

Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal

M. Cherif Bassiouni

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Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal

M. Cherif Bassiouni†

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† Distinguished Research Professor of Law and President of the International Human Rights Law Institute ("IHRLI"), DePaul University College of Law, President of the International Institute for Higher Studies in Criminal Sciences ("ISISC," Siracusa, Italy), and Honorary President of the International Association of Penal Law.

IHRLI, under the direction of this writer, has been involved in Iraq for over one year with an in-country team working on restructuring legal education under a United States Agency for International Development ("USAID") contract. The project includes the physical rebuilding of the law libraries at the Universities of Baghdad, Sulaimaniya, and Basra. The first two were inaugurated in February 2005. Five conferences on the rule of law took place in-country, curricular reform is underway, and training for over half of all law professors has been ongoing. In addition, IHRLI, working with the American Bar Association's Central European and Eurasian Law Initiative ("ABA-CEELI") and the National Democratic Institute, working under a USAID contract, will provide technical assistance to the new legislative body elected on January 30, 2005.

The author acknowledges the assistance of Mr. Sermid Al-Sarraf, Project, Manager of the IHRLI "Raising the Bar—Legal Education Reform in Iraq" Initiative, Legal Consultant to the Coalition Provisional Authority ("CPA") in Baghdad, and former member of the State Department's "Future of Iraq" and "Working Group on Transitional Justice" projects; Judge Mohammed Abdel-Aziz, Egyptian Ministry of Justice and IHRLI Senior Research Fellow; and Mr. Martin Cinnamon, IHRLI Research Fellow, Ph.D. Candidate, University of Leeds.

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Introduction

Notwithstanding present political and security issues, the Iraqi people are desirous of establishing a new system of government based on pluralistic democracy and the rule of law.

Iraq consists of several civilizations, and its history dates back several millennia.¹ Its legal tradition goes back to one of the world's oldest codifications, the Code of Hammurabi, promulgated some 3750 years ago.²

Iraq, as it is known today, was unified in 1918 by the British Empire after the defeat of the Turkish Ottoman Empire in World War I.³ Britain

1. See JEAN BOTTÉRO, *MESOPOTAMIA: WRITING, REASONING, AND THE GODS* 55-200 (Zainab Bahrani & Marc van de Mieroop trans., 1995); GEORGE ROUX, *ANCIENT IRAQ* 66-84 (3d ed. 1993). The older civilizations that comprised what is now Iraq are the Sumerians, who go back to 5000 BCE and whose capital Ur was Abraham's place of birth; the Amorites, who founded the cities of Babylon and Akkad and whose empire lasted from 1900 to 1600 BCE; the Hittites, from 1600 to 1100 BCE; the Assyrians, from 1200 to 612 BCE; and the Chaldeans, from 612 to 539 BCE. *Id.* at 66, 104, 179-94, 377-79 tbls. IV-VIII.

2. JOHN HENRY WIGMORE, *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS* 86-93 (1936).

3. DAVID FROMKIN, *A PEACE TO END ALL PEACE: THE FALL OF THE OTTOMAN EMPIRE AND THE CREATION OF THE MODERN MIDDLE EAST* 449-55 (2d ed. 1989). The region, which comprises Iraq and which is generally described in note 4, has also been referred to as "Iraq" throughout history. Some archeological remains going back before the Com-

administered Iraq as a League of Nations mandate from 1922 to 1932, when Iraq became an independent state and was admitted to the League of Nations.⁴ The Hashemite monarchy, established by the British government in 1922,⁵ was toppled by a bloody military coup in 1958.⁶ This coup was followed by two Ba'athist military coups, in 1963 and in 1968.⁷ During the latter coup, Saddam Hussein was head of the security forces, and he was later elevated to Vice President.⁸ In 1979, he took over the presidency after Ahmed Hassan Al-Bakr resigned.⁹ (Al-Bakr later died under mysterious circumstances.)¹⁰ Saddam's repressive Ba'athist regime was marked by consistent brutality and violence against the Iraqi people,¹¹ by a bloody war of aggression against Iran in 1980, which lasted until August 1988,¹² and by the occupation of Kuwait from August 1990 until February 1991,

mon Era refer to that region as "Iraq," as do records of the Muslim Abbasid period from approximately 850 to 1250 CE. See M. CHERIF BASSIOUNI, *INTRODUCTION TO ISLAM* 18 (1988); see also generally ALBERT HOURANI, *A HISTORY OF THE ARAB PEOPLES* (2d ed. 2003).

4. The area known today as Iraq was ruled by the Persian Empire from 539 to 331 BCE; the Greeks and Macedonians from 331 to 170 BCE; the Parthians from 170 BCE to 224 CE; the Sassanians from 224 to 651 CE; the Arab Muslims from 652 to 1257; the Turkish Ottoman Empire from 1301 to 1918; and the British Empire from 1918 to 1922. ROUX, *supra* note 1, at 406-22 tbls. VIII-XI (Persian, Hellenistic, Parthian, Sassanian); FROMKIN, *supra* note 3, at 33, 426, 558-67 (Ottoman, British). During World War I, Britain relied on Emir Sherif Hussein of Hejaz to fight against the Turkish Ottoman Empire forces in the Arabian Gulf, Palestine, and what is now Syria, Lebanon, and Iraq. FROMKIN, *supra* note 3, at 174, 218-28. Hussein had two sons, Abdullah and Feisal. *Id.* at 113. Feisal became famous for having fought on the British side at the instigation of Thomas Edward Lawrence, popularly known as "Lawrence of Arabia." *Id.* at 497-99. Feisal was made King of Syria in 1920, but due to arrangements between the British and the French, on the French control of these areas he was made King of the newly constituted Iraq in 1921. *Id.* at 437-40, 442, 446, 499-500, 508. The League of Nations established a protectorate over Iraq in 1922 and gave its administration to the British Empire. *Id.* at 508-10. In 1932, the League of Nations admitted the Kingdom of Iraq into its ranks of independent states. CHARLES TRIPP, *A HISTORY OF IRAQ* 75 (2000).

5. FROMKIN, *supra* note 3, at 500-64.

6. MICHAEL EPPLE, *IRAQ FROM MONARCHY TO TYRANNY: FROM THE HASHEMITES TO THE RISE OF SADDAM* 147-52 (2004).

7. *Id.* at 204-08, 241.

8. *Id.* at 242, 244.

9. Between 1968 and 1979, Saddam Hussein was Iraq's strongman vice president. For a description of Saddam's criminal activities, see EPPLE, *supra* note 6, at 241-65; CON COUGHLIN, *SADDAM: KING OF TERROR* 23-175 (2002); and TRIPP, *supra* note 4, at 193-279.

10. TRIPP, *supra* note 4, at 254.

11. See EPPLE, *supra* note 6, at 241-65; COUGHLIN, *supra* note 9, 23-275. Human Rights Watch reports on human rights abuses in Iraq are available online at http://hrw.org/doc/?t=Mideast_pub&c=Iraq&document_limit=20,20 (last visited Mar. 8, 2005).

12. See generally STEPHEN C. PELLETIERE, *THE IRAN-IRAQ WAR: CHAOS IN A VACUUM* (1992) (examining Iraq's objectives and its decision to go to war with Iran); T.M.C. ASSER INSTITUTE, *THE GULF WAR OF 1980-88: THE IRAN-IRAQ WAR IN INTERNATIONAL LEGAL PERSPECTIVE* (Ige F. Dekker & Harry H.G. Post eds., 1992) (discussing Iran-Iraq border conflicts, the legal implications of the war, criminal responsibility, and the Islamic conception of international law); W. THOM WORKMAN, *THE SOCIAL ORIGINS OF THE IRAN-IRAQ WAR* (Ige F. Dekker & H.G. Post eds., 1994) (focusing on the social origins and foundations of the war).

when a coalition led by the United States¹³ drove Iraqi forces from Kuwait pursuant to UN Security Council Resolution 678.¹⁴ Thereafter, the Shi'a in the South, at the urging of the United States, rebelled against the Saddam regime and were ruthlessly crushed.¹⁵ The Kurds in Iraqi Kurdistan (in the northern part of the country) engaged in a struggle against Saddam's regime and were also the object of ruthless repression between 1988 and 1991.¹⁶ A unilateral U.S.-UK-imposed no-fly zone over Iraqi Kurdistan brought that region relief from attacks by Saddam's forces and de facto autonomy from the Baghdad-based Ba'ath government.¹⁷

The Ba'ath regime is estimated to have killed more than 500,000 Iraqi citizens from 1968 to 2003.¹⁸ No one knows what the actual numbers are,

13. For a description of the First Gulf War, see generally NORMAN SCHWARZKOPF, *IT DOESN'T TAKE A HERO: THE AUTOBIOGRAPHY OF GENERAL H. NORMAN SCHWARZKOPF* 291-491 (1992).

14. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 27-28, U.N. Doc. S/RES/678 (1990).

15. See Human Rights Watch, *Endless Torment: The 1991 Uprising in Iraq and Its Aftermath*, at <http://hrw.org/reports/1992/Iraq926.htm> (June 1, 1992).

16. See generally TRIPP, *supra* note 4, at 243-48, 253-59 (discussing Kurdish resistance and suppression).

17. The no-fly zone was imposed in April 1991 with the United States, the UK, and France relying on UN Security Council Resolution 687. S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg. at 31-32, U.N. Doc. S/RES/688 (1991); S.C. Res. 699, U.N. SCOR, 46th Sess., 2994th mtg. at 18-19, U.N. Doc. S/RES/699 (1991). Since Iraq's independence in 1932, the Kurds have called for self-rule in Iraqi Kurdistan. Iraq: Kurdish Autonomy, Library of Congress Country Studies, at [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+iq0076\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+iq0076)) (last updated May 1988) [hereinafter *Iraq Kurdish Autonomy*]. The Kurds were first colonized by the Persians, then by the Turkish Ottoman Empire, and when Britain defeated Turkey in World War I, it included what is now Iraqi Kurdistan in that new country. FROMKIN, *supra* note 3, at 503. Kurds in neighboring Turkey constitute almost twenty percent of that country's contemporary population. Turkey: Society, Library of Congress Country Studies, at [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID™r0006\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID™r0006)) (last updated Jan. 1995). They are also a minority in Syria. Syria: Kurds, Library of Congress Country Studies, at [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+sy0036\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+sy0036)) (Apr. 1987). The Kurds, who are Muslim, have their own language, culture, and traditions. They are not ethnically Arab (of Semitic origin), and have always maintained their claim to nationhood in all three countries, which led to alternating periods of struggle and repression by the governments of Iraq, Turkey, and Syria. Iraq: Kurds, Library of Congress Country Studies, at [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+iq0032\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+iq0032)) (last updated May 1988). In 1970, an Autonomy Agreement was negotiated between the Ba'ath regime and Kurdish representatives, establishing an Autonomous Region consisting of the three Kurdish governorates and other adjacent districts determined by census to contain a Kurdish majority. Iraq: Kurdish Autonomy, *supra*. The Autonomous Region was governed by an Executive Council and Legislative Assembly. *Id.* However, genuine self-rule never really existed, and the Ba'ath Party maintained strict control over the Region. *Id.* For example, any local enactments or administrative decisions that were deemed contrary to the "constitution, laws, or regulations" of the central government were countermanded. *Id.*

18. Estimates for the Anfal Campaign alone are 182,000, and estimates of bodies buried in mass graves are between 300,000 and 500,000. See U.S. Department of State, Fact Sheet: Past Repression and Atrocities by Saddam Hussein's Regime, at <http://www.state.gov/s/wci/fs/19352.htm> (Apr. 4, 2003) for compilation of statistics regarding human rights violations of the former Ba'ath regime.

as no international or national investigation has ever documented summary executions and disappearances at the hands of the regime.

At first, these crimes consisted of assassinations of Ba'ath party members who were not supportive of the then-strongman General Bakr and who were skeptical of Saddam, then deemed an overly ambitious upstart even among Ba'athists.¹⁹ Then, in the early 1970s, there were highly publicized executions of prominent religious leaders who opposed the regime.²⁰ Their killings were done in a manner designed to send a terror-inspiring message to the rest of the population.²¹ By the mid- to late 1970s, widespread and systematic disappearances, extrajudicial executions, torture, arbitrary arrests, and detentions took place in blatant ways.²²

These practices remained the regime's hallmark for almost thirty-five years. Many of the disappeared and executed were subsequently discovered in unmarked mass graves.²³ Among the better-known facts are the killing of some 8000 Kurds of the Barzani clan in 1983;²⁴ the brutal repressive campaign carried out against the Kurds in 1987 to 1988, known as the Anfal Campaign, which resulted in an estimated 182,000 deaths;²⁵ the gas-sing-to-death of some 4000 to 5000 Kurds in Halabja; the forceful displacement of Kurds in the Kirkuk region; and the forceful removal of an estimated 140,000 Shi'a from the Marshland region, on the Iranian border.²⁶ Notwithstanding the dreadful catalogue of crimes committed by this repressive regime and countless brazen abuses of power by Saddam, his sons, and his relatives, the international community tolerated the situation, and major powers maintained economic and financial ties to the regime.

Another aspect of the regime's malfeasance is the squandering of the country's assets on the development of weapons of mass destruction ("WMDs") and the embezzlement of public funds by Saddam and his sons and relatives.²⁷

19. See TRIPP, *supra* note 4, at 194-99.

20. EPPLE, *supra* note 6, at 253; TRIPP, *supra* note 4, at 202-03.

21. TRIPP, *supra* note 4, at 216-23.

22. *Id.*

23. See *supra* notes 17, 18.

24. TRIPP, *supra* note 4, at 243. Barzani supported Iran during Iraq's invasion of that country. *Id.* at 229.

25. See generally Human Rights Watch & Physicians, *Iraqi Kurdistan: The Destruction of Koreme During the Anfal Campaign*, at <http://www.hrw.org/reports/1992/iraqkor/> (Jan. 1993); Human Rights Watch, *Genocide in Iraq: The Anfal Campaign Against the Kurds*, at <http://www.hrw.org/reports/1993/iraqanfal/> (July 1993).

26. See Human Rights Watch, *The Iraqi Government Assault on the Marsh Arabs*, at <http://www.hrw.org/background/mena/marcharabs1.pdf> (Jan. 2003).

27. The tip of the iceberg has been exposed in the ongoing UN investigation of the oil-for-food program from which millions of dollars were illegally siphoned off. See Interim Report, Independent Inquiry Committee into the United Nations Oil-for-Food Programme, at <http://www.iic-offp.org/documents/InterimReportFeb2005.pdf> (Feb. 3, 2005); Second Interim Report, Independent Inquiry Committee into the United Nations Oil-for-Food Programme, at <http://www.iic-offp.org/documents/InterimReportMar2005.pdf> (March 29, 2005); see also *infra* note 55; Susan Sachs & Judith Miller, *Saddam's Oil-Food Fraud: "UN Let Him Do It,"* INT'L HERALD TRIB. (Paris), Aug. 13, 2004, at

It is also noteworthy that the regime's two aggressive wars, the Iraq-Iran War (1980 to 1988) and the Gulf War (1990 to 1991), led to the death of what is estimated to be more than one million Iraqis.²⁸ Further, the UN sanctions are estimated to have caused the deaths of 500,000 children and older and gravely ill persons.²⁹ Admittedly, the international

1. For UN responses to the oil-for-food program criticism, see UN News Centre, Oil for Food Inquiry, available at <http://www.un.org/apps/news/infocusRel.asp?infocusID=97&Body=Oil-for-Food&Body1inquiry> (last visited Apr. 5, 2005).

The program was administered by a committee operating under the Security Council, not under the Secretary General's control. Yet, much of the media's contemporary criticism is unfairly directed against the Secretary General. See, e.g., Norm Coleman, *Kofi Annan Must Go*, WALL ST. J., Dec. 1, 2004, at A10 (calling for UN Secretary General Kofi Annan's resignation).

28. Although precise numbers are unavailable, the media and other sources, official and unofficial, have reported that one million casualties resulted from the eight-year Iraq-Iran war. See Edward T. Pound & Jennifer Jack, *Special Report: The Iraq Connection*, U.S. NEWS & WORLD REP., Nov. 22, 2004, at 46; Death Tolls for Major Wars and Atrocities of the Twentieth Century, at <http://users.erols.com/mwhite28/warstat2.htm#Iran-Iraq> (last updated July 2004) (estimating that approximately 300,000 to 400,000 Iraqis and 600,000 to 700,000 Iranians perished during the Iran-Iraq War). Other estimates place the death toll at 1.5 million. See Interview by Dan Rather with Saddam Hussein on CBS News, 60 Minutes (CBS television broadcast, July 1, 2004), video streaming and transcript available at <http://www.cbsnews.com/stories/2003/02/26/60II/main542151.shtm> (last visited Apr. 5, 2005).

After the Gulf War, the U.S. Defense Intelligence Agency's approximated the death toll at around 100,000 Iraqi casualties. Patrick E. Tyler, *Iraq's War Toll Estimated by U.S.*, N.Y. TIMES, June 5, 1991, at A5. However, it is difficult to obtain estimates for this war due to the number of unidentified bodies that were either never recovered or were thrown into mass graves by coalition forces. Comptons has stated that 150,000 Iraqi soldiers were killed, and the *World Political Almanac* gives the same figure but includes civilian deaths. See Death Tolls for Major Wars and Atrocities of the Twentieth Century, at <http://users.erols.com/mwhite28/warstat2.htm#Iran-Iraq> (citing *Comptons* and *World Political Almanac*) (last updated July 2004).

29. See Barbara Crossette, *Iraq Sanctions Kill Children*, N.Y. TIMES, Dec. 1, 1995, at A9. In 1999, the UN estimated that one million Iraqis died due to the UN sanctions pursuant to Security Council Resolution 661. *Id.* The twelve-year embargo was finally lifted on May 22, 2003, when the Security Council adopted Resolution 1483. S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003).

The following Security Council Resolutions address the UN-imposed Iraq sanction regime: S.C. Res. 661, U.N. SCOR, 45th Sess., 2933d mtg., U.N. Doc. S/RES/661 (1990); S.C. Res. 665, U.N. SCOR, 45th Sess., 2938th mtg., U.N. Doc. S/RES/665 (1990); S.C. Res. 666, U.N. SCOR, 45th Sess., 2939th mtg., U.N. Doc. S/RES/666 (1990); S.C. Res. 669, U.N. SCOR, 45th Sess., 2942d mtg., U.N. Doc. S/RES/669 (1990); S.C. Res. 670, U.N. SCOR, 45th Sess., 2943d mtg., U.N. Doc. S/RES/670 (1990); S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991); S.C. Res. 700, U.N. SCOR, 46th Sess., 2994th mtg., U.N. Doc. S/RES/700 (1991); S.C. Res. 706, U.N. SCOR, 46th Sess., 3004th mtg., U.N. Doc. S/RES/706 (1991); S.C. Res. 712, U.N. SCOR, 46th Sess., 3008th mtg., U.N. Doc. S/RES/712 (1991); S.C. Res. 986, U.N. SCOR, 50th Sess., 3519th mtg., U.N. Doc. S/RES/986 (1995); S.C. Res. 1051, U.N. SCOR, 51st Sess., 3644th mtg., U.N. Doc. S/RES/1051 (1996); S.C. Res. 1115 U.N. SCOR, 52d Sess., 3792d mtg., U.N. Doc. S/RES/1115 (1997); S.C. Res. 1129, U.N. SCOR, 52d Sess., 3817th mtg., U.N. Doc. S/RES/1129 (1997); S.C. Res. 1134 U.N. SCOR, 52d Sess., 3826th mtg., U.N. Doc. S/RES/1134 (1997); S.C. Res. 1137 U.N. SCOR, 52d Sess., 3831st mtg., U.N. Doc. S/RES/1137 (1997); S.C. Res. 1143, U.N. SCOR, 52d Sess., 3840th mtg., U.N. Doc. S/RES/1143 (1997); S.C. Res. 1153, U.N. SCOR, 53d Sess., 3855th mtg., U.N. Doc. S/RES/1153 (1998); S.C. Res. 1158, U.N. SCOR, 53d Sess., 3865th mtg., U.N. Doc. S/RES/1158 (1998); S.C. Res. 1175, U.N. SCOR, 53d Sess.,

community deserves blame for maintaining sanctions that had such a negative impact on the civilian population, but it was also the Saddam regime that made decisions on allocating resources that produced these results. This terrible tragedy will not be accounted for.

In a perverse way, Saddam's regime will escape responsibility for aggression against its two neighboring states and the resulting casualties suffered by his people because, after World War II, the major powers did not declare aggression an international crime.³⁰

Regrettably, the March 2003 invasion by coalition forces,³¹ the internal violence in Iraq since the occupation,³² the Abu Ghraib tortures by U.S.

3893d mtg., U.N. Doc. S/RES/1175 (1998); S.C. Res. 1210, U.N. SCOR, 53d Sess., 3946th mtg., U.N. Doc. S/RES/1210 (1998); S.C. Res. 1242, U.N. SCOR, 54th Sess., 4008th mtg., U.N. Doc. S/RES/1242 (1999); S.C. Res. 1266, U.N. SCOR, 54th Sess., 4050th mtg., U.N. Doc. S/RES/1266 (1999); S.C. Res. 1281, U.N. SCOR 54th Sess., 4079th mtg., U.N. Doc. S/RES/1281 (1999); S.C. Res. 1284, U.N. SCOR, 54th Sess., 4084th mtg., U.N. Doc. S/RES/1284 (1999); S.C. Res. 1293, U.N. SCOR, 55th Sess., 4123d mtg., U.N. Doc. S/RES/1293 (2000); S.C. Res. 1302, U.N. SCOR, 55th Sess., 4152d mtg., U.N. Doc. S/RES/1302 (2000); S.C. Res. 1330, U.N. SCOR, 55th Sess., 4241st mtg., U.N. Doc. S/RES/1330 (2000); S.C. Res. 1352, U.N. SCOR, 56th Sess., 4324th mtg., U.N. Doc. S/RES/1352 (2001); S.C. Res. 1360, U.N. SCOR, 56th Sess., 4344th mtg., U.N. Doc. S/RES/1360 (2001); S.C. Res. 1382, U.N. SCOR, 56th Sess., 4431st mtg., U.N. Doc. S/RES/1382 (2001); S.C. Res. 1409, U.N. SCOR, 57th Sess., 4531st mtg., U.N. Doc. S/RES/1409 (2002); S.C. Res. 1443, U.N. SCOR, 57th Sess., 4650th mtg., U.N. Doc. S/RES/1443 (2002); S.C. Res. 1447, U.N. SCOR, 57th Sess., 4656th mtg., U.N. Doc. S/RES/1447 (2002); S.C. Res. 1454, U.N. SCOR, 57th Sess., 4683d mtg., U.N. Doc. S/RES/1454 (2002); S.C. Res. 1472, U.N. SCOR, 58th Sess., 4732d mtg., U.N. Doc. S/RES/1472 (2003); S.C. Res. 1483, U.N. SCOR 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003).

For a discussion of the legality of these UN sanctions, see W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT'L L. 86 (1998) (concluding that the Council has failed to give adequate weight to international law and recommending legal principles for mandatory economic sanctions programs); and Paul Conlon, *Legal Problems at the Centre of the United Nations Sanctions*, 65 NORDIC J. INT'L L. 73 (1996) (discussing the legal relationships of the UN Committees and the problems that arise between them). Another estimate that Iraqis and the rest of the Arab world compare to the regime's violations is the estimated 100,000 Iraqis killed by Coalition forces between March 2003 and September 2004. See Les Roberts et al., *Mortality Before and After the 2003 Invasion of Iraq: Cluster Sample Survey*, THE LANCET, 364, 1857-64 (2004). The relevance of these comparisons is that opponents of accountability for the Saddam regime raise these estimates to show that the United States is also blameworthy and that it does not come forth with "clean hands" when it condemns this regime.

30. Since the International Military Tribunal ("IMT") and International Military Tribunal for the Far East ("IMTFE"), there has been no international consensus on "aggression" as an international crime. The 1974 General Assembly resolution on defining aggression, G.A. Res. 3314 U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974), was never relied upon by the Security Council. See M. Cherif Bassiouni & Benjamin B. Ferencz, *The Crime Against Peace*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 167, 184-85 (M. Cherif Bassiouni ed., 2d rev. ed. 1999). The International Criminal Court ("ICC") is still unable to agree on a definition of aggression. See M. CHERIF BASSIOUNI, 1 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT (2005); MAURO POLITI & GIUSEPPE NESI, THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 81-84, 94 (2004).

31. See *A Nation at War: On the Battlefield*, N.Y. TIMES, Mar. 22, 2003, at B2.

32. See Edward Wong et al., *The Conflict in Iraq: Insurgents; Rebels Attack in Central Iraq and the North*, N.Y. TIMES, Nov. 16, 2004, at A1.

forces,³³ and the Battle of Fallujah³⁴ have overshadowed the Iraqi and Arab peoples' concerns for post-conflict justice against the Saddam regime. Moreover, the need for political stability in this transitional stage of Iraq's history may induce the new Iraqi government to make post-conflict justice a low priority. If that were to be the case, it would be a regrettable missed opportunity that will join a long series of post-World War II conflicts³⁵ where impunity has prevailed.³⁶

Furthermore, the flaws of the Iraq Special Tribunal ("IST" or "Tribunal") discussed herein should not overshadow the imperative of prosecuting Saddam Hussein and the senior leaders of his regime. The pursuit of the best should not be the enemy of the good.

I. The Goals of Post-Conflict Justice in Iraq³⁷

Given the widespread and systematic nature of the political violence committed by Saddam Hussein and his repressive Ba'ath regime for some thirty-five years, the country's future requires a thoughtful national reflection on past abuses and an assessment of post-conflict justice needs. Iraq's reconstruction and future democratic and rule-of-law-based society can benefit from the government's³⁸ ability to openly engage itself and the people of Iraq with the principles and strategies of post-conflict justice.³⁹ This

33. See citations *infra* note 147.

34. See Jackie Spinner & Karl Vick, *U.S. and Iraqi Troops Push into Fallujah*, WASH. POST, Nov. 9, 2004, at A1.

35. Since World War II, there have been more than 250 conflicts, and estimates of the resulting casualties range from 70 million to 170 million. See M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, in POST-CONFLICT JUSTICE 3, 6 (M. Cherif Bassiouni ed., 2002); Jennifer Balint, *An Empirical Study of Conflict, Conflict Victimization and Legal Redress*, 14 NOUVELLES ETUDES PÉNALES 101 (M. Cherif Bassiouni ed., 1988).

36. Balint, *supra* note 35; *Report of the Secretary-General to the Security Council on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. SCOR, 59th Sess., 5052d mtg., U.N. Doc. S/2004/616 (2004); *Independent Study of Best Practices, Including Recommendations, To Assist States in Strengthening Their Domestic Capacity To Combat All Aspects of Impunity*, by Diane Orentlicher, U.N. ESCOR, Commission on Human Rights, 60th Sess., Prov. Agenda Item 17, U.N. Doc. E/CN.4/2004/88 (2004); *Final Report of Louis Joinet, Special Rapporteur of the Subcommission on Prevention of Discrimination and Protection of Minorities*, U.N. SCOR Commission on Human Rights, 49th Sess., Agenda Item 9, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (1997).

37. For post-conflict justice goals, see POST-CONFLICT JUSTICE, *supra* note 35; M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409 (2000); M. Cherif Bassiouni, *Searching for Justice in the World of Realpolitik*, 12 PACE INT'L L. REV. 213 (2000). For accountability standards, see Int'l Human Rights Law Inst., *Chicago Principles on Post-Conflict Justice* (forthcoming 2005).

38. UN-sponsored elections took place in Iraq on January 30, 2005, pursuant to S.C. Res. 1511, U.N. SCOR, 58th Sess., 4844th mtg., U.N. Doc. S/RES/1511 (2003). Dexter Filkins, *The Iraqi Elections: Election; Defying Threats, Millions of Iraqis Flock to Polls*, N.Y. TIMES, Jan. 31, 2005, at A1.

39. See, e.g., POST-CONFLICT JUSTICE, *supra* note 35; NAOMI ROHT-ARRIAZA, *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* (1995); STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* (2d ed. 2001); 3 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* (Neil Krutz ed., 1995); Diane Orentlicher,

includes how the nation responds to the systematic violations of the previous repressive regime, how it deals with the regime's victims, and how it transforms yesterday's tragedies into lessons for tomorrow that will enhance future deterrence and prevention.

Experiences in various parts of the world since World War II confirm that post-conflict justice in Iraq should not be ignored, and that its goals should include the following:

1. Enhancing social reconciliation and avoiding individual acts of vengeance;
2. Restoring an independent judiciary to Iraq and strengthening the sustainability of a modern legal system in Iraq;
3. Sustaining the democratic future, territorial integrity, and stability of Iraq, and supporting the establishment of a new democratic government based on the principles of the rule of law;
4. Creating a precedent in the Arab world for holding officials responsible for systematic repression and abuse and contributing to the worldwide experience of enforcing international criminal justice through domestic legal processes, to which international prosecutions are complementary;⁴⁰
5. Prosecuting Saddam Hussein and the senior leaders of the Ba'ath regime before a specialized tribunal for violations of international humanitarian law, gross violations of international human rights law (including for crimes committed in the Iraq-Iran War of 1980 to 1988, in the Iraq-Kuwait War of 1990 to 1991, during the occupation of Kuwait, in the regime's internal conflict waged against the Kurdish independence movement, and during the suppression of the Shi'a), and for crimes committed by the regime against the Iraqi people in violation of international law and domestic criminal law. Retributive justice in these cases is necessary to reinforce future deterrence and prevention. To accomplish other goals, these prosecutions must have legitimacy and credibility in the eyes of Iraqis and Arabs, and they must be conducted fairly and effectively.
6. Prosecuting less prominent perpetrators of war crimes and torture before one or more chambers of Iraq's criminal courts to avoid impunity for certain perpetrators;⁴¹
7. Providing victims of these regime crimes with reparation and other redress remedies.⁴² It has been recognized in the Draft Basic Prin-

Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime, 100 *YALE L.J.* 2537 (1991).

40. For more on complementarity, see M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 15-18 (2003).

41. It is possible to specialize some of the criminal courts' chambers to hear these cases.

42. See *Declaration of Basic Principles of Justice for Victims of Crime and Abuses of Power*, G.A. Res. 40/34, U.N. GAOR, 40th Sess., Supp. No. 53, Annex, at 214, U.N. Doc. A/40/53 (1985); *Civil and Political Rights, Including the Questions of: Independence of the Judiciary, Administration of Justice, Impunity: The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*,

ciples and Guidelines on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms that “in honouring the victims’ right to benefit from remedies and reparation, the international community keeps faith and human solidarity with victims, survivors and future human generations, and reaffirms the international legal principles of accountability, justice and the rule of law.”⁴³ Victim compensation should also provide popular support for prosecutions and become the basis for an oral history recordation and a historic commission described below.

8. Establishing an objective historical record of past political violence⁴⁴ in order to educate future generations about such crimes and, generally, to inform such future generations of the perils of undemocratic governance that commit gross violations of fundamental human rights.⁴⁵ The sequel to such a historical recordation should be the development of public educational programs at all levels to strengthen the capacity of civil society.

Four post-conflict justice mechanisms should be used to achieve these goals: prosecution of Saddam Hussein and senior leaders of his regime before a specialized tribunal, prosecution of lesser offenders before one or more specialized chambers of the Iraqi criminal courts, a victim compensation scheme, and a historic commission. These mechanisms must be made part of an Iraqi process that enjoys national and international legitimacy and that would also have broad Iraqi popular support.

*Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission Resolution 1999/33, U.N. ESCOR, Commission on Human Rights, 56th Sess., Prov. Agenda Item 11(d), U.N. Doc. E/CN.4/2000/62 (2000) (including, in the Annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law); The Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, E.S.C. Res. 2002/44, Commission on Human Rights, 58th Sess., 51st mtg., U.N. Doc. E/CN.4/2002/200 (2002); The Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, E.S.C. Res. 2003/34, Commission on Human Rights, 58th Sess., 50th mtg., U.N. Doc. E/CN.4/2003/L.11/Add.4 (2003). The latest revision will be submitted to the Commission on Human Rights at its sixty-first session in March or April 2005. See *Civil and Political Rights, The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, Note by the High Commissioner for Human Rights*, U.N. ESCOR, Commission on Human Rights, 61st Sess., U.N. Doc. E/CN.4/2005/59 (2004). For commentary on these draft guidelines, see Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT’L & COMP. L. REV. 157, 160-65 (2004); and ILARIA BOTTIGLIERO, REDRESS FOR VICTIMS OF CRIMES UNDER INTERNATIONAL LAW 167-91 (2004).*

43. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, U.N. ESCOR, Commission on Human Rights, 56th Sess., Prov. Agenda Item 11(d), Annex, at 5, U.N. Doc. E/CN.4/2000/62 (2000).

44. The term “historic commission” is used here instead of “truth commission,” because the former has a known connotation in Arabic, while the latter sounds alien to the Arab culture.

45. See PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGES OF TRUTH COMMISSIONS 29-30 (2002).

The first of these post-conflict justice mechanisms, namely, the prosecution of Saddam Hussein and senior leaders of his regime before a specialized tribunal, will be faced with the criticism that they are only focused on a few members of a defeated regime, namely, Saddam Hussein and some of his senior subordinates.⁴⁶ In the Arab world and elsewhere, these prosecutions will be perceived as victors' vengeance or unfair because they are selective. However, it should be said that selective justice, imperfect as it is, does no injustice to those who deserve prosecution. In light of the widespread atrocities committed by the Ba'ath regime, no one can argue that the persons considered for prosecution do not deserve to face justice. Nonetheless, every effort should be made to enhance the legitimacy, credibility, and fair outcomes of their prosecutions.⁴⁷

46. See Secretary of Defense Donald H. Rumsfeld, Briefing on Media Availability (June 18, 2003) (transcript available at <http://www.defenselink.mil/transcripts/2003/tr20030618-secdef0282.html>). It is likely that only eleven to fifteen (out of forty-three or more) high-level detainees in U.S. custody will be prosecuted. *Id.* Others may receive leniency in exchange for their trial testimony against Saddam and others. *Id.* Originally, the famous deck of cards printed by the United States before the March 2003 invasion of Iraq, with Saddam Hussein as the ace of spades, had fifty-five prospective indictees. James Risen, *April 27–May 3; Playing 55 Pickup in Iraq: The Game's One Third Over*, N.Y. TIMES, May 4, 2003. That number was, however, reduced after some of the prospective indictees died and others, such as Tariq Aziz, who cooperated with U.S. officials in identifying Saddam Hussein after his arrest and detention, were offered plea bargains. See John Burns, *Top Saddam Aides Face Trials in Spring*, INT'L HERALD TRIB. (Paris), Feb. 10, 2005, at 4.

Negotiated pleas, which are not part of the Iraqi criminal justice system, or, for that matter, of most inquisitorial systems, is also a troublesome aspect of the IST. Its purpose is mostly to make the case against Saddam and some of his most senior regime associates. However, the judgment as to which prospective defendant falls in the category of a defendant with a more favorable outcome (a guilty pleader who cooperated) and one who does not is purely opportunistic. It has nothing to do with justice, and raises serious questions about impartiality, and perhaps even about partial impunity, for those who will benefit from leniency only because they cooperated with the accusers. See Mirjan Damaska, *Negotiated Justice in International Criminal Courts*, 2 J. INT'L CRIM. JUST. 1018 (2004); see also Francoise Tulkens, *Negotiated Justice*, in EUROPEAN CRIMINAL PROCEDURE 673 (Mireille Delmas-Marty & John Spencer eds., 2004). For a justice-oriented perspective, see N.A. Combs, *Copping the Plea to Genocide*, 151 U. PENN L. REV. 4 (2002). For a truth-oriented perspective, see Mirjan Damaska, *Truth in Adjudication*, 49 HASTINGS L.J. 289 (1998); and Thomas Weigend, *Is the Criminal Process About Truth?*, 26 HARV. J. L. & PUB. POL'Y 157 (2003).

47. The most damaging argument will be the immunity given by the CPA Order 17 to the coalition forces. Status of the Coalition Provisional Authority, MNF–Iraq, Certain Missions and Personnel in Iraq, CPA Order 17, (June 27, 2004), available at http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf (last visited Apr. 5, 2005). (The CPA website will remain operational until June 30, 2005. However, CPA Orders and Regulations are also available online at the International Humanitarian Law Institute website, <http://www.ihlresearch.org/iraq/legal.php?PHPSESSID=B077b8429a762acfd2da65aba77415f4>.) It should be noted that the word "order" was consistently translated into Arabic as "decree" in CPA publications. Ironically, though the United States originally resented the label "occupying power," it nonetheless issued orders in the same way as it did during the post-World War II occupation of Germany and Japan. In Germany, these orders were issued by the Allied Control Council, while in Japan they were issued by the Supreme Allied Commander. See Agreement on Control Machinery in Germany, Nov. 14, 1944, 5 U.S.T. 2062, 236 U.N.T.S. 359; U.S. Dep't. of State, Pub. No. 2671, Occupation of Japan 8–9 (U.S. Dep't of

II. The Evolution of Thought on Post-Conflict Justice: 1991 to 2004

Prior to addressing the issues involved in the prosecution of Saddam and his regime leaders, it is useful to examine the evolution of the post-conflict justice debate that took place from 1991 to 2004⁴⁸ to provide the reader with a background on the major events leading to the formation of the IST,⁴⁹ which is discussed in detail below. What follows is a brief chronology of events concerning post-conflict justice proposals and ideas that took place over more than a decade.⁵⁰

A. Post-Gulf War: 1991 to 2001

After Iraq's invasion of Kuwait in 1990, its exiled government in Saudi Arabia, some other governments, and some nongovernmental organizations ("NGOs") called for the prosecution of war crimes arising out of the occupation of Kuwait. Some NGOs also called for the prosecution of the Ba'ath regime leadership for crimes committed in Iraq and for war crimes prosecution for violations of international humanitarian law during the Iraq-Iran War of 1980 to 1988.⁵¹ In January 1991, a Saudi law firm in Riyadh floated an idea whose origin was assumed to be a U.S. government source.⁵² The proposal was for an Arab League initiative to establish an Arab war crimes tribunal for Iraq. However, the idea never percolated to the Arab League's political echelons because it met with lack of interest in Arab governments.⁵³ This was followed by a suggestion, also believed to be

State Far Eastern Series 17, 1946). In Iraq, the equivalent were called Coalition Provisional Authority Orders.

48. It should be noted that the post-conflict justice debate was essentially a U.S. debate. The international community did not exhibit much interest in it.

49. See THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL, available at http://www.cpa-iraq.org/human_rights/Statute.htm (last visited Apr. 5, 2005). The statute became effective upon CPA Order 48 (Dec. 10, 2003), available at http://www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf (last visited Apr. 5, 2005).

50. Much of what this Article describes is based on this writer's personal involvement in the process or his direct knowledge of events. Some of these facts, however, are not a matter of public record and cannot be documented. Much more than what is known to this writer is sure to have occurred within the U.S. Government and elsewhere. Consequently, what follows is not presented as a complete description of all endeavors relating to Iraqi post-conflict justice.

51. See, e.g., Human Rights Watch, Justice for Iraq: A Human Rights Watch Policy Paper, at <http://hrw.org/backgrounders/mena/iraq1217bg.htm> (Dec. 2002) (calling for the prosecution of Ba'ath party leadership for human rights violations).

52. In February 1991, a partner of this firm who requested anonymity contacted me to solicit my views on these proposals and my advice on how to advance them.

53. This lack of interest may be due to Arab states' reluctance to establish a precedent of calling Arab leaders to justice or to Arabs' popular resentment of the U.S. military intervention in Iraq and of its support of Israel. Historically, regime change in Arab states has been accompanied by summary executions or imprisonment of previous regime leaders. Post-conflict justice has not been the practice, although after Gamal Abdel-Nasser's death in Egypt and the assumption of the presidency by Anwar al-Sadat in 1971, a number of former Nasser regime officials were put on trial for various atrocities, including summary executions, torture, and other human rights abuses. Among those defendants was Salah Nasr, a former head of the *Mukhabarat* (Egyptian intelligence), who was convicted and subsequently served a few years in jail. Afterwards, Nasr wrote his memoirs, and blamed Nasser for his actions. See generally SALAH NASR,

U.S.-inspired, that the Gulf Cooperation Council (which includes Saudi Arabia, Kuwait, Bahrain, the United Arab Emirates, Qatar, and Oman) sponsor a war crimes tribunal, but it is believed Saudi Arabia did not welcome the idea.⁵⁴ At that time, the George H. Bush Administration was not willing to involve the UN in the process and was not desirous of pursuing it unilaterally. The United States, however, started to amass a large volume of documents and engaged in large-scale interrogation of Iraqi prisoners of war in Saudi Arabia for use in future prosecutions. This data was scanned and computerized by the Department of Defense ("DOD"), and it was reportedly stored in Boulder, Colorado.⁵⁵

No progress was made for the next three years until the Clinton Administration in 1994 undertook preliminary informal consultations with Security Council members with a view to establishing a commission to investigate the Iraqi regime's domestic crimes and war crimes against Iran and Kuwait. The commission was to be modeled on the Security Council's 1992 Commission of Experts to Investigate Violations of International Humanitarian Law in the Former Yugoslavia.⁵⁶ Certain NGOs informally proposed broadening the mandate of this proposed commission to include the investigation of other crimes in the context of internal conflicts and political violence committed by the Ba'ath regime since it took power in 1968, including the use of chemical weapons by the Iraqi armed forces against Iraqi Kurds, as well as an array of violations committed against the Kurds, the Shi'a, and other Iraqi citizens. Between 1995 and 1997, the Clinton Administration continued its informal consultations at the UN with Security Council members, but it met with opposition from other permanent members of the Security Council.⁵⁷ In the face of this opposition,

THIKRAYAT: AL-THAWRA, AL NAKSA, AL-MUKHABARAT [REMEMBRANCE: THE REVOLUTION, THE DISASTER AND THE INTELLIGENCE] (1999) (Nasr's autobiography).

54. Similar to other Arab countries, Saudi Arabia's reluctance to endorse an Iraqi war crimes tribunal may be explained by a historic lack of interest in international criminal justice. For example, between 1992 and 1994, the Saudis did not contribute to the Voluntary Trust Fund of the UN Security Council Commission of Experts for the Former Yugoslavia. See *Final Report of the U.N. Commission of Experts Pursuant to S.C. Resolution 780 (1992)*, U.N. SCOR, 49th Sess., Annex, at 12, U.N. Doc. S/1994/674 (1994) (enumerating the countries which contributed to the Voluntary Trust Fund).

55. The archives of data related to Iraqi prisoners of war ("POWs") were then called the "Boulder files." Some of that material concerning the Ba'ath regime's Anfal Campaign, *supra* note 18 and accompanying text, and the Marshland people's internal displacement, *supra* note 26 and accompanying text, reportedly was provided to Human Rights Watch, which published reports on these events. Most of these documents came from the Kurdish north after the 1991 uprising. It is estimated that eighteen tons of documents, including prison files, and video and audio recordings documenting individual crimes and widespread abuses of fundamental human rights were collected. Moreover, some documentation was obtained by the coalition forces in Kuwait. Some of these documents have been digitized by the Iraq Foundation, whose President, Rend Rahim, recently served as Iraq's Ambassador to the United States.

56. Such commissions have historically met with a tepid response in the Arab world. See discussion *supra* note 54.

57. France, Russia, and the UK had significant economic ties with the Ba'ath regime. In addition, Saddam had bestowed massive financial support on neighboring Arab governments and senior individuals in certain countries including Jordan, Syria, Turkey,

the Clinton Administration abandoned its efforts to establish such a commission.⁵⁸

B. The Bush Administration Period: 2001 to 2004

Shortly after 2001, the idea of a Security Council commission to investigate the Saddam regime's violations of international humanitarian law and human rights law was floated within the George W. Bush Administration but was soon discarded. This may have been due to ideologically based opposition to a UN-led effort, as well as the fact that it originally was a Clinton Administration idea. However, in 2002, the Department of State ("DOS") included post-conflict justice issues, particularly the establishment of an ad hoc tribunal, as a component of its "Future of Iraq" Project.⁵⁹ This year-long effort involved over one hundred Iraqi expatriates from different parts of the world, including Iraqi-Americans and non-Iraqi experts.⁶⁰ It had several working groups, one of which was a "Working

Palestine, and Egypt, as well as others, as documentation of Iraqi oil vouchers later indicated. See Perry Beacon, Jr., *A Deepening U.N. Scandal*, TIME (London), Nov. 29, 2004, at 16; Bill Gertz, *Saddam Paid Off French Leaders: \$1.78 Billion in Oil-Food Funds Went To Buy Influence at the U.N.*, WASH. TIMES, Oct. 7, 2004, at A14. China was also reluctant to see the Security Council become more involved with the business of regime violations investigations.

58. Secretary Albright was, however, interested in pursuing the option of a Security Council Commission. Ambassador David Scheffer, then the Department of State's (DOS) Ambassador-at-large for War Crimes, under the direction of Secretary Albright, was also involved in this process. He had played an important role with the Yugoslavia Commission between 1992 and 1994, which I chaired, and he asked me whether I would chair a similar commission for Iraq.

59. As an expert to the "Working Group on Transitional Justice" under the "Future of Iraq" Project, I prepared a comprehensive post-conflict justice plan in January 2003. See M. Cherif Bassiouni, *Iraq Post-Conflict Justice: A Proposed Plan*, available at http://www.law.depaul.edu/institutes_centers/iharli/_downloads/Iraq_Proposal_04.pdf (last revised Jan. 2, 2004, based on plan prepared Apr. 28, 2003). The plan was modified in April 2003 after broad governmental and NGO consultations. Among those who worked with me then and who continue to have a leading role in Iraq is Ambassador Feisal Istrabadi, who is Deputy Permanent Representative of Iraq to the UN. Previously, Istrabadi was an aide to General Council ("GC") member Dr. Adnan Pachachi, and, in that capacity, he contributed to the drafting of the Transitional Administrative Law ("TAL"), which is the equivalent of a temporary constitution. For a discussion of the TAL, see *infra* notes 121-137 and accompanying text. Ambassador Istrabadi has been a Senior Fellow at IHRLI since 2002. Another member of the Working Group was Attorney Sermid Al-Sarraf, who has been the IHRLI's Chief of Party in Iraq since October 2003 and who oversees the IHRLI's "Raising the Bar" Project in Iraq (a project designed to restructure legal education in that country. International Human Rights Law Institute, *Raising the Bar: Legal Education and Reform in Iraq*, at http://www.law.depaul.edu/institutes_centers/iharli/programs/rule_education.asp (last visited Apr. 5, 2005). Mr. Al-Sarraf summarized the 700-page report of the "Working Group on Transitional Justice," and the report was publicly released in New York on May 15, 2003. Salem Chalabi was another member of that working group, and he prepared the statute of the Iraqi Special Tribunal ("IST") on the basis of this writer's proposals. For a description of some details of the "Future of Iraq" Project's, see David Rieff, *Blueprint for a Mess*, N.Y. TIMES, Nov. 2, 2003, at 28; Eric Schmitt & Joel Brinkley, *State Department Study Foresaw Troubles Plaguing Postwar Iraq*, N.Y. TIMES, Oct. 19, 2003, at 1.

60. The coordinator of this project was Thomas Warrick, who was previously Ambassador Scheffer's deputy in the Department of State ("DOS") War Crimes Bureau

Group on Transitional Justice” consisting of forty-one Iraqi expatriate jurists and a number of U.S. experts,⁶¹ including this writer, who prepared several options for a post-conflict justice plan.⁶²

In March 2003, before the U.S.-led coalition forces attacked Baghdad and amidst concerns that the Ba’ath regime would use WMDs,⁶³ the idea of establishing an ad hoc international criminal tribunal by the Security Council was again briefly considered.⁶⁴ This idea was abandoned within

during the Clinton Administration. Mr. Warrick moved to the Iraq desk to work on Iraqi regime prosecutions shortly before George W. Bush came into office. Mr. Warrick served as my legal counsel when I was the Chairman of the UN Security Commission Established Pursuant to Resolution 780 (1992).

61. As stated above, Salem Chalabi was a member of this working group. He is the nephew of the former GC member Ahmed Chalabi, who was then known for being supported by the DOD’s civilian leadership and who later fell out of grace with the U.S. government. Salem relied on this writer’s proposed plan to prepare the IST’s Statute. He subsequently became the IST’s Administrator. *See infra* note 81. He was appointed to that post by the GC on May 8, 2004, and was tasked with setting up the organization and structure of the IST and with working on the selection and vetting of sitting judges, investigative judges, and prosecutors. However, in August 2004, Zuhair Maliky, an investigating judge of Iraq’s Central Criminal Court, issued an arrest warrant for Ahmed Chalabi on charges of counterfeiting currency, and an arrest warrant for Salem Chalabi on suspicion of murder. *See* Rajiv Chandrasekaren & Carol D. Leonnig, *Chalabi Back in Iraq, Aide Says: Former US Client Charged with Counterfeiting Currency*, WASH. POST, Aug. 12, 2004, at A19; 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. It should be noted that the charges of August 8, 2004, against Ahmed and Salem Chalabi were subsequently reported to have been dropped. Salem Chalabi, who fled to London, resigned his post but is likely to return soon to Iraq. Politics notwithstanding, Salem Chalabi was committed to post-conflict justice in Iraq, and his efforts in that respect should be acknowledged. In January 2005, however, in the latest bizarre twist of events, the Iraqi government made it known that it was going to arrest Ahmed Chalabi and hand him over to Interpol, which has had an outstanding arrest warrant against him since 1992 for an in absentia criminal conviction in Jordan for embezzlement of funds when he was in charge of Petra Bank. *See* Chandrasekaren & Leonnig, *supra*. At the time of his conviction in 1992 by a Jordanian criminal court, Ahmed Chalabi escaped to England. In addition to a twenty-two-year sentence of hard labor, Chalabi’s sentence also included an order for restitution of \$230 million. Chalabi’s status as a wanted criminal in Jordan is well-known, yet he remains a free man and claims that the Jordanian conviction was the product of a political setup. *See* Jane Mayer, *The Manipulator: Ahmed Chalabi Pushed a Tainted Case for War. Can He Survive the Occupation?*, THE NEW YORKER, June 7, 2004, at 58. Most recently, Ahmed Chalabi filed a lawsuit against the Jordanian government in U.S. federal court based on his 1992 conviction for embezzlement and other crimes. *See* Chandrasekaren & Leonnig, *supra*. At the time of this writing, he had just been elected as a member of the new Iraqi legislative body in the January 30, 2005 elections as part of the Shi’a list.

62. *See* Bassiouni, *supra* note 59.

63. This was probably based on a faulty interpretation of a speech made in Arabic by the Ba’athist Minister of Information, Mohammed Saeed Al-Sahhaf, who made public statements days before the attack on Baghdad, some reported on CNN, that Iraqi forces would use “unconventional” means against the United States. What he probably meant by “unconventional” was the guerrilla warfare tactics that some Iraqis employed after the fall of Baghdad. For an in-depth analysis of the war, see JOHN KEEGAN, *THE IRAQ WAR* (2004).

64. At the time that the ad hoc criminal tribunal was being considered, Congressman Mark Kirk (R., Ill.), the ranking Republican member of the House Appropriations

days, however, when concerns relating to the Iraqi forces' use of WMDs did not materialize, and Baghdad fell with few U.S. casualties.⁶⁵

After the U.S.-led coalition forces took control of Iraq, it became increasingly clear that some form of tribunal would have to be established to address the Ba'ath regime's violations of international humanitarian law, international human rights law, and Iraqi law. The following three alternatives were considered by the Bush Administration, the UN, and the NGO community, which are incidentally the same as those proposed by this writer in the context of the Future of Iraq Project mentioned above: (1) an international tribunal established by the Security Council similar to the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda;⁶⁶ (2) a mixed international and national tribunal similar to the one established in Sierra Leone,⁶⁷ and (3) a national Iraqi tribunal with some international support. The last option was favored by the Bush Administration and this writer, while the NGO community favored one of the first two.⁶⁸ However, efforts within U.S. government relating to the establishment of the tribunal were put on the back burner in April after the DOD began apprehending a number of important leaders of the Ba'ath regime. At that time, it was believed that the DOD was more interested in obtaining intelligence from these individuals regarding a number of key issues, including WMDs and the whereabouts of Saddam Hussein and his two sons, Uday and Qusay,⁶⁹ than in establishing a tribunal.⁷⁰ However,

Committee, called this writer and asked him to prepare a statute and a draft Security Council resolution to be forwarded to Secretary of Defense Donald H. Rumsfeld and U.S. Ambassador to Iraq John D. Negroponte.

65. William J. Broad, *A Nation at War: Outlawed Weapons; Some Skeptics Say Arms Hunt Is Fruitless*, N.Y. TIMES, Apr. 18, 2003, at B8; Jodi Wilgoren & Adam Nagourney, *A Nation at War: The Casualties; While Mourning Dead, Many Americans Say Level of Casualties Is Acceptable*, N.Y. TIMES, Apr. 8, 2003, at B1.

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

67. See S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg., U.N. Doc. S/RES/1315 (2000); Jennifer L. Poole, *Post-Conflict Justice in Sierra Leone*, in POST-CONFLICT JUSTICE, *supra* note 35, at 563.

68. At initial meetings NGOs expressed a preference for an internationally mandated institution. However, a "mixed" international and national tribunal, similar to the Special Court for Sierra Leone, was viewed as the second-best option. See Letter from Human Rights Watch to the U.S. Regarding the Creation of a Criminal Tribunal for Iraq (Apr. 15, 2003), available at <http://www.hrw.org/press/2003/04/iraqtribunal041503ltr.htm> (last visited Apr. 5, 2005). For further details of the Sierra Leone Special Tribunal, see Poole, *supra* note 67, and JOHN R.W.D. JONES & STEVEN POWLES, INTERNATIONAL CRIMINAL PRACTICE: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, THE INTERNATIONAL CRIMINAL COURT, THE SPECIAL COURT FOR SIERRA LEONE, THE EAST TIMOR SPECIAL PANEL FOR SERIOUS CRIMES, WAR CRIMES PROSECUTIONS IN KOSOVO (3d ed. 2003).

69. They were killed by U.S. forces in a raid on their hideout in Mosul on July 22, 2003. See Neil MacFarquhar, *Hussein's Two Sons Dead in Shootout*, U.S. SAYS, N.Y. TIMES, July 23, 2003, at A1.

70. During this time, Rumsfeld indicated that plea bargains with these leaders were possible. See Rumsfeld Briefing, *supra* note 46. Saddam was captured by U.S. forces at Al-Dawr, near Tikrit, on December 13, 2003. See Susan Sachs & Kirk Semple, *Ex-Leader, Found Hiding in Hole, Is Detained Without Fight*, N.Y. TIMES, Dec. 14, 2003, at A1.

the Administration always intended to prosecute Saddam Hussein and the leaders of his regime.

During April and June 2003, several NGOs, led by Human Rights Watch and the Open Society Institute with informal participation by UN representatives, met in New York to discuss the above-mentioned three options.⁷¹ The preference of most of the experts who participated in these meetings was for an ad hoc international criminal tribunal established by the Security Council with jurisdiction over crimes committed during the Iraq-Iran War of 1980 to 1988 and during the invasion and occupation of Kuwait from 1990 to 1991 and over crimes committed against the Kurds, the Shi'a, and other Iraqi citizens. The next option was for a mixed national and international tribunal as was used in Sierra Leone.⁷²

The NGO community felt that the scope and severity of the crimes committed by the Ba'ath regime required the creation of a specialized international tribunal and that the Iraqi judiciary did not have the capacity to undertake complex prosecutions. In addition, it expressed concerns for the ability of Iraqi judges to be fair and impartial. On the other hand, the Bush Administration was opposed to the idea of an international tribunal established by the Security Council, preferring instead a national Iraqi tribunal that it could help fashion and influence.⁷³ This writer, who was present at most of these meetings, favored the option of an Iraqi tribunal based on Iraqi law with international support.⁷⁴

Between April and September 2003, the Bush Administration, while still favoring an Iraqi tribunal, remained unsure of what specific course of action to follow regarding post-conflict justice in Iraq and ignored the recommendations of the Department of State ("DOS") Future of Iraq Project's "Working Group on Transitional Justice."⁷⁵ Though it was apparent that an international tribunal would enjoy the greatest amount of international legitimacy, the ability to establish such a tribunal through the Security Council was doubtful, given the limited role the UN was afforded by the United States in Iraq. Additionally, even if it were possible for the Security Council to establish a tribunal, the experiences of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and International Crimi-

71. See OPEN SOCIETY INSTITUTE & THE UNITED NATIONS FOUNDATION, *IRAQ IN TRANSITION, POST-CONFLICT CHALLENGES AND OPPORTUNITIES* 85-87 (2004); Bassiouni, *supra* note 59, at 48.

72. See *supra* note 67 and accompanying text.

73. These ideas were discussed on June 11, 2003, at a White House meeting between Kenneth Roth, Executive Director of Human Rights Watch ("HRW"), and Condoleezza Rice, then National Security Adviser to the President. The U.S. Administration argued that Security Council Resolution 1483, operative paragraph 8(i), empowered the CPA to carry out investigations and engage in subsequent prosecutions. See S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg. at 3, U.N. Doc. S/RES/1483 (2003). Paragraph 8(i) is ambiguous in referring to "encouraging international efforts to promote legal and judicial reform." *Id.* Thus, the U.S. Administration employed a great deal of latitude in relying on this paragraph to justify the establishment of an entirely new judicial institution.

74. See Bassiouni, *supra* note 59.

75. See *supra* note 59.

nal Tribunal for Rwanda ("ICTR") suggest that it would be costly and time-consuming.⁷⁶ Moreover, a tribunal under UN auspices would not impose the death penalty for any of the convicted perpetrators, and the Iraqi people would most likely oppose the elimination of this penalty, which has always existed in its criminal laws.⁷⁷

The Administration's views were that (1) an Iraqi tribunal would allow the people of Iraq to assume responsibility for trying high-ranking Iraqi Ba'ath officials for past political violence committed against them; (2) such a tribunal would provide a strong foundation for a system of government based on the rule of law; and (3) while any tribunal is likely to deliver a message regarding impunity, an Iraqi tribunal would send a particularly powerful message to Arab and Muslim leaders and their people that individuals responsible for systematic repression are no longer guaranteed impunity. These views were in harmony with the international community's expectations of post-conflict justice,⁷⁸ the difference being in the nature of the process.⁷⁹

In September 2003, the idea of an Iraqi national tribunal bolstered by international support was being actively pursued by the DOD, the DOS, and the Department of Justice ("DOJ"), and it was coordinated by the National Security Council ("NSC"), but there was no comprehensive plan for post-conflict justice in Iraq. Nor was there someone with high enough authority to establish policy and coordinate justice issues—a problem which still exists.⁸⁰ The conclusion was to have the initiative come from

76. See U.N. General Assembly, General Assembly Adopts \$3.16 Billion 2004-2005 Budget as It Concludes Main Part of Fifty-Eighth Session, at <http://www.un.org/News/Press/docs/2003/ga10225.doc.htm> (Dec. 12, 2003). For example, the budgets for the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") in 2004 to 2005 alone were \$298.23 million and \$235.32 million respectively. *Id.* Cumulatively the ICTY and ICTR have cost over \$1 billion to date. *Id.* Both the ICTY and ICTR have been criticized for their cost and the slow pace of the trials. See International Crisis Group, International Criminal Justice for Rwanda: Justice Delayed, at <http://www.icg.org/home/index.cfm?id=1649&l=1> (June 7, 2001). For a review of the ICTY and ICTR's judicial work and jurisprudence see Megan Kaszubinski, *The International Criminal Tribunal for the Former Yugoslavia*, in POST-CONFLICT JUSTICE, *supra* note 35, at 459-85; Roman Boed, *The International Criminal Tribunal for Rwanda*, in POST-CONFLICT JUSTICE, *supra* note 35, at 487-98. For an analysis of the ad hoc tribunal's jurisprudence, see generally 1-4 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (Andre Klip & Goran Sluiter eds., 1999); JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA (2d ed. 2000).

77. The death penalty has long been an accepted part of the Iraqi criminal law system. It is a penalty that the majority of Iraqis favor for Saddam and for the senior perpetrators of his regime.

78. See authorities cited *supra* note 42.

79. This writer supports this view but differs with the Administration as to the heavy footprints of U.S. government on the process.

80. This was still a period where lack of clarity existed within the Administration as to the channels of authority on this subject. In other words, no one in high authority was leading this project. There was also infighting between the DOS and the DOD, which had ignored the DOS's "Future of Iraq" Project report. The CPA had a human rights office headed by a capable and committed human rights advocate, Sandra Hodg-

the Governing Counsel ("GC"), subject to the approval of the Coalition Provisional Authority ("CPA").⁸¹

C. Administering the IST

Between September and December 2003, the Statute of such a tribunal was drafted and approved by the GC and the CPA. In accordance with the established process, the GC approved a decree on December 9, 2003, establishing the IST, and on the same day, the CPA issued Order 48 (in Arabic, "decree"), containing the Statute. On December 10, after CPA Administrator Paul Bremer signed the order, it was published in the CPA's Official Gazette.⁸² Thus, it became an official institution of the occupying power.⁸³

Shortly after the IST was established, CPA Administrator Paul Bremer announced that the United States would make \$75 million available to

kinson, who is now at the National Security Agency ("NSA"), and her husband, David Hodgkinson, an equally capable and committed CPA official responsible for post-conflict justice, who now serves at the DOS. Their authority, however, was limited, and in fact, even Bremer's authority was limited on this subject. The National Security Council ("NSC") had another capable person responsible for justice issues, Clint Williamson, but his authority was also limited. At the NSC, these issues involved Robert D. Blackwill, then responsible for Iraq and Afghanistan, and Elliot Abrams, who was, and still is, responsible for the Middle East. Neither are lawyers, and they seem to have given justice issues a low priority. The NSC then decided to give the DOJ "lead agency" status over Iraqi justice issues without regard to the fact that the DOJ, a domestic prosecutorial and law enforcement agency, has no experience in such international justice issues and has no expertise on the Iraqi legal system among its personnel. The DOS's Office of War Crimes, headed by Ambassador Pierre-Richard Prosper, was not given the full role that this office was originally set up to play in these matters. Ambassador Prosper was the deputy head of that office under the Clinton Administration. He had previously served in the DOJ and as a prosecutor at the ICTR. It may have been assumed that DOJ would rely on the "Future of Iraq Working Group on Transitional Justice" and its experts, which some in the White House and in the DOD opposed. The DOJ was apparently sensitive to these currents, and it even sent an assessment team to Iraq consisting of distinguished federal judges and prosecutors, none of whom knew the Iraqi legal system, and it excluded U.S. experts of the "Working Group on Transitional Justice."

81. See THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL; Salem Chalabi: *Judging Saddam*, 11 MIDDLE E. Q. 325 (2004), available at <http://www.meforum.org/article/664> (last visited Apr. 5, 2005). While he presided over the GC during September 2003, Salem Chalabi was asked, with the approval of the CPA, by his uncle Ahmed Chalabi, to prepare a draft statute for a special tribunal. Salem Chalabi relied on the draft statute that this author prepared in March 2003, which was intended for a UN Security Council mandated institution. In his attempts to use this draft statute for a national tribunal, Salem Chalabi did not address a number of legal problems, which exacerbated the IST's legitimacy and credibility problems. Among these legal problems was the fact that the draft statute was modeled on an accusatorial-adversarial model, while Iraqi law is based on an inquisitorial system, as discussed *infra* notes 331 to 337 and accompanying text. As a result of these apparent flaws, a meeting was held at the International Institute of Higher Studies in Criminal Sciences ("IIHSC"), Siracusa, Italy, from December 7 to 12, 2003, to review the draft IST statute with CPA participation, and to address other issues. However, the meeting was called off just days before it was scheduled to commence, because, in the interim, the CPA had decided that the IST should be promulgated on December 10, given that the capture of Saddam Hussein appeared imminent. For Salem Chalabi's perceptions, see Salem Chalabi: *Judging Saddam*, *supra*.

82. See THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL.

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

it,⁸⁴ and the DOJ dispatched a team of prosecutors and investigators to Iraq in early March 2004 to gather the evidence to be used in prosecutions, to organize the Tribunal, and to give on-the-job training to its judges and prosecutors.⁸⁵ While these U.S. prosecutors and investigators had a great deal of experience and expertise to share with their Iraqi counterparts, they knew little about the Iraqi legal system and the Iraqi legal culture. Further, what the DOJ specialists had to offer in terms of experience with large-scale criminal prosecutions did not fit well with a completely different legal system and a substantially different legal culture. This led to their assumption of a more directive, and necessarily more visible role. To some extent, this was obvious in the choreographed arraignment of Saddam Hussein on July 1, 2004. The Iraqi criminal justice system does not have that type of arraignment procedure. Though the investigative judge acted with poise and dignity, Saddam all but stole the show, adding to the perception that this was an American-run operation.⁸⁶ Since Iraqi judges, investigative judges, and prosecutors lack the experience to conduct these types of complex criminal prosecutions, the vacuum drew U.S. specialists more into the process, thus increasing the visibility of U.S. involvement.⁸⁷

However, the judges, investigative judges, and prosecutors of the IST have gradually taken ownership of the process, and have courageously assumed their responsibilities.⁸⁸ As the judges, investigative judges, prosecutors, investigators, and staff of the IST gained more confidence, the process gradually became more Iraqi, and the role of the Regime Crimes Liaison Office ("RCLO") became more supportive. Thus, as time goes on,

84. See CPA Transcripts, *Bremer Affirms: Iraq Turns the Page*, Apr. 23, 2004, available at http://www.iraqcoalition.org/transcripts/20040423_page_turn.html (last visited Apr. 5, 2005).

85. See Neil A. Lewis & David Johnston, *U.S. Team Is Sent To Develop Case in Hussein Trial*, N.Y. TIMES, Mar. 7, 2004, at 1.

86. While all courts have the potential to be undermined or challenged by particularly pugnacious and obstreperous defendants, as is currently the case in the ICTY Milosevic Trial, see Keith B. Richburg, *At Tribunal, Milosevic Blames NATO: Yugoslav Ex-Leader Opens Defense, Mostly Ignores Charges*, WASH. POST, Feb. 15, 2002, at A1, a lack of legal clarity existed in Saddam's "arraignment." This disconnect pertained to whether the procedure performed was ad hoc and whether the magistrates were chosen by the United States. The proceedings were choreographed as an American hearing where an investigative judge read an indictment and asked the defendant to plead guilty or not guilty, and was thus more American than Iraqi. There is no such procedure in the Iraqi criminal justice system. The investigative judge, sitting behind a table facing Saddam, was obviously uncomfortable. On the table where he sat facing Saddam Hussein was a copy of the 1971 Iraqi Code of Criminal Procedure, which does not provide for such an American-style arraignment procedure. The investigative judge asked Saddam to enter a plea, something unknown in the Iraqi system, and Saddam, who has a law degree, realized this. Saddam then retorted that he was still a head of state under Iraqi law and that the investigative judge had no legal right or basis to question him. 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.

87. Additional capacity is needed at all levels of the Iraqi judicial system. However, that should not be done in a way that leaves heavy U.S. footprints.

88. Having gotten to know the IST judges, investigative judges, and prosecutors, I can attest to their commitment to justice. Still, they can benefit from more expertise, as they freely acknowledge.

it is inappropriate to refer to the IST as an American creature dominated by the U.S. government. In fact, since June 28, 2004, and the passage of sovereignty to the interim government, the U.S. mission in Iraq has assumed the characteristics of a diplomatic mission that is very mindful of Iraq's sovereignty.

The IST was originally administered by Salem Chalabi,⁸⁹ who was widely viewed as an American appointee with a domestic political agenda, similar to that of his mentor-uncle, Ahmed Chalabi.⁹⁰ This had an adverse effect on the perception of the IST in Iraqi and Arab public opinion. After Salem Chalabi's indictment and departure to London⁹¹ the United States reclaimed the administration of the IST and relied on the DOJ's RCLO, which assumed the responsibility for setting a prosecutorial strategy, training the judges and prosecutors, providing resources and personnel for investigations, evidence gathering, and establishing the IST's infrastructure.⁹² This laudable task nevertheless exposed the extent of the U.S. role in the process, and contributed to the widespread belief that the IST is a U.S. enterprise.

In March 2004, the United States Institute of Peace ("USIP") and the Institute for International Criminal Investigation, at the request of the RCLO, cosponsored the first training conference in Amsterdam for Iraqi IST judges and prosecutors.⁹³ Then in September 2004, the DOJ and the UK Foreign Office scheduled a training session for judges and prosecutors in London, which included some IST judges and prosecutors. In February 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 in Siracusa, Italy.

D. The Overall Trial Strategy to Date

Since March 2004, the U.S.-led investigators have been gathering evidence, which they have presented to the investigative judges of the IST. The latter have also conducted their own investigations. The prosecutorial strategy has been developed by the IST's investigative judges. In part to fulfill the aims of the prosecutorial strategy and in part to fix some of the

89. See *supra* notes 61 and 81.

90. See John F. Burns & Dexter Filkins, *Iraqis Battle over Control of Panel to Try Hussein*, N.Y. TIMES, Sept. 24, 2004, at A13; see also *supra* notes 61 and 81.

91. See *supra* notes 61 and 81.

92. See U.S. Inst. of Peace, Special Report 122: Building the Iraqi Special Tribunal: Lessons from Experiences in International Criminal Justice, at <http://www.usip.org/pubs/specialreports/sr122.html> (June 2004).

93. The IST judges and prosecutors were formally appointed by the Iraqi Governing Council (GC), but ostensibly selected by Salem Chalabi, who confirms that the GC selected these officers only after consultation with a member of the new Judicial Council, and after Chalabi and the GC had vetted the nominees. See *Salem Chalabi: Judging Saddam*, *supra* note 81. The Judicial Council was reestablished with the Chief Justice as its head by CPA Order Number 35. See *infra* Part IV.D.1.

Statute's flaws, the United States, with UK input,⁹⁴ prepared a draft "Rules of Procedure and Evidence." However, these proposed rules were essentially redrafted by the IST in accordance with the 1971 Criminal Procedure Law.⁹⁵ Nevertheless, it should be noted that the Iraqi legal system, like almost all of the world's legal systems, does not recognize such court rules, because the judges constitute a judicial authority and cannot, therefore, make laws or rules, which are the province of the legislative authority. This is a fundamental tenet of the Iraqi constitutional doctrine of separation of powers, though under the Ba'ath regime, this principle was consistently violated.⁹⁶

The IST's prosecution strategy could be to record the criminal history of the regime from 1968 to 2003. Such a model would, in part, follow what both the International Military Tribunal ("IMT")⁹⁷ and the International Military Tribunal for the Far East ("IMTFE")⁹⁸ prosecutors did, and also what Israel did in the *Eichmann* case.⁹⁹ However, the danger of such a strategy is that it will further enable Saddam Hussein to rely on a "political" defense, which could detract attention from the crimes committed by the regime, turning the proceedings into a trial against the United States and other states that had dealings with the regime during the period in question.¹⁰⁰ It is quite likely that Saddam Hussein will deploy a similar

94. The UK has also been discreetly involved in this process through experts such as retired Colonel Charles Garraway, CBE, BIICL, former member of UK Army Legal Services, who was detached to the CPA. In September 2004 and February 2005, the UK Foreign Office facilitated training seminars for IST personnel in London.

95. An unpublished copy of the draft Rules of Procedure and Evidence, completed in January, 2005, is on file with the author.

96. The legislature's exclusive rulemaking aegis is reflected in all Iraqi Constitutions (see *infra* notes 132 to 136), though during the Ba'ath regime, the Revolutionary Command Council, under Saddam's control, exercised all powers.

97. International Military Tribunal: Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 279 (Aug. 8, 1945) [hereinafter IMT Agreement].

98. Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, 4 Bevans 20 (amended on Apr. 26, 1946) [hereinafter IMTFE Charter].

99. Attorney General of Israel v. Eichmann, 36 I.L.R. 277 (Sup. Ct. Isr. 1962). For the views of the attorney general who prosecuted Eichmann, see also GIDEON HAUSNER, JUSTICE IN JERUSALEM 322-51 (4th ed. 1966).

100. One likely goal of Saddam's prosecutors is to establish the "evil" character of Saddam's regime, and thereby justify the coalition forces' March 2003 invasion of Iraq. Ironically, Saddam may base his defense on the same contention, namely, that the prosecution's main purpose is to vindicate the United States' decision to invade Iraq and to overturn Saddam's regime. The anticipated U.S. strategy may explain why the IST's temporal jurisdiction starts in 1968 and lasts until 2003. Such a trial strategy is likely to be similar to the one used in the Eichmann case in Jerusalem. *Eichmann*, 36 I.L.R. 277. However, that case demonstrated the difficulty of trying to fit historic events into the trial of a single person. See generally STEPHAN LANDSMAN, CRIMES OF THE HOLOCAUST: THE LAW CONFRONTS HARD CASES (2005) (analyzing various post-conflict judicial systems, including the IMT, the Eichmann and Demanjuk trials in Israel, and the Imre Finta prosecution in Canada). The broader the inquiry into historic events, the more likely it will involve political factors, and that explains why Saddam and other members of his senior leadership may attempt to characterize their trials as being motivated by politics rather than by a quest for justice. Consequently, these trials may degenerate into political diatribes between the prosecution and the defense, though more so on the side of the

strategy as did Herman Goering before the IMT¹⁰¹ and as Milosevic continues to do before the ICTY.¹⁰² An alternative strategy, which is likely to be

defense, as was the case at the IMT for Hermann Goering, and as is now in part the case before the ICTY for Slobodan Milosevic.

For Saddam and the senior leaders of his regime, the situation lends itself much more to political considerations than was the case with Goering, Eichmann, and Milosevic, perhaps due to the intimate American connection to the rise and, ironically, the fall of Saddam's regime. See CHALMERS JOHNSON, *THE SORROWS OF EMPIRE* 217-53 (2004). Aspects of America's foreign policy in the Middle East since the end of the Cold War that have become known may encourage Saddam to raise a defense based on the notion of *tu quoque*, meaning "you too," in that America's actions contributed to the crime at hand, even though that type of defense was rejected at the Nuremberg Trials, in the case of Germany's Grand Admiral Doenitz. See EUGENE DAVIDSON, *THE TRIAL OF THE GERMANS: AN ACCOUNT OF THE TWENTY-TWO DEFENDANTS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG* 394-419 (1966); M. Cherif Bassiouni, *International Criminal Investigations and Prosecutions: From Versailles to Rwanda*, in 3 *INTERNATIONAL CRIMINAL LAW: ENFORCEMENT* 31-86 (M. Cherif. Bassiouni ed., 2d ed. 1999); Otto Kranzbuehler, *Nuremberg: Eighteen Years Afterwards*, 14 *DEPAUL L. REV.* 333 (1964). Although *tu quoque* is not a recognized defense, it would allow Saddam to argue that he is being charged by his accomplices, who are not themselves being held accountable.

Thus, for example, Saddam may argue that the United States acquiesced to his invasion of Kuwait as part of an evolving plan to secure an American presence in the Middle East oil belt. See JOHNSON, *supra*, at 225. Surely, even more troublesome would be arguments raised by the defense with respect to the use of chemical weapons that Iraq used during the Iran-Iraq War, whose manufacture was facilitated by materials provided by the United States and other Western powers, including Britain. See Michael Dobbs, *U.S. Has Key Role in Iraq Buildup: Trade in Chemical Arms Allowed Despite Their Use on Iranians, Kurds*, *WASH. POST*, Dec. 30, 2002, at A1; (Scott) Report of the Inquiry into the Export of Defense Equipment and Dual-Use Goods to Iraq and Related Prosecutions (H.C. 1995-96); Eugene Robinson, *Spy Says British Knew of Iraqi Arms Plans; M15 Man Testifies in Rare Breach of Secrecy*, *WASH. POST*, Oct. 31, 1992, at A17. It has been reported that between 1985 and 1988 biological agents were exported, under a U.S. government license, to Iraqi government agencies, possibly including materials used in March 1988 by Ba'athists in the gassing of the Kurdish village of Halabja, which resulted in 5000 casualties. See Dobbs, *supra*; Philip Shenon, *Threats and Responses: The Bioterror Threat: Iraq Links Germs for Weapons to U.S. and France*, *N.Y. TIMES*, March 16, 2003, at A18. In fact, it has been argued that the link between Saddam's devices of chemical warfare and the United States was so strong that the United States removed 8000 crucial pages from the weapons dossier that it was required to disseminate to the Security Council in December 2002. See James Cusick & Felicity Arbuthnot, *U.S. Tore out 8000 Pages of Iraq Weapons Dossier*, *SUNDAY HERALD* (Glasgow), Dec. 22, 2002, at 1.

What may also become contentious during Saddam's trial is the U.S. involvement in the funding of his military program. Moreover, he targeted Iranians during the 1980s using U.S. supplies, including military intelligence, technology, and munitions. JOHNSON, *supra*, at 221-25; Patrick Tyler, *Officers Say U.S. Aided Iraq in War Despite Use of Gas*, *N.Y. TIMES*, Aug. 18, 2002, at A1. Also, the CIA has been no stranger to Iraq's political machine. *Id.* Ironically, the United States is now driving the prosecution of a figurehead it helped put in power, after having provided the Ba'athists with military and economic support, first to crush Iraq's pro-Soviet regime in 1963 and subsequently to train and ensure the ascendancy of Saddam as the head of Iraq security forces in 1968. JOHNSON, *supra*, at 223-24.

101. See DAVIDSON, *supra* note 100, at 59-98; TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 319-50 (1992); 9 *TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL* 417-661 (1947).

102. Slobodan Milosevic clearly intended to pursue such a strategy, as illustrated by his proposed list of witnesses, which included President Clinton, Prime Minister Blair, and Ambassador Richard Holbrooke, the architect of the "Dayton Accords" of 1995 that brought an end to the conflict in Bosnia and Herzegovina. See Ana Uzelac, *Inst. for War*

followed, would be to focus on specific crimes without connecting the historic dots. This would avoid some of the defense's more politically oriented arguments. Even so, it will be difficult to control the proceedings and almost impossible to disengage them from politics.¹⁰³

A more significant consideration affecting strategy is the limitation imposed by the 1971 Criminal Procedure Law, Article 132, which does not contemplate the type of complex litigation involving multiple victims that presents itself in this context.¹⁰⁴ Iraqi criminal procedure is based on individual cases presented by victims as complainants and investigated only by an investigative judge. Moreover, Iraqi criminal law does not know conspiracy as a crime, though it is included in the IST Statute. Article 132 mentioned above requires the case of each victim to be brought separately, with the possibility of joinder of three victims' complaints against the same accused in one case. There is an exception to that limitation in paragraph 4 of Article 132 permitting joinder of more complainants whenever it is a single criminal act that produces multiple victims. This limitation does not allow much room for the chief investigative judge to develop cases of command responsibility based on multiple victims who have suffered harm at different places and times and at the hands of multiple perpetrators other than the commanders to whom ultimate responsibility is sought to be attributed.

Lastly, it should be noted that evidentiary requirements under Iraqi law do not allow for much leeway in drawing inferences from the facts. Direct evidentiary connections must be established. Thus, reliance on what the United States knows as the "but for" test cannot be used in Iraqi criminal proceedings. These and other evidentiary limitations, particularly in view of the lack of specific written evidence containing explicit orders by senior leaders, will make it difficult for the IST to rely on the experiences of the ICTY and the ICTR in establishing a strategy for prosecuting senior leaders and executors and in proving these cases according to Iraqi criminal law and evidentiary requirements. The remedy presently relied upon, the IST's adoption of "Rules of Procedure and Evidence,"¹⁰⁵ will have to withstand potential legal challenges in Court if they are deemed of a legislative nature.

and Peace Reporting, Tribunal Update: Milosevic Planning "Political Show," at http://www.iwpr.net/index.pl?archive/tri/tri_367_1_eng.txt (July 16, 2004).

103. In the inquisitorial system, the presiding judge at the trial has the discretion to decide what questions suggested by the defense he wants to ask a given witness. However, there is no limit as to what the defense can present in writing, either as proposed evidence or as submissions for the Court's consideration.

104. See QANUN USUL AL-MUHAKAMAT AL-JAZA-IA [CRIMINAL PROCEDURE LAW OF 1971], Law No. 132 (Iraq).

105. See THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL.

III. The Legal and Political Structure in Iraq from March 19, 2003 to June 30, 2004

On March 19, 2003, a U.S.-led coalition invaded and occupied Iraq.¹⁰⁶ On May 1, 2003, President George W. Bush announced the end of major combat operations in Iraq, thus beginning the era of foreign military occupation.¹⁰⁷ After thirteen months of formal occupation, the United States and the UK, who were the lead countries in the coalition forces, ended their formal occupation on June 30, 2004, pursuant to Security Council Resolution 1483.¹⁰⁸ This resolution reaffirmed the applicability of international humanitarian law and its binding obligations on the occupying power (referred to by the United States and UK as “the Authority” entrusted to administer Iraq) until the establishment of an interim government.¹⁰⁹ The process of transfer of sovereignty started on June 26, 2004, and was concluded on June 30th.¹¹⁰

Since March 2003, the United States and UK and other foreign forces have been an occupying power. Security Council Resolution 1511¹¹¹ affirms the coalition forces’ obligations as an occupying power that arise under international humanitarian law.¹¹² The occupying power, no matter what name it assumed, is unquestionably bound by the Geneva Con-

106. The invasion happened on the assumption that Iraq’s long-time repressive regime continued to produce or even stockpile WMDs and that it had thwarted attempts of UN inspectors to verify compliance with prior UN resolutions concerning WMDs. The United States Iraq Survey Group’s search for WMDs recently ended in failure. See Julian Borger and Jonathan Steele, *U.S. Gives up Search for Saddam’s WMD: Iraq Survey Group Concludes Dictator Destroyed Weapons Years Before Invasion*, THE GUARDIAN (London), Jan. 13, 2005, at 14.

107. See George W. Bush, Speech at USS Lincoln (May 1, 2003) (transcript available at <http://www.cnn.com/2003/US/05/01/bush.transcript/>) (last visited Apr. 5, 2005); Jordan J. Paust, *ASIL Insights: The U.S. as Occupying Power over Portions of Iraq and Relevant Responsibilities Under the Laws of War*, Apr. 2003, at <http://www.asil.org/insights/insigh102.htm> (Apr. 2003).

108. S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003).

109. The interim government assumed power on June 28, 2004. It will remain in existence until the three-member Presidency Council, elected by the new Iraqi parliament (elected on January 30, 2005), appoints a new prime minister and cabinet, subject to confirmation by the parliament.

110. The occupying power formally transferred sovereignty to the Judicial Council on June 26, 2004. The Judicial Council then transferred authority to the interim government on June 28th, and on June 30th, the U.S. declared an end to its presence in Iraq as an occupying power. However, the U.S. military has remained in Iraq, exercising de facto control over the country’s security, with the consent of the interim government. Neither the United States nor any of the coalition forces have a status of forces agreement with Iraq. The coalition forces are not under the control of the interim government and act within the territory of Iraq with complete freedom of action and without accountability to the interim government.

111. S.C. Res. 1511, *supra* note 38.

112. See Human Rights Watch, *The War in Iraq and International Humanitarian Law*, at http://www.hrw.org/___Iraq/ihlfaqoccupation.htm (May 16, 2003); Amnesty International, *Iraq Responsibilities of the Occupying Powers*, at <http://web.amnesty.org/library/index/eng.model140892003> (Apr. 16, 2003); International Humanitarian Law Institute, *Military Occupation of Iraq: IHL and the Maintenance of Law and Order*, at <http://www.ihlresearch.org/iraq/> (Apr. 14, 2003).

ventions¹¹³ and other sources of customary international humanitarian law.¹¹⁴ It should be noted, however, that Security Council Resolution 1511 implicitly recognizes that Iraqi sovereignty lies in the GC.¹¹⁵

The CPA was created by the U.S. Government on June 16, 2003, as an organization under the control of DOD to administer Iraq, in keeping with UN Security Council Resolution 1483.¹¹⁶ The CPA, whose legal authority was premised on international humanitarian law as the civilian administration of an occupying power,¹¹⁷ was recognized by the Security Council in Resolution 1483 as exercising this role.¹¹⁸ Security Council Resolution 1511 reaffirmed this proposition.¹¹⁹ In July 2003, the CPA appointed the GC to serve as a transitional Iraqi governmental body subject to CPA's approval of its orders, directives, and personnel appointments.¹²⁰ Consequently, the GC was a subordinate local administrative body operating under the authority of the occupying power.

Probably one of the GC's most influential tasks was the preparation of the Transition of Administrative Law ("TAL"),¹²¹ which is in the nature of a transitional constitution to guide the governing of Iraq until legislative elections take place and a permanent constitution is adopted. The TAL was approved by the GC on March 5, 2004,¹²² and published by the CPA on March 8, 2004.¹²³ Notwithstanding the TAL, however, the CPA's Administrator Paul Bremer reserved for himself a veto power over all GC decisions and personnel appointments.¹²⁴ It could be said that because of this self-declared veto power by the occupying power, the Security Council did not

113. See generally Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004).

114. For a compendium of information on the laws of armed conflict, see U.K. MINISTRY OF DEF., *THE MANUAL OF THE LAW OF ARMED CONFLICT* (2004); and *A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS* (M. Cherif Bassiouni ed., 2000).

115. See S.C. Res. 1511, *supra* note 38.

116. See CPA Reg. No. 1, May 16, 2003, available at http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf (last visited Mar. 13, 2005) (creating the CPA).

117. See U.K. MINISTRY OF DEF., *supra* note 114, at 281-99. For an account of the history of war and compliance with the laws of war, see generally GEOFFREY BEST, *WAR AND LAW SINCE 1945* (1994).

118. See S.C. Res. 1483, *supra* note 108.

119. See S.C. Res. 1511, *supra* note 38.

120. See CPA Reg. No. 6, (July 13, 2003), available at http://www.iraqcoalition.org/regulations/20030516_CPAREG_6_The_Coalition_Provisional_Authority_.pdf (last visited Apr. 5, 2005) (creating the Governing Council of Iraq).

121. *LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD* (Mar. 8 2004), available at <http://www.iraqcoalition.org/government/TAL.html> (last visited Apr. 5, 2005) [hereinafter TAL].

122. Nathan J. Brown, *Transitional Administrative Law, Commentary and Analysis*, at <http://www.geocities.com/nathanbrown1/interimiraqiconstitution.html> (June 11, 2004).

123. See *supra* note 109.

124. The TAL does not include a statement recognizing the CPA Administrator's veto over decisions made by the Governing Council or decisions made pursuant to the TAL. However, the TAL does not specifically exclude the veto that the CPA Administrator has by virtue of the fact that he is the appointing authority of the Governing Council and

refer to the TAL in any of its resolutions.¹²⁵ However, a more likely explanation has to do with another provision of the TAL that gives a de facto veto power to the Kurds in respect to the legal status of Iraqi Kurdistan, which raised concerns among both Shi'a and Sunni segments of Iraqi society.

On June 8, 2004, Security Council Resolution 1546¹²⁶ endorsed a plan for Iraq's transition to full sovereignty and for legislative elections.¹²⁷ It was on that basis that the CPA ended its tenure on June 30, 2004. This was done under formal UN cover. The appointment of the interim government, a president, two vice presidents, a prime minister, and cabinet officers were based on consultations by the Special Representative of the Secretary General ("SRSG"), with Iraqi political forces and the United States and the UK as the principal occupying power.¹²⁸ The primary task of this transitional national authority was to work with the postoccupation United Nations Assistance Mission for Iraq ("UNAMI"), established pursuant to Security Council Resolution 1500, and with the Special Representative to the Secretary General¹²⁹ to establish an Iraqi Independent Electoral Commission, which oversaw the January 30, 2005 elections. These elections produced a Transitional National Assembly ("TNA"), whose term of office is to last until the formation of an elected Iraqi government and the adoption of a constitution, which is to be no later than December 31, 2005.¹³⁰ During this transitional period, the TNA is to draft a new constitution.¹³¹ Iraq's first constitution was the Monarchical Constitution of 1925.¹³² Provisional constitutions were adopted in 1958 (which elimi-

that all decisions of the Governing Council must be approved by the CPA. CPA Regulation Number 1 states that all decisions have to be ratified by and reenacted by the CPA.

125. S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003); S.C. Res. 1500, U.N. SCOR, 58th Sess., 4808th mtg., U.N. Doc. S/RES/1500 (2003); S.C. Res. 1511, U.N. SCOR, 58th Sess., 4844th mtg., U.N. Doc. S/RES/1511 (2003); S.C. Res. 1546, U.N. SCOR, 59th Sess., 4987th mtg., U.N. Doc. S/RES/1546 (2004).

126. S.C. Res. 1546, U.N. SCOR, 59th Sess., 4987th mtg., U.N. Doc. S/RES/1546 (2004).

127. S.C. Res. 1546, *supra* note 126.

128. See Rajiv Chandrasekaran, *Envoy Bowled to Pressure in Choosing Leaders*, WASH. POST, June 3, 2004, at A10.

129. Ashraf Jehangir Qazi of Pakistan was appointed UN Special Representative to Iraq on July 22, 2004.

130. See TAL, *supra* note 121, at art. 2. Pursuant to the TAL, the TNA elected on January 30, 2005 a president and two vice presidents, who then appointed a prime minister, whose cabinet will be approved by the TNA. See *id.*

131. Whether the TAL will be a model is uncertain. Also uncertain is whether the present governmental structure of the interim government will remain and, if so, what changes may occur and how. For sources on Iraqi constitutional law, see generally NABIL ABDEL RAHMAN HELAWI, *DUSTUR AL-IRAQ AL-MALAKY, AL-QANUN AL-ASASI [CONSTITUTION OF ROYAL IRAQ: THE FUNDAMENTAL LAW OF 1925 AND CONSTITUTIONAL LEGISLATIONS OF THE ROYAL ERA]* (2003); NABIL ABDEL RAHMAN HELAWI, *DASATIR AL-IRAQ AL-JOMHORIA [REPUBLICAN CONSTITUTIONS OF IRAQ]* (2003).

132. *AL-QANUN AL-ASASI AL-IRAQI [Constitution] (1925) (Iraq)*, available at <http://nahrain.com/d/doc/dtr1925a.html> (last visited Apr. 5, 2005) (Arabic version) and at <http://www.mallat.com/iraq%20const%201925.htm> (English version).

nated the monarchy),¹³³ 1964,¹³⁴ 1968,¹³⁵ 1970,¹³⁶ and the GC adopted the TAL in March 2004.¹³⁷

UN Security Council Resolution 1546, which sets the framework for the transitional phase to a legislative body and a permanent constitution,¹³⁸ does not however address two essential issues:

1. The continued legal validity of CPA Orders published in English and later in Arabic in “the Official Gazette of an occupying power.”¹³⁹ This lacunae leaves the interim government and the TNA the prerogative of choosing whether to give continued legal effect to all or some CPA Orders.¹⁴⁰ The TAL Annex provides that

133. AL-DUSTUR AL-MO'AKAT [Provisional Constitution] (1958) (Iraq), available at <http://nahrain.com/d/doc/dtr1958.html> (last visited Apr. 5, 2005) (Arabic version).

134. AL-DUSTUR AL-MO'AKAT [Provisional Constitution] (1964) (Iraq), available at <http://nahrain.com/d/doc/dtr1964.html> (last visited Apr. 5, 2005) (Arabic version).

135. AL-DUSTUR AL-MO'AKAT [Provisional Constitution] (1968) (Iraq), available at <http://nahrain.com/d/doc/dtr1968.html> (last visited Apr. 5, 2005) (Arabic version).

136. AL-DUSTUR AL-MO'AKAT [Provisional Constitution] (1970) (Iraq), available at www.mallat.com/iraq%20const%201970.htm (last visited Apr. 5, 2005) (English version) [hereinafter 1970 Constitution]. There was also a 1990 draft constitution that was never promulgated.

137. The TAL of 2004, *supra* note 121, does not have the status of an official constitution.

138. The Security Council's failure to address the CPA's continued legal viability and pass a status of forces agreement, *see infra* notes 139 to 142 and accompanying text, occurred because the positions of the United States and United Kingdom differed from those of the other Security Council members. *See* Sharon Otterman, Iraq: UN Resolution 1546, at www.cfr.org/background/background_iraq_1546.php (June 10, 2004).

139. Under the Provisional Constitution of 1970, *see supra* note 136, legislative power by decree could be exercised by the Revolutionary Command Council, presided over by Saddam Hussein. Such decrees were then published in the Official Gazette of Iraq, which had only a limited circulation. Ironically, the CPA repeated this procedure. The CPA's inspiration may have come from the post-World War II occupation of Germany, when the four Allied Powers issued the Allied Control Council Orders. The most famous of these was Control Council Order or Law Number 10, which established the Allies' right to prosecute Germans in their respective zones of occupation on two different grounds of the same crimes contained in the IMT, namely, “war crimes” and “crimes against humanity.” Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, art. II(c), reprinted in 1 BENJAMIN FERENCZ, *DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE* 492 (1975). For a discussion of the U.S. prosecutions, *see* TELFORD TAYLOR, *FINAL REPORT TO THE SECRETARY OF THE ARMY ON NAZI WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NUMBER 10*, at 6-8 (1997). There were also prosecutions by the British, the French, and the USSR. *See* BASSIOUNI, *supra* note 40, at 140, 412-13; Bassiouni, *supra* note 100, at 41-48.

140. Article 26(c) of the TAL, *supra* note 121, 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.” This provision is analogous to the situation where laws issued by the government of a predecessor state also apply to the successor state. 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); I. L. OPPENHEIM, *INTERNATIONAL LAW, A TREATISE* 156-69 (H. Lauterpacht ed., 8th ed. 1955); Mathew C.R. Craven, *The Problem of State Succession and the Identity of States Under International Law*, 9 *EUR. J. INT'L L.* 142-62 (1998); Malcolm N. Shaw, *State Succession Revisited*, 6 *FIN. Y.B. INT'L L.* 34 (1994). State succession could be relied upon on the

the Interim Council of Ministers of the interim government can, by unanimous vote and the approval of an interim president, issue decrees with the force of law that will remain in effect until rescinded or amended by future governments of Iraq.¹⁴¹

2. The need to have status of forces agreements¹⁴² between the government of Iraq and those foreign governments whose military personnel are stationed there after June 30, 2004, when the occupation formally ceased.

The failure of Resolution 1546 to address these two issues has an impact on post-conflict justice in Iraq. First, it creates uncertainty as to whether the IST can have continued legal validity at the end of the occupation and whether the government of Iraq after the election of the TNA needs to reenact a law similar to CPA Order Number 48 of December 9, 2003, which established the IST.¹⁴³ Second, it calls into question the continued legal validity of CPA Order Number 17 granting coalition forces immunity in Iraq,¹⁴⁴ which is particularly important after evidence of violations of the Geneva Conventions¹⁴⁵ and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment ("CAT")¹⁴⁶ by coalition forces operating in Iraq was uncovered.¹⁴⁷ While the U.S. administra-

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. See Geneva IV, *infra* note 145. For a further analysis of the continued legal validity of the TAL, see Peter W. Galbraith, *Iraq: The Bungled Transition*, N.Y. REV. BOOKS, Sept. 2004, at 70-74.

141. See TAL Annex, *supra* note 121.

142. 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, Apr. 4, 1949, 4 U.S.T. 1792, 199 U.N.T.S. 67 (entered into force Aug. 23, 1963) [hereinafter NATO Status of Forces Agreement].

143. See THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL.

144. See CPA Order No. 17. It should be noted that the Ba'ath regime adopted, through the Revolutionary Command Council, a similar decree giving all of its members complete immunity. This decree is unavailable to the author.

145. The 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]; The 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]; The 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]; The 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]. For details of states party to the Geneva Conventions, see ICRC Annual Report 2002: States Party to the Geneva Conventions, at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/945D7163D51CAAD7C1256D47004B0D5C/\\$File/icrc_ar_02_MAP_GE_CONV_A4.pdf?OpenElement](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/945D7163D51CAAD7C1256D47004B0D5C/$File/icrc_ar_02_MAP_GE_CONV_A4.pdf?OpenElement) (last visited Apr. 4, 2005).

146. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter CAT]. CAT has been implemented in U.S. law at 18 U.S.C. §§ 2340-2340B.

147. See The "Taguba Report" on Treatment of Abu Ghraib Prisoners in Iraq, Article 15-6 Investigation of the 800th Military Police Brigade, Mar. 2004, available at <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html> (Apr. 4, 2004) [hereinafter Taguba Report]; Major General George R. Fay, Investigation of Intelligence Activities at Abu

tion maintains that such violations represent isolated incidents, evidence continues to emerge that points to a wider policy of systematic abuse and suggests that senior officials either approved or were deliberately indifferent to it.¹⁴⁸ In light of these violations, the continued legal validity of CPA Order Number 17,¹⁴⁹ which gives immunity to coalition forces, raises serious questions of legality.

The connection between CPA Order Number 17 and the IST is evident in Article 1(b) of the IST, which limits jurisdiction to "Iraqi nationals or residents of Iraq."¹⁵⁰ Thus, Article 1(b) of the IST Statute (the "Statute") gives effect to CPA Order Number 17. Of note, however, is that CPA Order Number 17 does not specifically obligate the governments of the coalition

Ghraib: Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 6-33, available at <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf> (Aug. 23, 2004) [hereinafter Fay Report]; Lieutenant General Anthony R. Jones, Investigation of Intelligence Activities at Abu Ghraib: Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade 34-176, available at <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf> (Aug. 23, 2004) [hereinafter Jones Report]; Final Report of the Independent Panel To Review DOD Detention Operations, available at <http://news.findlaw.com/cnn/docs/dod/abughraibrpt.pdf> (Aug. 2004) [hereinafter Schlesinger Panel]; see also SEYMOUR HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 1-72 (2004) (arguing that responsibility for official misconduct at the Abu Ghraib prisons extends to high officials in the Bush Administration); American Civil Liberties Union, Torture FOIA, at <http://www.aclu.org/International/International.cfm?ID=13962&rc=36> (last updated Mar. 25, 2005); Human Rights Watch, The Road to Abu Ghraib, at <http://www.hrw.org/reports/2004/usa0604/usa0604.pdf>. (June 2004). Seven U.S. reservists from the 372nd Military Police Company were charged for the abuses that occurred at the Abu Ghraib prison in Iraq. On January 14, 2005, Specialist Charles Graner was the first one convicted by a U.S. military court, and the following day he was sentenced to ten years in a military prison. Kate Zernike, *The Conflict in Iraq: Abu Ghraib: Ringleader in Iraqi Prisoner Abuse Sentenced to 10 Years*, N.Y. TIMES, Jan. 16, 2005, at A12. As of January 2004, four other reservists have reached plea bargain agreements with the prosecution, including: Staff Sergeant Ivan Frederick, Specialist Megan Ambuhl, Specialist Jeremy Sivits, and Specialist Armin Cruz. Sergeant Javal Davis's trial is scheduled for February 2, 2004, and Specialist Sabrina Harmon's trial is scheduled for March 2004. See Dexter Filkins, *The Struggle for Iraq: The Court-Martial; G.I. Pleads Guilty in Court-Martial for Iraqi Abuse*, N.Y. TIMES, May 20, 2004, at A1; Richard Opiel, *Guilty Plea by Sergeant in Abuse Case*, N.Y. TIMES, Oct. 21, 2004, at A10; Zernike, *supra*. Yet, no high ranking military personnel or high-level civilian officials have been implicated in the scandal.

Similar to the situation in Iraq, the treatment of detainees in Afghanistan has also violated international legal obligations under the Geneva Conventions and CAT. See *Report of the Independent Expert of the Commission on Human Rights on the Situation of Human Rights in Afghanistan*, U.N. GAOR, 59th Sess., Agenda Item 105(c), U.N. Doc. A/59/370 (2004).

148. For the proposition that torture may have been ordered or condoned at high levels, see Report of Independent Expert on the Commission on Human Rights on the Situation of Human Rights in Afghanistan, *supra* note 147; HERSH, *supra* note 147, at 1-72; ACLU Report, *supra* note 147; Fay Report, *supra* note 147; Jones Report, *supra* note 147; Schlesinger Panel, *supra* note 147; Taguba Report, *supra* note 147.

149. See CPA Order No. 17.

150. The IST's temporal jurisdiction lasts from July 17, 1968 through May 1, 2003. See THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL arts. 1, 10.

forces to prosecute those who are alleged to have committed war crimes.¹⁵¹ Had CPA Order Number 17 and Article 1(b) of the IST Statute clearly stated the intention to provide coalition forces with jurisdictional immunity before Iraqi courts, while providing for the obligation of Coalition Forces governments to prosecute alleged offenders, the issue of selective enforcement and disparity in accountability standards would not arise, unless, of course, the coalition forces fail to carry out their legal obligations to investigate and, where appropriate, to prosecute.

It should be noted that complementarity between national and international legal systems is recognized in Article 17 of the International Criminal Court ("ICC") statute, which gives priority to the national criminal jurisdictions of states parties that are willing and able to undertake prosecutions and does not call for the establishment of a jurisdictional regime under such circumstances.¹⁵² The problem with CPA Order Number 17 and Article 1(b) of the IST Statute is that they appear to provide substantive immunity from prosecution.¹⁵³ No such immunity is permissible under international humanitarian law or other sources of international law with regard to international crimes such as genocide, crimes against humanity, war crimes, torture, slavery, and slave-related practices.¹⁵⁴ Multinational forces in Iraq have been authorized pursuant to Security Council Resolutions 1511 and 1546,¹⁵⁵ and coalition forces could have been covered by the Convention on the Safety of United Nations and Associated Personnel.¹⁵⁶ In any event, the immunity referred to in CPA Order Number 17

151. See CPA Order No. 17, at art. 2(3) (declaring that the members of the Coalition forces shall be "subject to the exclusive jurisdiction of their Sending States," but not charging the sending states with any prosecutorial obligations).

152. See Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, art. 17, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute]. In the event that a state party is "unable" or "unwilling" to prosecute, the ICC may assert jurisdiction. For a comprehensive background of the creation of the ICC, see generally THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY (M. Cherif Bassiouni ed. 1998). For a legislative history of the ICC, see generally BASSIOUNI, *supra* note 30. On February 15, 2005, the Interim Government adopted a decree on accession to the ICC, but before the instrument of accession could be deposited with the United Nations, the "Interim Government" revoked it, presumably at the instigation of the United States, which feared that the actions of its forces in Iraq could be referred by the subsequent Iraqi government to the ICC.

153. Between 2002 and 2004, the United States adopted a similar strategy when it obtained immunity from ICC jurisdiction for its forces serving in UN missions, or UN-authorized missions, with the adoption of Security Council Resolution 1422, S.C. Res. 1422, U.N. SCOR, 57th Sess., 4572d mtg., U.N. Doc. S/RES/1422 (2002), and Security Council Resolution 1487, S.C. Res. 1487, U.N. SCOR, 58th Sess., 4772d mtg., U.N. Doc. S/RES/1487 (2003). However, on June 23, 2004, in the face of increasing international opposition, the United States withdrew its request for a renewal of Resolution 1487. See BASSIOUNI, *supra* note 30.

154. See BASSIOUNI, *supra* note 40, at 109-36.

155. S.C. Res. 1511, *supra* note 38; S.C. Res. 1546, *supra* note 126; see TAL, *supra* note 121, at arts. 59(B)-(C) (recognizing the legal presence of multinational forces).

156. See Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, G.A. Res. 49/59, 49 U.N. GAOR, Supp. No. 49, at 299, U.N. Doc. A/49/49 (1994). UN personnel and associated personnel operate under the privileges and immunities of the UN, pursuant to the Charter, and as negotiated between the UN and

should be interpreted as granting immunity from Iraqi legal processes, but not from the national jurisdiction of those countries contributing the personnel. Thus, it does not mean substantive immunity for international crimes, as this would be categorically contrary to international law.¹⁵⁷ This problem can be solved by a status of forces agreement between the coalition forces and the government of Iraq.¹⁵⁸

IV. An Appraisal of the Iraq Special Tribunal

A. Introduction

Iraq's first major step on the path of post-conflict justice was the establishment of the IST with jurisdiction over Iraqi citizens for crimes of genocide, crimes against humanity, war crimes, and other crimes under Iraqi law as defined in Articles 11 to 14 of the Statute.¹⁵⁹ The Tribunal's jurisdiction extends to these crimes even if committed outside of Iraq, such as in Iran and Kuwait. Article 10, however, refers to the Tribunal's jurisdiction over Iraqi and non-Iraqi citizens, and this provision will have to be interpreted in light of CPA Order Number 17, which gives coalition forces immunity.¹⁶⁰

The IST was established pursuant to the Iraqi GC Decree of 9 December 2003, and the Statute, discussed below, was issued thereunder.¹⁶¹ Like all other decisions taken by GC, it was subject to the CPA's official enactment, and it became CPA Order Number 48 on December 9, 2003, effective upon its signature by Paul Bremer, the CPA Administrator, on December 10, 2003.¹⁶² The TAL confirmed CPA Order Number 48, but the TAL was promulgated by the GC under the authority of the CPA and is therefore an instrument developed by a subordinate body of the occupying power. Nevertheless, the TAL was the expression of all political tendencies in Iraq and should be given greater weight than GC decrees and CPA orders.

The IST's legislative basis is the order of an occupying power, which, as discussed below¹⁶³ in Part IV.B, is questionable, particularly as to its survival in the postoccupation era. Moreover, the continued control of this process by the United States undermines its legitimacy and credibility in

the host state within which they operate. Under this agreement, jurisdiction vests primarily in the personnel's state of nationality, much as in the status of forces agreements. Nevertheless, even peacekeeping forces can be held responsible for international humanitarian law violations. See GEERT-JAN ALEXANDER KNOOPS, *THE PROSECUTION AND DEFENSE OF PEACEKEEPERS UNDER INTERNATIONAL CRIMINAL LAW* 1-24 (2004).

157. Thus, foreign personnel who violate international law would likely be barred from defending their actions based on the principle of "no responsibility due to ignorance." See discussion *infra* note 308.

158. See NATO Status of Forces Agreement, *supra* note 142, for an example of such an agreement.

159. See discussion *infra* Part IV.E.2-3.

160. *Id.* See also *supra* note 152.

161. See THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL.

162. *Id.*

163. See discussion *infra* Part IV.B.

the perception of the Iraqi and other Arab people.¹⁶⁴ In addition, the IST's jurisdictional exclusion of coalition forces during the same range of the IST's temporal jurisdiction without a concomitant obligation for the coalition forces to prosecute, adds to the perception of politicized justice.¹⁶⁵

It must be understood that Iraq is not post-World War II Germany or Japan. It is not an enemy of the United States crushingly defeated after a protracted war. Iraq is a country that was invaded without international legitimacy¹⁶⁶ on the premise that it had WMDs likely to be used against the United States.¹⁶⁷ The United States and other coalition partners who were involved in the invasion of Iraq did not do so on the basis of the doctrine of humanitarian intervention, as was the case of NATO's intervention in Kosovo in 1999.¹⁶⁸ Even though the United States and the UK frequently invoked the regime's past misdeeds, nothing in international law justifies foreign military intervention for past violations of human rights or other humanitarian laws.¹⁶⁹ The United States and the UK did not invoke the doctrine of humanitarian intervention for ongoing violations by the Ba'ath regime as the basis of their military action, which started in March, 2003. Paradoxically, throughout the entire period of the Ba'ath regime (1968 to 2003), and during phases of its worst widespread and systematic human rights violations (1970 to 1988), the United States never formally advanced the likelihood of its reliance on the doctrine of humanitarian intervention for military action in Iraq.

No norm or precedent exists in international law for an occupying power, the legitimacy of which is in doubt, to establish an exceptional national criminal tribunal. Yet, there is no doubt of the need for a specialized tribunal to prosecute Saddam and the regime's major offenders. Moreover, any criticism of the IST should not overshadow the need to have such prosecutions.

164. Since its establishment, the IST has been essentially a U.S.-led enterprise, though, as stated above, the Iraqi judges, investigative judges and prosecutors have taken some ownership of the Tribunal, and their personal courage in agreeing to serve in such capacities deserves recognition.

165. See *supra* notes 138 and 144 and accompanying text.

166. See S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002). This resolution did not authorize the use of "all necessary means," language that is recognized as authorizing the use of force, but only referred to "serious consequences," which is not synonymous with the authorization of the use of force. Furthermore, every Security Council member affirmed that the resolution did not provide for the automatic resort to force. *Id.*

167. In his remarks to the UN Security Council on March 7, 2003, U.S. Secretary of State Colin Powell presented the U.S. case for attacking Iraq, based on its possession of WMDs. See Press Release, The White House, President George W. Bush, Iraq: Denial and Deception; Secretary Powell's Remarks at U.N. Security Council Meeting (Mar. 7, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/print/20030307-10.html> (last visited Apr. 5, 2005).

168. For a discussion of that war, see generally TIM JUDAH, *KOSOVO WAR AND REVENGE* (2000); WESLEY K. CLARK, *WAGING MODERN WAR: BOSNIA, KOSOVO AND THE FUTURE OF COMBAT* (2001).

169. Had the international community established a Security Council commission to investigate these crimes, as discussed *supra* Part II.B. and accompanying footnotes, it would have contributed some legitimacy to the military intervention of March 2003.

The way to remedy criticism of the IST is for a legitimate national legislative authority to repromulgate an amended law establishing a specialized (not special) criminal tribunal, in conformity with the Iraqi legal system but on the basis of continuity of the IST.¹⁷⁰ If that were not the case, all of the IST's work until now would be deemed null and void, damaging the overall purposes of future prosecutions. Such a repromulgated, amended law would also resolve the legal issues and problems contained in the Statute. Moreover, as is customary in the legislative practice of most Arab states, the repromulgated, amended law should be accompanied by an explanatory memorandum (*muthakkira tafsiriya*) that describes the contents of the law and reflects the legislative intent.¹⁷¹

More importantly, the repromulgated, amended law must follow a certain legal method to avoid incongruences presently contained in the Statute. For example, the Statute incorporates some of the measures enacted by the Ba'ath regime, but not others. It recognizes the applicability of the 1970 Provisional Constitution in Article 14¹⁷² and the 1971 Criminal Procedure Law in Article 17,¹⁷³ but it provides no explanation for this selectivity. Moreover, it commingles features of the adversary-accusatorial American system with the Iraqi inquisitorial one.¹⁷⁴ Worse yet, it commingles legal aspects of the Ba'ath regime whose protagonists are to be prosecuted and due process guarantee features of the American legal system. Also troubling is that the Statute provides for judicial appointments made

170. Iraq has a legal system and laws that, between 1925 and 1958, were on par with the legal systems of other Arab states and well in keeping with many legal systems of the world. The modern Iraqi legal system was established after the adoption of the 1925 Constitution, *supra* note 132. The judiciary consisted of a three-tiered court system modeled on the Egyptian and Syrian systems, which, in turn, were derived from the French inquisitorial judicial system. The Court of Cassation acted as Iraq's court of last resort for all cases, except for security cases. Crimes against the security of the state were tried in Revolutionary Courts, which operated outside the formal Iraqi court system. The Court of Cassation also adjudicated jurisdictional conflicts between lower courts and assumed jurisdiction over crimes committed by high government officials. The intermediate Court of Appeals decided issues of law and fact. There were seven Circuit Courts of Appeals sitting throughout Iraq. Below these courts were a number of district courts, which were divided into specialized chambers dealing with criminal, civil, and domestic relations matters. See Iraq: The Judiciary. Library of Congress Studies, at <http://countrystudies.us/iraq/74.htm> (last visited Mar. 13, 2005).

Under the 1925 Constitution, judicial independence was guaranteed. See 1925 Constitution, *supra* note 132, at art. 71. However, subsequent to 1958, the military and Ba'ath revolutions and coups tampered with that system by enacting special laws that violated the independence of the judiciary and by establishing a number of special arbitrary courts. The Ba'ath regime also instituted a series of laws that placed the judiciary under the direct control of the Minister of Justice, and thus effectively curtailed the independence of the judiciary.

171. Such an explanatory memorandum would provide guidance to the judges and to the parties, and enhances judicial uniformity in the application of the law.

172. THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL art. 14; see also 1970 Constitution, *supra* note 136.

173. THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL art. 17; see also QANUN USUL AL-MUHAKAMAT AL-JAZA'IA [IRAQI CRIMINAL PROCEDURE LAW] Law No. 23 of 1971 [hereinafter Criminal Procedure Law].

174. See *infra* Part V.

by the executive with a limited role for the Judicial Council. This is similar to what the Ba'ath regime did.¹⁷⁵ These and other incongruences of the IST which are sought to be remedied are discussed below.

B. General Observations on the Legitimacy of the IST's Establishment

As stated above, the IST was established pursuant to CPA Order Number 48, which represented the occupying power.¹⁷⁶ It is a "special tribunal" with jurisdiction over Iraqi nationals accused of committing genocide, crimes against humanity, war crimes, and certain other crimes under Iraqi law,¹⁷⁷ whether committed inside or outside Iraq, between July 17, 1968 and May 1, 2003, with the exception of coalition forces' actions, which, as discussed above, are not included in the IST's jurisdiction under Article 1. However, Article 10 of the Statute states that the Tribunal's jurisdiction extends to non-Iraqis, while CPA Order Number 17 gives coalition forces immunity. There is therefore an inconsistency between Articles 1 and 10 of the Statute and CPA Order Number 17.

Since the IST is a special tribunal outside the established Iraqi legal system, the question arises as to whether an occupying power has the legal authority to create such a tribunal. However, it should be noted that the TAL ratified the IST, and that the TAL is implicitly recognized in Security Council Resolution 1511.¹⁷⁸ Notwithstanding the TAL's confirmation of the IST, there is some ambiguity as to whether the IST is established by the CPA and the GC during a period of occupation, and it is necessary for the transitional government to repromulgate the Statute by adopting an amended law. The repromulgation of the Statute with amendments and an explanatory memorandum will not only eliminate questions of legitimacy and credibility but also cure some of the flaws contained in the Statute, which are discussed below.

The United States is bound by the Fourth Geneva Convention of 1949¹⁷⁹ and the Hague Regulations of 1907,¹⁸⁰ as well as subsequent developments of customary international law.¹⁸¹ According to these sources of applicable law, the United States is an occupying power, and it cannot, *inter alia*, do the following: (1) change the functioning of the

175. See *infra* Part IV.E.1.

176. Geneva IV, *supra* note 145.

177. See *infra* Parts IV.E. 2-3.

178. S.C. Res. 1511, *supra* note 38.

179. Geneva IV, *supra* note 145, applies to the civilian population and the administration of occupied territories.

180. 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, 1 Bevans 631 [hereinafter Hague IV].

181. For support of the proposition that the United States is bound by customary international law, see generally JORDAN PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* (1996). But see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing that the United States is not so bound).

administration of the occupied territory;¹⁸² (2) change the existing legal system;¹⁸³ (3) alter the status of public officials and judges;¹⁸⁴ (4) change the penal legislation;¹⁸⁵ (5) issue new penal provisions;¹⁸⁶ (6) intern civilian populations other than on the basis of prisoner of war;¹⁸⁷ (7) change the tribunals of the occupied territory;¹⁸⁸ (8) prosecute inhabitants for acts committed before the occupation;¹⁸⁹ or (9) 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."¹⁹⁰

An exception to the above 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,¹⁹¹ or if the laws introduced by the occupying power are more favorable to the civilian population. Article 4 of Protocol I confirms the above limitations on the occupying power.¹⁹² Although the United States has not ratified Protocol I, this provision still applies because it is deemed part of customary international law.¹⁹³ Accordingly, the question arises as to whether the United States had the legal authority to establish the IST. The answer depends on what aspect of the Statute is addressed. With respect to the procedures and guarantees of the rights of the defense, the IST is more favorable than existing Iraqi laws on criminal procedure under the 1971 Criminal Procedure Law.¹⁹⁴ Thus, these provisions of the Statute are in conformity with international humanitarian law, but that does not resolve the problems of incongruities arising out of the commingling of certain procedural aspects of the adversary-accusatorial model of criminal procedure with that of the inquisitorial model.

With respect to substance, the crimes defined in Articles 11 to 13 violate the principles of legality¹⁹⁵ as they have been understood and applied

182. See Hague IV, *supra* note 180, at arts. 43, 48; Geneva IV, *supra* note 145, at arts. 51, 54, 64.

183. See Hague IV, *supra* note 180, at art. 43.

184. Geneva IV, *supra* note 145, at art. 54.

185. *Id.* at art. 64.

186. *Id.*

187. *Id.* at arts. 79-135.

188. *Id.* at art. 64.

189. *Id.* at art. 70.

190. Geneva IV, *supra* note 145, at art. 7.

191. *Id.* at art. 64.

192. 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 (entered into force Dec. 7, 1979).

193. See PAUST, *supra* note 181.

194. Criminal Procedure Law, *supra* note 173. For a discussion of international human rights law standards, see generally M. CHERIF BASSIOUNI, THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A COMPENDIUM OF UNITED NATIONS NORMS AND STANDARDS (1994); ANNE BAYEFSKY, THE U.N. HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS (2001); CHRISTOPHER GANE & MARK MACKAREL, HUMAN RIGHTS AND THE ADMINISTRATION OF JUSTICE: INTERNATIONAL INSTRUMENTS (1997).

195. See discussion *infra* Parts IV.E.2-3.

in Iraqi criminal law since the 1925 Constitution.¹⁹⁶ Iraq also follows a rigid positivistic approach to the nonretroactivity of criminal laws, and that is consonant with international human rights law.¹⁹⁷ The principles of legality are enunciated in Article 15 in the International Covenant on Civil and Political Rights.¹⁹⁸ The same prohibition also exists under Article 7 of the European Convention on Human Rights,¹⁹⁹ Article 9 of the American Convention on Human Rights,²⁰⁰ and Article 7 of the African Charter on Human and Peoples Rights.²⁰¹ The principles of legality are part of “general principles of law,” a source of international law under Article 38 of the Statute of the International Court of Justice, which is part of the UN Charter.²⁰² An occupying power cannot derogate from these principles. Moreover, the selection of the judges as discussed below²⁰³ in Part IV.D.1 contravenes the Iraqi pre-Ba’ath law on judicial selection and international human rights law on judicial independence and impartiality. This aspect of the Statute is also questionable.

The limitations imposed by the Geneva Conventions are purposely strict in order to avoid abuse of authority by an occupying power. The unarticulated premise is that a foreign occupying power must be given less discretion because it cannot be assumed to always act in the best interests of the occupied and because its interest and presence in the occupied territory is for a limited time.

C. Issues of Legality in the Statute

1. The “Exceptional” Nature of the Tribunal

The IST is referred to in the Arabic language version of the Statute as *Al-Mahkama Al-Mukhtassa*. This could have been translated as “specialized tribunal” or “competent tribunal.” However, the controlling English language text chose the term “special” tribunal, which translates into Arabic as *Al-Mahkama al-Khassa*. Thus, the name and a number of the Statute’s provisions make it an “exceptional” tribunal, in violation of Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”).²⁰⁴

196. 1925 Constitution, *supra* note 132.

197. See e.g., International Covenant on Civil and Political Rights, Dec. 19, 1966, 6 I.L.M. 368 (1967) (entered into force March 23, 1976) [hereinafter ICCPR]. Iraq signed the ICCPR on March 23, 1976. Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, available at <http://www.unhcr.ch/pdf/report.pdf> (last updated June 9, 2004).

198. ICCPR, *supra* note 197, at art. 15.

199. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221.

200. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

201. African Charter on Human and Peoples Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (entered into force Oct. 21, 1986).

202. See generally M. Cherif Bassiouni, *A Functional Approach to “General Principles of International Law,”* 11 MICH. J. INT’L L. 768 (1990); BASSIOUNI, *supra* note 40, at 198–204.

203. See discussion *infra* Part V.D.1.

204. ICCPR, *supra* note 197, at art. 14.

This provision requires states to guarantee the fair and public trial of individuals by a competent, independent, and impartial tribunal established in accordance with ordinary applicable law and prohibits the establishment of exceptional tribunals.²⁰⁵ It should be noted that the existence of a conflict, whether of an international or noninternational character, does not suspend the applicability of international human rights law, and that international humanitarian law and human rights law are coextensive.²⁰⁶

Article 14 of the ICCPR prohibits, by implication, exceptional tribunals, or, more significantly, in French, "*tribunaux d'exceptions*."²⁰⁷ The IST is a special tribunal in that it is not part of the ordinary system of justice. Its special nature is evidenced by its temporary existence, and for the exercise of jurisdiction over only certain crimes committed within a defined period of time, and only by certain persons. The exceptional nature of the IST, which contradicts international human rights norms, is reflected in the characteristics described below:

1. The establishment of the IST by an occupying power violates the Geneva Conventions and customary international humanitarian law applicable to conflicts of an international character.²⁰⁸
2. The specific naming of the Tribunal as a "special" judicial body violates the International Convention on Civil and Political Rights.²⁰⁹

205. Setting up the IST as a "special" tribunal will also inevitably lead to comparisons with the various "special" tribunals set up by the Ba'ath regime in various agencies, such as the secret police (the *mukhabarat*), the military, the police, and the Ba'ath party itself. These tribunals were a significant factor in the degeneration of the Iraqi judiciary and the Iraqi judicial process.

206. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. No. 131 (July 9); M. Cherif Bassiouni, Humanitarian Law, in 1 ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY 467-76 (Dinah Shelton et. al. eds., 2004).

207. See ICCPR, *supra* note 197, at art. 14. The term is more significant in French because until about 1950, most of the countries in the world followed the Romanist-Civilist system. Between 1945-50, a number of these countries, particularly in Europe, established *tribunaux d'exceptions* to try Nazi collaborators. This procedure was also used by Communist regimes to purge those who opposed them. In the 1950s and 1960s, France also used similar tribunals to preserve its colonial system. By 1966, when the ICCPR was adopted, the prohibition against tribunals specifically contemplated *tribunaux d'exceptions*. More particularly, "exceptional tribunals" were used by several regimes as part of their repressive systems. Thus, the French term has more significant legal consequences than its English counterpart.

208. See *infra* Part IV.B. It should be noted that the Security Council adopted a number of resolutions in the aftermath of the Coalition forces' invasion of Iraq. See *supra* note 125. Some of these resolutions are ambiguous and somewhat confusing with respect to the legal status of the CPA, the GC, and the interim government. In fact, some of their provisions may appear to contradict the provisions of the Geneva Conventions regarding an occupying power's obligations. In any event, it is important to know that the Geneva Conventions control and that Security Council Resolutions do not amend those obligations. Thus, nothing in these resolutions can be interpreted in a manner which is inconsistent with either conventional or customary international humanitarian law.

209. See discussion *infra* Part IV.C.1.

3. The assignment of English as the Tribunal's controlling language is in violation of Iraqi law, which requires Arabic to be the official language of the state.²¹⁰
4. The appointment of sitting judges, investigative judges, and prosecutors by a temporary political authority, the GC, whose authority was derived from the occupying power, affects judicial independence and the impartiality of the Tribunal.²¹¹
5. The Statute's provision on appointing foreign judges may be in violation of Iraqi law.²¹²
6. The appointment of foreign experts and observers as monitors, and the conduct of criminal investigations by foreign experts not under the control of the investigative judges, is in violation of Iraqi law.²¹³
7. The Statute confuses the roles of investigative judges and prosecutors, which results in violations of Iraqi procedural law, possibly to the detriment of the defense's rights.²¹⁴
8. The determination of compensation of the sitting judges, investigative judges, and prosecutors by a temporary political authority, the GC, appointed by an occupying power, affects judicial independence and the impartiality of the Tribunal, and thus constitutes a violation of international human rights law.²¹⁵
9. The exclusion of sitting judges, investigative judges, and prosecutors solely on grounds of membership in the Ba'ath party, infringes upon the principle of impartiality.²¹⁶
10. The failure to allow for challenges of judges and investigative judges on the basis of conflict of interest or partiality violates the principle of judicial impartiality established in international human rights law.²¹⁷
11. The definition of crimes in the Statute that are not contained in Iraqi law are in violation of the principles of legality²¹⁸ recognized in Iraqi law and international human rights law.

A repromulgated, amended law that conforms to the relevant Iraqi laws and general principles of criminal law and procedure recognized

210. See discussion *infra* Part IV.C.2.

211. See discussion *infra* Part IV.D.1. Even though, de facto, the selection of sitting judges, investigative judges, and prosecutors may have been appropriate and the persons chosen satisfactory, nevertheless the issue here is the process and not the personalities involved.

212. See discussion *infra* Part IV.D.2.

213. See discussion *infra* Part IV.D.3.

214. See discussion *infra* Parts IV.E.4-5.

215. See discussion *infra* Part IV.D.5.

216. See discussion *infra* Part IV.D.6.

217. See discussion *infra* Part IV.E.9. While the Statute does not provide for challenges of a judge's ability to impartially adjudicate a given case, its silence on the question arguably permits a reference to preexisting Iraqi laws, which may allow for such challenges. Nevertheless, this assumption would require judicial interpretation exceeding the traditional role of judges in an essentially positivistic legal system.

218. See discussion *infra* Part IV.F.

under Iraqi law, international humanitarian law, and human rights law can cure these problems.

2. Language

The Statute was promulgated in both the English and Arabic languages, but under the CPA Regulation 1 the English version controls²¹⁹ even though Arabic is the only official language of Iraq. The Arabic version is a poor translation of the English text, revealing that even the English text was not drafted by Iraqi jurists.

The fact that the Statute was originally drafted in English and that the English version, rather than the Arabic version, controls in the event of any conflict or inconsistency between the two versions is problematic. Moreover, the Statute contains an inconsistency, as Article 34 of the Statute provides that "Arabic shall be the official language of the Tribunal." The controlling language of the Statute is English, while the proceedings and judgments are to be conducted in the Arabic language.²²⁰

A language is reflective and expressive of a given culture. Requiring Iraqi Arabic-speaking jurists to interpret and apply a Statute that was drafted in the language of a foreign legal system and culture is not only unworkable; it is fraught with ambiguities. Also, like other aspects of the Statute discussed below, drafting the Statute in the English language and the choice of the English version as the governing version reinforces the view that the IST bears a "Made in USA" stamp, which undermines the legitimacy and credibility of the IST.

It could be argued, however, that CPA Order Number 48 delegated to the GC the power to adopt the Statute. Consequently, it may be said that the English language controls as to CPA Order Number 48, but not as to the Statute which was promulgated by the GC on the basis of that Order's delegation of authority. Such an interpretation would be more in keeping with Article 34 of the Statute, which requires the proceedings to be in English. Obviously, a repromulgation in Arabic of the Statute by an Iraqi governmental authority having such power would eliminate any such questions.

219. CPA Reg. No. 1, § 3(2). According to CPA Regulation Number 1, the English version controls over the Arabic version in the event of any conflict or inconsistency. It was the CPA's practice to issue Decrees in the English language first, with Arabic versions issued subsequently. In some cases the Arabic versions were issued more than 143 days later, as was the case with CPA Order Number 10 regarding the Management of Detention and Prison Facilities. The English version of this order was issued on June 5, 2003. See CPA Order No. 10, available at http://www.iraqcoalition.org/regulations/20030605_CPAORD10_Management_of_Detention_and_Prison_Facilities.pdf (last visited Mar. 13, 2005). However, the Arabic version was not issued until October 29, 2003. For further discussion of this issue, see Amnesty International, Iraq: Memorandum on Concerns Related to Legislation Introduced by the Coalition Provisional Authority, available at <http://www.amnesty.nl/persberichten/NK-PB0357.shtml> (Dec. 4, 2003). To the best knowledge of this writer, it is common practice for independent states to require that laws be promulgated first in the official language or languages of those states. Only states under colonial regimes enacted laws in the language of the colonial power.

220. See THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL art. 34.

D. Challenges to Judicial Independence and Impartiality

The following are a number of issues pertaining to judicial independence and impartiality that contribute to undermining the credibility of the IST and that, unless corrected in the repromulgated, amended law proposed above, are likely to be raised by the defense at the trials.²²¹

1. Appointment of Iraqi Judges, Investigative Judges, and Prosecutors

The now defunct GC, a political body whose authority derived from the CPA, established by an occupying power, had the power to appoint the sitting judges,²²² the investigative judges,²²³ and the prosecutors under the Statute.²²⁴ The Statute gives the Judicial Council only a limited consultative role.²²⁵ In fact, these appointments have been made by the Prime Minister, presumably on the basis of a decision of the Council of Ministers in consultation with some of the members of the Judicial Council. This procedure violates Articles 1 to 5 of the 1985 United Nations' Principles of the Independence of the Judiciary, which disfavor having judicial appointments by political authority.²²⁶ Ironically, this selection process is similar to the Ba'athist approach, whose 1977 Law on the Organization of the Judiciary placed the Minister of Justice as the head of the Judicial Council instead of the President of the Court of Cassation.²²⁷ The Ba'ath regime obviously interfered with judicial independence by having a representative

221. As stated above, nothing in what follows is intended to question the integrity of the judges, investigative judges, and prosecutors appointed to the IST by the GC.

222. THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL art. 5(c).

223. Art. 7(b).

224. Art. 8(d).

225. Art. 5(c) (stating that "[j]udges are to be nominated and appointed by the Governing Council or the Successor Government, after consultation with the Judicial Council").

226. See *Basic Principles on the Independence of the Judiciary*, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at 59, 7th Sess., U.N. Doc. A/CONF.121/22/Rev.1 (1985). The Seventh United Nations Congress took place in Milan from August 26 to September 6, 1985. For an Arab perspective on the independence of the judiciary, see FAROUK EL-KILANI, ISTIQLAL AL-QADA'A [INDEPENDENCE OF THE JUDICIARY] (1999).

227. In 1954, the Iraqi Parliament passed a law that established an independent Judicial Council (*Majlis al-Qadha*), presided over by the President of the Court of Cassation, the judicial system's highest court. However, in 1977, Law Number 101 (*Qanun Wezarat al-Adl*) adopted by the Revolutionary Command Council established the Law Organizing the Ministry of Justice. That law placed the judiciary, the prosecution, and the courts under the control of the executive branch, specifically the Ministry of Justice. The 1979 Judicial Organization Law, *infra* note 228, reorganized the Judicial Council as the Justice Council (*Majlis al-Adl*) and elevated the Ministry of Justice to the position of its president, placing all of the courts under the Ministry of Justice. CPA Order Number 35 reinstated the Judicial Council, thereby abrogating provisions of the 1979 Judicial Organization Law, *infra* note 228. CPA Order No. 35 (Sept. 18, 2003), available at http://www.iraqcoalition.org/regulations/20030921_CPAORD35.pdf (last visited Apr. 5, 2005). Article 2(3) of CPA Order Number 35 reinstating the Judicial Council as the President of the Court of Cassation. *Id.* at art. 2(3). *Mahkamat Al Tami'ize*, the equivalent of the French *Cour de Cassation*, is frequently referred to as the Court of Cassation, although the term does not exist in English. In French, "casser" means "to quash," whose equivalent in English is to reverse a judgment by a lesser court.

of the Executive branch chair the Council and direct it. For the IST to follow the model of the Ba'ath regime, while at the same time prosecuting its leaders, is, to say the least, paradoxical. Adding to these problems is the uncertainty as to who actually appointed the IST judicial officers. Moreover, some of the judges who were appointed are Iraqi practicing lawyers, and this violates the Iraqi law on judicial appointments, which requires that judges be graduates of the Judicial Institute who qualify for certain levels of judicial appointment, namely, trial court, appellate court, and supreme court. These issues, unless resolved in a repromulgated, amended law, followed by new formal appointments by the Judicial Council, will surely be raised by the defense at the trials as violating judicial independence.

2. Appointment of Foreign Judges

Pursuant to Article 4(d) of the Statute, the GC and its successor may appoint foreign judges to the IST provided that they fulfill certain criteria, which do not include familiarity with the Arabic language or the Iraqi legal system. The appointment by a political authority of foreign judges who lack familiarity with the Arabic language and the Iraqi legal system is contrary to Iraqi law.²²⁸ It is also contrary to the law and practice of almost every legal system in the world. Moreover, even if such appointments were legally valid, such foreign judges would have an adverse impact on the Tribunal's ability to effectively perform its functions. Appointment of non-Arab judges should be excluded for reasons of qualifications, appropriateness, and practicality, as they are not likely to have knowledge of Iraqi laws and of the Arabic language, which is the language of the proceedings.

A better solution previously advocated by this writer²²⁹ is to have highly qualified Arab judges who would be designated by the Iraqi Judicial Council for their expertise and experience. Such appointments could also include highly competent Arab jurists who are not judges, but whose expertise, knowledge, and reputation would lend weight to the IST. The use of Arab judges is a practice followed in the Arab Gulf states where, in light of the similarities in legal systems, states may use the services of judges from other Arab states to fill in as necessary.²³⁰

228. See Law 160 of 1979, QANUN AL-TANZIM AL-QADA'I [IRAQI JUDICIAL ORGANIZATION LAW] art. 4(1) [hereinafter Judicial Organization Law].

229. See *supra* note 61.

230. It should be noted that the Criminal Code promulgated by Law No. 111 of 1969, *infra* note 251, and the Criminal Procedure Law of 1971, *supra* note 194, are derived from the Egyptian and Syrian legal systems, which in turn derives from the French legal system. For sources on Egyptian Criminal Law, see NAGIB HOSNI, SHARH QANUN AL-UQUBAT AL-QISM AL-A'M [EXPLANATION OF THE CRIMINAL LAW: GENERAL PART] (1962); AHMED AWAD BELAL, MABADE' QANUN EL-UQUBAT EL-MASRI AL-QISM AL-A'M [PRINCIPLES OF EGYPTIAN CRIMINAL LAW: GENERAL PART] (2004); I AHMED AWAD BELAL, [PRINCIPLES OF EGYPTIAN CRIMINAL LAW: GENERAL PART, CRIMINAL OFFENCES] (2004); MAHMOUD MUSTAFA, SHARH QANUN EL-UQUBAT AL-QISM AL-A'M [EXPLANATION OF THE CRIMINAL LAW: GENERAL PART] (10th ed. 1983); NAGIB HOSNI, SHARH QANUN AL-UQUBAT AL-NAZARIA AL-A'M FIL GARIMA WAL-EKAB [EXPLANATION OF THE CRIMINAL LAW: GENERAL THEORY OF CRIME AND PUNISHMENT] (6th ed. 1989); AHMED FATHY SOROUR, AL-WASEET FI QANUN AL-UQUBAT AL-

While the Statute does not address the issue of qualifications of foreign judges, the Judicial Council should apply the same professional and moral qualifications for appointments of Arab judges and jurists as it does for appointments to its higher court. These qualifications should be made public, and a record of the selection process and reasons for the appointments should be made. This is to ensure transparency and to reinforce public perception of the technical competence and integrity of the judges. This would surely contribute to the legitimacy and credibility of the Tribunal in and outside of Iraq.

3. *Appointment of Foreign Judicial "Experts" and "Observers"*

Pursuant to Article 6(b) of the Statute, the President of the IST is required to appoint non-Iraqi nationals "to act in advisory capacities or as observers to the Trial Chambers and to the Appeals Chamber."²³¹ Articles 7(n) and 8(j) provide for similar appointments with respect to investigative judges and prosecutors. The Statute, however, does not clarify the procedures relating to, or the nature of, this advisory or observatory role to be assumed by such foreign nationals. This in turn raises various concerns, including how the secrecy of judicial deliberations required by Iraqi law may be maintained when non-Iraqi experts are required to observe the trials.

Requiring the IST judges, investigative judges, and prosecutors to be observed or monitored by foreign experts as per Articles 6(b), 7(a), and 8(j) of the Statute,²³² is unprecedented except in prior colonial regimes. This cannot be well-received by members of the Iraqi legal profession and is probably the most offensive provision in the Statute. Moreover, the presence of foreign observers casts doubt on the independence of the sitting Iraqi judges, investigative judges, and prosecutors.

It should be noted that Article 6(b) of the Statute was not necessary to achieve the purported goal of having the technical support of nonnational

QISM AL-KHAAS [A MANUAL OF CRIMINAL LAW: SPECIAL PART] (3rd ed., n.d., circa 2000). For sources on Egyptian Criminal Procedure, see AHMED FATHY SOROUR, AL-SHARI'A WAL EJRAAT AL-JENA'EA [LEGITIMACY AND CRIMINAL PROCEDURE] (1977); NAGIB HOSNI, SHARH QANUN AL-EJRAAT AL-JENA'EA [EXPLANATION OF THE CRIMINAL PROCEDURE LAW] (1982); AHMED FATHY SOROUR, AL-WASEET FI QANUN AL-EJRAAT AL-JENA'EA [A MANUAL ON CRIMINAL PROCEDURE LAW] (7th ed. 2002). For sources on Iraqi criminal law, see ALY HASSAN KHALAF & SULTAN ABDULKADER AL-SHAWI, AL-MABADE' AL-A'M FI QANUN AL-UQUBAT [GENERAL PRINCIPLES OF CRIMINAL LAW] (n.d.); DARI KHALIL MAHMOUD, AL-WAJIZ FI SHARH QANUN AL-UQUBAT AL-QISM AL-A'M [SIMPLIFIED EXPLANATION OF THE CRIMINAL LAW: GENERAL PART] (2002). For sources on Iraqi criminal procedure, see I SAMI EL-NASRAWI, DERASAT FI QANUN AL-EJRAAT AL-JENA'EA [STUDIES ON CRIMINAL PROCEDURE: INVESTIGATIONS, INTERROGATIONS, AND INDICTMENT] (1978); ABDEL AMIR EL-EKILY & SELIM IBRAHIM HARBA, AL-EJRAAT AL-JENA'EA [CRIMINAL PROCEDURE] (1988).

Differences exist, however, between the Iraqi Ba'ath and contemporary Egyptian criminal justice systems. For example, the Iraqi criminal legal system separates the powers of investigative judges and prosecutors, whereas the Egyptian system combines these powers in public prosecutors who work under the control of the Prosecutor General. See discussion *supra* Part IV.A.

231. See THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL art. 6(b).

232. *Id.* at arts. 6(b), 7(a), and 8(j).

judges. Article 166 of the 1971 Criminal Procedure Law already provides for the appointment of experts.²³³

The repromulgated, amended Statute should enable the Tribunal to employ foreign experts to serve as part of a pool, under the direction of its president. Such experts may provide nonbinding advice on questions of law to the president or to the various trial chambers of the Tribunal, at the president's direction. Their role should not affect the independence of the judges or their impartiality. Moreover, there can be no provision in the repromulgated, amended law for foreign judges or experts to monitor the work of the Tribunal or to sit in on the deliberations of the judges.

4. *Qualifications of Judges, Investigative Judges, and Prosecutors*

The IST does not establish professional qualifications for the appointment of its judges,²³⁴ but does so for investigative judges²³⁵ and prosecutors,²³⁶ as is required by Iraqi laws on the subject.²³⁷ The appointment of judges by a political body without fully going through the formal process of selection by the Judicial Council, is troublesome.²³⁸ Moreover, if special qualifications are required, they should be set out by the Judicial Council,²³⁹ which is to administer the appointing process with transparency. So far, the selections have been made by the GC and the interim government, subject to political vetting, and only in consultation with the Judicial Council. Moreover, the appointment of practicing lawyers as judges violates the Iraqi law on the judiciary. This process raises issues of legitimacy and judicial impartiality. These issues are reminiscent of Ba'ath regime practices, when the Minister of Justice controlled the appointments of members of the Judiciary.

5. *Compensation of Judges and Investigating Judges*

Pursuant to Articles 5(e) and 7(l) of the Statute, the GC, which is a temporary political authority, sets the compensation of sitting judges and investigating judges, "in light of the increased risks associated with the position."²⁴⁰ While the general criterion is justified, it needs to be fully articulated to avoid the taint of preferential ad hominem determinations,

233. Art. 166 of the Criminal Procedure Law provides that "the court may appoint 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." Criminal Procedure Law, *supra* note 194.

234. See THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL art. 5(a).

235. *Id.* at art. 7(d).

236. *Id.* at art. 8.

237. Law No. 159 of 1979, QANUN AL-EDDE'A AL-A'M [LAW OF PROSECUTORS] art. 41 [hereinafter Law of Prosecutors] (indicating the role of Public Prosecutors); Judicial Organization Law, *supra* note 228, at art. 36.

238. See *supra* Part IV.D.1.

239. Judicial Organization Law, *supra* note 228; see THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL art. 5(c) ("Judges are to be nominated and appointed by the Governing Council").

240. *Id.* at arts. 5(c), 7(l).

which violate the principles of a judiciary's independence.²⁴¹ Compensation should be legislatively established as it is in most of the world's legal systems, and variances in compensation could be established by the Judicial Council, but pursuant to a law that provides criteria and transparency.

6. *Ba'ath Party Membership Disqualification*

Article 33 of the Statute provides that "[n]o officer, prosecutor, investigative judge, judge or other personnel of the Tribunal shall have been a member of the Ba'ath Party."²⁴² This blanket exclusion applies to all members of the Iraqi judiciary who were in office as of March 2003 when the United States occupied Iraq, but does not apply to other members of the judiciary.²⁴³ This provision also does not distinguish between judges who were active members in the party and those who may have simply joined the party to maintain their source of livelihood. The problem here is that such blanket exclusions of Ba'ath party members, many of whom are likely to have suffered at the hands of the Ba'ath regime,²⁴⁴ may be cause for concern with respect to the impartiality of sitting judges and investigative judges.²⁴⁵ This concern is heightened by the fact that the Statute does not provide for grounds to challenge judicial personnel on the basis of lack of impartiality as discussed below.

7. *Impartiality*

The issue of judges' impartiality is unrelated to membership in the Ba'ath party. A judge who was victimized by the Ba'ath regime is as much subject to partiality as is a judge who was a member of that party.²⁴⁶ The

241. See Basic Principles on the Independence of the Judiciary, *supra* note 226.

242. See THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL art. 33.

243. The assumption is based on the fact that judicial appointments under the Ba'ath regime favored Ba'ath party members. However, many Ba'ath party members were only registered as a matter of expediency and did not play an active role in the party, while others were appointed because relatives held positions in the party and used that influence to obtain positions through their family members. Some members of the Judicial Council were registered Ba'ath party members.

244. See THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL arts. 5(f)(1)(i), 7(m)(1)(i) and 8(f)(1)(i), which, in setting out bases for automatic disqualification of judges, investigative tribunal judges and prosecutors that include criminal records, recognize an exception if the relevant individual's criminal record is "a political or false charge made by the Ba'ath Party regime."

245. It should be noted that the GC and CPA have appointed cabinet officers and judges who were Ba'ath party members. This includes cabinet officers presently serving in the interim government as of June 30, 2004, and members of the Judicial Council who had a role in vetting the judges of the IST.

246. Judge Dara Nureddin, former member of the GC, was nominated to sit on the appellate division of the IST, but recused himself because he had previously been imprisoned by the Saddam regime. Judge Dara, whom this writer has the privilege of knowing, is held in high esteem in Iraq. He is the only judge in Iraq to have declared as legally invalid a decree issued by Saddam, for which he was imprisoned. After two years in jail, he was released by a quirk of fate. Saddam decided in March 2003, shortly before the invasion, to free an estimated 20,000 (some put that number at 80,000) common prisoners in Iraq. Many of these have become sources of Iraq's insecurity during the occupation, as Saddam had hoped. Judge Dara, whose sentence for his courageous

Statute fails to articulate a standard of impartiality and fails to address the issue of challenges to the judges for lack of impartiality or conflict of interest. The reason for these omissions confirms these concerns. The drafters, in this writer's opinion, wanted the process of appointing the judges, namely by the GC, to be a political one.²⁴⁷ This should be remedied in the repromulgated, amended law by developing procedures for challenges and by establishing standards for recusal of judges and investigative judges.

8. Removal of the Tribunal's President

Article 5(f)(3) of the Statute gives the GC the authority to remove the president of the IST. This is a gross breach of the independence of the judges, who must be shielded against political removal of their president. Removal and discipline under Iraqi law are the prerogatives of the Judicial Council.²⁴⁸ This issue is probably moot now that the GC is no longer in existence, unless this authority is exercised by the government of Iraq. This provision should be deleted from the repromulgated, amended law, leaving removal of any judge for cause to the prerogative of the Judicial Council.²⁴⁹

V. Substantive Issues of Legality: Crimes and Penalties

A. Introduction

Articles 11 to 14 refer to subject matter jurisdiction for crimes committed by Iraqi nationals or residents of Iraq. Given the general principle recognized under all national criminal legal systems relating to personal jurisdiction that a national criminal court has personal jurisdiction over all individuals committing a crime within the territory of the state irrespective of their nationality or residence status, it is not clear why the IST's jurisdiction under Article 1 does not extend to all individuals who may be accused of the crimes set out in Articles 11 to 14 of the Statute who are not Iraqi nationals or residents of Iraq as referred to in Article 10.

The Statute also limits the temporal jurisdiction of the IST to crimes committed between July 17, 1968 and May 1, 2003, but does not provide a limitation related to where the crimes were committed.²⁵⁰ Accordingly, there does not appear to be any need to expressly refer to the crimes committed by Iraqi nationals and residents related to the Iraq-Iran war and the invasion and occupation of Kuwait as falling within the IST's jurisdiction in Article 1(b) of the Statute, since such crimes are already included in the IST's jurisdiction. In this regard, it should be noted that Iraqi legislation

action was likened to that of a common criminal, was thus released. Judge Dara's story is one example of how ironies make history.

247. See discussion *supra* Part IV.D.1.

248. Judicial Organization Law, *supra* note 228, at arts. 58-59; The Law 101 of 1977, Regarding the Ministry of Justice, art. 4(2)(a).

249. Judicial Organization Law, *supra* note 228, at arts. 58-59.

250. See J. Peter Pham, *Bringing Saddam Hussein to Justice*, 3 IN THE NAT'L INTEREST 5 (July 7, 2004), at <http://www.inthenationalinterest.com/Articles/Vol3Issue27/Vol3Issue27PhamPFV.html>.

contemplates jurisdiction over crimes committed outside Iraq: Pursuant to Article 7 of the 1969 Criminal Code, for example, Iraqi territorial jurisdiction extends to "foreign territories occupied by the Iraqi army in relation to crimes which affect the army's safety or interests,"²⁵¹ and pursuant to Article 53(b) of the 1971 Criminal Procedure Law, "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."²⁵²

The maxims *nulla poene sine lege* and *nullum crimen sine lege* have long been regarded as cornerstone principles of criminal law.²⁵³ They have become known in almost all of the world's legal systems as the principles of legality. They are also embodied in Article 15 of the International Convention on Civil and Political Rights,²⁵⁴ Article 7 of the European Convention on Human Rights,²⁵⁵ and Article 9 of the American Convention on Human Rights.²⁵⁶ Many constitutions include them as well.²⁵⁷ In the U.S. Constitution they are specifically mentioned as the prohibitions against "ex post facto" laws and against "Bills of Attainder,"²⁵⁸ and its Fifth and Fourteenth Amendments have been interpreted as prohibiting statutes that are vague and ambiguous.²⁵⁹ The Iraqi legal system, which is a positivist one, is more categorical about the principles of legality. The IST Statute violates these principles by borrowing the definition of the crimes of genocide, crimes against humanity, and war crimes from the ICC statute Articles 6, 7, and 8,²⁶⁰ which are not contained in the 1969 Iraqi Criminal Code.²⁶¹ These issues and the issue of penalties are discussed below.

B. Defining the Three Core Crimes

Articles 11, 12, and 13 of the Statute extend the jurisdiction of the IST to three international core crimes, namely, genocide, crimes against humanity, and war crimes. Article 14 applies to other crimes under Iraqi law.²⁶² The Statute defines the three core crimes identically to the definitions contained in the ICC statute,²⁶³ though without establishing a foun-

251. Law No. 111 of 1969, QANUN AL-UQUBAT [CRIMINAL CODE] art. 7 [hereinafter Criminal Code].

252. Criminal Procedure Law, *supra* note 194, at para. 53(b).

253. See M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 150-58 (2d ed. 1999).

254. See ICCPR, *supra* note 197, at art. 15.

255. See European Convention on Human Rights, *supra* note 199, at art. 7.

256. See American Convention on Human Rights, *supra* note 200, at art. 9.

257. See, e.g., EGYPT CONST. art. 66; FR. CONST. arts. 7-8; ITALY CONST. arts. 25, 26. See generally CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1993) (compiling the constitutions of many countries).

258. U.S. CONST. art. I, § 9, cl. 3.

259. *Id.* at amends. V, XIV; see also *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (declaring a Florida vagrancy ordinance void for vagueness).

260. See Rome Statute, *supra* note 152, at arts. 6-8.

261. Criminal Code, *supra* note 251.

262. See *infra* Part IV.E.3.

263. See Rome Statute, *supra* note 152, at arts. 6-8. The reason for this formula is that in modeling the IST to one of the three proposals I made to the Future of Iraq Working Group on Transitional Justice, one of the models was for a Security Council-

dition for their application under Iraqi law. This approach on its face violates the principles of legality,²⁶⁴ since these crimes are not covered in the 1969 Criminal Code,²⁶⁵ nor were they separately promulgated in another national legislation published in the Official Gazette of Iraq.²⁶⁶ This problem can be addressed in the repromulgated, amended law as follows:

1. Genocide and War Crimes

The violation of the principles of legality in the Statute with respect to the crime of genocide and war crimes can be resolved by interpreting the principles of legality in a manner that distinguishes between the formal aspect of these "principles" (promulgation in national Iraqi legislation and publication in the Official Gazette) and the substantive aspects of the principles of legality, which require ensuring that public notice of such crimes has been provided prior to the commission of the criminalized acts. Such an interpretation would be based on the proposition that the crimes of genocide and war crimes are contained in the conventions that have been ratified by Iraq,²⁶⁷ even though they have not been the subject of national

established Tribunal. See *supra* Part II. Under the model for a Security Council-established tribunal, I used the ICC Statute for the definitions of the crimes. As Chairman of the Diplomatic Conference's Drafting Committee, it was also natural that I would make such a choice. Salem Chalabi, who had the principal role in drafting the IST Statute, followed that approach without regard to the fact that what is appropriate for a Security Council-established tribunal is not appropriate for an Iraqi national tribunal. See *supra* note 75. It should be noted that the United States, even though it opposes the ICC, does not disagree with the contents of ICC Articles 6, 7, and 8, nor does it disagree with the "Elements of Crimes" developed by the ICC's Preparatory Commission and later adopted by its Assembly of States Parties. Military Penal Law, *infra* note 272, at art. 123. In fact, the U.S. delegation at the Rome conference and during the Preparatory Commission's work was instrumental in the shaping of these provisions. The United States' opposition to the ICC refers to its jurisdiction over nonnationals of states parties. William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 701, 709-14 (2004).

264. The principles of legality, which prohibit crime or penalty without a specific legal textual description that is clear (not vague or ambiguous), and the retroactive application of criminal laws and penalties, are recognized in the 1969 Criminal Code, *supra* note 251, and in general principles of the criminal laws of more than 120 of the world's criminal justice systems, international criminal law, and international humanitarian law. See ICCPR, *supra* note 197, at art. 15; European Convention on Human Rights, *supra* note 199, at art. 7; Rome Statute, *supra* note 152, at arts. 22 (nullum crimen sine lege), 23 (nulla poena sine lege); BASSIOUNI, *supra* note 253, at 150-58; BASSIOUNI, *supra* note 40, at 198-204.

265. See generally Criminal Code, *supra* note 251.

266. The ICTY faced the problem of potentially violating principles of legality; however, since the Yugoslav federal criminal code included the crime of genocide, crimes against humanity, and war crimes and corresponding penalties, the ICTY was able to rely upon them. 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: A DOCUMENTARY HISTORY AND ANALYSIS* 274-76 (1995).

267. See Geneva I-IV, *supra* note 145. Iraq acceded to all the Geneva Conventions on February 14, 1956. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277. Iraq acceded to the Genocide

Iraqi legislation published in the Official Gazette of Iraq. Accordingly, the formal aspects of the principles of legality may be set aside in favor of its substantive aspects. Moreover, these crimes have been publicly known in Iraq, and the prospective defendants and others in the upper echelons of the regime leadership can be assumed to have had knowledge of these crimes.²⁶⁸

The repromulgated, amended law should specifically include a reference to Iraq's ratification of the Genocide Convention²⁶⁹ and the four Geneva Conventions of 1949,²⁷⁰ which apply to these crimes. Moreover, the explanatory memorandum should cross-reference the definitions of these crimes to their specific contents in the 1969 Criminal Code²⁷¹ and in the 1940 Iraqi Military Penal Law.²⁷² In this way, the crimes in question could be relied upon in prosecutions, even though they do not satisfy the formal aspects of the principles of legality, namely, the inclusion of these crimes in a national law and its publication in the Official Gazette.²⁷³

Another argument is that such international crimes, being *jus cogens*,²⁷⁴ penetrate national law and cannot be derogated from because they are peremptory norms of international law.

These arguments should be described in the explanatory memorandum, distinguishing between the substantive and formal aspects of the principles of legality and demonstrating the basis of direct applicability under international law.²⁷⁵ This memorandum would clarify that although the formal aspects of the principles of legality may not have been met, the substantive aspects have been satisfied, and, accordingly, the Tribunal's jurisdiction over the crime of genocide and war crimes does not

Convention on January 20, 1959. For details of state parties to the Convention, see Ratifications and Reservations, Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, available at <http://www.ohchr.org/english/countries/ratification/1.htm>. (last updated Nov. 24, 2004).

268. In substance, the Nuremberg judgment established that defendants are assumed to have knowledge of crimes against humanity, regardless of whether those crimes have been promulgated as positive law. See BASSIOUNI, *supra* note 253, at 525-31.

269. See Ratifications and Reservations, *supra* note 267.

270. See Geneva I-IV, *supra* note 145.

271. Criminal Code, *supra* note 251.

272. QANUN AL-UQUBAT AL-ASKARIA [MILITARY PENAL LAW], Law No. 13 of 1940 [hereinafter Military Penal Law].

273. Legal doctrine and practice in Iraq deems that a treaty, even if ratified, must be subject to the adoption of national implementing legislation before it can be considered applicable domestically. Additionally, under Iraqi law, all laws must be published in the Official Gazette.

274. See BASSIOUNI, *supra* note 40, at 167.

275. It should be noted that Iraq is not only a state that adheres to a rigid positivistic approach, but it is also a dualist state, where treaties must be incorporated in national legislation and published in the Official Gazette before their applicability. This is also the position of all other Arab states. Moreover, Iraqi jurists have been isolated from international law developments for some forty years. Consequently, it is difficult for that country to accept changes that took a long time to seep into the thinking of other countries' jurists.

violate the principles of legality.²⁷⁶

2. Crimes Against Humanity

Remedying the violation of the principles of legality with respect to crimes against humanity is more problematic than with respect to genocide and war crimes. Unlike the former, this category of international crimes has not been included in a specialized international convention.²⁷⁷ Thus, Iraq is not bound by a treaty as it is with respect to genocide and war crimes. However, crimes against humanity have been defined in different ways by various international instruments²⁷⁸ and are jus cogens.²⁷⁹ Most of the contents of crimes against humanity are, however, included in the 1969 Criminal Code.²⁸⁰ The explanatory memorandum of the repromulgated, amended law should articulate the reasons for the permeation of jus cogens principles and customary international law into Iraqi domestic law.²⁸¹ Given that this theory has never been argued before in any Arab court, it would be highly advisable to prepare an appropriate authoritative legal interpretation with respect to this issue prior to the commencement of any trials before the Tribunal.

An alternative approach to avoiding a violation of the principles of legality is to divide the above three crimes of genocide, crimes against humanity, and war crimes into several lesser crimes that are usually found in most domestic criminal codes, including the 1969 Criminal Code and the 1940 Military Penal Law. For example, the 1969 Criminal Code criminalizes the following crimes: (1) unlawful detention;²⁸² (2) use of person as object of mockery;²⁸³ (3) cruelty;²⁸⁴ (4) torture;²⁸⁵ (5) intentional

276. Detailing this argument in an explanatory memorandum would also provide the additional benefit of ensuring that IST judges do not reach opposing conclusions on the issue.

277. See M. Cherif Bassiouni, "Crimes Against Humanity": The Need for a Specialized Convention, 31 COLUM. J. TRANSNAT'L L. 457-94 (1994).

278. For various definitions of "crimes against humanity, see IMT Agreement, *supra* note 97; Charter of the International Military Tribunal, at art. 6(c), 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 284; IMTFE Charter, *supra* note 98, at art. 5(c); International Criminal Tribunal for Yugoslavia, S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., art. 5, U.N. Doc. S/RES/808 (1993) [hereinafter ICTY Statute]; International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., art. 3, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute]; Rome Statute, *supra* note 152, at art. 7. For a discussion of these and other formulations see BASSIOUNI, *supra* note 253.

279. See Criminal Code, *supra* note 251

280. For example, Article 325 of the Criminal Code, *supra* note 251, prohibits slavery. See, e.g., Criminal Code, *supra* note 251, at arts. 325, 333, 421 (prohibiting slavery, torture, and illegal detention and torture respectively). However, Iraq has not signed the CAT, *supra* note 146.

281. For a detailed discussion on crimes against humanity and other jus cogens crimes, see generally BASSIOUNI, *supra* note 253, at 210-17; BASSIOUNI, *supra* note 40, at 684-704.

282. Criminal Code, *supra* note 251, at art. 322.

283. *Id.* at art. 325.

284. *Id.* at art. 332.

285. *Id.* at arts. 333, 421.

damage of public property;²⁸⁶ (6) burning of petroleum wells;²⁸⁷ (7) intentional spreading of dangerous diseases;²⁸⁸ (8) persecution based on religious affiliation;²⁸⁹ (9) rape;²⁹⁰ (10) killing two people or more;²⁹¹ (11) causing the disappearance of bodies;²⁹² (12) embezzlement;²⁹³ and (13) destroying real estate.²⁹⁴ The 1940 Military Penal Law references, *inter alia*, the following war crimes:²⁹⁵ (1) ordering an inferior to commit a crime;²⁹⁶ (2) the destruction of property;²⁹⁷ (3) the destruction of property through the use of force;²⁹⁸ (4) the unlawful taking of the property of the prisoners, wounded, and deceased;²⁹⁹ and (5) overlooking criminal acts.³⁰⁰ Accordingly, it would be appropriate to refer to these crimes, which are defined in Iraqi law, and to rely on them as elements of the three international crimes mentioned above.³⁰¹

3. *Other Crimes*

Article 14 of the Statute states:

The Tribunal shall have the power to prosecute persons who have committed crimes under Iraqi law:

- a) For those outside the judiciary, the attempt to manipulate the judiciary or involvement in the functions of the judiciary, in violation, *inter alia*, of the Iraqi interim constitution of 1970, as amended;³⁰²
- b) The wastage of national resources and the squandering of public assets and funds, pursuant to, *inter alia*, Art. 2(g) of the Law No. 7 of 1958, as amended; and
- c) The abuse of position or the pursuit of policies that may lead to the threat of war or the use of armed forces of Iraq against an Arab country, in accordance with Art. 1 of Law No. 7 of 1958, as amended.³⁰³

None of the above are, however, contained in the 1969 Criminal Code.

286. *Id.* at art. 340.

287. *Id.* at art. 342(b).

288. *Id.* at art. 368.

289. *Id.* at art. 372(a).

290. *Id.* at art. 393.

291. *Id.* at art. 405(e).

292. *Id.* at art. 420.

293. *Id.* at art. 444.

294. *Id.* at arts. 447-78.

295. The procedures relating to the trial of military personnel under Iraqi law are governed by QANUN USUL AL-MUHAKAMAT EL-ASKARIA [MILITARY TRIALS PROCEDURAL LAW], Law Number 13 of 1940.

296. Military Penal Law, *supra* note 272, at art. 98.

297. *Id.* at art. 113.

298. *Id.* at art. 114.

299. *Id.* at art. 115.

300. *Id.* at art. 123.

301. See U.N. Doc. PCNICC/2000/1/Add.2 (ICC-ASP/1/3) (describing the elements of crimes in the International Criminal Court).

302. It should be noted that the 1970 Constitution contains no such crime; thus, this is entirely *ultra vires* and therefore in violation of the principles of legality in Iraq and, for that matter, in any legal system in the world.

303. THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL art. 5(e).

4. Establishing Penalties

As stated above, the principles of legality require that penalties be established by law. Article 24(c) of the Statute provides that “[t]he penalty for any crimes under Articles 11 to 13 which do not have a counterpart under Iraqi law shall be determined by the Trial Chambers taking into account such factors as the gravity of the crime, the individual circumstances of the convicted person and the relevant international precedents.” It is contrary to these principles and to the 1969 Criminal Code to have penalties established by judges, even though in advance of the Tribunal’s operations. This formula was taken by the IST drafters from ICTY,³⁰⁴ where the Security Council delegated the legislative tasks to the judges, but the exceptional nature of the ICTY, as established by the Security Council, cannot serve as a precedent to an occupying power’s limitations under international humanitarian law.³⁰⁵

The delegation of legislative power by the IST to the judges to determine penalties for crimes under Articles 11 through 13 of the Statute expressly conflicts with the principle that there can be no penalty without an expressed provision in the law.³⁰⁶ Article 14 refers to existing crimes under Iraqi criminal law, and penalties for these crimes are already provided for in Iraqi law.³⁰⁷ With respect to penalties for crimes contained in Articles 11 to 13, they could be established by analogy to penalties contained in the 1969 Criminal Code, though it violates the traditionally rigid positivistic approach of Iraqi criminal law, which requires penalties to be specifically established by law.

C. Immunity and Statutes of Limitations

The Statute’s two related issues of removal of immunities provided to the head of state and the members of the Revolutionary Command Council, and the removal of statutes of limitations need to be addressed in the repromulgated, amended law. More importantly, the explanatory memorandum to the repromulgated, amended law should explain the reasons for the validity of removing these immunities³⁰⁸ and for the nonapplicability

304. For further details on penalties and the ICTY, see BASSIOUNI & MANIKAS, *supra* note 266, at 689–710.

305. See THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL art. 14; see also discussion *supra* Part V.B.

306. See Criminal Code, *supra* note 251. This also means that judges can impose the death penalty with legislative authority. For a discussion of the status of the death penalty, see generally WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (2002).

307. See discussion *supra* notes 282–301 and accompanying text.

308. In addition to immunity, the principle of “no responsibility due to ignorance of the legal principle” is also likely to be raised as a defense. This principle was one of the main defenses raised by the defendants in the post-Nuremberg regional trials and was quickly debunked by the prosecution’s argument that the mere attempt of the officials to pass legislation affording themselves immunity from international law is a clear demonstration of their knowledge as to the criminal nature of their actions under international law. See BASSIOUNI, *supra* note 253, at 505.

of statutes of limitations.³⁰⁹

Given that Saddam Hussein will be on trial, the issue of head-of-state immunity will be raised. Article 40 of the 1970 Iraqi Provisional Constitution,³¹⁰ which is referenced in Article 14(a) of the Statute, affords the head of the Iraqi state immunity, although this is contrary to international law.³¹¹ Immunity issues will also arise with respect to members of the Revolutionary Command Council, who also granted themselves immunity under the 1970 Constitution.³¹²

Article 15(c) of the Statute expressly denies immunity with respect to any of the crimes stipulated in Articles 11 to 14. This is consistent with international law, which does not recognize the defense of immunity in relation to international crimes such as genocide, war crimes, and crimes against humanity.³¹³ Such immunity, under international law, can at best only be temporal and not substantive.³¹⁴

The repromulgated, amended law should remove any reference to the 1970 Provisional Constitution,³¹⁵ so as to preclude Saddam Hussein and members of the Revolutionary Command Council from resorting to immunity arguments on the basis of the head-of-state immunity provided in this constitution.

Article 17(d) of the Statute provides that “[t]he crimes stipulated in Articles 11 to 14 shall not be subject to any statute of limitations,” but the crimes under Article 14 are subject to statutes of limitations under Iraqi law. The proposed law should specifically eliminate statutes of limitations from applying to civil cases in relation to crimes committed by the Ba’ath regime as these would unjustly deprive numerous victims of access to reparations or damages for harm they may have suffered under it.³¹⁶

309. *See id.* at 224.

310. *See* 1970 Constitution, *supra* note 136, at art. 40.

311. *See* Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14), available at <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (last visited Apr. 5, 2005) (declining to extend jurisdictional immunity to the Minister for Foreign Affairs of the Congo) [hereinafter Congo v. Belgium]. For a discussion of heads of state immunity, see BASSIOUNI, *supra* note 40, at 71. *See also* Rome Statute, *supra* note 152, at art. 27 (removing both substantive and temporal immunity for crimes within the ICC’s jurisdiction).

312. *See* 1970 Constitution, *supra* note 136, at art. 40 (“The President of the Revolutionary Command Council, the Vice President, and the members enjoy full immunity.”).

313. *See* IMT Agreement, *supra* note 97, at art. 7; ICTY Statute, *supra* note 278, at art. 7(2); ICTR Statute, *supra* note 278, at art. 6(2); Congo v. Belgium, *supra* note 311; Prosecutor v. Taylor, No. SCSL-03-01-I-059 (Special Ct. Sierra Leone May 31, 2004) (denying immunity to Charles Taylor, former President of the Republic of Liberia), available at <http://www.sc-sl.org/taylor-decisions.html> (last visited Apr. 5, 2005). Kathleen Day & Pascale Bonnefoy, *Pinochet Loses Immunity in Chile; Ruling May Lead to Human Rights Trials*, WASH. POST, Aug. 27, 2004, at A14; Larry Rother, *Court Upholds Pinochet Indictment*, N.Y. TIMES, Jan. 5, 2005, at A6.

314. *Id.*

315. *See* 1970 Constitution, *supra* note 136.

316. *See generally* Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. GAOR, Supp. No. 53, Annex, at 214, U.N. Doc. A/40/53 (1985) (stating that victims of abuse of power should be “entitled to access to the

In civil legal systems, civil cases for damages arising out of a particular crime are, to a large extent, determined by the criminal trial, because the latter establishes the facts upon which damages are awarded in criminal cases.³¹⁷ This is why in criminal cases, the rights of the victims are to be protected at the trial level by the prosecutor or by private counsels representing the victims and known as *partie civile*.³¹⁸

Reference should be made in the proposed statute and in the proposed explanatory memorandum that *jus cogens* principles of international law prohibit statutes of limitations for certain international crimes,³¹⁹ but this would not apply to crimes listed in Article 14, which are domestic crimes.

VI. Issues Pertaining to Procedure and Evidence

A. Introduction

It is clear from reading the Statute that its drafters were not familiar with the 1971 Criminal Procedure Law³²⁰ and the inquisitorial system upon which it is based. This is evident in the confusion created by the provisions of the Statute in connection with the roles of the investigative judge and the prosecutor and the application of certain due process rights at different stages of the proceedings.

In an inquisitorial system, an investigative judge independently investigates the facts, including by examining suspects, victims, and witnesses, collects all evidence prior to trial, and makes findings of fact. The findings made by the investigative judge are conclusive and are only reopened at the trial at the trial judge's discretion. This is quite different from the Anglo-Saxon adversary-accusatorial system, where, in addition to issuing indictments and presenting cases before the courts, the role of the prosecutor includes many of the functions performed by an investigative judge

mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered").

317. See *International Protection of Victims*, in 7 NOUVELLES ETUDES PÉNALES 49 (M. Cherif Bassiouni ed., 1988).

318. In all Romanist-Civilist legal systems, the victim of a crime is entitled to be represented at the criminal trial in order to make sure that the record is made as to the victim's basis for a civil claim. The latter must follow the criminal case, and the findings of facts in the criminal case are conclusive in the civil case. In other words, the criminal case controls the civil case as to the findings of fact. The criminal case's judges will then determine whether these facts are sufficient for a civil claim. Facts established in a criminal case will also determine the outcome of the damages. An acquittal, therefore, may nonetheless result in civil recovery. The common law is different, as the criminal and civil cases arising out of the same facts are independent of one another. See *id.*

319. See The UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391, U.N. GAOR, 23rd Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1969). Moreover, the Genocide Convention, *supra* note 267, and the 1949 Geneva Conventions, *supra* note 145, both of which were acceded to by Iraq, remove statutes of limitations for these crimes. See also Christine Van Den Wyngaert, *War Crimes, Genocide and Crimes Against Humanity—Are States Taking National Prosecutions Seriously?*, in INTERNATIONAL CRIMINAL LAW: ENFORCEMENT, *supra* note 93, at 227–38 (discussing, among other things, the nonapplicability of statutory limitations to crimes against humanity).

320. Criminal Procedure Law, *supra* note 194.

under an inquisitorial system. 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.

B. Investigative Judges

As stated above, the Iraqi legal system is not an adversary-accusatorial system—it is an inquisitorial one, modeled after the French legal system. Iraqi criminal laws and procedure are based on Egyptian law,³²¹ which is also based on the French legal system. Under that system, an investigative judge gathers the evidence and prepares the case for submission to trial.³²² The Statute is based in part on the American adversary-accusatorial system, which does not include investigative judges. Several of the Statute's provisions demonstrate the confusion of its drafters regarding the role of investigative judges and of prosecutors in gathering evidence and at the trial under Iraqi law.³²³ Moreover, the procedures fail to understand the respective roles of investigative judges and prosecutors. This can only produce more confusion in respect to the role of investigative judges and prosecutors. It should be noted that the Iraqi judges, investigative judges, and prosecutors have addressed some of the problems discussed herein and have resolved them internally. But a *de facto* solution is not a substitution for a legislative solution because what is controlling is the text of the Statute and not the *de facto* corrections that occurred. These corrections, however, could be relied upon in the repromulgated, amended law.

Article 7(c) of the Statute provides that "up to twenty" permanent tribunal investigating judges may be appointed, and Article 7(j) of the Statute provides that each such judge "shall act independently as a separate organ" of the IST and shall not "seek or receive instructions" from any source whatsoever. This structure, whereby up to twenty judges may be acting independently and without any coordination, raises concerns in light of the fact that several cases that may share the same or similar relevant facts or that may involve more than one perpetrator could be handled by more than one tribunal investigative judge, leading to conflicting facts or find-

321. QANUN AL-UQUBAT [EGYPTIAN PENAL LAW], Law No. 58 for the Year 1957; QANUN AL-IJRAAT AL-JENA'EA [EGYPTIAN CRIMINAL PROCEDURE LAW], Law No. 50 for the Year 1950.

322. See Mirjan Damaska, *Structures of Authority in Comparative Criminal Procedure*, 84 YALE L.J. 539 (1975); Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973); 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 (1978); Abraham S. Goldstein & Martin Marcus, *Comment on Continental Criminal Procedure*, 8 YALE L.J. 1570 (1978).

323. Compare THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL art. 7(h)-(j) (detailing the powers and independence of the investigative judges, including that they "shall not receive instructions from any Governmental Department, or from any other source") with art. 8(b), (h) (giving prosecutors "the right to be involved in the investigative stages of a case," yet also ensuring that the prosecutor shall also not seek or receive instructions from any governmental department or from any other source). This overlap raises the question of how prosecutors can carry out their function without infringing on investigative judges' autonomy.

ings.³²⁴ Furthermore, such an arrangement may also lead the IST to issue inconsistent or conflicting judgments. Accordingly, it would be advisable for the repromulgated, amended law to provide one investigative judge appointed by a Judicial Council with a number of deputies who would be answerable to the investigative judge. This would avoid conflicting fact finding by separate investigative judges.³²⁵ A single investigative judge would be tantamount to a prosecutor general in other legal systems, who supervises investigators, integrates their outcomes, sets up policies for his office, selects personnel, establishes priorities, determines the sequences of cases, consolidates evidence to be presented, and determines when and how it is presented. This has already occurred *de facto* as a chief investigative judge has been appointed. However, a specific provision in the repromulgated, amended law would clarify this situation.³²⁶

C. Prosecutors

The role of prosecutors in Iraqi criminal procedure is different from that of the investigative judge. This is quite different from what prosecutors do in the adversary-accusatorial system. In the Iraqi legal system, prosecutors do not gather evidence, as this is the province of investigative judges. Prosecutors may only investigate and gather evidence before the case is referred to the investigative judge. It is the latter who constitutes the dossier of evidence, to be presented at the trial by a prosecutor. The prosecutor presents the evidence at the trial and calls the witnesses to confirm this testimony. There is no right of confrontation or cross-examination at the trial. The presiding judge asks the questions presented by the defense but is under no obligation to do so. Abuse of judicial discretion is reviewable on appeal. While the Statute provides for the appointment of prosecutors in the Prosecutions Department, it does not articulate their specific roles or parameters. This is further complicated by the fact that the 1971 Criminal Procedure Law does not specify a specific pretrial investigative role for the prosecutor.

The prosecutor also acts during the trial to guarantee the proper procedure of the proceeding and to represent the rights of others, such as victims, who may be affected by the proceedings. However, Article 17 of the Statute, which refers to various Iraqi laws, does not refer to the 1979 Law of Prosecutors³²⁷ as being applicable to the IST. Thus the role of the prosecutor in the IST is uncertain, unless it is deemed subject to the 1979 Law of

324. It appears that some time after the televised, so-called arraignment of Saddam on July 1, 2004, a chief investigative judge was appointed. It is not publicly known who appointed him or what authority he can exercise over other investigative judges who, under IST Statute Article 7(1), are presumably independent of any hierarchical authority.

325. This approach would be consistent with the Criminal Procedure Law of 1971, *supra* note 194, under which investigative judges are free of hierarchical control over findings of fact.

326. It has now been agreed upon internally that a chief investigative judge oversees all investigations as suggested herein before a case is remanded to trial.

327. Law of Prosecutors, *supra* note 237.

Prosecutors and the 1971 Criminal Procedure Law. The difficulty here is that the IST refers to prior Ba'ath regime laws in some instances but not in others. These ambiguities should be resolved in the repromulgated, amended law.

D. Procedural Rights in the Context of the Statute's Hybrid Nature

The competences of the investigative judge and the prosecutor are contained in two different laws. For investigative judges, it is in the 1971 Criminal Procedure Law, and for prosecutors, it is in the 1979 Law of Prosecutors. The latter expanded the powers of the prosecutor, creating overlaps with the powers of the investigative judge. The reason for that was the Ba'ath party's goal of giving the Executive Branch, acting through the Minister of Justice and the Public Prosecutor, greater political influence. Nevertheless, primary competence for investigation and preparation of the evidence to be presented against a person in criminal proceedings remained with the investigative judge. The prosecutor can, however, engage in a variety of investigative activities even before the matter is referred to the investigative judge. Understandably, the intricate nature of these overlapping competences may have led the drafters of the IST to make certain procedural selections based on what they hoped would bring clarity to the process.

The investigative judge's authority under the Criminal Procedure Law of 1971 is stated in the section beginning with Article 51. Article 53(b) specifies that an investigation taking place outside of Iraq is to be exclusively conducted by the investigative judge, who would be appointed for that purpose by the Minister of Justice. In the IST's context, this is relevant in connection with securing evidence regarding violations committed in Kuwait and Iran, since the IST's jurisdiction encompasses crimes committed in these territories by Iraqi nationals. Thus, if the evidence is not gathered by the investigative judge in these two countries, the evidence gathered by the prosecutorial authorities of both Kuwait and Iran cannot be used before the IST or any other Iraqi criminal court. The Iraqi investigative judge would have to hear witnesses himself, and could not rely on witness statements produced by the prosecutorial or judicial authorities of these two governments.³²⁸ The alternative is to establish treaties on mutual legal assistance between Iraq and Kuwait, and Iraq and Iran, to have evidence gathered by the respective national judicial authorities of Kuwait and Iran, in accordance with the requirements of Iraqi criminal law and procedure.³²⁹ It should be noted that there is a treaty on judicial

328. To the best of this writer's knowledge, there has been no such gathering of evidence by the designated chief investigative magistrate so far.

329. There is an Arab Convention on Judicial Cooperation adopted in Riyadh, Saudi Arabia, which serves as a model. Moreover, the Council of Ministers of Justice of the League of Arab States adopted the Draft Arab Model Legislation on international cooperation in penal matters at their meeting in November 2004 in Cairo (prepared by a ministerial committee of experts chaired by this writer and known as the "Siracusa Model Law," since it was prepared at the International Institute for Higher Studies in Criminal Sciences, Siracusa, Italy). See also European Convention on Mutual Assistance in Crimi-

cooperation between Iraq and Kuwait.³³⁰

Article 20 of the Statute provides the accused with a number of rights, which are derived from international human rights law standards and which in turn are derived from the adversarial-accusatorial system.³³¹ The drafters of the 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.³³² Some of these rights cannot be engrafted from one system unto the other. For example, in the inquisitorial system, the questioning of witnesses takes place mostly before the investigative judge during the investigation 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 discretion³³³ as to whether and in what form to pose the questions to the witness.³³⁴ Accordingly, the adversary-accusatorial system's right of the accused to confront and cross-examine a witness³³⁵ cannot be applied in the inquisitorial system.³³⁶ The philosophy is that the investigative judge represents justice and is neither a partisan in the proceedings nor an umpire who referees the sparring of adversaries—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, the 1971 Criminal Procedure Law³³⁷ requires the investigative judge to inform the parties concerned of his field investigations, the hearing of witnesses, findings of certain evidence, and to allow the defense to be present with counsel and to offer any evidence it wishes. These procedural rights of the defense are the counterpart of those offered

nal Matters, ETS No. 30 (Apr. 20, 1959), reprinted in 2 INTERNATIONAL CRIMINAL LAW: PROCEDURAL AND ENFORCEMENT MECHANISMS 381 (M. Cherif Bassiouni ed., 2d rev. ed. 1999).

330. However, its text is unavailable to the author. Kuwaiti sources in the Ministry of Foreign Affairs have confirmed its existence.

331. See, e.g., ICCPR, *supra* note 197, at arts. 9-15.

332. See Damaska, *supra* note 322, at 526-30.

333. 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, Criminal Procedure Law, *supra* note 194, at para. 57, and how to direct questions, *id.* at para. 64.

334. The defense counsel can also pose questions through the president of the court at the trial stage and, like the investigative judge, the president would have the discretion as to whether to direct the questions to a witness or not, and he can phrase those questions in any way he deems fit. Criminal Procedure Law, *supra* note 178, arts. 56-71.

335. In the Anglo-Saxon adversarial-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) (confirming that a criminal defendant's right to confront witnesses against him, as guaranteed by the Confrontation Clause of the Sixth Amendment, includes the right to cross-examination).

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

337. See Criminal Procedure Law, *supra* note 194.

in the adversary-accusatorial model. The fundamental difference between the two systems is the adversary-accusatorial leaves the evidence gathering process and its rebuttal 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 repromulgated, amended law should recognize that the inquisitorial system generally, and the Iraqi legal system in particular, do provide rights to the defense that are equivalent to the due process rights under the adversary-accusatorial system, but that, in light of the differences between the systems, such rights do not arise at the same stages of the proceedings and cannot be applied in the same way. 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, which contradict those of the prosecution. Thus, questions to witnesses are made by the presiding judge, and he may reformulate them. If the defense's questions are not asked, or are 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.

To the extent that it is determined that additional rights and protections are necessary, these should be included during the appropriate stages of the proceedings, which is most likely to be at the investigation level and before the investigative judge. To have partially changed the rules of procedure and evidence in a way that is different, not to say contradictory to the 1971 Criminal Procedure Law, reinforces the perception of a process rigged against the defendants, when, in part, the opposite is what was intended. Paradoxically, now that those supporting the adversary-accusatorial model have succeeded in introducing such rights as confrontation and cross-examination at trial, there will be no way to prevent Saddam and the leaders of his regime to make the trial political and even farcical. To curtail that right after having enunciated it will only add to the charges of hypocrisy and rigged trials.

There are other problematic procedural and evidentiary issues raised by the Statute that cannot be described in detail here, but suffice it to say that they derive essentially from the misconceptions mentioned above. If the Iraqi inquisitorial system is to be preserved, the 1971 Criminal Procedure Law³³⁸ should apply. If a new system is to be developed to be more favorable to the accused, then it should be carefully explained in the official explanatory memorandum to the repromulgated, amended law.

Conclusion

Post-conflict justice is needed in Iraq. The establishment of the IST has been an important first step in the journey of post-conflict justice in Iraq; however, the IST and the Statute are marked by certain flaws identi-

338. *Id.*

fied above. This situation can be corrected by the repromulgation of an amended law, accompanied by an explanatory memorandum. The repromulgated, amended law should be drafted in the Arabic language by jurists familiar with the Iraqi legal system and international criminal law and should be based on existing Iraqi law and legal concepts.

Moreover, the repromulgated, amended law should go beyond merely setting up a specialized tribunal, because this does not sufficiently advance the goals of post-conflict justice identified above in Part I. For example, there is no victim compensation scheme, nor a historic commission to establish the truth. Individual trials such as those that will involve Saddam and ten to twelve of his senior aides cannot be expected to record the history of the regime's crimes.³³⁹

A victim compensation scheme will create popular demand for justice in Iraq. More importantly, in conjunction with a repromulgated, amended law issued in accordance with the propositions made above, the victim compensation scheme could restore the faith of the Iraqi people in the post-conflict justice process and the future of the rule of law in Iraq. The victim compensation scheme could also be tied in to a historic commission, which would be an extremely valuable contribution to the strategies for post-conflict justice in Iraq.

A historic commission is also necessary to advance a broad strategy of post-conflict justice in Iraq. This commission should investigate and document the political violence committed in Iraq between 1968 and 2003, and would provide an objective, formal, and official account of such violence, detailing specific violations of human rights and humanitarian law as well as general patterns of repression.³⁴⁰ The commission would complete its work by issuing a final report providing a detailed account of past violence and violations, and make a series of specific policy recommendations for future prevention. A popular version of its work should be produced for wide dissemination and use in the Iraqi educational system and the Arab world. Both the commission's detailed and popular reports can serve as a permanent reference for future generations.

In addition to the need for a repromulgated, amended law and for an accompanying explanatory memorandum, there is a need for building the Iraqi legal system's institutional capacity and sustainability. The Iraqi justice system does not have enough qualified personnel with necessary expertise for handling cases involving a massive amount of evidence. In addition, the Iraqi judicial system lacks adequate logistical capabilities and infrastructure necessary for a specialized tribunal. To deal with the issue of building institutional capacity and sustainability, significant international assistance is required. This assistance, however, must be provided at the request and under the direction of Iraqis, and should be complementary to and supportive of Iraqi efforts, rather than in the place of such

339. See LANDSMAN, *supra* note 100.

340. See generally HAYNER, *supra* note 45 (outlining the way in which historic truth commissions can aid countries in confronting past atrocities).

efforts. Investigations cannot be developed by U.S. prosecutors and investigators and then handed over to Iraqi investigating judges.³⁴¹ The RCLO, which supports the IST, is conscious of this. Rather, the entire process of the specialized tribunal should function in a manner that builds sustainability and capacity within the Iraqi judiciary. While a process of this type may be difficult and time-consuming, a more comprehensive, engaged approach will significantly improve the IST's legitimacy and provide an array of other benefits to Iraqi society.

Given the enormous task facing such a specialized tribunal, the importance of comprehensive and carefully planned training programs cannot be underestimated.³⁴² Some of these programs have begun under the aegis of the RCLO, but they must be continuous, and be provided separately for the sitting judges, investigative judges, and prosecutors, as well as the clerical staff. The separate training sessions should be topical, skill- and subject-matter-specific, by persons who are familiar with the Iraqi legal system, and conducted in Arabic. Better-trained legal professionals will significantly improve the success of the specialized tribunal, and uniform parallel training will enhance predictability, consistency, and coherence in the practice. This will reduce the need for external, foreign consultants and provide the foundation for a renewed professional judiciary in Iraq.

In the estimation of many, the success of the political transition in Iraq rests on the success of a broad-based post-conflict justice strategy, as outlined above in Part I.³⁴³ How the nation faces its violent past is, to many, central to the determination of its future and to its domestic and international legitimacy. However, it should be clearly understood that opposition to such trials in the Arab world is widespread. The reasons are that this region has witnessed many regime changes, many of which were bloody and none of which resulted in anything resembling genuine post-conflict justice. Obviously, this is not a justification, nor even a valid reason, but popular wisdom seems to rebel against a new *ex post facto* practice, probably because it is viewed as an American idea. More significantly, however, *vox populi* is that the United States, viewed as the promoter of such trials, is delegitimized because of its own "crimes" in Iraq and in the region exceed those committed by Saddam and his regime. Nowhere in the world is this so strongly felt as it is in the Arab world, and probably nowhere in the world is it as strongly felt as in Iraq.

Justice in Iraq is too great a historic opportunity to be missed. It would be a tragic historic event if it were to fail for the reasons stated above. This is why it is imperative to set the process back on track by enacting a

341. The IST investigative judges should be in a position to gather, process, and organize the evidence in a manner consistent with Iraqi law, procedure and practice. International assistance would be most useful, not only with respect to technical capabilities, but also storage facilities, retrieval of evidence, computerization of documents, training of administrators and technical personnel, securing testimony from a large number of victims and witnesses, and providing witness protection.

342. The Regime Crimes Liaison Office ("RCLO"), to its credit, has been providing such programs.

343. See *supra* Part II.

repromulgated, amended law as described above, generating popular Iraqi support for the trials, establishing a victim compensation scheme, and setting up a historic commission whose work can serve as a component of educating future generations. Such a comprehensive plan will also enhance the judiciary's capacity, sustain the rule of law, and enhance democracy.

The IST needs to be perfected, and those who support post-conflict justice in Iraq should support the suggestions contained herein and any other constructive ideas. Moreover, they should lend their moral support to the courageous and dedicated men and women of the IST who have put their lives at risk to affirm the rule of law in their troubled country.

Table of Iraqi Legal Authorities

The following laws relating to Iraq are listed in chronological order. Where indicated, English versions of the laws are available. Otherwise the laws are in Arabic, and copies are on file with the author.

I. Iraqi National Laws

A. Constitutions of Iraq

1. AL-QANUN AL-ASASI AL-IRAQI [Iraqi Fundamental Law of 1925], available at <http://nahrain.com/d/doc/dtr1925a.html> (Arabic version) and <http://www.geocities.com/dagtho/iraqiconst19250321.html> (English version).
2. AL-T'ADIL AL-AWAL LIL QANUN AL-ASASI [First Amendment of the Iraqi Fundamental Law], available at <http://nahrain.com/d/doc/dtr1925b.html> (Arabic version).
3. AL-T'ADIL AL-THANI LIL QANUN AL-ASASI [Second Amendment of the Iraqi Fundamental Law], available at <http://nahrain.com/d/doc/dtr1925c.html> (Arabic version).
4. AL-DUSTUR AL-MO'AKAT 1958 [Provisional Constitution of 1958], available at <http://nahrain.com/d/doc/dtr1958.html> (Arabic version).
5. AL-DUSTUR AL-MO'AKAT 1964 [Provisional Constitution of 1964], available at <http://nahrain.com/d/doc/dtr1964.html> (Arabic version).
6. AL-DUSTUR AL-MO'AKAT 1968 [Provisional Constitution of 1968], available at <http://nahrain.com/d/doc/dtr1968.html> (Arabic version).
7. AL-DUSTUR AL-MO'AKAT 1970 [Provisional Constitution of 1970], available at <http://mallat.com/iraq%20const%201970.htm> (English version).

B. National Legislation of Iraq

1. Qanun al-Uqubat al-Askaria [Military Penal Law], Law No. 13, 1940 and its amendments.
2. Qanun Usul al-Muhakamat al-Askaria [Military Trials Procedural Law], Law No. 44 of 1941.
3. Al-Qanun el-Madani [Civil Code], Law No. 40 of 1951.

4. Qanun Majlis Kidyadat al-Thawra [The Revolutionary National Command Council Statute] No. 25 of 1963; *available at* <http://nahrain.com/d/doc/dtr1963.html>.
 5. Qanun al-Asleha [Weapons Law], Law No. 151 of 1968.
 6. Qanun al-Khedma w'el-Takaoud el-Askary [Military Service Law], Law No. 65 of 1969.
 7. Qanun al-Ijra'at el-Madania [Civil Procedure Law], Law No. 83 of 1969.
 8. Qanun al-Uqubat [Criminal Code], Law No. 111 of 1969 and its amendments (English version on file with author).
 9. Qanun Usul al-Muhakamat al-Jaza'ia [Criminal Procedure Law], Law No. 23 of 1971.
 10. Qanun Wezarat al-Ad'l [Ministry of Justice Law], Law No. 101 of 1977.
 11. Qanun al-Ideá al-A'm [Law of Prosecutors], Law No. 159 of 1979.
 12. Qanun al-Tanzim al-Qada'i [Judicial Organization Law], Law No. 160 of 1979.
- C. Legislation of Occupied Iraq
- LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD (TAL), *available at* <http://www.cpa-iraq.org/arabic/government/TAL-arabic.html> (Arabic version) and <http://www.cpa-iraq.org/government/TAL.html> (English version).
- D. Human Rights Instruments Signed or Acceded to by Iraq
1. The Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ("First Geneva Convention"), Aug. 12, 1949, 6 U.S.T. 3144, 75 U.N.T.S. 31.
 2. The Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea ("Second Geneva Convention"), Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.
 3. The Convention Relative to the Treatment of Prisoners of War ("Third Geneva Convention"), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.
 4. The Convention Relative to the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention"), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Iraq acceded on February 14, 1956.
 5. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force January 12, 1951). Iraq acceded on January 20, 1959.
 6. International Convention on the Elimination of All Forms of Racial Discrimination, March 7, 1966, 5 I.L.M. 352 (entered into force January 4, 1969). Iraq signed on February 30, 1970.
 7. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 6 I.L.M. 360 (entered into force January 3, 1976). Iraq signed on January 3, 1976.

8. International Covenant on Civil and Political Rights, Dec. 19, 1966, 6 I.L.M. 368 (entered into force on March 23, 1976). Iraq signed on March 23, 1976.
9. Convention on the Elimination of All Forms of Discrimination Against Women, July 17, 1980, 19 I.L.M. 33 (1979) (entered into force September 3, 1981). Iraq acceded on August 13, 1986.
10. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force September 2, 1990). Iraq acceded on July 15, 1994.