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# SADDAM HUSSEIN AND THE IST ON TRIAL: THE CASE FOR THE ICC

*Heidi M. Spalholz\**

## INTRODUCTION

Acts of genocide have terrorized humanity since the inception of mankind.<sup>1</sup> While genocide has persisted throughout the centuries, it is only in the last century that its malevolence has been recognized and addressed in the hopes of deterrence.<sup>2</sup> Generally, those responsible for organizing and mobilizing such mass atrocities are heads of state, who up until the last century have enjoyed immunity for their actions.<sup>3</sup> Only recently has international law developed the ability to hold former heads of state accountable for crimes against humanity. It is not surprising that issues of “how” and “when” to try perpetrators of crimes against humanity have not been solved. Accordingly, it was not denied that Saddam Hussein should be held accountable for his crimes against humanity, but rather the question how he was to be held accountable was subject to much debate.

The Iraqi Special Tribunal (IST) was tasked with trying Saddam Hussein. On a broad level, the IST is significant in that it solidified newly developed parameters of head-of-state immunity; shifting the traditional concepts of head-of-state immunity to a modern head of state accountability. However, the Hussein trial also serves to illustrate that head of state accountability is applied in a dichotomous fashion – exempting some while aggressively pursuing others. Such a dichotomy results in the branding of

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<sup>1</sup> MICHAEL J. KELLY, NOWHERE TO HIDE: DEFEAT OF THE SOVEREIGN IMMUNITY DEFENSE FOR CRIMES OF GENOCIDE AND THE TRIALS OF SLOBODAN MILOSEVIC AND SADDAM HUSSEIN 7 (2005) (explaining that the book of Genesis, the first book of the Bible, narrates the first genocide whereby God “cleansed” the earth of every living creature with the exception of Noah, his family, and the animals on the ark).

<sup>2</sup> *Id.*

<sup>3</sup> Jamison G. White, Note, *Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC and a Wake-Up Call for Former Heads of State*, 50 CASE W. RES. 127 at 174 (1999).

head of state tribunals as “victor’s revenge.”<sup>4</sup> This attacks the scrutinizing world’s view of the core legitimacy of the trial; a perceived legitimacy which is necessary not only in the broad sense of affirming the human rights movement, but also in the narrower sense of the future of the Iraqi people and nation as a whole. In addition, The IST has been criticized with having serious procedural and substantive flaws.<sup>5</sup> Hussein’s trial also illustrates the world’s need for a consistent, swift, and fair application of international law once crimes against humanity have been committed; a task which would be best served by the International Criminal Court (ICC).

The problems with the IST, in particular the procedural and substantive problems, are inherent to domestic tribunals tasked with trying heads of state for crimes against humanity. Domestic tribunals are not experienced or equipped in the areas of international law and procedure which are necessary to try such complex cases. A strengthened and supported ICC ultimately leads to global recognition of human rights, and a universally accepted form of restrictive head-of-state immunity. This global recognition will result in a “trickle down” effect in which individual states adopt the principles set forth by the ICC. In theory, a strengthened ICC would encourage individual states to develop domestic legislature and procedures which recognize and address crimes against humanity and a restrictive form of head-of-state immunity. Therefore, by examining the IST and its prosecution of Saddam Hussein, the conclusion of this paper is that the ICC should be wholeheartedly supported and endorsed by states in the hope that individual nation states will develop their own internal laws and procedures to swiftly address and ultimately deter egregious crimes against humanity.

#### OUTLINE OF ANALYSIS

The first section of this comment discusses the erosion of head-of-state immunity to a restrictive form of head-of-state immunity. An understanding of head-of-state immunity is important in regards to the Hussein Trial as it establishes a foundation for the IST’s jurisdiction over Saddam Hussein. Next the significance of fair and just trials for criminals who commit crimes against humanity is discussed. The debate surrounding various options of trying heads of states for crimes against humanity is then dis-

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<sup>4</sup> Mary Margaret Penrose. *It’s Good to be King! Prosecuting Heads of State and Former Heads of State under International Law*, 39 COLUM. J. TRANSNAT’L L. 193, 206-207 (2000-2001) (“Nuremberg is an exemplary testament to ‘victor’s justice,’” defining victor’s justice as “the spoils of war. . . meted out by the victors of war”).

<sup>5</sup> See generally 18 HUMAN RIGHTS WATCH No. 9, JUDGING DUJAIL: THE FIRST TRIAL BEFORE THE IRAQI HIGH TRIBUNAL (Nov. 2006), available at <http://hrw.org/reports/2006/iraq1106/>.

cussed as applied to trying Saddam Hussein. Critiques of the current IST are next briefly addressed. It is concluded that the ICC is the best venue available to adjudicate Saddam Hussein. In particular, it is emphasized that support and endorsement of the ICC by individual states ultimately contributes to the development of domestic laws and procedures of addressing crimes against humanity in individual nation states.

#### HEAD-OF-STATE IMMUNITY SHIFTS TO HEAD-OF-STATE ACCOUNTABILITY

In order to understand head-of-state immunity, an examination of its foundation, state sovereignty, is necessary. Previously notorious heads of state could hide behind the veil of head-of-state immunity, shielding themselves from any accountability for their atrocious actions. Only recently have former heads of state been held accountable for their actions. The first explanation of head-of-state immunity appeared in *The Schooner Exchange v. McFadden* decision. U.S. Supreme Court Justice Marshall explained that heads of state were immune from arrest in a foreign sovereign as they were not “intending to subject (themselves) to a jurisdiction incompatible with his dignity, and the dignity of his nation.”<sup>6</sup> Head-of-state immunity is also closely linked to diplomatic immunity. While head-of-state immunity, diplomatic immunity, and state sovereign immunity are strongly related, the three concepts have diverged into three distinct doctrines.<sup>7</sup>

Analyzing the parameters of and distinctions between diplomatic immunity and state immunity may help to clarify the evolution of head-of-state immunity. An historical examination of the status of head-of-state immunity from the Nuremberg trials on to the Pinochet case is also significant in evaluating the erosion and application of head-of-state immunity.

#### *State Sovereignty*

While the origins of head-of-state immunity are not precisely known, it is believed that it developed hand in hand with the immunity granted to sovereign states.<sup>8</sup> Traditionally, a ruler and his country were legally deemed inseparable.<sup>9</sup> Under the original core notions of state sover-

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<sup>6</sup> *The Schooner Exchange v. McFaddon & Others*, 11 U.S. 116 (1812).U.S. See also HAZEL FOX, *THE LAW OF STATE IMMUNITY* 438 (2002).

<sup>7</sup> Michael A. Tunks, Note, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 DUKE L.J. 651, 652 (2002).

<sup>8</sup> *Id.* See also *Regina v. Bow St. Metro. Stipendiary Magistrate; ex parte Pinochet* (1999) 1 A.C. 147 (H.L.) (U.K.).

<sup>9</sup> Jerrold L. Mallory, Note, *Resolving the Confusion over Heads of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 170 (1986).

eignty, a sovereign state was afforded absolute immunity and could not be tried without its consent.<sup>10</sup> This concept of absolute state immunity reflects the fundamental principle that all sovereigns are equal under international law,<sup>11</sup> and that subjecting a state to a foreign court's jurisdiction would undermine this principle.<sup>12</sup> A ruler's liability was likened to that of their sovereign nation's liability, and both were deemed immune. The rationale is that since acts undertaken by the head of state ultimately "constitute acts of the state, the head of state must be subsumed into the latter's immunity."<sup>13</sup> However, recent interpretations show that state immunity and head-of-state immunity are diverging.<sup>14</sup> Heads of states and their respective states no longer have the same relationship as they once did. Originally, a head of state's actions were those of the state, carried out by a tangible actor. Today, the current role of a head of state depends on the practices of their respective state.<sup>15</sup> As Hazel Fox points out "on one hand, the functions of monarchs such as those of the United Kingdom, The Netherlands, . . . of Presidents, such as those of Austria, Germany . . . and of Emperors . . . are largely ceremonial, although they may retain some residuary constitutional function. On the other hand, the Kings of Jordan, Saudi Arabia, and Morocco continue to exercise political power."<sup>16</sup>

The immunity afforded sovereign states has eroded as the activities states encompass have grown to include not only political activities but also economic affairs.<sup>17</sup> This has resulted in many states adopting a doctrine of restrictive sovereign immunity: granting immunity to foreign states in respect to their governmental acts, yet not granting immunity to states in re-

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<sup>10</sup> Tunks, *supra* note 7, at 653 (citing PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 118 (7th ed. 1997)). For a thorough examination of the immunity of states *see generally* FOX, *supra* note 6.

<sup>11</sup> *See generally* U.N. Charter art. 2, para. 1, *available at* <http://www.un.org/aboutun/charter/>.

<sup>12</sup> Tunks, *supra* note 7.

<sup>13</sup> Kerry Creque O'Neill, *A New Customary Law of Head of State Immunity? Hirohito and Pinochet*, 38 *STAN. J INT'L L.* 289, 292 (2002) (quoting Hazel Fox, *The Pinochet Case No.3*, 48 *INT'L COMP. L.Q.* 687, 694 (1999)).

<sup>14</sup> Mallory, *supra* note 9, at 170-71.

<sup>15</sup> FOX, *supra* note 6 at 422. Fox notes that it is impossible to generalize the roles of head of states.

<sup>16</sup> *Id.* Fox points out that a state may have more than one head of state, as there may be a head of the executive, legislative or other various branches.

<sup>17</sup> PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 119 (7th ed. 1997).

spect to their commercial acts.<sup>18</sup> Since head-of-state immunity had formerly been associated with state sovereignty, establishing clear rules for head-of-state immunity early on did not seem necessary.<sup>19</sup> As the erosion of state sovereign immunity occurred, the status of head-of-state immunity came into question.

### *Diplomatic Immunity*

A form of restrictive immunity for diplomats<sup>20</sup> has been laid out in the 1961 Vienna Convention on Diplomatic Relations.<sup>21</sup> Diplomats are absolutely immune from criminal prosecution by the receiving state and are restrictively immune in regards to civil suits.<sup>22</sup> A diplomat is immune from civil suit only if their action does not relate to their private commercial activities or their own private property.<sup>23</sup> In other words, a diplomat is immune in regards to civil and administrative jurisdiction only if the activity relates to their official functions.<sup>24</sup> However, Article 32 of the 1961 Vienna Convention on Diplomatic Relations grants the sending state the power to waive their diplomat's immunity.<sup>25</sup>

The rationale behind granting broad immunity to diplomats is that diplomatic immunity is necessary for diplomats to act freely to ensure harmonious relations between states.<sup>26</sup> The preamble of the Vienna Convention on Diplomatic Relations stresses that the purpose of diplomatic immunity is "to ensure the efficient performance of the functions of diplomatic missions ."<sup>27</sup>

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<sup>18</sup> *Id.* It is important to note that not all countries adhere to the theory of restrictive immunity for sovereign states, but continue to observe absolute sovereign immunity. *Id.*

<sup>19</sup> Tunks, *supra* note 7, at 655.

<sup>20</sup> A diplomat is defined as "the head of the mission or a member of the diplomatic staff of the mission." Vienna Convention on Diplomatic Relations, art. 1, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter Vienna].

<sup>21</sup> *Id.* at art. 29-38, *See also* MALANCZUK, *supra* note 17, at 123 ("Most of the provisions of the Convention seek to codify customary law, and can therefore be used as evidence of customary law even against states which are not parties to the Convention.").

<sup>22</sup> Vienna, *supra* note 20, at art. 31.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, at art. 32.

<sup>26</sup> Tunks, *supra* note 7, at 654 (pointing out that without diplomatic immunity, international relations would suffer).

<sup>27</sup> Vienna, *supra* note 20, at preamble.

*Impact of Sovereign and Diplomatic Immunity on Head-of-State Immunity*

The rationale behind the doctrine of head-of-state immunity is expressed in the rationales of sovereign and diplomatic immunity. Head-of-state immunity is necessary as a symbol of a state's sovereign independence and also serves to ensure that heads of state can perform their diplomatic duties unhindered.<sup>28</sup> Strong arguments have been made both for a strong and diluted form of a head-of-state immunity doctrine. Supporters of absolute head-of-state immunity argue that heads of state must have freedom in order to perform their diplomatic functions, and cite leaders such as Ariel Sharon who was unable to visit the European Union Headquarters for fear that he might be arrested.<sup>29</sup> Some of the loudest arguments for head-of-state immunity stem from those who may benefit from it themselves. For example, Henry Kissinger, has argued that prosecutions against heads of state or government officials may be fueled by political purposes, creating a situation where international prosecution is used to pursue political vendettas rather than pursuing justice.<sup>30</sup> However this argument is tarnished by the fact that Kissinger himself relies on the shield of head-of-state immunity for his own previous actions.<sup>31</sup>

Arguments against an absolute form of head-of-state immunity stem from the promotion of human rights in international law, and the corresponding erosion of state sovereignty. International law began to recognize that fundamental crimes such as genocide cannot be violated, and that all nations have jurisdiction over the violators of such crimes.<sup>32</sup> The doc-

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<sup>28</sup> Tunks, *supra* note 7, at 654. See also Roxas v. Marcos, 969 P.2d 1209 at 1252 ("The rationale behind the doctrine is to promote international comity and respect among sovereign nations by ensuring that leaders are free to perform their governmental duties without being subject to detention, arrest, or embarrassment in a foreign country's legal system.")

<sup>29</sup> Tunks, *supra* note 7, at 656-57 (citing Herb Keinon, *Israel Compiling List of States With 'Universal Jurisdiction'*, U.S.JERUSALEM POST, July 27, 2001 at 4A).

<sup>30</sup> HENRY A. KISSINGER, DOES AMERICA NEED A FOREIGN POLICY? 273-74 (2001).

<sup>31</sup> KELLY, *supra* note 1, at 81-82 (analyzing the strength of Kissinger's arguments for head-of-state immunity and referencing Christopher Hitchens' assertion of Kissinger's responsibility in the 1975 genocide in East Timor and the 1973 carpet bombing of Cambodia). See also, CNN.COM, UK Bid at Arrest Kissinger Fails (Apr. 22, 2002), available at <http://archives.cnn.com/2002/WORLD/europe/04/22/uk.kissinger/>.

<sup>32</sup> Hari M. Osofsky, Note, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 YALE L. J. 191, 205 (1998) (citation omitted).

trine of universal jurisdiction provides “that claims arising from universally condemned conduct are within the subject matter jurisdiction of all courts, regardless of the location or nationality of the parties.”<sup>33</sup> The application of universal jurisdiction results in compromising a state’s sovereignty. As Richard Haass has explained, “[s]overeignty entails obligations. One is not to massacre your own people . . . [i]f a government fails to meet these obligations, then it forfeits some of the normal advantages of sovereignty, including the right to be left alone inside your own territory.”<sup>34</sup> As international law increasingly recognized human rights, sovereign states and heads of state consequently consented to limitations on their immunity.

### *Former Heads of State*

The status of head-of-state immunity is further complicated when it is analyzed in regards to current and former heads of state, particularly in the realm of criminal liability.<sup>35</sup> Generally, current heads of state enjoy absolute immunity in regards to criminal proceedings while they are in office.<sup>36</sup> Once a head of state leaves office, they enjoy continued immunity from criminal liability only for “official acts undertaken while in office in his or her official capacity.”<sup>37</sup> The Rome Statute of the ICC explicitly denies immunity to sitting heads of state for crimes against humanity.<sup>38</sup> However no nation has actually passed judgment against a sitting head of state.<sup>39</sup> Therefore courts are more likely to subject former heads of state to their

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<sup>33</sup> Jeffrey Rabkin, Note, *Universal Justice: The Role of Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2139 (1995). See also Michael P. Davis, Note, *Accountability and World Leadership: Impugning Sovereign Immunity*, 1999 U. ILL. L. REV. 1357, 1368 (1999) (“The doctrine was first developed to justify the assertion of jurisdiction over pirates who, by definition, were outside of the territorial jurisdiction of any particular country but were, at the same time, a burden on all nations.”) (citations omitted).

<sup>34</sup> Nicholas Lemann, *Letter from Washington: The Next World Order*, THE NEW YORKER, April 1, 2002, at 42, 45-46.

<sup>35</sup> KELLY, *supra* note 1, at 83 (“It should be noted . . . that courts remain ready to recognize immunity defenses as a complete bar to civil suit for heads of state, even after they have left office.”).

<sup>36</sup> KELLY, *supra* note 1, at 78.

<sup>37</sup> *Id.*

<sup>38</sup> Rome Statute of the International Criminal Court, at art. 27, July 17, 1998, U.N. Doc. A/CONF. 183/9, 37 I.L.M. 999, 1010 (“[O]fficial capacity as Head of state or Government . . . shall in no case exempt a person from criminal responsibility under this Statute.”) [hereinafter ICC Statute].

<sup>39</sup> Tunks, *supra* note 7, at 663.



jurisdiction than they are current heads of state, even when dealing with criminal acts of grave proportion, such as genocide.<sup>40</sup> This reticence in itself creates a strong argument for the erosion of current head-of-state immunity, as tyrannical leaders who commit mass atrocities may attempt to hold onto power as long as possible in order to evade prosecution.

#### *Head-of-State Immunity in Practice*

States' application of head-of-state immunity to former and current heads of state who have violated criminal international law illustrates the recent shift towards limiting head-of-state immunity:<sup>41</sup> "While there is no formal recognition of *stare decisis* in international law, cases can become reflective of existing norms and thereby persuasively mandatory in their own right."<sup>42</sup>

Up until the end of WWII, "international law governed state-to-state relations, but . . . [the] relations between individuals and the States of which they were nationals were governed only by the national law of those States, as a matter exclusively within their domestic jurisdiction."<sup>43</sup> The Nuremberg Principle established after WWII was the first instance in which offenders of gross violations were held accountable for their crimes, and a restricted form of head-of-state immunity was recognized.<sup>44</sup> Principle III of the Nuremberg Charter specifically provides that "the fact that a person who committed an international crime acted as Head of State or public official does not free him from responsibility under international law or mitigate punishment."<sup>45</sup> While Nuremberg laid an initial framework for

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<sup>40</sup> *Id.* at 658.

<sup>41</sup> Adam Isaac Hasson, Note, *Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet, and Milosevic – Trends in Political Accountability and Transnational Criminal Law*, 25 B.C. INT'L & COMP. L. REV. 125, 155 (2002).

<sup>42</sup> 42KELLY, *supra* note 1, at 118 (citing Raj Bahla, *The Myth of Stare Decisis and International Trade Law*, 14 AM. U. INT'L L. REV. 845, 852-53 (1999)).

<sup>43</sup> Davis, *supra* note 33, at 1364 (quoting A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN THE WORLD: AN INTRODUCTION TO THE STUDY OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 1, 2 (3rd ed. 1989)).

<sup>44</sup> See Eric A. Posner, *Political Trials in Domestic and International Law*, 55 DUKE L.J. 75, 85-86 (2005). "Throughout most of history victorious states saw no value in conducting trials of the leaders of vanquished states . . . leaders were executed, imprisoned, exiled, or welcomed as guest-hostages." *Id.* at 85.

<sup>45</sup> Principle III, Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, U.N. GAOR, 5th Sess., Supp. No. 12, at 11-14, U.N. Doc. A/1316 (1950).

restrictive head-of-state immunity and recognized accountability for international war crimes and other gross violations of human decency, it was blatantly applied to the vanquished while sparing the victor.<sup>46</sup> The Nazi's had committed massive atrocities against humanity, and were rightfully held accountable for their crimes. However, Nuremberg convicted only 19 persons, leaving a gaping hole in regards to complete criminal liability for the massive atrocities committed by the Nazis.<sup>47</sup> Furthermore with Adolf Hitler dead, none of the men convicted at Nuremberg were considered heads of state, leaving the status of head-of-state immunity open for debate.<sup>48</sup>

The Nuremberg trials drew criticism that the allied powers vigorously pursued the Nazis and Japanese while simultaneously taking extensive measures to protect themselves from the Tribunal's jurisdiction.<sup>49</sup> At the Tokyo Tribunal, the Japanese defendants were precluded from using the *tu quoque*,<sup>50</sup> or "you also," defense. The Japanese application of the *tu quoque* defense would have drawn attention and perhaps even accountability to the allied forces for the fire-bombing of Tokyo and the nuclear bombing of Hiroshima.<sup>51</sup> Nuremberg was significant in that it created a basis for

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<sup>46</sup> See M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 29 (1997) (noting that all of the defendants at Nuremberg were Germans, resulting in a one-sided prosecution); see also Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L.J. 167, 170-71 ("Nuremberg can be seen as an orchestrated and highly-manipulated forum initiated primarily to impress upon the Nazi leadership who the victors were and to discredit them as individuals").

<sup>47</sup> Mutua, *supra* note 46, at 172 (emphasizing that the numbers prosecuted in Germany by the Nuremberg Tribunal and others were "too small to account for such widespread offenses. Prosecution was thus selective . . ."). See also Posner, *supra* note 44, at 84-85.

<sup>48</sup> Penrose, *supra* note 4, at 194-95.

<sup>49</sup> Mutua, *supra* note 46, at 172.

<sup>50</sup> See generally, *Glossary of Key Legal Terms*, Grotian Moment: The Saddam Hussein Trial Blog, Case Western School of Law, <http://www.law.case.edu/saddamtrial/content.asp?id=7> ("Latin for 'you too,' *tu quoque* is an argument used in war crimes trials in which the defense argues that 'since you have committed the same crime, you cannot legitimately prosecute me.' The *tu quoque* argument was rejected as an illegitimate defense by the Nuremberg Tribunal and by the Yugoslavia Tribunal").

<sup>51</sup> E.g., Mutua, *supra* note 46, at 172. But see, *Will Saddam Hussein Get a Fair Trial? Debate Between Dr. Curtis F. J. Doebbler and Professor Michael P. Scharf*, 37 CASE W. RES. J. INT'L L. 21 [hereinafter Doebbler Scharf Debate] (Professor

criminal international laws and a restrictive form of head-of-state immunity. However, Nuremberg also drew criticism that only the vanquished were held accountable for their actions.<sup>52</sup>

As significant as the Nuremberg trials were to the development of the human rights movement, they were nonetheless tarnished by their hegemonic prosecution of the vanquished only. While Nuremberg laid the framework for defining international crimes and restrictive head-of-state immunity, it left the boundaries of head-of-state immunity unclear.

From the end of WWII to 1990, there was little progress in defining the status of head-of-state immunity. The Cold War's *realpolitik* led nations to ignore crimes against humanity, focusing instead on avoiding confrontations with one another.<sup>53</sup> When assessing developments in international law, "it is necessary to look not only at what states do, but also at what they do not do."<sup>54</sup> The apparent indifference of the international legal communities to international crimes created doubt that the status of head-of-state immunity was shifting from an absolute form to a restrictive form.

The parameters of head-of-state immunity swiftly evolved during the 1990s.<sup>55</sup> In *United States v. Noriega*,<sup>56</sup> the Eleventh Circuit Court of Appeals denied Manuel Noriega head-of-state immunity for the charges of

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Scharf states that the *tu quoque* defense has always been dismissed by International courts as an invalid defense. "In doing so, they [international courts] say it is true that in wars and in foreign affairs many countries violate international law, but when a tribunal is set up to prosecute defendants, the only question is: were these defendants guilty of the crimes charged?").

<sup>52</sup> Peter Rosenblum, *Save the Tribunals: Salvage the Movement, A Response to Makau Mutua*, 11 TEMP. INT'L & COMP. L.J. 189, 195 (1997) ("Information continues to surface each year about how much the Allies knew of the extermination camps and how easy it would have been to stop them.").

<sup>53</sup> Geoffrey Robertson, *Ending Impunity: How International Criminal Law Can Put Tyrants on Trial*, 38 CORNELL INT'L L.J. 649, 656. See also, Mutua, *supra* note 46, at 168-69 ("In the fifty years since Nuremberg, states have shown little stomach for the international punishment of war crimes, crimes against humanity, and genocide, although treaties and normative canon proscribing such atrocities have increased.").

<sup>54</sup> MALANCZUK, *supra* note 17, at 43.

<sup>55</sup> KELLY, *supra* note 1, at 80; Tunks, *supra* note 7, at 658 (citing Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2130 (1999) and Jerrold L. Mallory, *Resolving the Confusion*

drug trafficking and ultimately found him accountable for his crimes.<sup>57</sup> This case was unique in that a foreign head of state had never before been brought to the United States to stand trial for an offense committed outside the United States.<sup>58</sup> The *Noriega* case illustrated that heads of state were not immune from liability for criminal activities not related to their official acts.<sup>59</sup> However, the *Noriega* case shed little light on the issue of head-of-state liability for serious crimes against humanity which can be argued as official acts.

After the dissolution of Yugoslavia, the situation in Croatia, Bosnia, and Herzegovina escalated to that of crimes against humanity and genocide.<sup>60</sup> In response, the United Nations Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993.<sup>61</sup> One of the stated main objectives of the ICTY was to “bring to justice persons allegedly responsible for serious violations of international humanitarian law,” including genocide.<sup>62</sup> Article 7 of the Statute of the ICTY specifically provides that “[t]he official position of any accused person, whether as Head of State. . . or. . . Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”<sup>63</sup> Indeed, U.N. Secretary General Kofi Annan, during a visit to the ICTY in 1997 stated that “impunity cannot be tolerated, and will not be. In an interdependent world, the Rule of the Law must prevail.”<sup>64</sup>

In 2001, the ICTY approved indictments for war crimes, crimes against humanity, and genocide for former head of state Slobodan

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*over Head-of-State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 170 (1986).

<sup>56</sup> United States v. Noriega, 117 F.3d 1206 (11th Cir. 1997).

<sup>57</sup> *Id.*

<sup>58</sup> Hasson, *supra* note 41, at 125.

<sup>59</sup> *Id.* at 142.

<sup>60</sup> See generally 16 HUMAN RIGHTS WATCH NO. 7, JUSTICE AT RISK: WAR CRIMES TRIALS IN CROATIA, BOSNIA AND HERZEGOVINA, AND SERBIA AND MONTENEGRO, (2004), available at <http://www.hrw.org/reports/2004/icty1004/>.

<sup>61</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), as amended by U.N. Doc. S/RES/1166 (May 13, 1998)[hereinafter Statute of the ICTY].

<sup>62</sup> See generally, ICTY AT A GLANCE, available at <http://www.un.org/icty/glance-e/index.htm>.

<sup>63</sup> ICTY, *supra* note 61, at art. 7, para. 2.

<sup>64</sup> ICTY AT A GLANCE, *supra* note 62.

Milosevic.<sup>65</sup> While the death of Milosevic abruptly ended his trial,<sup>66</sup> the fact that Milosevic was denied head-of-state immunity and was prosecuted is nonetheless significant as it demonstrates a restrictive form of head-of-state immunity.<sup>67</sup>

In response to the well documented genocide in Rwanda,<sup>68</sup> the International Criminal Tribunal for Rwanda (ICTR) was established.<sup>69</sup> The ICTR was modeled after, and is substantially similar to the ICTY.<sup>70</sup> Like the ICTY, the ICTR did not recognize head-of-state immunity as an affirmative defense for defendants.<sup>71</sup> Hence, Jean Kambanda, Rwanda's former Prime Minister, was convicted of genocide by the ICTR.<sup>72</sup> Once again, absolute head-of-state immunity did not shield Kambanda, illustrating that a restrictive form of immunity is evolving.

While the ICTR and the ICTY were successful in showing that heads of state can be held accountable for crimes against humanity, they also drew fierce criticism.<sup>73</sup>

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<sup>65</sup> Prosecutor v. Milosevic, Indictment, Case no. IT-01-50-I (Nov. 22, 2001) available at <http://www.un.org/icty/milosevic/trialc/decision-e/11122RIE16898.htm>; see also KELLY, *supra* note 1, at 95-97 (noting that the original indictment did not charge Milosevic with genocide, but was amended to include genocide after the prosecutor's successful conviction of a Serb general for the massacre at Srebrenica).

<sup>66</sup> BBC.co.uk, Milosevic suffered heart attack (Mar. 13, 2006), available at <http://news.bbc.co.uk/2/hi/europe/4799880.stm>. For information on the Milosevic trial, see <http://www.un.org/icty/milosevic/>.

<sup>67</sup> KELLY, *supra* note 1, at 118.

<sup>68</sup> See generally HUMAN RIGHTS WATCH, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA (Mar. 1999), available at <http://www.hrw.org/reports/1999/rwanda/>.

<sup>69</sup> Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter "Statute of the ICTR"].

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at Annex.

<sup>72</sup> Prosecutor v. Kambanda, Case No. ICTR 97-23-S (Sept. 4, 1998) available at [http://www.afrol.com/html/Countries/Rwanda/documents/kambanda\\_verdict\\_98.htm](http://www.afrol.com/html/Countries/Rwanda/documents/kambanda_verdict_98.htm) (last visited March 25, 2007) (Kambanda pleaded guilty to conspiracy to commit genocide.).

<sup>73</sup> *C.f.* Mutua, *supra* note 46, at 167 (describing the faults and contradictions of Nuremberg, the ICTY, and the ICTR), with Rosenblum, *supra* note 52, at 189 (arguing that the tribunals are nonetheless significant in the overarching progression of the human rights movement, despite the flaws and hypocrisy of the tribunals), and Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995) ("No matter how many atrocities cases these international

Many argued that the ICTY was established only after the general public realized the atrocities which had occurred in the former Yugoslavia.<sup>74</sup> Once the general public realized the magnitude of the atrocities via published and televised reports, “the political will of the major powers was mobilized by public shame and public outrage, [and only then did the] Security Council resolutions provide[ ] the legal basis for speedy action.”<sup>75</sup> The indifference of the international community to the genocide in Rwanda was even more severe than seen in the former Yugoslavia.<sup>76</sup> This was later acknowledged by U.N. Secretary General Kofi Annan who in a report he commissioned, found both the United Nations and leading member countries responsible for failing to prevent or end the genocide in Rwanda.<sup>77</sup> In fact, some scholars acknowledged Western powers as not only ignoring the genocide in Rwanda, but also as creating and fueling it.<sup>78</sup> The tribunals were consequently viewed as letting powerful states “off the hook” for both their fueling and subsequent failure to address the human rights violations which occurred in Rwanda.<sup>79</sup> In fact, “[j]udges from some of the very countries that are regarded as partly ‘to blame’ for these crimes [were] . . . readily accepted as neutral arbitrators simply because they do not come from

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tribunals may eventually try, their very existence sends a powerful message. Their statutes, rules of procedure and evidence, and practice stimulate the development of the law.”).

<sup>74</sup> Mutua, *supra* note 46, at 174.

<sup>75</sup> *Id.* (quoting journalists of the Yugoslav Tribunal who observed the Security Council’s reactions to published and televised reports of ethnic cleansing “reminiscent of Nazi genocide”).

<sup>76</sup> See Barbara Crossette, *Inquiry Says U.N. Inertia in ‘94 Worsened Genocide in Rwanda*, N.Y. TIMES, Dec. 17, 1999, at A1; Mutua, *supra* note 46, at 176 (“If the former Yugoslavia suffered from international inaction, the world seemed asleep, uncaring, as ominous clouds gathered over Rwanda . . .”). See generally, LEAVE NONE TO TELL THE STORY, *supra* note 68.

<sup>77</sup> Crossette, *supra* note 76, at A1 (quoting Kofi Annan).

<sup>78</sup> Jose Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365, 440. (1999) (“[C]olonizers of Rwanda who imported their racist notions of ‘superior races’ to Rwanda, need to accept their responsibility for creating the ‘tribalism without tribes’ that helped make the genocide possible. . . [M]uch greater blame can be attributed to those, like the French, who, in the 1990s and through the 1994 killings themselves continued to befriend and arm the Habyarimana [Hutu] government. But the circle of blame extends much wider and includes Kofi Annan, who ignored warnings of the impending genocide; all members of the U.N., and particularly the Security Council, who . . . failed to send the 5000 troops that, it is estimated, might have prevented the vast majority of the killings.”).

<sup>79</sup> Mutua, *supra* note 46, at 176.

Rwanda.”<sup>80</sup> On the other hand, many argue that the existence of the tribunals themselves “sends a powerful message. . . [and] stimulate[s] the development of law.”<sup>81</sup> While the criticism of the tribunals is deserved, tribunals have nonetheless illustrated that it is possible for heads of state to be held accountable for crimes against humanity. However, the restrictive form of head-of-state immunity applied by the ICTY and ICTR exists only to try individuals for alleged international crimes that are sanctioned by the U.N. The ability of courts outside the ICTY and ICTR to try former heads of state for human rights abuses would further strengthen the concept of restrictive head-of-state immunity and thereby advance the human rights movement.<sup>82</sup>

The *Pinochet*<sup>83</sup> case squarely addressed the issue of trying a former head of state before a foreign municipal court for allegedly committing gross human rights violations in his domicile.<sup>84</sup> In 1973, after staging a successful coup against elected leader Salvador Allende, General Pinochet became the President and Commander in Chief of the Republic of Chile.<sup>85</sup> Soon after, Pinochet established detention camps throughout Chile with torture becoming commonplace.<sup>86</sup> Pinochet resigned as head of state of Chile in 1990, and became a senator for life. “In 1999, responding to a Spanish request for extradition, the British House of Lords found that former Chilean dictator Augusto Pinochet ‘did not enjoy former head-of-state immunity for acts of torture that he or his government committed during his reign.’”<sup>87</sup> Pinochet argued that mass murder of civilians be considered “official acts,”

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<sup>80</sup> Alvarez, *supra* note 78, at 441.

<sup>81</sup> Meron, *supra* note 73, at 555.

<sup>82</sup> See generally Gilbert Sison, Note, *A King No More: The Impact of the Pinochet Decision on the Doctrine of Head-of-State Immunity*, 78 WASH. U.L.Q. 1583 (2000).

<sup>83</sup> Ex parte Pinochet, *supra* note 8.

<sup>84</sup> Andrea Bianchi, *Immunity versus Human Rights: The Pinochet Case*, 10 EUR. J. INT’L L. 237, 237-38 (1999).

<sup>85</sup> Sison, *supra* note 82, at 1588-89.

<sup>86</sup> *Id.* at 1589. (“[F]rom September to December of 1973 . . . 13,500 people were arrested and possibly 1,500 were killed . . . . In addition, the regime carried out political executions against former members of the Allende government and anyone else deemed to be a danger.”) (citing Nehal Bhuta, *Justice Without Borders? Prosecuting General Pinochet*, 23 MELB. U. L. REV. 499, 507 (1999)).

<sup>87</sup> See generally KELLY, *supra* note 1, at 80 (quoting Christopher L. Blakesley, *Autumn of the Patriarch: The Pinochet Extradition Debacle and Beyond – Human Rights Clauses Compared to Traditional Derivative Protections Such as Double Criminality*, 91 J. CRIM. L. & CRIMINOLOGY 1, 15 (2000)).

thereby triggering an immunity defense. However, the House of Lords found that torture should not be considered an official act for immunity purposes.<sup>88</sup> The Pinochet case was significant in showing that international law was beginning to prioritize human rights and was shifting towards a restrictive form of head-of-state immunity.<sup>89</sup> The *Pinochet* case affirmed more than just a restrictive form of head-of-state immunity; it recognized that foreign courts, not sanctioned by the U.N., have the ability to prosecute visiting defendants who commit gross human rights violations in their home country.

On March 29, 2006, former Liberian President Charles Taylor was arrested and surrendered to the Special Court for Sierra Leone. While the United States generally distanced itself from taking measures which could be perceived as legitimizing the ICC, the United States nonetheless called for Taylor's trial to be moved to the Hague. The United States proposed that Taylor be prosecuted by the Special Court, but that the trial take place using the facilities of the ICC in the Hague. Article 27 of the ICC statute explicitly denies immunity to sitting heads of state for crimes against humanity.<sup>90</sup>

The acknowledgement of head of state accountability for internationally recognized crimes against humanity lays the framework for prosecuting Saddam Hussein. The Statute of the IST provides that "[t]he official position of any accused person, whether as president. . .or in any other capacity, shall not relieve such person of criminal responsibility nor mitigate punishment. No person is entitled to any immunity with respect to any of the crimes stipulated. . ."<sup>91</sup> Nonetheless, Saddam's attorneys indicated their intention to raise head-of-state immunity as a defense.<sup>92</sup> Early in the trial's proceedings Saddam asserted that he deserved immunity because he had been acting in an official capacity.<sup>93</sup> This aimed to require the court to recognize crimes such as genocide and crimes against humanity as "official

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<sup>88</sup> Ex parte Pinochet, *supra* note 8.

<sup>89</sup> Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2183 (1999).

<sup>90</sup> ICC Statute, *supra* note 38, at art. 27.

<sup>91</sup> Statute of the Iraqi Special Tribunal art. 15(c), Dec. 10, 2003, 43 I.L.M. 231, available at [http://www.cpa-iraq.org/human\\_rights/Statute.htm](http://www.cpa-iraq.org/human_rights/Statute.htm) [hereinafter IST Statute].

<sup>92</sup> See, e.g., Michael Kelly, Forum, *Sovereign Immunity for Saddam? Not Likely.*, JURIST, Oct. 18, 2005, <http://jurist.law.pitt.edu/forumy/2005/10/sovereign-immunity-for-saddam-not.php>.

<sup>93</sup> Rajiv Chandrasekaran, *Defiant Hussein Hears Charges in Court; Eleven Lieutenants Are Also Arraigned Before Iraqi Judge*, WASH. POST, July 2, 2004, at A01.



acts” for sovereign immunity purposes. As already seen in the *Pinochet* case, heinous criminal acts against humanity are not considered “official acts” for sovereign immunity purposes.<sup>94</sup> However, Saddam Hussein indicated that he was entitled to a stronger form of current head-of-state immunity. When asked his name, Saddam Hussein stated “I am Saddam Hussein, president of the Republic of Iraq.”<sup>95</sup> As President, Saddam Hussein enacted legislation contrary to international law which granted absolute criminal and civil immunity to himself.<sup>96</sup> Saddam’s statement that he was the current president of Iraq rests on the idea that the invasion of Iraq was illegal under international law, and therefore Saddam Hussein was still the legal President of Iraq.<sup>97</sup> Consequently both Hussein and his lawyers asserted that the invasion of Iraq was illegal.<sup>98</sup> As intriguing as this argument is, it is unlikely that the IST will put the U.S. invasion of Iraq on trial.<sup>99</sup> Furthermore, in order to benefit from head-of-state immunity, a government official must

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available at <http://www.washingtonpost.com/wp-dyn/articles/A19746-2004Jul1.html>.

<sup>94</sup> Ex parte Pinochet, *supra* note 8.

<sup>95</sup> Chandrasekaran, *supra* note 93 (“When the judge asked whether he [Saddam Hussein] was the former president of Iraq, Hussein insisted that he was the ‘present’ and ‘current’ president.”). *But see* Ramsey Clark, WHY I’M WILLING TO DEFEND HUSSEIN, L.A. TIMES, January 24, 2005, available at [http://www.iacenter.org/Iraq/rc\\_whydefend-sh012405.htm](http://www.iacenter.org/Iraq/rc_whydefend-sh012405.htm) (note that Clark, one of Saddam Hussein’s defense attorneys, referred to Hussein as the “former president”).

<sup>96</sup> AL-DUSTUR AL-MO’AKAT [Provisional Constitution], art. 40 (Iraq), available at <http://www.mallat.com/iraq%20const%201970.htm>.

<sup>97</sup> Mikhail Wladimiroff, *Prosecution, Defense and Investigation: Former Heads of State on Trial*, 38 CORNELL INT’L L.J. 949, 964-65 (2005) (“[Sadaam’s defense team] may well argue that the head of state is immune under the Iraqi Constitution as it stood at the time, claiming the present constitutional instruments null and void as being promulgated by foreign occupational powers in violation of the Fourth Geneva Convention or by an illegal government.”) (citations omitted).

<sup>98</sup> Doebbler Scharf Debate, *supra* note 51, at 23 (“I [Doebbler] have been to more than sixty countries after the invasion of Iraq in March 2003, and I have not met one lawyer with whom I had to argue about the illegality of the invasion, except in the United States. In every other country I visited, and meeting with some of the heads of state of those countries and some of their most senior lawyers, they were unequivocally convinced that the United States’ aggression against Iraq was a violation of international law, a violation of Article 2(4) of the Charter of the United Nations . . . ”); Chandrasekaran, *supra* note 93 (noting that Saddam Hussein had remarked that the true criminal is President George W. Bush, and referred to the newly established Iraqi power as an “occupational power”).

<sup>99</sup> See Kelly, *supra* note 92.

be recognized by the immunizing state as the head of state; and at the time of trial, it was doubtful that the newly elected regime in Iraq would recognize Hussein as their current head of state.<sup>100</sup> Thus head-of-state immunity would most certainly not have been afforded to Saddam Hussein.<sup>101</sup>

Like Pinochet, Taylor, Kambanda, and Milosevic, the prosecution of Hussein is significant in recognizing restrictive head-of-state immunity as international law, and establishing that those who disobey the norms of international law can be held accountable.<sup>102</sup> Former heads of state fear that they too could be held accountable for crimes against humanity which they may have committed.<sup>103</sup> However, while head of state accountability is important in addressing past crimes, whether or not its existence will deter future crimes against humanity is questionable.<sup>104</sup> There are two main rea-

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<sup>100</sup> Hasson, *supra* note 41, at 142 (“Recognition [of a head of state] is considered a discretionary function, with there generally being no legal duty to recognize the validity of a state or its leader.”) (citing IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 92 (4th ed. 1990)).

<sup>101</sup> Mikhail Wladimiroff, *Prosecution, Defense and Investigation: Former Heads of State on Trial*, 38 *CORNELL INT’L L.J.* 949, 964-65 (2005).

<sup>102</sup> KELLY, *supra* note 42, 1 at 118 and Hasson, *supra* note 41, at 154-55.

<sup>103</sup> Ricardo Lagos, & Heraldo Muñoz, *The Pinochet Dilemma*, 114 *FOREIGN POL’Y* 26, 36 (1999) (“At the same time that Pinochet was being detained by British authorities in London, the French government was hosting Democratic Republic of Congo president Laurent Kabila, who stands accused of playing an active role in the Rwandan genocide. Kabila was reportedly nervous about traveling to Europe and inquired about formal assurances of diplomatic immunity prior to leaving his home country.”). See also Theodor Meron, *Answering for War Crimes: Lessons from the Balkans*, 76 *FOREIGN AFFAIRS* 2, 7 (1997) (stating that indicted individuals have been “branded with the mark of Cain . . . preventing them from traveling abroad and instilling in them a fear of arrest by . . . foreign governments.”).

<sup>104</sup> Compare M. Cherif Bassiouni, *Post-Conflict Justice In Iraq: An Appraisal of the Iraq Special Tribunal*, 38 *CORNELL INT’L L.J.* 327, 344 (2005) (stating that “an Iraqi tribunal . . . send[s] a particularly powerful message to Arab and Muslim leaders . . . that individuals responsible for systematic repression are no longer guaranteed impunity.”), and Sison, *supra* note 82, at 1584 (2000) (“[T]he Pinochet decision sends a strong message to heads of state who would use their power to commit human rights abuses.”), with David Wippman, Essay, *Atrocities, Deterrence, and the Limits of International Justice*, 23 *FORDHAM INT’L L.J.* 473, 488 (1999) (observing that international criminal prosecutions may “strengthen whatever internal bulwarks help individuals obey the rules of war, but the general deterrent effect of such prosecutions seems likely to be modest and incremental, rather than dramatic and transformative.”), and Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 95 *AM. J. INT’L L.* 7, 31 (2001) (“No one should entertain the illusion that the relative success of the

sons for this. First, the application of head of state accountability has been scattered and inconsistent, leaving many war criminals to wager that they will not be prosecuted.<sup>105</sup> As noted in a hearing before the Foreign Relations Committee, “a person stands a much better chance of being tried for taking a single life than for killing ten thousand or a million.”<sup>106</sup> Second, the nature of individuals who commit crimes against humanity are unlikely to behave rationally and be deterred by the risk of punishment. Consider Martha Minow’s discussion on tribunals’ effect on deterring crimes against humanity:

Does the risk of punishment for human rights violations make the leaders of authoritarian regimes reluctant to surrender power in the first place? Individuals who commit atrocities on the scale of genocide are unlikely to behave as “rational actors,” deterred by the risk of punishment. Even if they were, it is not irrational to ignore the improbable prospect of punishment given the track record of international law thus far.<sup>107</sup>

Theodor Meron, a former ICTY judge and prominent head-of-state accountability advocate, proclaims that the international tribunals “stimulate[d] the development of law,” while also acknowledging that “a uniform and definite corpus of international humanitarian law that can be applied apolitically to internal atrocities” is also needed.<sup>108</sup>

Clearly Saddam Hussein thought that he was above the grasp of international law, and why shouldn’t he have? One of the many cases that was to be brought against Saddam Hussein involved his role in the killing

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ICTY, the ICTR, and the ICC process, or the engagement of national and foreign courts, has somehow exorcised the specter of genocide and other massive crimes from our midst.”).

<sup>105</sup> See Hasson, *supra* note 41, at 158 (“Why do states prosecute leaders such as Noriega, Pinochet, and Milosevic, while others do not pursue sovereigns such as Gaddafi, Mugabe, or Bush?”).

<sup>106</sup> *Is a U.N. International Criminal Court in the U.S. National Interest? Hearing Before the Subcomm. on Int’l Operations of the Senate Comm. on Foreign Relations*, 105th Cong. 72 (1998) (statement of Michael P. Scharf, Professor, New England School of Law).

<sup>107</sup> MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 50 (1998) (internal citations omitted).

<sup>108</sup> Meron, *supra* note 73, at 555.

of 10,000 members of the Kurdish Barzani tribe in the 1980s.<sup>109</sup> In 1993, Human Rights Watch issued a public report drawing global attention to Saddam Hussein's systematic genocide of the Kurds.<sup>110</sup> However, a recently declassified U.S. State Department memo indicates that the United States was aware of Hussein's actions against the Kurds as early as 1983; in particular, the memo notes Saddam's fondness for chemical weapons.<sup>111</sup> Nonetheless, the Reagan and Bush administrations were indifferent to the genocide in Iraq, portraying friendly public relations with Hussein.<sup>112</sup> In effect, this enabled Saddam Hussein to confidently commit further atrocities against humanity throughout his regime.<sup>113</sup> Saddam Hussein evaded accountability as the world's superpowers appeared indifferent to his atrocious human rights violations in the late 1970s, and throughout the 1980s and 1990s.<sup>114</sup> It is thus of no surprise that Saddam Hussein thought he was above international law. The message that a 2005 indictment for crimes committed in the 1980s sends to similarly situated violators of crimes against humanity is not that of deterrence, but rather that of the significance of maintaining good relations with the world's superpowers. Even in the face of these critiques and limitations, it is nonetheless important that

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<sup>109</sup> See generally Michael Scharf, *Basic Information about the Iraqi Special Tribunal*, Grotian Moment: The Saddam Hussein Trial Blog, available at <http://www.law.case.edu/saddamtrial/content.asp?id=1>.

<sup>110</sup> HUMAN RIGHTS WATCH, MIDDLE EAST WATCH REPORT: GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS (1993).

<sup>111</sup> Memo from Jonathan Howe, U.S. Dep't of State, to Sec'y of State Lawrence S. Eagleberger, regarding Iraqi use of chemical weapons (Nov. 21, 1983), available at George Washington University's National Security Archive, Briefing Book No. 82: *Shaking Hands with Saddam Hussein, The U.S. Tilts toward Iraq, 1980-1984*, <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB82/iraq25.pdf> (quoting Saddam Hussein as saying "There is a weapon for every battle, and we have the weapon that will confront great numbers.").

<sup>112</sup> See HUMAN RIGHTS WATCH, WORLD REPORT: IRAQ (1989), available at <http://www.hrw.org/reports/1989/WR89/Iraq.htm#TopOfPage>. There is also evidence that U.S. administrations were supportive of Saddam Hussein's use of chemical weapons. Patrick E. Tyler, *Officers Say U.S. Aided Iraq in War Despite Use of Gas*, N.Y. TIMES, Aug. 18, 2002, at A1.

<sup>113</sup> For a detailed account of Saddam Hussein's crimes against humanity, see KELLY, *supra* note 1 at 124-34.

<sup>114</sup> See Bassiouni, *supra* note 104, at 359 ("[T]hroughout 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.").

Saddam Hussein be held accountable for his crimes. While the implications of holding Saddam Hussein accountable are disputed on an international level, they are undeniably of grave importance to the Iraqi people and the future of Iraq.

#### THE NEED FOR A JUST TRIAL IN POST-CONFLICT IRAQ

Accountability of Saddam Hussein is important to Iraq for a number of reasons. Foremost among them, the prosecution of Saddam Hussein plays a crucial role in allaying the wounds of Saddam's victims, their families, and even bystanders.<sup>115</sup> In addition to healing individuals, the proper prosecution of Saddam Hussein is vital to the collective future of Iraq. A successful trial can "inspire societies that are reexamining their basic values to affirm the fundamental principles of respect for the rule of law and for the inherent dignity of individuals."<sup>116</sup> Furthermore, Iraqi support for the prosecution of Hussein effectively expresses their society's moral condemnation of the atrocities Hussein and his Ba'ath party committed.<sup>117</sup> Recognizing the illegality and inhumanity of the targeted nature of Hussein's crimes towards various ethnic groups is significant in the initial phases of forming a new cohesive democratic Iraq which recognizes the fundamental rights of all ethnic groups.<sup>118</sup> To accentuate this, the IST emphasized that the Iraqi people include "Arabs, Kurds, Turcomans, Assyrians and other ethnic groups, and its Shi'ites and Sunnis."<sup>119</sup> A perception of the IST as unjust could further fuel a civil war by inflaming the pro-Saddam and ex-Ba'athists of the Sunni insurgency. In order for Saddam's prosecution to be considered a success, it is necessary that the Iraqi people view the outcome as fair and just.

Saddam Hussein notoriously denied thousands of victims their due process rights. At first impulse, it is tempting to utilize summary executive punishment when dealing with criminals who have committed such atrocious crimes.<sup>120</sup> While summary executive punishment may momentarily satisfy desires for revenge, a punishment guided by the rule of law is of

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<sup>115</sup> MINOW, *supra* note 107, at 50.

<sup>116</sup> Diane F. Orentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991).

<sup>117</sup> Michael J. Frank, *Justice for Iraq, Justice for All*, 57 OKLA. L. REV. 303, 308 (2004).

<sup>118</sup> *Id.* at 310-11.

<sup>119</sup> IST Statute, *supra* note 91, at art. 1.

<sup>120</sup> Winston Churchill argued against a trial and for summary execution by a firing squad for the Nazi leaders. BRADLEY F. SMITH, *THE ROAD TO NUREMBERG* 45-47 (1981).

indispensable importance. The day following the capture of Saddam Hussein, President Bush declared “now the former dictator of Iraq will face the justice he denied to millions.”<sup>121</sup> A member of Iraq’s transitional Governing Council, Adnan Pachachi, proclaimed that Iraq’s establishment of a fair and just IST “shows we want to apply the rule of law and not let the desire for revenge take over.”<sup>122</sup> However, how Saddam Hussein was to be tried generated much debate.

#### CHOICE OF FORUM ISSUES

Only recently has the legal problem of sovereign immunity been solved, so it is not surprising that we have “reached a stage where the issue is typically no longer whether persons suspected of international crimes should be judged, but the finer points of how they should be judged are debated.”<sup>123</sup> Indeed, once Saddam was captured, the debate revolved not around whether Saddam can or should be tried, but rather around how he should be tried. The debate centered on four models: a domestic tribunal, the ICC, an international tribunal like the ICTY or ICTR, and a hybrid tribunal. Ultimately, it was up to the United States to determine what forum would prosecute Saddam Hussein.<sup>124</sup>

#### *Domestic Tribunal*

The argument for a domestic tribunal, which allows governments to prosecute their own criminals, is rooted in the concepts of sovereignty and

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<sup>121</sup> President George W. Bush, Address to the Nation on the Capture of Saddam Hussein (Dec. 14, 2003), available at <http://www.whitehouse.gov/news/releases/2003/12/20031214-3.html> (last visited Mar. 5, 2006).

<sup>122</sup> Bruce Zagaris, *Iraq Governing Council Establish Special Tribunal and Saddam Hussein is Arrested*, 20 INT’L ENFORCEMENT L. REP. 76, 76 (2004).

<sup>123</sup> Frederic Megret, *Who Should Try Ousted Leaders? In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice*, 38 CORNELL INT’L L.J. 725 (2005).

<sup>124</sup> Hamza Hendawi, *Iraqis Fear They Can’t Put Saddam on Trial*, TUCSON ARIZONA STAR, Jan. 10, 2004 (quoting the International Red Cross spokesman Ian Piper as saying “It is up to the United States, as Iraq’s occupier, to determine how Saddam is to be tried.”), available at <http://www.freerepublic.com/focus/f-news/1055558/posts>. However, because Hussein was a prisoner of war, the United States was required to ensure that its choice guaranteed independence and impartiality in accordance with the Geneva Convention. See generally Convention Relative to the Treatment of Prisoners of War, at art. 84, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. See also Richard Goldstone, *Justice in Iraq: The Trial of Saddam Hussein*, 27 FORDHAM INT’L L.J. 1490, 1508 (2003-2004).

the promotion of the rule of law. A domestic tribunal in Iraq has been deemed by some as essential “because the trials can assist the transition to democracy by demonstrating that no one is above the law.”<sup>125</sup> “The exercise of punitive criminal accountability pursuant to domestic laws is at the heart of our understanding of what it means to have a society built on the rule of law . . .”<sup>126</sup> Another argument in support of a domestic tribunal to try Saddam Hussein is that his victims were Iraqi, and consequently the Iraqis should be able to try him. The counter argument to this is that in Iraq’s current political setting, “fragile democracies may not be able to survive the destabilizing effects of politically charged trials.”<sup>127</sup>

### *The ICC*

After years in the making, the first permanent International Criminal Court (the ICC) was established on July 17, 1998, by the U.N. Diplomatic Conference of Plenipotentiaries, and entered into force on July 1, 2002.<sup>128</sup> The ICC has jurisdiction over genocide, war crimes, and crimes against humanity.<sup>129</sup> While traditional international tribunals are not established until years after the crimes have occurred and been acknowledged, the ICC has the ability to investigate and address crimes against humanity as they happen.<sup>130</sup> Thus, the ICC provides for a consistent application of head of state accountability for crimes against humanity. The ICC is re-

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<sup>125</sup> David M. Gersh, Note, *Poor Judgment: Why the Iraqi Special Tribunal is the Wrong Mechanism for Trying Saddam Hussein on the Charges of Genocide, Human Rights Abuses, and Other Violations of International Law*, 33 GA. J. INT’L & COMP. LAW 273, 280 (2004)(citing Orentlicher, *supra* note 116, at 2543)

<sup>126</sup> Michael A. Newton, *The Iraqi Special Tribunal*, 38 CORNELL INT’L L.J. 863, 864 (2005). See also Jerrold M. Post & Lara K. Panis, *Tyranny on Trial: Personality and Courtroom Conduct of Defendants Slobodan Milosevic and Saddam Hussein*, 38 CORNELL INT’L L.J. 823, 835 (2005) (“The Iraqi people feel strongly motivated to prove to the world, that as a nation of law, Iraq is capable of carrying out justice, against even its most brutal dictators. There is a strong desire to reestablish the pride of Iraq’s glorious past, when the Hammurabi code played an important role in the development of the law – a tradition that was set aside during the Saddam Hussein years.”).

<sup>127</sup> Orentlicher, *supra* note 116, at 2544.

<sup>128</sup> ICC Statute, *supra* note 38.

<sup>129</sup> *Id.* at art. 6, 7, and 8.

<sup>130</sup> *Id.* at art. 13. Art. 13 details the triggering mechanisms to exercise the ICC’s jurisdiction for the crimes listed in Articles 6, 7 and 8 of the statute. The three triggering mechanisms are 1) referral by a State, 2) Initiation by the Independent Prosecutor, and 3) Referral by the Security Council.

garded as highly credible because of its international composition and set of well defined rules of procedure and evidence.<sup>131</sup>

The ICC was the ideal forum to try Saddam Hussein. The ICC's fair and just methods of trying Saddam Hussein would have resulted in the trial's perceived legitimacy by the Iraqi people and international community. An ICC trial of Saddam Hussein also would have served to establish norms of the application of international law once crimes against humanity have been committed. However, it was highly unlikely that the ICC would exercise jurisdiction over Saddam Hussein as the ICC's jurisdiction is primarily limited to crimes committed after 2002.<sup>132</sup> This was further compounded by the recent U.S. administration's blatant disdain for the ICC.<sup>133</sup> Nonetheless, it was conceivable that the ICC could have been able to exercise jurisdiction over Saddam Hussein. The Rome Statute of the ICC encourages states to exercise jurisdiction over those responsible for internal crimes.<sup>134</sup> The ICC was designed as a court of last resort that can only operate when a state with jurisdiction cannot or will not act.<sup>135</sup> The ICC can only exercise jurisdiction if a state with existing jurisdiction is unwilling or unable to prosecute.<sup>136</sup> If the ICC finds that the domestic tribunal is "unwilling or unable to prosecute," it is not completely inconceivable that the ICC could exercise jurisdiction and take over a domestic tribunal.<sup>137</sup> While this was plausible, it was highly unlikely that the ICC would usurp jurisdiction from the IST over Saddam Hussein.

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<sup>131</sup> See *id.*, at art. 63-76; see also Danielle Tarin, Note, *Prosecuting Saddam and Bungling Transitional Justice in Iraq*, 45 VA. J. INT'L L. 467, 528 (2005).

<sup>132</sup> ICC Statute, *supra* note 128, at art. 11.

<sup>133</sup> See generally, Remigius Chibueze, *United States' Objection to the International Criminal Court: A Paradox of "Operation Enduring Freedom,"* 9 ANN. SURV. INT'L COMP. L. 19 (2003). Note that the U.S. is not a signing party to the ICC Statute, *supra*, note 38.; see also letter from John R. Bolton to U.N. Sec'y Gen'l Kofi Annan, reprinted in KELLY, *supra* note 1 at 61; see also Kenneth Roth, *Try Saddam in an International Court*, INT'L HERALD TRIB., Dec. 15 2003 (noting that the Bush Administration pushed for a domestic trial to further undermine the legitimacy of the ICC).

<sup>134</sup> ICC Statute, *supra* note 38, at pmbl. ("The Court's jurisdiction is complementary to national criminal jurisdictions.")

<sup>135</sup> See *id.* at pmbl., art 1, art. 17, and art. 19, para. 2(b).

<sup>136</sup> *Id.* at art. 17.

<sup>137</sup> *Id.* See also, Tarin, *supra* note 131, at 529-30 (2005).



*International Tribunals*

An international tribunal is usually located outside the country where the crimes occurred and is composed of international judges and prosecutors. The Nuremberg tribunal, the Tokyo tribunal, the ICTY, and the ICTR are all examples of international criminal tribunals. Supporters of international tribunals argued that a removed tribunal would create an objective distance between the judges and Saddam, rendering judgments against him more authoritative.<sup>138</sup> On the other hand, dissenters noted that Saddam's crimes were domestic in nature and "[could] only be understood by reference to political projects that took form within a given polity"<sup>139</sup> However, U.N. judges and prosecutors of international tribunals are renowned as experts in trying complex crimes against humanity cases.<sup>140</sup> International tribunals are also argued to have more of an overall deterrent effect because they have a broader reach.<sup>141</sup> Regardless of these arguments, the likelihood of an international tribunal being established to prosecute Saddam Hussein was bleak from the onset for a number of reasons. Most importantly, there was no existing international court that could exercise jurisdiction over Saddam Hussein.<sup>142</sup> Therefore, in order for Hussein to be tried before an international tribunal, a U.N. Security Council would have had to establish such a tribunal "from scratch."<sup>143</sup> The use of an international tribunal was further deterred by the fact that the Bush administration has amply demonstrated its disdain for working with international bodies, in particular the ICC.<sup>144</sup> "Given the outright hostility that the Bush administration has shown toward international criminal justice and the recent testimony of the U.S. War

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<sup>138</sup> Megret, *supra* note 123.

<sup>139</sup> *Id.* at 729.

<sup>140</sup> See generally, Michael J. Kelly, *The Tricky Nature of Proving Genocide Against Saddam Hussein Before the Iraqi Special Tribunal*, 38 CORNELL INT'L L.J. 983 (2005).

<sup>141</sup> Megret, *supra* note 123, at 728-729. However, the author notes that this argument is deflated by the fact that it is logistically and politically impossible for international tribunals to systematically react to all occurrences of international crimes. *Id.* at 729.

<sup>142</sup> KELLY, *supra* note 1 (noting that the ICJ in The Hague only has jurisdiction over states, while the ICTY and the ICTR only have jurisdiction for the criminal events that unfolded in the conflicts in those countries); ICC Statute, *supra* note 38, at art. 11 (explaining that the ICC has jurisdiction only over crimes committed on or after July 1, 2002).

<sup>143</sup> Statute of the ICTY, *supra* note 61; Statute of the ICTR, *supra* note 69. See also Kelly, *supra* note 141 at 1001.

<sup>144</sup> Kelly, *supra* note 141, at 1000.

Crimes Ambassador that the ad hoc tribunals should end their work by 2008, it seems highly unlikely that the United States would support their proliferation."<sup>145</sup> In general, critics of the Bush Administration state that United States' support of a domestic tribunal is reflective of the Bush Administration prioritizing its own ideology over that of the Iraqi people. A domestic tribunal of "Iraqis selected by [a U.S.] picked Governing Council will be less likely to reveal embarrassing aspects of Washington's past support for Saddam Hussein . . . and, most important, less likely to enhance . . . the legitimacy of the detested International Criminal Court."<sup>146</sup>

### *Hybrid Tribunals*

Hybrid tribunals seek to address the problems of both domestic and international tribunals by employing a combination of domestic and international actors.<sup>147</sup> A hybrid tribunal was used in Sierra Leone, employing international and domestic judges, prosecutors and administrative staff.<sup>148</sup> In regards to the IST, a hybrid tribunal was widely regarded as a solution to the alleged competency problems of the Iraqi courts, judges and prosecutors.<sup>149</sup> Commentators argued that international assistance to the IST is necessary to ensure a fair and just trial.<sup>150</sup> However, critics of the hybrid tribunal argue that it does little to help rebuild the local judiciary and that it is not perceived as legitimate by civilians.<sup>151</sup> Furthermore, the United States was unlikely to support a hybrid tribunal because like the international tri-

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<sup>145</sup> William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 9 (2002).

<sup>146</sup> Roth, *supra* note 133 (noting that the Bush Administration pushed for a domestic trial to further undermine the legitimacy of the ICC).

<sup>147</sup> See generally Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003).

<sup>148</sup> Diane F. Orentlicher, *Venues for Prosecuting Saddam Hussein: The Legal Framework*, ASIL INSIGHTS, Dec. 2003, available at [http://www.asil.org/insights/insigh124.htm#\\_ednref6](http://www.asil.org/insights/insigh124.htm#_ednref6).

<sup>149</sup> Goldstone, *supra* note 124, at 1506-07; See also Roth, *supra* note 133.

<sup>150</sup> See generally, Goldstone, *supra* note 124.

<sup>151</sup> Gersh, *supra* note 125, at 281-82.

bunal, a hybrid tribunal is sanctioned by the U.N.,<sup>152</sup> and as discussed below would not offer the death penalty as punishment.<sup>153</sup>

### *Death Penalty Issues*

The debate on the application of an international versus a domestic tribunal model was affected by the issue of the death penalty. Permitted by Iraqi law, the death penalty for Saddam Hussein is a viable punishment in a domestic tribunal.<sup>154</sup> However, the death penalty is not available to U.N. sanctioned international courts.<sup>155</sup> From the standpoint of fairness, guilty persons should receive punishment that is proportional to their crimes.<sup>156</sup> While some may argue that execution was the only penalty sufficient to address Hussein's crimes, it can be argued that there is no punishment that is proportional to his crimes. There was also the argument that the death penalty would provide Hussein with an easy exit; instead, affording Hussein no more than the legal minimum of humane treatment would have ensured

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<sup>152</sup> Note that the Sierra Leone Court was created via the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, available at <http://www.sierra-leone.org/specialcourt/Agreement.html>. These discussions were mandatory pursuant to SC Res. 1315, para. 1, U.N. Doc. S/RES/1315 (2000).

<sup>153</sup> Gersh, *supra* note 125, at note 196. See also Orentlicher, *supra* note 149 ("[T]he Iraqi Governing Council's desire to retain the death penalty presents a significant impediment to the creation of such a hybrid court operating with U.N. support. Neither the United Nations nor most of the United States' European allies would participate in a court that could impose capital punishment.").

<sup>154</sup> Initially, the Coalition Provisional Authority suspended the use of the death penalty in Iraq. See COALITION PROVISIONAL AUTHORITY, ORDER NO. 7, § 3 (June 10, 2003), available at <http://www.cpa-iraq.org/regulations/#Regulations> (suspending the use of the death penalty in Iraq). However, the new Iraqi government has reinstated the death penalty originally stipulated in the Iraqi Penal Code No 111 for 1969.

<sup>155</sup> International human rights law favors the abolition of capital punishment. See Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty. G.A. Res. 44/128, U.N. Doc. A/RES/44/128 (Dec. 15, 1989), available at <http://www.ohchr.org/english/countries/ratification/12.htm> (60 states were parties as of March 13, 2007). See also, BBC Monitoring International Reports, *Iraqi Cabinet Reinstates Death Penalty*, Sept. 27, 2004.

<sup>156</sup> Gerard V. Bradley, *Retribution and the Secondary Aims of Punishment*, 44 AM. J. JURIS. 105, 115 (1999).

that he would truly suffer for his crimes.<sup>157</sup> However Hussein's victims may have objected to him being spared the death penalty as they "[would] not [have] want[ed] the grand author of their miseries to live out his life in comparative comfort under the liberal prison regime in Finland with full visiting rights, telephone access and a weekly ration of condoms."<sup>158</sup> While executing Hussein may have assisted in his victims' healing, it also posed the danger of inciting more violence from his followers. Executing Hussein also had the potential of turning him into a martyr, especially given the Sunnis' perception of the IST as unfair.<sup>159</sup> It is important to note that the majority of countries and international human rights law favors the abolition of capital punishment.<sup>160</sup> Nonetheless, the current U.S. administration appeared adamant that the death penalty should be available for Saddam Hussein. Some argue that the United States' desire for Saddam Hussein's execution is the underlying reason why the United States was opposed to U.N. or ICC involvement with his prosecution.<sup>161</sup>

The IST was established by the U.S.-appointed Iraqi Governing Council on December 10, 2003, and approved by the Iraqi Transitional National Assembly on August 11, 2005.<sup>162</sup> The IST has jurisdiction over Iraqi nationals accused of committing genocide, crimes against humanity, war crimes, and certain other crimes under Iraqi law committed inside or outside of Iraq between July 17, 1968 and May 1, 2003.<sup>163</sup> Located in Baghdad, and composed of Iraqi judges and prosecutors, the IST is in theory a domestic judiciary.<sup>164</sup> However, the IST is admittedly influenced by international expertise.<sup>165</sup> Article 4(d) of the IST provides that "[t]he Governing Council, if it deems necessary, can appoint non-Iraqi judges who have ex-

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<sup>157</sup> Robertson, *supra* note 53, at 669-70 (suggesting sending Slobodan Milosevic and Saddam Hussein to the Falkland Islands to "shiver away their last years . . . [rather than] giving them an easy and quick exit on the gallows").

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Second Optional Protocol, *supra* note 156.

<sup>161</sup> Roth, *supra* note 133; *but see* Robertson, *supra* note 53, at 670-71 (noting that current Iraqi "President Talibani, who will have the power to commute [Saddam Hussein's] sentence, is a life-long opponent of the death penalty.").

<sup>162</sup> Scharf, *supra* note 109.

<sup>163</sup> *See* IST Statute, *supra* note 91, at art. 10.

<sup>164</sup> IST Statute, *supra* note 91, at art. 28 ("The judges, investigative judges, prosecutors and the Director of the Administration Department shall be Iraqi nationals . . .").

<sup>165</sup> "[T]he drafters of the statute consulted international experts in the field . . . [and] concluded that, with international assistance, the Iraqi judicial process would

perience in the crimes encompassed in this statute, and who shall be persons of high moral character, impartiality and integrity.”<sup>166</sup> In effect, it appears that the U.S. has evaded and perhaps undermined the U.N. by establishing a domestic tribunal with international aspects. While locating Hussein’s trial in Iraq allowed the tribunal to be “more responsive to the needs . . . of victims and the affected society[,] it also carrie[d] dangers: localization cannot come at the expense of fundamental fair trial rights . . . .”<sup>167</sup>

#### CRITIQUES OF THE IST

The IST had a number of flaws. The problems associated with the IST undermined the tribunal’s perceived legitimacy.<sup>168</sup> This further jeopardized security in an already hostile Iraq.

##### *Location*

The location of the IST proved to be one of its major downfalls. The IST is located in Baghdad, Iraq where the political climate is highly polarized and very unsafe.<sup>169</sup> The highly dangerous nature of the location of the IST greatly challenged its legitimacy. Human Rights Watch issued the following statement following the first assassination of one of Saddam’s defense attorneys: “We are gravely concerned that this killing will have a chilling effect on the willingness of competent lawyers to vigorously defend the accused in these cases. Such an outcome will seriously undermine the ability of the court to provide a fair trial.”<sup>170</sup> This “chilling effect” also extends to judges, prosecutors, and witnesses. As Justice Richard Goldstone critiques, “[h]ow can you have a trial with bombs going off daily, people

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be able to pursue an accountability process.” Iraqi Special Tribunal website, *available at* <http://www.iraqspecialtribunal.org/en/about/overview.htm>.

<sup>166</sup> IST Statute, *supra* note 91, at art. 4(d). Other provisions require the appointment of non-Iraqi nationals “to act in advisory capacities or as observers.” *Id.*, arts. 6(b), 7(n) and 8(j).

<sup>167</sup> HUMAN RIGHTS WATCH, THE FORMER IRAQI GOVERNMENT ON TRIAL I (2005), *available at* <http://hrw.org/backgrounder/mena/iraq1005/iraq1005.pdf>.

<sup>168</sup> JUDGING DUJAIL *supra* note 5 (detailing the flaws of the IST and calling for the overturning of the verdict).

<sup>169</sup> HUMAN RIGHTS WATCH, IRAQ: DEFENSE IN DANGER (2005), *available at* <http://hrw.org/english/docs/2005/10/21/iraq11911.htm> (“These trials are commencing in an environment of severe insecurity. Everyone participating in the trial process – judges, prosecutors, victims, witnesses and defense counsel – are exposing themselves to grave risks. We have already seen successful and unsuccessful assassination attempts against a judge, prosecutor and other court staff.”).

<sup>170</sup> *Id.*

being attacked daily?"<sup>171</sup> Spokesman for Iraqi Prime Minister, Dr. Laith Kubba, stated that "the Iraqi government is committed to protecting the judges, the witnesses, lawyers, and all those who are involved in the trial of Saddam Hussein, and will not be deterred from pursuing the trial."<sup>172</sup> Nonetheless, the IST in Baghdad put all parties involved in the judicial process in grave danger. The location of the IST has proven to be one of its major downfalls.

### *Competency of Iraqi Courts and Judges*

The competency of the Iraqi courts and judges was challenged as insufficient to act as the framework for the IST. "[T]here have been no independent courts sitting in Iraq since 1968 . . . [T]here are . . . only a handful of judges who are still there who were judges before 1968 . . . [and there is no] pool of independent prosecutors who are available."<sup>173</sup> Iraq once had a proud legal tradition based on one of the world's oldest codifications, the 3750 year old Code of Hammurabi.<sup>174</sup> However, the rule of law in Iraq disappeared as the courts of the Ba'ath party were subjected to the will of an authoritarian government.<sup>175</sup> Furthermore, the IST Statute understandably precluded these judges from serving on the IST.<sup>176</sup> This left mostly inexperienced, low-level judges to serve on the IST, as most of the senior judges in Iraq were members of the Ba'ath Party.<sup>177</sup> This is compounded by the fact that genocide is considered the most complicated crime to try.<sup>178</sup> Many questioned if the IST was prepared to handle such complex cases. The IST was regulated by the Iraqi Code of Criminal Procedure.<sup>179</sup> However, the Iraqi Code of Criminal Procedure "does not contemplate the type of complex litigation involving multiple victims that presents itself in this

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<sup>171</sup> Goldstone, *supra* note 124, at 1505-06.

<sup>172</sup> CNN.com, *Gunmen Kill Hussein Co-Defendant's Lawyer: Assassinations Raise Questions Over Resumption of Trial*, Nov. 8, 2005, <http://www.cnn.com/2005/WORLD/meast/11/08/iraq.main/index.html>.U.S.

<sup>173</sup> Goldstone, *supra* note 124, at 1505-06.

<sup>174</sup> Bassiouni, *supra* note 104, at 328 (citing JOHN HENRY WIGMORE, *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS* 86-93 (1936)).

<sup>175</sup> Stanley A. Roberts, Note, *Socio-Religious Obstacles to Judicial Reconstruction in Post-Saddam Iraq*, 33 *HOFSTRA L. REV.* 367, 380 (2005).

<sup>176</sup> IST Statute, *supra* note 91, at art. 33.

<sup>177</sup> Doebbler Scharf Debate, *supra* note 51, at 24.

<sup>178</sup> See generally WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 345-417 (2000).

<sup>179</sup> IST Statute, *supra* note 91, at art. 16. See also, *Qanun Usul al-Muhakamat al-Jaza-ia* [Criminal Procedure Law of 1971], Law No.23 (Iraq).

context. Iraqi criminal procedure is based on individual cases presented by victims as complainants and investigated only by an investigative judge.”<sup>180</sup> Furthermore, the Iraqi judges and prosecutors did not have experience in trying crimes of this nature. To combat these problems, IST judges and prosecutors traveled to The Hague for a three day conference with jurists from the ICTY and ICC.<sup>181</sup> Although commendable, it is doubtful that attendance at a three-day conference served to compensate for experience.

### *Impartiality of Iraqi Judges*

The process of appointing judges to the IST raised concerns about their independence and impartiality.<sup>182</sup> The IST Statute contains a blanket provision prohibiting any former members of the Ba’ath party to serve as judges.<sup>183</sup> By doing so, the IST assumed that all Ba’ath party members were devotees of Saddam Hussein. This ignores the fact that some Ba’ath party members were not sincere in their devotion to Hussein. Many Iraqis joined the Ba’ath party out of fear.<sup>184</sup> President Bush acknowledged this when he said that Hussein “showed no love for the Iraqi people, particularly those that dared express an opinion other than his.”<sup>185</sup> A judge’s prejudice is not solely related to sincere membership in the Ba’ath party. Just as a Ba’ath devotee would be a biased judge, a judge who was victimized by Hussein would be equally affected by bias.<sup>186</sup> However the IST Statute does not disqualify judges who were victimized by Saddam Hussein and the Ba’ath regime. Article 5 of the IST Statute specifically qualifies judges who were politically prosecuted by the Ba’ath regime.<sup>187</sup> In one instance, a judge who had been victimized by the Ba’ath regime was asked to sit on the appellate division of the IST.<sup>188</sup> The judge, Dara Nureddin, had previously been imprisoned by the Ba’ath regime after declaring as legally invalid a decree

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<sup>180</sup> Bassiouni, *supra* note 104, at 350 (citing Qanun Usul al-Muhakamat al-Jaza-ia [Criminal Procedure Law of 1971], Law No. 132 (Iraq)).

<sup>181</sup> Kelly, *supra* note 141, at 1003.

<sup>182</sup> Bassiouni, *supra* note 104, at 367-72. *See also* FORMER IRAQI GOVERNMENT ON TRIAL *supra* note 167.

<sup>183</sup> IST Statute, *supra* note 91, at art. 33.

<sup>184</sup> Gersh, *supra* note 125, at 296-97.

<sup>185</sup> *Id.*

<sup>186</sup> Bassiouni, *supra* note 104, at 371.

<sup>187</sup> IST Statute, *supra* note 91, at art. 5(f)(1)(i) (stating that a judge shall be disqualified [if] “[h]e or she has a criminal record including a felony unless the felony is a political or false charge made by the Ba’ath Party regime”).

<sup>188</sup> Bassiouni, *supra* note 104, at n. 246.

issued by Saddam.<sup>189</sup> Saddam's defense attorneys also questioned the impartiality of current judge Rauf Abdel Rahman, claiming that he is a native of the Kurdish village of Halabja.<sup>190</sup> Halabja was the target of a 1988 chemical attack; an attack some regard as the one of the most horrific incidents for which Saddam Hussein is responsible.<sup>191</sup> The exclusion of former Ba'athists and the presence of Ba'ath victims as IST judges created a politically polarized tribunal which could only be viewed as biased.<sup>192</sup> Ideally, the IST statute would have been amended to articulate impartiality of judges on a case by case basis.

### *Procedural and Evidentiary Issues*

The IST Statute is guided by the Iraqi Code of Criminal Procedure.<sup>193</sup> The IST, and its guiding Iraqi Code of Criminal Procedure have been criticized for not requiring that guilt be proved beyond a reasonable doubt, not guaranteeing Saddam Hussein access to counsel, and requiring that Saddam be executed immediately upon a judgment of guilt.

A widely accepted component of a fair trial is that the accused be found guilty only if the charge is proved beyond reasonable doubt.<sup>194</sup> The Iraqi criminal law allows defendants to be convicted on the "satisfaction" of the judge.<sup>195</sup> A fair conviction "must be based on a reasoned judgment that demonstrates the establishment of each of the elements of the crime beyond reasonable doubt."<sup>196</sup>

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<sup>189</sup> *Id.* Ironically, Judge Dara was released early from prison along with thousands of others, many common criminals, when Hussein decided shortly before the U.S. invasion that doing so would create insecurity during a potential occupation. *Id.*

<sup>190</sup> *Lawyers Demand Disqualification of Saddam Judge*, MIDDLE EAST TIMES (Feb. 26, 2006), available at <http://www.metimes.com/print.php?StoryID=20060224-044253-6244r>.

<sup>191</sup> See generally KELLY, *supra* note 1, at 128, giving a detailed description of Hussein's crimes against humanity.

<sup>192</sup> Bassiouni, *supra* note 104, at 369. See also FORMER IRAQI GOVERNMENT ON TRIAL, *supra* note 167.

<sup>193</sup> IST Statute, *supra* note 91, at art. 16.

<sup>194</sup> ICC Statute, *supra* note 38, at art.66(3); Rule of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia, Rule 87(A); Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, Rule 87(A).

<sup>195</sup> Law on Criminal Proceedings with Amendments, Number 23 of 1971, Decree No. 230 Issued by the Revolutionary Command Council, Feb. 14, 1971, par. 213 [hereinafter Iraqi Criminal Procedure Code], available at [http://www.law.case.edu/saddamtrial/documents/Iraqi\\_Criminal\\_Procedure\\_Code.pdf](http://www.law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf).

<sup>196</sup> FORMER IRAQI GOVERNMENT ON TRIAL, *supra* note 167, at 8.



A fair trial requires a competent defense, which entails unrestricted and regular access to legal counsel of one's own choice at all stages of a criminal proceeding. Khalil Dulaimi, Saddam Hussein's chief defense lawyer, claimed that he and other defense lawyers for Hussein were not allowed access to their client.<sup>197</sup>

Article 27 of the IST's Statute mandates that punishment must be executed within 30 days of the date a guilty judgment becomes final regardless of pending charges.<sup>198</sup> A guilty verdict of the first charge against Saddam Hussein was very likely.<sup>199</sup> Under Article 27, Saddam did not stand trial for his additional charges as he was executed immediately after the commencement of the first trial. This is exceptionally inconsistent with many of the goals of trying Saddam Hussein for his crimes against humanity. "A possible execution of Hussein at the end of his first trial could leave unanswered questions, however, and might disappoint Iraqis seeking justice for other crimes of the Saddam regime."<sup>200</sup> A premature execution of Saddam Hussein demonstrated the IST's eagerness to "be done with him." This supports the argument that the IST was a mechanism of victor's revenge.

### *Courtroom Behavior*

Saddam Hussein's antics in the courtroom caused many onlookers to doubt the legitimacy and credibility of the IST.<sup>201</sup> Granted, Saddam's outbursts and hunger strike were not exactly the stuff dream tribunals are made of.<sup>202</sup> However Saddam's behavior is not unique; such grandiose defi-

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<sup>197</sup> BBC.co.uk, Lawyers 'denied access to Saddam' (Feb. 5, 2006), available at [http://news.bbc.co.uk/1/hi/world/middle\\_east/4684238.stm](http://news.bbc.co.uk/1/hi/world/middle_east/4684238.stm) (last viewed March 12, 2007).

<sup>198</sup> IST Statute, *supra* note 91, at art. 27.

<sup>199</sup> Kelly, *supra* note 141 (explaining that the first charge against Hussein is considered the easiest of all the charges for the prosecution to prove). See also Katerina Ossenova, *Prosecutor Says Saddam Cannot Rely on Later Trials to Delay Hanging*, JURIST, Feb. 19, 2006, available at <http://jurist.law.pitt.edu/paperchase/2006/02/prosecutor-says-saddam-cannot-rely-on.php> ("Moussawi [the IST Chief prosecutor] estimated that the current trial ha[d] 'passed the 75% mark' and indicated that an appeals panel ha[d] already been assembled.").

<sup>200</sup> Ossenova, *Id.*. See also Posting of Leila Sadat to Grotian Moment: The Saddam Hussein Trial Blog, Case Western School of Law, available at [http://law.case.edu/saddamtrial/entry.asp?entry\\_id=95](http://law.case.edu/saddamtrial/entry.asp?entry_id=95) (Mar. 9, 2006, 7:59 CST).

<sup>201</sup> *Undignified, but not a Farce*, THE ECONOMIST, Feb. 16, 2006, [http://www.economist.com/opinion/PrinterFriendly.cfm?story\\_id=5524516](http://www.economist.com/opinion/PrinterFriendly.cfm?story_id=5524516).

<sup>202</sup> *Id.* ("Since the trial began in October, the former dictator and his co-defendant half-brother have been having a high old time denouncing the American-backed

ance has become standard courtroom behavior for former dictators.<sup>203</sup> Milosevic employed similar courtroom behavior, which resulted in increased support from his followers in Serbia, and a negative impact on the perception that his trial was legitimate.<sup>204</sup> “Thus the parallels we have seen with the style of Milosevic in the first court appearance of Saddam Hussein, questioning the legitimacy of the court, playing defiantly to his radical Arab supporters and to his reputation in Arab history, are not mere coincidence but probably reflect[ ] admiration for the success of the Milosevic tactics and a conscious resolve to model his courtroom conduct after the Serbian dictator.”<sup>205</sup> While Milosevic’s antics may have been aggravating to the ICTY, they did not prove successful in vindicating him. Therefore, some argue that the legitimacy of the IST was not affected by Saddam’s antics.<sup>206</sup> However, the ability of the ICTY to handle Milosevic’s courtroom behavior should be attributed to the fact that the ICTY judges and prosecutors are internationally renowned experts in their field. The same can not be said for the IST judges. Therefore, Saddam’s courtroom behavior strategy may have proven more successful in the IST than Milosevic’s similar strategy at the ICTY.

### *U.S. Involvement*

Both Saddam and critics alike argued that the IST was an extension of the U.S. government.<sup>207</sup> This further contributes to the notion of victor’s justice. In trial, Saddam Hussein stated that the IST was “‘all a theater’

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tribunal as ‘the daughter of a whore’, hurling abuse at the judges, staging walk-outs, railing against Iraq’s occupation by ‘foreign invaders,’ demanding repeated adjournments, and, now, mounting a hunger strike.”)

<sup>203</sup> Michael P. Scharf & Ahran Kang, *Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL*, 38 CORNELL INT’L L.J. 911, 920 (2005).

<sup>204</sup> Jerrold M. Post & Lara K. Panis, *Tyranny on Trial: Personality and Courtroom Conduct of Defendants Slobodan Milosevic and Saddam Hussein*, 38 CORNELL INT’L L.J. 823, 825-6 (noting that “[Milosevic] played to his supporters back in Serbia, put his accusers on the defensive, and in general, turned the trial into an international spectacle.”).

<sup>205</sup> *Id.* at 829. Accord Scharf & Kang, *supra* note 203, at 920 (noting that Hussein and Milosevic share the same lawyer, former U.S. Attorney General Ramsey Clark).

<sup>206</sup> *ECONOMIST, U.S.*, *supra* note 201.

<sup>207</sup> *But see* Frank, *supra* note 117, at 323.

designed by President Bush . . . to win re-election.”<sup>208</sup> The IST has been perceived as an extension of the U.S. government for a number of reasons. First, Saddam was captured and the tribunal was established<sup>209</sup> while Iraq was being occupied by the U.S.<sup>210</sup> Some commentators believed that the IST was illegitimate on its face because it was created by an occupying force.<sup>211</sup> Under the Geneva Convention, occupying powers have limited powers to alter the legislation of the country they occupy.<sup>212</sup> However, subsequent approval of the IST statute by the Iraqi Transitional Government in October 2005 has somewhat enhanced the perceived legality of the IST by international legal scholars. Despite the Iraqi Transitional Government approval of the IST statute, the trial is still viewed as closely associated with politics of occupation. The drafting of the IST statute by the United States CPA is noted by some as further evidence that the IST is an extension of the United States. The IST is also viewed as being controlled by the United States because the United States funds it.<sup>213</sup> U.S. involvement and control appears to be an inherent feature of the IST. As former U.N. Appeal Judge, Richard Goldstone notes:

If this court is in fact or in perception a front for the United States, that is obviously going to be self-destructive. It is not going to bring any substantial justice to the victims. And the international community . . . is simply going to reject it. It would be a recipe for failure.<sup>214</sup>

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<sup>208</sup> CNN.com, *Defiant Saddam Rejects Court Charges*, July 1, 2004, <http://www.cnn.com/2004/WORLD/meast/07/01/iraq.saddam/> (last visited Feb.26. 2007).

<sup>209</sup> IST Statute, *supra* note 91.

<sup>210</sup> See generally Diane F. Orentlicher, *Venues for Prosecuting Saddam Hussein: The Legal Framework*, ASIL INSIGHTS, Dec. 2003, available at [http://www.asil.org/insights/insigh124.htm#\\_ednref6](http://www.asil.org/insights/insigh124.htm#_ednref6).

<sup>211</sup> Bassiouni, *supra* note 104, at 361-63. 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.

<sup>212</sup> Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 212, at art. 70.

<sup>213</sup> Kelly, *supra* note 141, at 1003 (noting that the U.S. annual budget for supporting the IST exceeds \$75 million.); See DEP'T OF STATE, BUREAU OF NEAR EASTERN AFFAIRS, REPORT ON IRAQ RELIEF AND RECONSTRUCTION, Sec. 2207, App. I (Oct. 2005), available at <http://www.state.gov/p/nea/rls/rpt/2207/oct2005/html/54729.htm> (noting that an additional \$128 million has been allocated for investigating crimes against humanity).

<sup>214</sup> Goldstone, *supra* note 124, at 1506.

*Victor's Revenge*

Criticism of the Nuremberg trials has continued to plague modern tribunals. The IST has drawn sharp criticism that it punished the vanquished while sparing the victors.<sup>215</sup> Like its Nuremberg predecessor, the Iraqi Special Tribunal was implemented such that it prosecutes a select few members of the defeated regime, while leaving members of the invasion coalition unaccountable for their actions.<sup>216</sup> However, while M. Cherif Bassiouni acknowledges that the trials may be perceived as “victors’ vengeance,” he continues that:

selective justice, imperfect as it is, does no injustice to those who deserve prosecution. In the 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.<sup>217</sup>

The abovementioned problems with the IST, are not a reflection of a uniquely insufficient Iraqi justice system, but rather these problems are inherent to domestic tribunals tasked with trying heads of state for crimes against humanity. Domestic tribunals are not experienced or equipped in the necessary areas of international law and procedure which are necessary to try such sophisticated cases. On the other hand, the ICC is fully capable of trying such complex cases because of its “entirely international composition

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<sup>215</sup> Bassiouni, *supra* note 104, at 337 (“In the Arab world and elsewhere, these prosecutions will be perceived as victors’ vengeance or unfair because they are selective.”). See also Diane Marie Amann, *Saddam Hussein and the Impartiality Deficit in International Criminal Justice*, 13-14 (Working Paper No. 813249, 2005), available at <http://ssrn.com/abstract=813249>.

<sup>216</sup> C.P.A. Order No. 17 § 2 (3), The Coalition Provisional Authority (Jun. 27, 2004), [http://www.cpa-iraq.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_with\\_Annex\\_A.pdf](http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf) (last visited Feb. 26, 2007) (stating that members of the Coalition forces shall be “subject to the exclusive jurisdiction of their Sending States.”); see generally Ryan J. Liebl, *Rule of Law in Postwar Iraq: From Saddam Hussein to the American Soldiers Involved in the Abu Ghraib Prison Scandal, What Law Governs Whose Actions?* 28 *HAMLIN L. REV.* 91, 107 (2005). See also, Amann, *supra* note 216 (“Many hands enabled repression in Iraq. They were not only Iraqi hands, but also, by all accounts, American, and British, and others.’”)

<sup>217</sup> Bassiouni, *supra* note 104, at 337.

[and] set of well defined rules of procedure and evidence.”<sup>218</sup> Moreover, the ICC does not challenge state sovereignty, but rather it encourages individual states to exercise jurisdiction over violators of the most serious crimes. Article 5 of the ICC statute lists the most serious crimes which it has jurisdiction over.<sup>219</sup> Specifically listed in Article 5 is the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>220</sup> Articles 6, 7, and 8 go into great depth to clarify exactly how it defines genocide, crimes against humanity, and war crimes.<sup>221</sup> Moreover, the ICC can only exercise jurisdiction if a state with pre-existing jurisdiction is unable or unwilling to prosecute.<sup>222</sup> The language of the preamble emphasizes that “The [ICC] established under this Statute shall be complementary to national criminal jurisdiction.”<sup>223</sup> Therefore, the Rome Statute of the ICC encourages states to exercise jurisdiction over those responsible for internal crimes.<sup>224</sup> A strengthened and supported ICC ultimately leads to global recognition of human rights, and a universally accepted form of restrictive head-of-state immunity. This global recognition will result in a “trickle down” effect in which individual states adopt the principles set forth by the ICC. In theory, a strengthened ICC would encourage individual states to develop domestic legislature and procedures which recognize and address crimes against humanity and a restrictive form of head-of-state immunity.

#### CONCLUSION

International law has only recently developed the ability to hold former heads of state accountable for crimes against humanity. It is not surprising that consistent principles of how to try violators of crimes against humanity have not been established. A consistent, swift, and fair application of international law once crimes have been committed against humanity is needed to prevent and deter further crimes against humanity. This was illustrated by the international community’s inaction towards Saddam Hussein

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<sup>218</sup> ICC Statute, *supra* note 38, at art. 63-76; *see also* Tarin, *supra* note 131, at 528 (citing Jess Bravin, “U.N. Panel Urges Prosecution of Sudan in ICC,” *WALL ST. J.*, Feb. 1, 2005, at A4); *see also* Kelly, *supra* note 141.

<sup>219</sup> ICC Statute, *supra* note 38, at art. 5.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at art. 6-8.

<sup>222</sup> *Id.* at art. 17, and art. 19, para. 2(b).

<sup>223</sup> *Id.* at, pmb1. This is further emphasized in Article 1 of the ICC Statute. *Id.* at art. 1.

<sup>224</sup> *Id.* (“The Court’s jurisdiction is complementary to national criminal jurisdictions.”) The ICC is a court of last resort that can only operate when a state with jurisdiction cannot or will not act.

for his initial crimes against humanity, and the subsequent atrocities which ensued. Rather than inconsistently reacting to mass atrocities years after they occur, a proactive front needs to be taken; a task which would be best served and enforced by the ICC. Furthermore, the support and endorsement of the ICC by individual states would contribute to the development of domestic laws and procedures of addressing crimes against humanity in individual nation states.

The critiques of the IST illustrate that it did not provide a fair and just trial for Saddam Hussein. It is clear that international judges and prosecutors with expertise in trying crimes against humanity were needed. It is unfortunate that the ICC was not afforded the opportunity to prosecute Hussein. An ICC trial over Saddam Hussein would have finally confirmed the international community's intolerance for crime's against humanity and would have undisputedly sent a message of deterrence to current and future heads of state. Furthermore, the ICC's fair and just methods of trying Saddam Hussein would have resulted in the trial's perceived legitimacy by the Iraqi people, a perception which is necessary for the stability and future of Iraq. Nonetheless, the IST and its downfalls have illustrated to the international community the need for the ICC.

