempt to identify those crimes against humanity that are also *jus cogens* or marshal strong historical or scholarly

³²⁰ See BASSIOUNI, THE LEGISLATIVE HISTORY OF THE ICC, *supra* note 93, at 150.

³²¹ The definition in the IHCC Statute does not include enforced sterilization or the crime of apartheid.

³²² These expansive provisions defining crimes against humanity were not included in the ICTY Statute and the ICTR Statute.

³²³ See *supra* Part III.E.1; Statute of the Iraqi High Criminal Court art. 12(First)(H).

³²⁴ al-Dujail Trial Opinion Part 1, *supra* note 127, at 36.

³²⁵ *Id.* at 38.

³²⁶ *Id.* at 39.

support, but simply argued that international crimes under customary international law could be directly applied in an Iraqi national forum.³²⁷ Needless to say, this analysis is wholly incomplete and is not in keeping with Iraqi legal traditions or state practice. Lastly, in approaching the issue of whether there exists a requirement for a nexus between crimes against humanity and war, the IHCC mischaracterizes the evolution and state of customary international law with respect to this issue. The IHCC emphatically states that “crimes against humanity became a part of the [customary] international law whether during peace or war”³²⁸ as far back as 1982, when the crimes in question occurred, and earlier.³²⁹ As was discussed above, it cannot be argued that such crimes occurring during a period when no armed conflict existed were part of customary international law during the entire period covered by the IHCC’s temporal jurisdiction, and it is fairly clear that such crimes did not constitute customary international law in 1982.

b. Other Crimes Under Iraqi Law

Article 14 of the IHCC Statute extends the jurisdiction of the Court to other crimes under Iraqi law. Under Article 14(First), the IHCC has the power to prosecute persons who have intervened in the judiciary or attempted to influence the functions of the judiciary.³³⁰ However, this crime is given no basis in Iraqi law and this crime does not exist in the Iraqi Criminal Code. This lack of specificity clearly violates the principles of legality as this crime has no grounding in Iraqi law.

Articles 14(Second) and (Third) allow the IHCC to exercise its jurisdiction over two separate political crimes.³³¹ The first such crime is the “wastage and squander of national resources” and the second is the “abuse of position and the pursuit of policies that were about to lead to the threat of war or the use of the armed forces of Iraq against an Arab country.”³³² Both provisions attempt to define the crimes by reference to Law No.7 of 1958, however, neither of these crimes is contained in the Iraqi Criminal Code and Law No.7 of 1958 does not define these political crimes with any level of specificity that would warrant application of these provisions.

³²⁷ The al-Dujail trial opinion mentions in passing that international criminal law has been applied in the past by other national courts, such as in “England, Australia, France, Italy, Canada, [and] in Belgium when it prosecuted persons accused in committing ethnic extermination in Rwanda.” *Id.* at 42. This lack of specificity or analysis in dealing with such divergent cases cannot form the proper basis for establishing consistent state practice.

³²⁸ *Id.* at 44.

³²⁹ *Id.*

³³⁰ Statute of the Iraqi High Criminal Court art. 14(First).

³³¹ *Id.* arts. 14(Second), 14(Third).

³³² *Id.*

Finally, Article 14(Fourth) extends the IHCC's jurisdiction to instances where "the Court finds there is an absence of a specific element for any of the crimes stipulated in Articles 11, 12, and 13 of this law and it is proved to the Court that the act constitutes a crime punishable by the penal law or any other criminal law at the time of its commission."³³³ This provision appears to be a catch-all that would apply if an element of a crime under Articles 11, 12, or 13 is not met, but a crime could be proved under any other legal authority of Iraqi criminal law. In effect, this provision greatly expands the jurisdiction of the IHCC and could allow the Court to prosecute individuals for a large number of less serious crimes punishable under Iraqi criminal law. This is clearly an unwarranted extension of the IHCC's jurisdiction because it grants the Court concurrent jurisdiction over a large number of lesser crimes not specifically included in the IHCC Statute to the detriment of the Iraq criminal court system.

c. Establishing Penalties

Article 24(Fifth) of the IHCC Statute provides that "[t]he penalty for any crimes under Articles 11, 12, and 13, which do not have a counterpart under Iraqi law shall be determined by the Court taking into account such factors like the gravity of the crime, the individual circumstances of the convicted person, guided by judicial precedents and relevant sentences issued by international criminal courts."³³⁴ This approach to determining penalties runs contrary to Iraqi law and the principles of legality as formally enshrined in the Iraqi constitution, which does not allow for penalties without an expressed provision in the law.³³⁵ Article 19(Second) of the constitution mandates that penalties be determined by stipulation and does not delegate to the IHCC the legislative authority to determine such penalties.³³⁶ The Iraqi system is rigidly positivistic and does not contemplate a delegation of this type of legislative power to the Iraqi judiciary. The drafters of the Iraqi constitution could have expressly permitted the delegation of this type of legislative power to the IHCC judges but did not include any such delegation. This omission is particularly conspicuous as the constitutional drafting process occurred after the establishment of the IST and prior to the establishment of the IHCC.

This formulation for the judicial establishment of certain penalties is borrowed from the experiences and practices of international criminal tribunals. With respect to the ICTY, the United Nations Security Council

³³³ Statute of the Iraqi High Criminal Court art. 14 (Fourth).

³³⁴ *Id.* art. 24(Fifth). An identical provision was included in Article 24(c) of the IST Statute. *See* Statute of the Iraqi Special Tribunal art.24(c).

³³⁵ *See* DUSTUR JUMHURIAT AL-'IRAQ [Constitution] art 19(Second) (Iraq).

³³⁶ *Id.*

delegated these legislative tasks, namely, determining such penalties by analogy, to the judges of the ICTY.³³⁷ However, while customary international law permits the application of penalties by analogy to similar crimes and penalties in the national criminal laws of a prosecuting state having proper jurisdiction,³³⁸ this permissive approach is not obligatory and cannot displace the more stringent requirements of a national legal system.

The al-Dujail Trial Opinion attempts to dispense with the traditions of the Iraqi legal system and constitutional requirements³³⁹ by reference to the practice of international criminal tribunals and the practice of other national courts.³⁴⁰ However, in so doing, the IHCC misconstrues the state of customary international law with respect to the practice of establishing penalties by analogy.³⁴¹ As mentioned above, customary international law permits the application of penalties by analogy,³⁴² but it cannot be said that the application of penalties in this manner is in and of itself reflective of customary international law.

5. Due Process Guarantees

The drafters of the IHCC Statute intended to create rules governing procedure and evidence that incorporated adversary-accusatorial elements that have been employed by international and hybrid tribunals.³⁴³ This approach ignored the context and manner in which the IHCC was established as a domestic tribunal and needlessly complicated and compromised the trial proceedings.³⁴⁴ It also exemplified the ways in which the drafters of the

³³⁷ See BASSIOUNI & MANIKAS, *supra* note 275, at 689–92.

³³⁸ See BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 262, at 107–14 (defining the minimum standards of the principles of legality in international criminal law).

³³⁹ See DUSTUR JUMHURIAT AL-‘IRAQ [Constitution] art. 19(Second) (Iraq).

³⁴⁰ al-Mahkama al-Jina’iya al-‘Iraqiya al-‘Uliya [The Iraqi High Criminal Court], al-Dujail Trial Opinion (Part Two), available at <http://www.iraq-ihc.org/ar/doc/finalcour.pdf>, translated in Grotian Moment: The Saddam Hussein Trial Blog, English Translation of Dujail Judgment Part 2 (Dec. 2006), at 2–3, available at http://www.law.case.edu/saddamtrial/documents/dujail_opinion_pt2.pdf.

³⁴¹ *Id.* at 3 (“The evolution of international criminal law bestows legality on the law of the Iraqi High Tribunal, considering that this forms the latest that has been achieved in the required [sic] the status of international criminal legislation and its implementation, not only by international criminal tribunals but also by national international criminal courts that examine international crimes also.”).

³⁴² See *supra* text accompanying note 338.

³⁴³ See, e.g., Newton, *supra* note 96, at 884 (“International tribunals and the more recent phenomenon of internationalized domestic tribunals require a complex intermingling of procedural approaches derived from both civil and common law.”).

³⁴⁴ In commenting on the choice to intermingle procedural features based on the adversary-accusatorial system, Salvatore Zappalà questions the wisdom of such an undertaking by noting that “these experiments are always difficult, time-consuming and costly.” Salvatore

Statute were not familiar with the Iraqi Criminal Procedure Law³⁴⁵ and the inquisitorial system upon which it is based. The manner in which adversary-accusatorial elements were simply grafted onto the existing procedural structure indicated that the drafters believed that simply including these more familiar provisions and due process protections would insulate the IHCC from outside criticism.³⁴⁶ However, the shortcomings of this approach have resulted in a great deal of criticism of the conduct of the proceedings in the al-Dujail trial and have raised fundamental issues regarding the fairness of the trial proceedings.³⁴⁷

The Iraqi legal system is not an adversary-accusatorial system—it is an inquisitorial system, modeled after the French legal system. Iraqi criminal laws and procedure are based on Egyptian law,³⁴⁸ which is also modeled on the French legal system. In an inquisitorial system, an investigative judge conducts the factual investigation independently, including the examination of suspects, victims and witnesses and the collection of all evidence prior to trial, and also makes findings of fact.³⁴⁹ These findings are conclusive and are only re-opened at the trial at the trial judge's discretion. The indictment procedure does not exist in Iraqi law. The investigative judge, upon being satisfied by the evidence that a crime has been committed, "refers" (*ihala*) a case to trial. This is quite different from the Anglo-American adversary-accusatorial system where in addition to issuing indictments and presenting cases before the courts, the role of the prosecutor

Zappalà, *The Iraqi Special Tribunal's Draft Rules of Procedure and Evidence: Neither Fish nor Fowl?*, 2 J. INT'L CRIM. JUST. 855, 861 (2004).

³⁴⁵ See generally Iraqi Criminal Procedure Law.

³⁴⁶ It should also be pointed out that the IHCC, and not the TNA, adopted the Rules of Procedure and Evidence. As previously discussed, the Iraqi legal system is rigidly positivistic and does not contemplate a delegation of this type of legislative power to the Iraqi judiciary, and the constitution granted no such delegation of authority to the IHCC.

³⁴⁷ See, e.g., HUMAN RIGHTS WATCH, *JUDGING DUJAIL: THE FIRST TRIAL BEFORE THE IRAQI HIGH TRIBUNAL*, *supra* note 3 (arguing that the verdict should be set aside as a result of the failure of the tribunal to meet international human rights standards, including procedural flaws that undermined the fairness of the trial); Wierda & Sissons, *Dujail: Trial and Error?*, *supra* note 3 (arguing that the trial phase in the Dujail proceedings failed to meet internationally-recognized standards of fairness).

³⁴⁸ Qanun al-'Uqubat [Egyptian Penal Law], No. 58 (1957); Qanun al-Ejra'at al- Jina'iya [Egyptian Criminal Procedure Law], No. 50 (1950).

³⁴⁹ See Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 525 (1973); Mirjan Damaska, *Structures of Authority in Comparative Criminal Procedure*, 84 YALE L.J. 480, 524 (1975); William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1 (1992); John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549, 1551 (1978); Abraham S. Goldstein & Martin Marcus, *Comment on Continental Criminal Procedure*, 8 YALE L.J. 1570 (1978).

includes many of the functions performed by an investigative judge under an inquisitorial system.³⁵⁰

Article 19 of the IHCC Statute provides the accused with a number of due process guarantees with respect to their trials that are derived from international human rights law standards and which, in turn, are derived from the Anglo-American adversarial-accusatorial system.³⁵¹ The drafters of the IHCC Statute failed to recognize that due to the different systemic roles of investigative judges and prosecutors, the rights of the defendant differ in the inquisitorial and adversary-accusatorial systems. The inquisitorial system generally, and the Iraqi legal system in particular, do provide rights to the defense which are equivalent to the due process rights under the adversary-accusatorial system. Such rights do, however, arise at different stages of the proceedings. As such, procedural guarantees cannot be understood or applied in the same manner.³⁵²

In the inquisitorial system, the questioning of witnesses takes place mostly before the investigative judge during the investigative stage prior to trial. If the defense counsel wishes to direct any questions to a witness, it can be done only through the investigative judge, who would have the discretion³⁵³ concerning whether, and in what form, to pose the questions to the witness.³⁵⁴ Accordingly, the adversary-accusatorial system's right of the accused to confront and cross-examine a witness³⁵⁵ cannot be applied in the

³⁵⁰ As Mirjan Damaska notes, "the continental criminal judge takes the lion's shares of factfinding activity, in Anglo-American lands procedural action is to a much greater extent in the hands of the lawyers for the prosecution and the defense." Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 841 (1997).

³⁵¹ See Statute of the Iraqi High Criminal Court art. 19.

³⁵² For example, at the trial, the defense can ask the presiding judge to direct certain questions to a witness or to admit expert reports and testimony by the defense that contradict those of the prosecution. Thus, the presiding judge poses questions to witnesses, and he may re-formulate them. If the defense's questions are not asked, or not asked in the manner necessary to elicit certain responses, the defense may raise that on appeal. Similarly, the defense may raise on appeal the presiding judge's failure to respond to its proffer of evidence if it is deemed prejudicial to the defense's case.

³⁵³ The investigative judge is provided with significant discretion under the inquisitorial system as to how to administer investigations, including who may be allowed to attend any hearings (Iraqi Criminal Procedure Law art. 57) and how to direct questions (Iraqi Criminal Procedure Law art. 64). Iraqi Criminal Procedure Law arts. 57, 64.

³⁵⁴ The defense counsel can also pose questions through the president of the court at the trial stage and, like the investigative judge, the president has the discretion as to whether and in what manner to direct the questions to a witness. Iraqi Criminal Procedure Law arts. 56-71.

³⁵⁵ In the Anglo-American adversary-accusatorial system, witnesses are directly confronted and cross-examined by the defense counsel. See, e.g., U.S. CONST. amend. VI. See also *Bruton v. United States*, 391 U.S. 123, 126 (1968) (citing *Pointer v. Texas*, 380 U.S. 400, 404 (1965)) (confirming that a criminal defendant's right to confront witnesses against him,

inquisitorial system.³⁵⁶ The investigative judge is seen as representing the interests of justice, and is neither a partisan in the proceedings nor an umpire who referees the sparring of adversaries, namely, the prosecution and defense. Thus, the assumption is that the investigative judge will pursue all questions concerning the truth of the matter without partiality, bias, or prejudice. To ensure that result the Iraqi Criminal Procedure Law requires the investigative judge to inform the parties concerned of the judge's field investigations, hearings of witnesses, and findings of certain evidence, and also allows the defense to be present with counsel and to offer any evidence it wishes.³⁵⁷ These procedural rights of the defense are the counterparts of those offered in the adversary-accusatorial model. The fundamental difference between the two systems is the adversary-accusatorial leaves the evidence-gathering process and its rebuttal, respectively, to the prosecution and defense, while the rules of evidence demarcate the lines between what is admissible and what is not, and the judge sits as an impartial arbiter.

The procedural confusion engendered by attempting to adopt procedural protections at the trial level ignores the fact that such due process guarantees are more properly addressed to the investigative stage prior to trial. The inquisitorial trial "places little emphasis on oral presentation of evidence or on cross-examination by counsel. Instead, the trial is mainly a public recapitulation of written materials included in a dossier compiled earlier by an investigating magistrate."³⁵⁸ To the extent that it is determined that additional rights and protections are necessary, these should have been included during the investigative stage and before the investigative judge. The Iraqi legal tradition and the experience of Iraqi jurists dictated that much greater emphasis would be placed on the investigative stage of the proceedings. By ignoring this context and attempting to simply engraft due process guarantees at the trial level, the drafters of the IHCC Statute helped to fuel negative perceptions of the Court.

6. "Exceptional" Nature of the Tribunal

Article 14 of the International Covenant on Civil and Political Rights requires states to guarantee the fair and public trial of individuals by

as guaranteed by the Confrontation Clause of the Sixth Amendment, includes the right to cross-examination).

³⁵⁶ Indeed, not only is the introduction of the rights of confrontation and cross-examination unnecessary and contrary to established practice and procedure in Iraq, it also provides a politically motivated defense with an opportunity to intimidate and badger witnesses and turn the trial proceedings into an extremely contentious and time-consuming farce.

³⁵⁷ See Iraqi Criminal Procedure Law.

³⁵⁸ Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1018-19 (1974).

a competent, independent and impartial tribunal established by law.³⁵⁹ The United Nations Human Rights Committee has considered the boundaries established by Article 14 and the legitimacy of establishing military or special courts to try civilians.³⁶⁰ While noting the existence of such tribunals in many countries and the fact that Article 14 does not explicitly prohibit such categories of courts, the committee has pointed out that such tribunals “could present serious problems as far as the equitable, impartial and independent administration of justice is concerned.”³⁶¹ As such, Article 14 of the ICCPR clearly discourages, by implication, exceptional tribunals, or more significantly in French “*tribunaux d’exceptions*.”³⁶² Article 95 of the Iraqi constitution also prohibits the establishment of “special or exceptional” courts.³⁶³ While the constitution also established the IHCC as an independent judicial body,³⁶⁴ the statutory framework establishing the IHCC, which was ratified after the constitutional referendum of October 15, 2005, went beyond the constitutional mandate by contravening these existing constitutional prohibitions against the establishment of “special or exceptional” courts. In addition, this constitutional infirmity violates Article 14(1)’s requirement that tribunals be established by law. It should be noted that the existence of a conflict, whether of an international or non-international character, does not suspend the applicability of international human rights law or international humanitarian law.³⁶⁵

³⁵⁹ ICCPR, *supra* note 177, art. 14(1).

³⁶⁰ See United Nations Human Rights Committee, General Comment 13/21, ¶ 4, CCPR/C/21/Rev.1 (Apr. 12, 1984).

³⁶¹ *Id.* The Committee goes on to state that “[q]uite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice.” *Id.*

³⁶² See ICCPR, *supra* note 177, art. 14 (guaranteeing “a fair and public hearing by a competent, independent and impartial tribunal established by law”). The term is more significant in French because until approximately 1950, most of the countries in the world followed the Romanist-Civilist system. Between 1945 and 1950, a number of these countries, particularly in Europe, established *tribunaux d’exceptions* to try Nazi collaborators. These tribunals were used by Communist regimes to purge opposition figures and political opponents. In the 1950s and 1960s, France also used similar tribunals to preserve its colonial system. By 1963, when the ICCPR was adopted, the reference to these types of tribunals was meant to be the *tribunaux d’exceptions*. Thus, the French term is more significant than its English counterpart.

³⁶³ DUSTUR JUMHURIAT AL-‘IRAQ [Constitution] art. 95 (Iraq).

³⁶⁴ *Id.* art. 134.

³⁶⁵ The artificial division between these two bodies of law has begun to erode, as they are in actuality co-extensive. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. No. 131, ¶ 106 (July 9, 2004), available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>; M. Cherif Bassiouni, *Humanitarian Law*, in 1 ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY 467 (Dinah Shelton et al. eds., 2004).

The "special or exceptional" nature of the IHCC is implicated by the major deficiencies of the IHCC Statute, most prominently, the fact that (i) the independence and impartiality of the IHCC are compromised; (ii) the temporal existence and jurisdictional scope of the IHCC are limited; (iii) the expansive subject matter jurisdiction of the IHCC and the manner in which its jurisdiction was established violate the principles of legality as recognized by the Iraqi legal system; and (iv) the IHCC is not part of the ordinary system of justice and its rules of procedure and evidence significantly depart from Iraqi criminal procedure.

ARTICLE I. IV. A COMPARATIVE HISTORICAL PERSPECTIVE

Even though all criminal trials are about judging individuals accused of committing crimes, domestic trials for common crimes are unlike trials instituted to address international crimes that have caused massive victimization. The prosecution of persons who commit mass victimization, whether by an internationally created body,³⁶⁶ a hybrid body,³⁶⁷ or an ordinary, military or special national tribunal,³⁶⁸ using national law, international law, or both, has different goals. The choice of the forum, its composition, and the applicable laws and procedures are always based on special considerations. These considerations include: the nature and scope of the crime, its impact on that society and the international community, the iden-

³⁶⁶ See generally IMTFE Agreement, *supra* note 308; ICTY Statute, *supra* note 308; ICTR Statute, *supra* note 308; ICC Statute, *supra* note 93.

³⁶⁷ Such hybrid courts include those of Sierra Leone, Cambodia, and Timor Leste. See generally Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.-Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 138, available at <http://www.sierra-leone.org/specialcourtagreement.html>.

³⁶⁸ See generally M. Cherif Bassiouni, *From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 19 (1997) [hereinafter Bassiouni, *From Versailles to Rwanda*] (discussing the Leipzig trials in post-World War I Germany); CLAUD MULLINS, *THE LEIPZIG TRIALS: AN ACCOUNT OF THE WAR CRIMINALS' TRIALS AND A STUDY OF GERMAN MENTALITY* (1921); Control Council Law No. 10 (Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity) adopted Dec. 20, 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, Jan. 31, 1946, reprinted in 1 AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 487 (Benjamin B. Ferencz ed., Oceana Publications 1980) (providing occupying authorities the power to "arrest and bring to trial persons suspected of having committed a crime"); *Attorney General of Israel v. Eichmann*, 36 I.L.R. 5 (Dis. Ct. 1962) (Israeli prosecution of Nazi war criminal Adolf Eichmann); *Attorney General of Israel v. Eichmann*, 36 I.L.R. 277 (Sup. Ct. 1962) (dismissing appeal); *Regina v. Finta* [1994] 1 S.C.R. 701 (Canadian prosecution of Nazi war criminal Imre Finta); Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT. L. 289 (1994) (discussing the Barbie, Touvier, and Papon war crimes trials in France), MEMORY, THE HOLOCAUST, AND FRENCH JUSTICE: THE BOUSQUET AND TOUVIER AFFAIRS (Richard J. Golsan ed., Univ. Press of New England 1996) (discussing the Bousquet and Touvier trials in France).

tivity of the perpetrators, and the intended goals of the trial at the national and international levels. Thus, they go beyond simply bringing an accused criminal to the bar of justice.

Among the goals of such trials are: disclosing the truth and memorializing history,³⁶⁹ providing retributive justice and future deterrence, consolidating the rule of law, establishing a legal/moral foundation for a nation's future, responding to the victims' needs for establishing the truth, providing punishment for the perpetrators and bringing closure, and, in certain cases, establishing the basis for reconciliation between different elements of a society or between peoples in neighboring states.³⁷⁰ The Iraqi process has to be assessed with respect to these goals and how they best serve Iraq and the international community.

The trials of Hussein and other senior Ba'athist leaders who committed crimes and atrocities against the Iraqi people for a period over thirty years and who also participated in crimes committed during the aggressions against Iran (1980–1988) and Kuwait (1990), were not simply about having a court issue a judgment to hang or punish those found guilty. If that were the sole purpose of such trials, it might have been preferable for all the accused to have been lined up and executed following a summary court-martial.³⁷¹ However, in the judgment of history, such summary techniques are invariably discredited.

Furthermore, Hussein and the senior Ba'athist leadership were not tried for the purposes of discovering the truth about the regime's crimes since these were widely known and publicized. The Iraqi people knew of these crimes because of their widespread and systematic scope and because Hussein and those in his regime who ordered and executed these crimes prided themselves in making them publicly known. The publicizing of these atrocities terrorized Iraqi society, thus making it easier for the ruling regime to impose its will without opposition.

The most significant goals of the Iraqi leadership trials were to demonstrate the triumph of the rule of law over the rule of tyrannical might, establish the foundation for a democratic state based on the rule of law, and, not least of all, provide closure to the victims and survivors. Most of these

³⁶⁹ See generally STEPHAN LANDSMAN, *CRIMES OF THE HOLOCAUST: THE LAW CONFRONTS HARD CASES 6–7* (University of Pennsylvania Press 2005) (“A key goal [of the Nuremberg trials] . . . was to establish a definitive record of the evil working of the entire Nazi regime.”); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 50* (Beacon Press 1999) (“Trials can create credible documents and events that acknowledge and condemn horrors.”).

³⁷⁰ See generally *POST-CONFLICT JUSTICE* (M. Cherif Bassiouni ed., 2002).

³⁷¹ A suggestion made by Winston Churchill at the Moscow Conference of 1943 in a proposal for prosecuting Hitler and his senior leaders after the war's end. See Bassiouni, *From Versailles to Rwanda*, *supra* note 368, at 23. In that way, there is no pretense of a legal process, the accused cannot grandstand in court, and their executions are swift and simple.

goals have not been achieved, but the fact that Hussein and his senior officials have been brought to trial, put in the dock reserved for criminals, and asked to account for their crimes is not a small result.

In assessing the relative successes and failures of the Iraqi leadership trials at this juncture, it is useful to compare them with the achievements and shortcomings of similar historic *causes célèbres*. The first comparison is to the Adolf Eichmann case in Israel.³⁷² That case had an entirely different purpose and an entirely different outcome. In both cases, the perpetrators had committed horrendous crimes that were widely known to the population of the territory wherein these crimes were committed. In both cases, there was no question that the perpetrators should be prosecuted and eventually punished for their crimes, and in both cases, there was also clearly much more at stake. Unlike the crimes committed by Hussein, which were well known in Iraq and throughout the world, the *Eichmann* trial sought to solidify in the minds of Jews and in world public consciousness that there was such a thing as a Holocaust and that six million Jews had been wantonly exterminated for no other reason than their Jewishness.³⁷³

The *Eichmann* trial faced questions with respect to its legitimacy and the scope of its jurisdictional reach, issues that have surfaced in connection with the IHCC and the trial of Hussein. The State of Israel was established on May 15, 1948, three years after the Nazi regime had fallen, thus, the crimes committed by Eichmann were committed prior to the establishment of the State of Israel. The majority of these crimes were committed in Poland and other areas under German occupation and, thus, not under the territorial jurisdiction of the State of Israel. These crimes were not committed against Israeli citizens, consequently, there was no jurisdiction in Israel based on the passive personality doctrine.³⁷⁴ Eichmann was German (by the time of the trial he had also acquired the citizenship of Argentina, although under false pretenses) and was not an Israeli citizen, thus, Israel could not rely on the active personality doctrine.³⁷⁵ This only left universality as a

³⁷² See generally *Attorney General of Israel v. Eichmann*, 36 I.L.R. 5 (Dis. Ct. 1962); *Attorney General of Israel v. Eichmann*, 36 I.L.R. 277 (Sup. Ct. 1962) (dismissing appeal).

³⁷³ In his memoirs on the *Eichmann* case and trial, Attorney General Gideon Hausner noted that Prime Minister David Ben-Gurion told him that he was to make this case a record for the Holocaust. This was needed because the IMT and the Subsequent Proceedings did not consolidate in world consciousness the nature and extent of the Holocaust. The IMT had priorities other than establishing the historical record of the Holocaust. It was the great achievement of the *Eichmann* case to have crystallized in world public consciousness the figure of six million deaths that is now associated with the Holocaust. See GIDEON HAUSNER, *JUSTICE IN JERUSALEM* (Harper & Row 1966).

³⁷⁴ See Christopher Blakesley, *Extraterritorial Extradition*, in 2 INTERNATIONAL CRIMINAL LAW 33, 40 (M. Cherif Bassiouni ed., 2d rev. ed. 1999); M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION* 370 (4th rev. ed. 2002).

³⁷⁵ See BASSIOUNI, *INTERNATIONAL EXTRADITION*, *supra* note 374, at 373.

jurisdictional basis, but Israel did not claim jurisdiction on that basis.³⁷⁶ Instead, it claimed passive personality jurisdiction on the basis that the State of Israel represented all of the Jews of the world—a theory that could not be validly advocated then and certainly not since then.³⁷⁷ Last, but not least, Israeli agents kidnapped Eichmann from Argentina, and the United Nations subsequently condemned Israel for its actions.³⁷⁸ The parallel in both cases is that serious questions existed as to legitimacy and jurisdiction.

Unlike the al-Dujail trial, Eichmann's trial was conducted with decorum. Eichmann stood mainly mute throughout the proceedings, while Hussein was vociferous, and the proceedings of the IHCC were frequently out of control. The judges in the *Eichmann* trial acted professionally, fairly and independently of the executive branch, which was not the case in the al-Dujail trial, where the executive branch meddled in the affairs of the IHCC and compromised its independence.³⁷⁹ The differences between these cases, however, are much more significant. The legacy of the *Eichmann* trial consolidated the historical fact of the Holocaust in the world's consciousness, which far outweighed its legal flaws. This is what would have been expected in the trials of Hussein and the senior leaders of his regime. Instead, the trials have so far left a legacy of questionable legitimacy and procedural unfairness. In time, the *Eichmann* trial's legal flaws recessed into the footnotes of legal history. Unfortunately, it is quite possible that the legal flaws of the trial of Hussein and other senior Ba'athists might come to obscure the crimes of his regime.

Another historical comparison is the 1923 Leipzig trials in Germany for war crimes committed during World War I.³⁸⁰ At the end of that war, the Allies included unprecedented and truly extraordinary provisions in the

³⁷⁶ See generally M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81 (2001) (discussing the origins and invocation of universal jurisdiction in international criminal cases).

³⁷⁷ For a critique, see PETER PAPADATOS, *THE EICHMANN TRIAL* (1964) (critiquing the implementation of passive personality jurisdiction); Leslie C. Green, *Legal Issues of the Eichmann Trial*, 37 TUL. L. REV. 641 (1962) (discussing Israel's invocation of passive personality jurisdiction).

³⁷⁸ See generally Michael H. Cardozo, *When Extradition Fails, Is Abduction the Solution?*, 55 AM. J. INT'L L. 127 (1961) (discussing the implications of Israel's abduction of Eichmann from Argentina); BASSIOUNI, *INTERNATIONAL EXTRADITION*, *supra* note 374, at 289 (observing that the Eichmann case is the most notorious example of state conduct that constitutes wrongful conduct against another state).

³⁷⁹ See *supra* note 194 and accompanying text.

³⁸⁰ See generally M. Cherif Bassiouni, *World War I: "The War to End all Wars" and the Birth of a Handicapped International Criminal Justice System*, 30 DENV. J. INT'L L. & POL'Y 244 (2002); JACKSON MAOGOTO, *WAR CRIMES AND REALPOLITIK: INTERNATIONAL JUSTICE FROM WORLD WAR I TO THE 21ST CENTURY* (2004).

1919 Treaty of Versailles,³⁸¹ namely Article 227, which provided for the prosecution for Germany's Kaiser.³⁸² Unlike the actions of the Allies following World War II, mainly the establishment of the IMT³⁸³ and the IMTFE³⁸⁴ and the institution of the subsequent proceedings in each of the Allies' respective zones of occupation,³⁸⁵ the Allies after World War I did not prioritize such international criminal prosecutions. Instead, the Allies decided to allow Germany to use its domestic legal processes to prosecute those it deemed war criminals. These war criminals were to be prosecuted under German criminal law and procedure, similar to the stated intention with respect to the trials of Hussein and other senior members of his regime. However, for a period of time, between 1919 and 1922, the Allies debated the establishment of an international criminal tribunal to prosecute the perpetrators of war crimes. A similar debate occurred during the period between 2002 and 2003 with respect to post-conflict justice in Iraq.³⁸⁶

In 1919, the Allies established a Commission to investigate the responsibility of individuals who had committed war crimes.³⁸⁷ At the end of the investigation, the Commission listed some twenty thousand perpetrators, all of whom were Germans.³⁸⁸ By 1922, the Allies agreed to reduce the number of persons to be prosecuted to 845, which was the number that the victorious Allies' representatives discussed with German authorities when they sought to have them prosecuted before the German Supreme Court sitting in Leipzig.³⁸⁹ The Allied diplomatic team, led by Great Britain, did not know or understand German criminal law and procedure, a similar predicament to that faced by those in the administration who shaped the contours of post-conflict justice in Iraq.³⁹⁰ Only after signing the agreement with Germany did the Allies realize that the German code of criminal procedure granted the Prosecutor General discretion as to whether to proceed

³⁸¹ Treaty of Peace with Germany (Treaty of Versailles), June 28, 1919, art. 227, 2 Bevans 43, 136–37.

³⁸² This subsequently became known under the IMT Agreement as “crimes against peace” and in article 228 as “violation of the law and customs of war.” See IMTFE Agreement, *supra* note 308, art. 228.

³⁸³ *See id.*

³⁸⁴ *See id.*

³⁸⁵ *See supra* note 368.

³⁸⁶ *See supra* text accompanying notes 55–71.

³⁸⁷ *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. INT'L L. 95, 127 (1920).

³⁸⁸ *See Bassiouni, supra* note 380, at 281.

³⁸⁹ *See, e.g., MULLINS, supra* note 368.

³⁹⁰ The RCLO was composed of DOJ staff with considerable experience in the U.S. criminal justice system but lacking the legal, linguistic and practical experience necessary to effectively engage with the realities of the Iraqi legal system.

with prosecutions. To the unpleasant surprise of the Allies, the Prosecutor General only accepted to consider forty-five cases, and he indicted only twenty-two of those forty-five. Just as knowledge of Germany's criminal procedure could have saved the Allies much embarrassment, an understanding and knowledge of the Iraqi legal system and its traditions could have guided those in the administration involved with post-conflict justice in Iraq and helped them to avoid many of the mistakes and flaws that have plagued the IHCC.

By all accounts, the Leipzig prosecutions were not vigorous and the penalties were minimal, but the process was carried out with rigid adherence to the German Code of Criminal Procedure and with a great deal of decorum.³⁹¹ The outcome was disappointing, as the most serious penalty was only three years imprisonment. Crowds outside the courtroom cheered those convicted, much as crowds mourned Hussein following his execution.³⁹²

From these trials, the German people learned that victors seek to find ways to humiliate the vanquished. Many Iraqis today have the same perception. The Leipzig trials never entered German public consciousness, nor did they serve a purpose in memorializing the war crimes committed by the defendants. They are in most respects a failure, except with respect to the legal precedent that they established. Perhaps the al-Dujail trial will be just that—a legal precedent for trying a tyrant—and that in and of itself, legal infirmities notwithstanding, is an accomplishment.

Another historical comparison concerns the IMTFE prosecutions.³⁹³ Admittedly, the procedures and processes at the Tokyo trials were less than decorous or fair by comparison to the Nuremberg proceedings,³⁹⁴ but the major difference was that the German people accepted the legitimacy of Nuremberg, whereas the Japanese people never accepted the Tokyo war crimes trials. To the Japanese people, the proceedings were only another way to humiliate the Japanese people because they were defeated. In fact, when the Tokyo trials prematurely ended in 1949, the government of Japan insisted that all persons sentenced to imprisonment by the IMTFE as well as other allied forces be transferred to a central prison in Tokyo.³⁹⁵ This was accomplished in 1953 before the signature of the armistice between the

³⁹¹ See JAMES F. WILLIS, *PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR* 126–47 (1982).

³⁹² The Americans at Nuremberg were conscious of this possible popular reaction, and there were no publicized hangings and no public burials. See generally WHITNEY R. HARRIS, *TYRANNY ON TRIAL* (1954).

³⁹³ See M. CHERIF BASSIOUNI, *The Nuremberg Legacy: A Historical Assessment Fifty Years Later*, in *WAR CRIMES: THE LEGACY OF NUREMBERG* 291 (Belinda Cooper ed., 1999).

³⁹⁴ See M. Cherif Bassiouni, *From Versailles to Rwanda*, *supra* note 368, at 31–38.

³⁹⁵ *Id.* at 34.

United States and Japan. Within months, every convicted person was released, and the following year, two of the major defendants at the Tokyo trials had become members of the Japanese cabinet in the capacity of Prime Minister and Minister.³⁹⁶

Unlike the people of Germany, who not only admitted but also understood that the Nazi regime had committed terrible crimes, the Japanese people have not fully reconciled with this past and have not accepted full responsibility for what occurred in World War II or before.³⁹⁷ Similarly, most Iraqi Sunnis, as well as other Arabs, view the Iraqi prosecutions as a way of humiliating the Iraqi people, or at the very least, its Sunni population.³⁹⁸ Like the Japanese, they do not feel that these leaders deserved to be tried and punished in this manner. In Iraq, at least with respect to the Sunnis, and in the Arab world, much as for the Japanese people, pride has trumped justice.

While nearly everyone except unreconstructed Ba'athists will acknowledge that Hussein was a dictator who committed terrible crimes against his own people and others, they compare his rule to the current chaos and violence that has overtaken the country in the years since the U.S. invasion and resulted in the deaths of tens of thousands of civilians.³⁹⁹ This has had the unfortunate effect for many Iraqis and others in the Arab world of washing Hussein and the Ba'athist regime clean of their misdeeds. Moreover, in light of the dire situation in Iraq, many in the Arab world have come to believe that the country is ungovernable and requires ruthlessness in its rulers to keep the country together. In presenting his defense, Hussein

³⁹⁶ *Id.* at 35.

³⁹⁷ Such as the invasion of Manchuria in 1932 and the terrible crimes committed by the Japanese forces in Nanking. See generally IRIS CHANG, *THE RAPE OF NANKING* (1997).

³⁹⁸ They also see these trials as a way of legitimizing the Shi'a and Kurdish political parties' ascendance and control of Iraq to the exclusion of the Sunnis.

³⁹⁹ The actual number of civilian deaths during the U.S. occupation of Iraq has become a matter of considerable controversy. At the highest end of the spectrum, a study published in November 2006 in the British medical journal, *The Lancet*, estimated that the March 2003 invasion of Iraq has resulted in an additional 655,000 civilian deaths. See Gilbert Burnham et al., *Mortality After the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey*, 368 *LANCET* 1421 (2006). As of this writing, the Iraq Body Count, an independent public database of media-reported civilian deaths in Iraq, estimates that between 54,432 and 60,098 civilians have been reported killed by military intervention in Iraq. See Iraq Body Count, available at <http://www.iraqbodycount.org>. The United Nations has also begun to release civilian casualty figures based upon information gathered from the Ministry of Health, hospitals, mortuaries and other agencies. See *U.N. Marks Soaring Iraq Death Toll*, BBC NEWS, Jan. 16, 2007, http://news.bbc.co.uk/2/hi/middle_east/6266393.stm. UNAMI estimates that 34,452 civilians have been violently killed in 2006 alone. UNITED NATIONS ASSISTANCE MISSION FOR IRAQ, *HUMAN RIGHTS REPORT: 1 NOVEMBER–31 DECEMBER 2006* (2006), available at <http://www.uniraq.org/FileLib/misc/HR%20Report%20Nov%20Dec%202006%20EN.pdf>.

reflected this notion and pushed the argument that any violence that had occurred in connection with the incidents in al-Dujail was a necessary response in the defense of his country and in the best interests of his people.

These historical precedents make absolutely clear that the architects of post-conflict justice must consider and understand the experiences of previous international criminal justice processes and other war crimes prosecutions, firmly root post-conflict justice in the national legal system of the country in question, and appreciate the popular culture of the people they seek to impact. Without such sensitivity and wisdom, the results of post-conflict justice will inevitably fall short of expectations and goals.

CONCLUSION

The necessity of prosecuting Hussein and other high-ranking Ba'athists is beyond doubt. Bringing the most serious perpetrators to account for their crimes and atrocities is in and of itself an important precedent in the Arab world. However, within the highly politicized context of Iraq, those U.S. and Iraqi officials who participated in the establishment of the IHCC lost sight of the deeper and far-reaching significance and implications of these proceedings for the future of the rule of law in Iraq and in the Arab world. The very importance of the Iraqi proceedings has made the shortcomings in the establishment of the IHCC and its work that much more unfortunate. These shortcomings were the products of errors in judgment that could have been avoided. Admittedly, all concerned were well intentioned and acted in good faith, but in this instance, such intentions cannot simply overcome the damage that has been wrought as a result of the loss of confidence in post-conflict justice in Iraq.

The establishment of the IHCC and the trial proceedings have not been a total failure. The latter stages of the al-Dujail trial and the early portions of the al-Anfal trial have proceeded with a much greater degree of regularity and propriety. The IHCC has created a forum through which a number of victims of the former regime have been afforded the opportunity to accusingly point in open court to Hussein and to his co-defendants—highly symbolic acts that were broadcast to an entire nation. These powerful moments and the production of damning evidence have ensured that Hussein and his cronies have not been transformed into martyrs. Further, in contemplating many of the shortcomings of the trial proceedings, it is necessary to bear in mind that similar institutions have struggled to establish their credibility at their inception. However, even while bearing in mind the positive developments associated with the IHCC and the potential for future improvement in the administration of justice, the legacy of the IHCC will be marred by the infirmities and shortcomings of its statutory basis.

These shortcomings have also been compounded by several other factors that will inevitably undermine the legacy of the IHCC. First, the lack of broad-based post-conflict justice mechanisms to involve victims and

members of all strata of Iraqi society in the post-conflict justice process has ensured that support for the IHCC has been limited. A victim compensation scheme would have helped to create a popular demand for justice in Iraq by recognizing the widespread nature of repression and abuse among all of the ethnic and sectarian communities in Iraq. The inclusive nature of a victim compensation scheme could have supplemented the necessarily limited scope of the historical record established through prosecutions and would have assisted in unifying Iraqi society on the basis of a shared legacy of persecution and repression. A victim compensation scheme could also have provided the basis for the establishment of a commission tasked with compiling an objective historical account of past political violence.

By eschewing a broad approach to achieving post-conflict justice in Iraq, the United States and the Iraqi government have furthered sectarian and ethnic tensions and have exacerbated the sense of exclusion among Sunni Arabs. The ethnic and sectarian biases evident in the selection of cases involving Shi'a and Kurdish victims to the exclusion of cases of Sunni victimization have also further aggravated this sense of exclusion and fuelled perceptions among Sunni Arabs that the IHCC is a political body that is bent on exercising victor's justice.

The hasty and chaotic execution of Hussein on the first day of 'Eid al-Adha for Sunnis cemented the sectarian perceptions of the IHCC.⁴⁰⁰ While opinions as to the legality of the timing of the execution have varied,⁴⁰¹ on a political level, the decision must be seen as a serious mistake and reflects the politicized nature of the IHCC.⁴⁰² The overtly sectarian manner in which the scenes played out on Arab satellite stations and the unseemly taunting of Hussein prior to his hanging helped to obscure the bloody legacy of Hussein and the Ba'athist regime and created an image of Hussein as a martyr who died with his dignity intact.⁴⁰³ The choice of the

⁴⁰⁰ See Sabrina Tavernise, *For Sunnis, Dictator's Degrading End Signals Ominous Dawn for the New Iraq*, N.Y. TIMES, Jan. 1, 2007, at A7; Hassan M. Fattah, *For Arab Critics, Hussein's Execution Symbolizes the Victory of Vengeance over Justice*, N.Y. TIMES, Dec. 31, 2006, at 13.

⁴⁰¹ For divergent opinions regarding the legality of the timing of Hussein's execution under Iraqi law, compare Grotian Moment: The Saddam Hussein Trial Blog, Dujail Issue #46, Saddam's Execution: Kevin Jon Heller, *Why Saddam's Execution was Unlawful* with Michael P. Scharf, *Saddam's Execution was a Fiasco, but its Timing did not Violate the Law*, at <http://www.law.case.edu/saddamtrial/>.

⁴⁰² See Press Release, International Center for Transitional Justice, Iraq Tribunal Chooses Speed over Justice in Final Ruling (Dec. 27, 2006), <http://ictj.org/en/news/press/release/1096.html> (criticizing the speed with which the Cassation Panel rendered its opinion in a case involving complex international crimes and noting the increased politicization of the IHCC's work).

⁴⁰³ See M. Cherif Bassiouni, *The Execution of a Tyrant*, CHI. TRIB., Jan. 4, 2007, at 19. The political fallout from the execution of Hussein continued following the botched and gruesome execution of Barzan al-Tikriti on January 15, 2007, which resulted in al-Tikriti's de-

Iraqi government to carry out this sentence prior to the completion of the al-Anfal trial also betrayed a lack of fidelity to the overarching goals of post-conflict justice. It is perhaps the ultimate irony that the legacy of excessive and far-ranging U.S. involvement with the IHCC has created an environment, particularly in the Arab world, where the United States will continue to receive blame and condemnation for decisions and mistakes made by the IHCC and the Iraqi government, even in those instances when such decisions are clearly in contradiction to the wishes of the United States.⁴⁰⁴

Finally, the current escalation of violence has also overtaken and overshadowed the possibilities of post-conflict justice in Iraq. A reporter recently recounted a conversation with an Iraqi friend in Baghdad following the announcement of the al-Dujail verdicts in which the Iraqi impatiently brushed aside questions regarding Hussein's impending death sentence by stating that "[a] mortar round exploded on the roof of my next-door neighbour's house, frightening my whole family. We worry about staying alive, not about . . . whether Saddam Hussein lives or dies."⁴⁰⁵ It is against this tragic backdrop that the work of the IHCC will continue. The broader challenges facing the Court might doom the future of post-conflict justice in Iraq regardless of the IHCC's future response to legal and technical challenges.

capitulation. See Burns, *supra* note 3. The execution of al-Tikriti, along with Awad Hamed al-Bandar, was filmed by the Iraqi authorities and rebroadcast for journalists in Baghdad. See *Hanging of Saddam Aides Filmed*, BBC NEWS, Jan. 15, 2007, http://news.bbc.co.uk/2/hi/middle_east/6263787.stm.

⁴⁰⁴ For an account of U.S. misgivings with respect to the timing of Hussein's execution, see John F. Burns & Marc Santora, *U.S. Questioned Iraq on the Rush to Hang Hussein*, N.Y. TIMES, Jan. 1, 2007, at A1; John F. Burns, *In Days Before Hanging, a Push for Revenge and a Push Back from the U.S.*, N.Y. TIMES, Jan. 7, 2007, at 12.

⁴⁰⁵ Patrick Cockburn, *We Worry About Staying Alive, Not The U.S. Elections*, INDEPENDENT, Nov. 10, 2006, available at <http://comment.independent.co.uk/commentators/article1962981.ece>.

