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# The Iraqi High Criminal Court: controversy and contributions

**Michael A. Newton\***

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## Abstract

*The Iraqi High Criminal Court established to prosecute Saddam Hussein and other leading Ba'athists is one of the most visible of the current efforts to establish criminal accountability for violations of international norms. Juxtaposed against other tribunals, the High Criminal Court has provoked worldwide debate over its processes and its prospects for returning societal stability founded on respect for human rights and the rule of law to Iraq. This article explores in detail the legal basis for the formation of the High Criminal Court under the law of occupation. It addresses the relationship between the Iraqi model of prosecuting crimes in domestic fora incorporating international law and the alternative model of transferring jurisdiction to an international forum. The controversial aspects of the Iraqi model are considered, such as the legitimacy of its creation, the revocation of official immunity, the procedural fairness of the Statute in the light of international norms, and the substantive coverage of what some have termed an internationalized domestic process. The author concludes that accountability for international crimes is one of the unifying themes that should bind humanity in common purpose with the Iraqi jurists as they pursue justice in accordance with international norms.*

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The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great

\* The author previously served as an Associate Professor of Law, United States Military Academy, and as the Senior Advisor to the United States Ambassador-at-Large for War Crimes.

nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.

Justice Robert H. Jackson, 21 November 1945<sup>1</sup>

The creation of the Iraqi High Criminal Court, commonly referred to as the Iraqi High Tribunal (IHT), as an independent component of the Iraqi domestic structure is not only warranted under the existing structure of international law, but accords with the highest aspirations of those who purport to believe in the rule of law. Just as the law-abiding nations of the world could not contemplate a revitalized Nazi domination, public justice for the crimes committed by the Ba’athist regime could be the cornerstone of an Iraqi society built on democratic principles rather than ethnic and religious divisions. The judges have privately reiterated on a number of occasions that they view the work of the Tribunal as being the doorway that will expand the influence and application of international humanitarian law across the Arab-speaking areas of the world.<sup>2</sup>

From the outset, the Iraqi lawyers who sought to develop a legal framework for prosecuting Saddam Hussein, the former Iraqi leader, and other Ba’athist officials were adamant that holding trials in Iraq would be a baseline towards restoration of the rule of law, rather than simply allowing an external tribunal to exercise punitive power.<sup>3</sup> The Iraqi people suffered the injustices and indignities of the Ba’athist regime<sup>4</sup> and have the strongest stake in the restoration of authentic justice. Paraphrasing Justice Jackson’s assessment of the International Military Tribunal at Nuremberg, ‘no history of the era of Iraq under Ba’athist rule will be “entitled to authority” if it ignores the factual and legal conclusions that will be presented in open court in the IHT’.<sup>5</sup> An accurate and comprehensive

1 Opening Statement to the International Military Tribunal at Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal*, Vol. II, 1947, p. 98.

2 For example, Article 17 (Second) of the Statute makes it clear that the judges ‘may resort to the relevant decisions of the international criminal courts’. Statute of the Iraqi High Criminal Court (IHT Statute), available at <[http://www.law.case.edu/saddamtrial/documents/IST\\_statute\\_official\\_english.pdf](http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf)>. However, investigators and judges preparing for the first trials under the Iraqi High Criminal Court structure were largely unable to obtain Arabic copies of the relevant decisions from the ad hoc Tribunals, the International Military Tribunal at Nuremberg, or other domestic cases applying the relevant principles of international humanitarian law. This defect was remedied in part by the provision of a contract by the US Agency for International Development for translation of the key decisions for the library of the Tribunal.

3 B. Crocker, ‘Iraq: Going it alone, gone wrong’, in R. C. Orr (ed.), *Winning the Peace: An American Strategy for Post-Conflict Reconstruction*, Center for Strategic and International Studies, 2004, p. 281. For a description of the broader mood of the Iraqi people see A. Barnard and M. Kranish, ‘Baghdad falls: Euphoric Iraqis topple symbols; US warns that war not over’, *Boston Globe*, 10 April 2003, art. 1.

4 Non-governmental organizations and the US Department of State have catalogued a panoply of human rights abuses under Saddam’s rule in Iraq, *inter alia* the deaths of 50,000 to 100,000 Kurds, the destruction of 2,000 Kurdish villages, the internal displacement of 900,000 Iraqi civilians, summary executions of over 10,000 political opponents, rapes, enforced prostitution and the intentional deprivation of food to the civilian population. ‘Past repression and atrocities by Saddam Hussein’s regime’, *White House Fact Sheet*, Washington D.C. 4 April 2003, available at <<http://www.whitehouse.gov/infocus/iraq/news/20030404-1.html>>.

5 Report to the President by Mr Justice Jackson (7 Oct. 1946) in *American Journal of International Law*, No. 49, 1955, pp. 44, 49; reprinted in *Report of RH Jackson United States Representative to the International Conference on Military Tribunals*, Department of State Publication 3080, 1949, pp. 432,

record of the history associated with the crimes in question is, after all, one of the vital purposes of individual accountability mechanisms.<sup>6</sup>

Like other post-conflict settings in which the legislative and judicial systems have become corrupted, have been replaced or have simply collapsed under the weight of tyranny, the pursuit of justice became a focal point for the Coalition military forces in Iraq following the fall of the regime.<sup>7</sup> Assuming its proper role on behalf of the Iraqi people, the Interim Iraqi Governing Council made the creation of an accountability mechanism for punishing those responsible for the atrocities of the Ba'athist regime one of its earliest priorities.<sup>8</sup> The Iraqi Special Tribunal (which Iraqi law renamed as the Iraqi High Criminal Court in August 2005) was not an exercise dictated by occupation authorities, but was initiated by Iraqis and revalidated at every stage by the domestic political processes. After an extensive and genuine partnership that entailed months of debate, drafting and consideration of expert advice solicited from the Coalition Provisional Authority (CPA) – which included both British and US lawyers – as well as the advice of other experts outside Iraq, the Iraqi Governing Council issued the Statute of the Tribunal on 10 December 2003.<sup>9</sup> The announcement of the Tribunal Statute was the culmination of a developmental process carried out under the auspices of the Legal Affairs Subcommittee of the Iraqi Governing Council led by Judge Dara, and by sheer coincidence preceded the capture of Saddam Hussein by only four days. Following the return of full sovereignty, the newly elected Iraqi government repromulgated the Statute and published it in the *Official Gazette* of the Republic of Iraq on 18 October 2005 as the Iraqi High Criminal Court Law.<sup>10</sup>

The IHT was created with the express goal of bringing personal accountability to those Ba'athists who were responsible for depriving Iraqis of their human rights, and for virtually extinguishing the real rule of law for over three decades. It would be ironic indeed if the mechanism created by the Iraqis to address the human rights failings of the past became in itself the vehicle for denying and suppressing human rights into the future. The purpose of this paper is to consider the controversial aspects of the creation and implementation of the IHT as well as its contributions to the progressive development of international humanitarian law. After discussing the legal foundations of the Iraqi Tribunal

438. (Justice Jackson also wrote that 'We have documented from German sources the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people.')

- 6 M. P. Scharf and P. R. Williams, 'The functions of justice and anti-justice in the peace-building process', *Case Western Reserve Journal of International Law*, No. 35 (2003), pp. 161, 175.
- 7 See M. A. Newton, 'Harmony or hegemony? The American military role in the pursuit of justice', *Connecticut Journal of International Law*, No. 19 (2004), p. 231.
- 8 Interview with David Hodgkinson, Office of Human Rights and Transitional Justice, Coalition Provisional Authority, Baghdad, 11 Dec. 2003.
- 9 Statute of the Iraqi Special Tribunal. The original statute is available at <[http://www.cpa-iraq.org/human\\_rights/Statute.htm](http://www.cpa-iraq.org/human_rights/Statute.htm)>.
- 10 IHT Statute, above note 2. The Statute was officially published in the *Official Gazette*, No. 4006, Ramadan 14, 1426 Hijri, 47th year.

under international law and commenting on the salient features of its structure in comparison with earlier accountability mechanisms, the paper will conclude by highlighting the contributions that the Tribunal may make to the evolution of the field of humanitarian law.

## The primacy of domestic enforcement in Iraq

Genuine justice cannot be achieved on the wings of vengeance or external manipulation. As a matter of historical record, the mechanics of establishing a judiciary free of political control were the very first concern of the jurists who gathered in Baghdad in December 2003 to assess the formation of the IHT. As a group, they were committed to a process that would comply with human rights norms and demonstrate the power of legal rules and processes over sectarian revenge, tribal animosity or personal hatred. The very essence of a fair trial is one in which the verdict is based not on innuendo and emotion, but on the quantum of evidence introduced in open court. One distinguished scholar has used the phrase ‘Potemkin Justice’ to describe enforcement efforts aimed at achieving only a shadow of justice through undermining the core human rights of those who will face charges under its authority.<sup>11</sup> Avoidance of this is the rationale behind the requirement of the International Covenant on Civil and Political Rights (ICCPR) that a criminal trial be a ‘fair and public hearing by a competent, independent and impartial tribunal established by law’.<sup>12</sup> This fundamental right derives from both human rights norms<sup>13</sup> and the law of occupation (as a subset of the laws and customs of war).<sup>14</sup> Protocol I refined previous articulations of this cornerstone principle by requiring an ‘impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure’.<sup>15</sup>

International mechanisms provide a necessary forum in circumstances where the domestic courts are unable or unwilling to enforce individual accountability for serious violations of international norms.<sup>16</sup> Phrased another way, none of the international fora in recent history has been created to enforce

11 M.C. Bassiouni, *Introduction to International Criminal Law*, Transnational Publishers, New York, 2003, p. 703.

12 International Covenant on Civil and Political Rights 1966, Article 14 (1), entered into force 23 March 1976.

13 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); ICCPR, Article 14 (1); European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) (1953), Art 6 (1); and the American Convention on Human Rights (ACHR) (22 Nov 2 1969), Article 8 (1).

14 Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 (Fourth Geneva Convention), Article 147; Geneva Convention relative to the Treatment of Prisoners of War 1949 (Third Geneva Convention), Article 130.

15 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977 (Protocol I), Art 75 (4).

16 M. A. Newton, ‘Comparative complementarity: Domestic jurisdiction consistent with the Rome Statute of the International Criminal Court’, *Military Law Review*, No. 167 (March 2001), p. 20.

international norms simply because the offences were defined and proscribed by modern international law norms. The very discipline now termed 'international criminal law' has been described as 'the gradual transposition on to the international level of rules and legal constructs proper to national criminal law or national trial proceedings'.<sup>17</sup> It logically follows that where domestic institutions address the underlying criminal conduct, such transfer to the international level is unnecessary. Though internationalized judicial mechanisms have permanently altered the face of international law,<sup>18</sup> the domestic courts of sovereign states are the courts of first resort. The lengthy debate over the phrase 'international criminal law' during negotiation of the Elements of Crimes for the International Criminal Court<sup>19</sup> reflected a continuing tension between the international respect for sovereign justice systems, and the transcendent importance of truth and accountability. Although states co-operate to define and proscribe crimes under international law, the domestic courts of the world retain the primary role in punishing violations and securing the rule of law within their societal structures.<sup>20</sup>

Nevertheless, the inspiring growth of the field of international criminal law since the Second World War has obscured the historical preference for imposing punishment through the national courts of the countries where the crimes were committed.<sup>21</sup> The military commissions established in the Far East incorporated the principle that the international forum did not supplant domestic mechanisms.<sup>22</sup> The UN Secretary-General has similarly concluded that 'no rule of

17 A. Cassese, *International Criminal Law*, Oxford University Press, 2003, p. 18.

18 See generally P. R. Williams and M. Scharf, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia*, Rowman & Littlefield, Lanham, 2002.

19 The Elements of Crimes were adopted by consensus and included compromise language in the introduction to Article 7 specifying that the crimes against humanity provisions relate to 'international criminal law' and as such 'should be strictly construed', UN Doc. PCNICC/2000/INF/3/Add.2 (2000).

20 *A-G of Israel v. Eichmann-Supreme Court Opinion*, reprinted in 36 ILR 18, 26 (Isr Dist Ct Jerusalem 1961), *aff'd* 36 ILR 277 (Isr Sup Ct 1962) (international law is 'in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial').

21 The Moscow Declaration, signed during the Moscow Conference in 1943 by the United States, the United Kingdom and the USSR, specifically stated that German criminals were to be 'sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be erected therein'. The international forum was limited only to those offences where a single country had no greater grounds for claiming jurisdiction than another country. IX Department of State Bulletin, No. 228, p. 310, reprinted in *Report of RH Jackson United States Representative to the International Conference on Military Tribunals*, Department of State Publication, 1945, p. 11. The Moscow Declaration was actually issued to the press on 1 November 1943. For an account of the political and legal manoeuvring behind the effort to put this stated war aim into practice, see P. Maguire, *Law and War: An American Story*, Columbia University Press, New York, 2000, pp. 85–110. Justice Jackson accepted the fact that the International Military Tribunal was merely a necessary alternative to domestic courts for prosecuting the 'symbols of fierce nationalism and of militarism', and declared that any defendants who succeeded in 'escaping the condemnation of this Tribunal ... will be delivered up to our continental Allies'. Opening Statement to the International Military Tribunal at Nuremberg, above note 1, pp. 99–100.

22 See Regulations Governing the Trial of War Criminals, General Headquarters, United States Army Pacific, AG 000.5 (24 Sept. 1945) [5 (b)] ('Persons whose offenses have a particular geographical location outside Japan may be returned to the scene of their crimes for trial by competent military or civil tribunals of the local jurisdiction') (copy on file with author).

law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable'.<sup>23</sup> The Iraqi people will determine the ultimate legitimacy and effectiveness of the trials.

The Iraqi High Criminal Court is built on the truism that sovereign states retain primary responsibility for adjudicating violations of crimes defined and promulgated under international law.<sup>24</sup> The process of developing the Statute in late 2003 was opaque to the outside world. This prompted observers to criticize the IHT, on the assumption that it would function in fact as a 'puppet court of the occupying power'.<sup>25</sup> Admittedly its forerunner, the Iraqi Special Tribunal (IST), was formed during the occupation by the United States, its original funding flowed from the United States (a total of US \$ 128 million to date),<sup>26</sup> its judges were selected by the US-appointed provisional government and the judges and prosecutors were to be assisted by US advisors. If the IST had indeed been promulgated as a sham court created only to accomplish the bidding of the occupation authorities, it would violate the basic human right of Ba'athist officials to have an adjudication of their offences based on the highest standards of law and professional conscience of the judges free of external bias or prejudice.<sup>27</sup> Iraqi officials, however, were adamant that a tribunal in Baghdad would be closer to the conflict in temporal terms as well as to the available evidence and the victims whose rights had been violated by the regime. While it created the seeds of subsequent controversy, the Iraqi decision to incorporate international norms into the domestic criminal code was consistent with the established practice of the international community, and prevented a widespread sense of hopelessness and renewed victimization for ordinary citizens.

23 Report of the Secretary-General, 'The rule of law and transitional justice in conflict and post-conflict societies', 23 Aug 2004, UN Doc. S/2004/616 [17], available at <<http://daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>>.

24 The necessity for states to use domestic criminal fora and penal authority to enforce norms developed in binding international agreements is perhaps one of the most consistent features of the body of international criminal law. See e.g. Convention on the Prevention and Punishment of the Crime of Genocide, US Naval War College, Newport, Rhode Island, 1951 (Article V obligates High Contracting Parties to enact the necessary domestic legislation to give effect to the criminal provisions of the Convention). Of particular note in the post-9/11 world, the imposition of criminal accountability for acts of terrorism is exclusively reserved to the courts of sovereign states through the welter of treaties created by sovereign states. M. A. Newton, 'International criminal law aspects of the war against terrorism', in F. Borch and P. Wilson (eds.), *International Law and the War On Terror*, US Naval War College International Law Studies No. 79, 2003, p. 323; M. C. Bassiouni, *International Terrorism: Multilateral Conventions (1937–2001)*, Transnational Publishers, New York, 2001.

25 M. P. Scharf, 'Is it international enough? A critique of the Iraqi Special Tribunal in light of the goals of international justice', *Journal of International Criminal Justice*, No. 2, 2004, pp. 330, 331; H. Weinstein, 'Law experts divided over legitimacy of tribunal', *Los Angeles Times*, 10 October 2005.

26 *2207 Report on Iraq Relief and Reconstruction: Quarterly Update to Congress*, Bureau of Resource Management, January 2006, pp. 32–4, available at <<http://www.state.gov/documents/organization/58811.pdf>>. These funds support, *inter alia*, the work of the Regime Crimes Liaison Office, whose staff have played a leading role in supporting Tribunal investigations and operations, the provision of security to both court personnel and defence attorneys, exhumation of mass graves, upgraded facilities for storing and handling evidence, the building of courtrooms, the conduct of investigations, including interrogations, and the training of IST staff.

27 ECHR, *Findlay v. UK* (1997) ECHR Series A No. 115–116; ECHR, *Bentham Case* (1985) ECHR Series A No. 97, 615; ECHR, *Piersack Case* (1981) ECHR Series No. 53, 616.



## The creation of and controversy behind the Tribunal

History is replete with individuals certain of their own superiority and moral impunity. Charles I demanded to know ‘by what authority – legal, I mean – do you sit as a court to judge me?’<sup>28</sup> When given a copy of his indictment before the International Military Tribunal at Nuremberg, Hermann Göring stroked the phrase ‘The victor will always be the judge and the vanquished the accused’ across its cover.<sup>29</sup> Slobodan Milošević demonstrated utter contempt for a tribunal that in his words represents ‘a lawless act of political expediency’ that has perpetrated a ‘terrible fabrication’ in order to ‘destroy and demonize’ him.<sup>30</sup> Likewise, Saddam Hussein demonstrates a pathological narcissism that shows his contempt for the rule of law. Even as the US soldier from the Fourth Infantry Division pulled him from his hole in the ground, Hussein defiantly stated, ‘I am Saddam Hussein, the President of Iraq.’<sup>31</sup>

During his first appearance before an IST investigative judge, Saddam was notified of his rights and acknowledged receipt of those rights in writing with the accompanying signature of the investigative judge, as required by the Iraqi Criminal Procedure Law. He challenged the legal authority of the IST and demanded to know: ‘How can you charge me with anything without protecting my rights under the constitution?’<sup>32</sup> He argued with the investigative judge and denied that he had any jurisdiction over him by saying, ‘I’m elected by the people of Iraq. The occupation cannot take that right away from me.’<sup>33</sup>

For those who have observed the Milošević trial, Saddam’s statements were eerily familiar. During his initial appearance before the International Criminal Tribunal for the former Yugoslavia (ICTY) on 3 July 2001, Milošević challenged the legality of the Tribunal’s establishment. In a pre-trial motion, Milošević stated, ‘I challenge the very legality of this court because it is not established on the basis of law.’<sup>34</sup> Of course, it is an accepted principle of modern international law that ‘individuals who commit international crimes are

28 G. Robertson, *The Tyrannicide Brief*, Chatto & Windus, London, 2005, p. 6.

29 J. E. Persico, *Infamy on Trial*, Penguin, Harmondsworth, 1994, p. 83.

30 Statement of Slobodan Milošević on the Illegitimacy of the Hague Tribunal, 30 Aug. 2001, available at <<http://www.slobodan-milosevic.org/spch-icty.htm>>.

31 R. McCarthy, ‘I am Saddam Hussein, the President of Iraq’, *Guardian*, 2 July 2004.

32 R. Cornwell, ‘Saddam in the dock: Listen to his victims, not Saddam, says White House’, *Independent*, 2 July 2004 (reporting that Hussein stated, ‘This is all theatre,’ at his first pre-trial hearing). Available at <<http://news.independent.co.uk/world/americas/story.jsp?story=537296>>.

33 ‘Defiant Saddam rejects court, charges’, CNN.com, 1 July 2004, available at <<http://www.cnn.com/2004/WORLD/meast/07/01iraq.saddam/>> (last visited on 3 March 2006). Lawyers hired by Saddam Hussein’s wife rapidly played the legitimacy card by claiming that the IST could not impose any punishments lawfully because it lacked legitimacy, or lawful creation, and accordingly its operation violated core human rights norms. R. McCarthy and J. Steele, ‘Saddam on trial: Legitimacy and neutrality of court will be challenged’, *Guardian*, 2 July 2004, available at <<http://www.guardian.co.uk/Iraq/Story/0,2763,1252096,00.html>>.

34 ‘Milošević challenges the legality of the UN tribunal’, *Online NewsHour*, 13 Feb. 2002, available at <[http://www.pbs.org/newshour/updates/february02/milosevic\\_2-13.html](http://www.pbs.org/newshour/updates/february02/milosevic_2-13.html)>.

internationally accountable for them'.<sup>35</sup> The Milošević Trial Chamber reaffirmed its jurisdiction, and opined that the lack of immunity for international crimes 'at this time reflects a rule of customary international law'.<sup>36</sup> Rather than relying on an international legal forum to overcome domestic immunity, Iraqi leaders took the preferable path of using domestic legislation to revoke the 'full immunity' that the 1970 Constitution afforded to Ba'athist officials.<sup>37</sup> The IHT Statute almost mirrors the language of the Rome Statute of the International Criminal Court<sup>38</sup> by providing that

The official position of any accused person, whether as president, chairman or member of the Revolution Command Council, prime minister, member of the counsel of ministers, a member of the Ba'ath Party Command, shall not relieve such person of criminal penal [responsibility],<sup>39</sup> nor mitigate punishment. No person is entitled to any immunity with respect to any of the crimes stipulated in Articles 11, 12, 13, and 14 of this law.<sup>40</sup>

In an effort to illustrate the transformation of justice, the Statute specifies that 'No officer, prosecutor, investigative judge, judge or other personnel of the Tribunal shall have been a member of the Ba'ath Party'.<sup>41</sup> This provision has been criticized both within and outside Iraq on the grounds that it fails to distinguish between those lawyers who were active party members and supportive of the Ba'athist policies, and those who were only token members, thus in fact but not in spirit. The effect of this has been to dilute the pool of qualified jurists significantly, even as it introduced an external political vetting process into the selection and qualification of judges.

An international court with international judges and applying international law would have been immune to the concerns of domestic politics or the pressure of the populace. Such an impartial bench could have overturned the immunity of Iraqi officials with barely a ripple of legal commentary. Many close observers have nonetheless concluded that an international tribunal superimposed by the UN Security Council or the political directives of other states would have

35 A Watts, 'The legal position in international law of heads of state, heads of government and foreign ministers', *Recueil des Cours de l'Académie de droit international de La Haye*, No. 3, 1994, p. 82.

36 *Prosecutor v. Milošević*, Case No. IT-99-37-PT, Decision on Preliminary Motion, para. 28 (8 Nov. 2001).

37 1970 Interim Constitution of Iraq, Article 40, reprinted in *Iraqi Laws Referenced in the Statute of the Iraqi Special Tribunal*, US Institute of Peace, 2004.

38 Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Statute), 17 July 1998, UN Doc. A/Conf.183/9 Article 27, repr. in 37 ILM 999 (1998).

39 The omission of the word responsibility in the English version of the revised Statute appears to be an error of translation. Article 15(c) of the original 2003 Statute read as follows: The official position of any accused person, whether as president, prime minister, member of the cabinet, chairman or a member of the Revolutionary Command Council, a member of the Arab Socialist Ba'ath Party Regional Command or Government (or an instrumentality of either) or as a responsible Iraqi Government official or member of the Ba'ath Party 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 in Articles 11–14.

40 IHT Statute, above note 2, Article 15 (Third).

41 *Ibid.*, Art 33.

resulted in a crisis of legitimacy that would have doomed efforts to prosecute the Ba'athists responsible for the oppression of Iraqi society. Even if it had been able to function inside Iraq, the ability of such a forum to impose punishments acceptable to the international community would likely have been negated by its form of neocolonialism wrapped in judicial robes.

If international law has indeed progressed to the point that the lack of official immunity is 'indisputably declaratory of customary international law',<sup>42</sup> then the Iraqi decision to incorporate and enforce international norms should be hailed as a positive example of state practice that reinforces the erosion of worldwide impunity. Given the fact that no international tribunal could have exercised jurisdiction, Iraqi officials essentially accepted Justice Jackson's Second World War-era conclusion that 'We may be certain that we do less injustice by the worst processes of law than would be done by the best use of violence. We cannot await a perfect international tribunal or legislature before prosecuting ...'.<sup>43</sup> Though the creation of a domestic process for punishing the officials of the former regime has been criticized for excluding international influence, it represented a courageous principled position to impose law rather than succumb to summary vengeance.

### Substantive scope of the Iraqi High Criminal Court

Grounded as it is in the right of a sovereign state to punish its nationals for violations of international norms, the temporal jurisdiction of the IHT covers any Iraqi national or resident of Iraq charged with crimes listed in the Statute that were committed between 17 July 1968 and 1 May 2003 inclusive. In addition, its geographical jurisdiction extends to acts committed on the sovereign soil of the Republic of Iraq, as well as those committed in other states, including crimes committed in connection with Iraq's wars against the Islamic Republic of Iran and the State of Kuwait.

For the first time in Iraqi domestic law, Articles 11–13 of the Statute establish the competence of the Tribunal to prosecute genocide (Art. 11), crimes against humanity (Art. 12), and war crimes committed during both international and non-international armed conflicts (Art. 13). These substantive provisions are perhaps the most significant aspect of the Statute, because they are modelled on those found in the Rome Statute and thus incorporate the most current norms laid down by international law into the fabric of Iraqi domestic law. Iraqi lawyers and judges are firmly rooted in a positivist tradition, and accordingly expressed concerns about conducting trials of individuals for acts that had not been prohibited under domestic law at the time of the *actus reus*. However, they accepted the principle that the underlying crimes were firmly proscribed under international norms at the time of their commission. In essence, Iraqi officials harmonized the Iraqi criminal code with international law to the same extent as

42 *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Judgment, para. 140 (10 Dec. 1998).

43 A. Tusa and J. Tusa, *The Nuremberg Trial*, Atheneum Press, New York, 1983, p. 69.

those officials in other states who are enacting implementing legislation after accession to or ratification of the Rome Statute.<sup>44</sup>

In addition, Article 14 of the IHT Statute conveys jurisdiction over a core group of crimes defined in the Iraqi criminal code. Article 14 is one of the strongest pieces of evidence that the drafting of the Statute was a genuine collaborative process in which the Governing Council spoke strongly on behalf of the citizens it represented.

The Iraqi lawyers involved in drafting the Statute demanded inclusion of a select list of domestic crimes because the proscribed acts had been so corrosive to the rule of law inside Saddam's Iraq. Article 14 of the IST Statute accordingly reads as follows:

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

- a) For those outside the judiciary, the attempt to manipulate the judiciary or involvement in the functions of the judiciary, in violation, inter alia, of the Iraqi interim constitution of 1970, as amended;
- b) The wastage of national resources and the squandering of public assets and funds, pursuant to, inter alia, Article 2(g) of Law Number 7 of 1958, as amended; and
- c) The abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended.

Some observers have criticized the elevation of pre-existing Iraqi crimes to the same plane as genocide, war crimes and crimes against humanity. For armchair lawyers tempted to dismiss the Tribunal as a bald assertion of Coalition power, Article 14 is a window into the soul of the Iraqi bar because it reveals the offences deemed most egregious by peace-loving Iraqis seeking to rebuild an Iraq based on freedom. The officials who committed the acts included in Article 14 in essence waged war on the Iraqi people and society; the prosecution of those acts was seen by the Iraqis as a prerequisite for restoring the rule of law inside Iraq. From the Iraqi perspective, the crimes listed in Article 14 are of comparable severity to the grave violations of international norms found in Articles 11–13. Therefore the Iraqis felt that prosecution of the domestic crimes described in Article 14 would be a necessary component of the broader IST objective of helping to heal the wounds inflicted on Iraqi society by the Ba'athists.

### The 'regularly constituted' nature of the Tribunal

Each conflict environment and accountability mechanism has required a slightly different set of blended procedures. For example, in the domestic prosecutions in

44 For a summary of state practice implementing the comparable criminal provisions in the Rome Statute, see M. C. Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text*, Transnational Publishers, Ardsley, New York 2005, Vol. I, pp. 188–91.

Argentina, the trials were conducted using special procedures necessitated by the volume of information and the number of victims in comparison to normal crimes.<sup>45</sup> In the case of the IHT, the civil law foundations of the Iraqi Criminal Code provided the baseline, which was then modified where appropriate to comply with relevant international norms. Unlike the ICTY<sup>46</sup> and the Special Court in Sierra Leone (SCSL),<sup>47</sup> the punitive authority of the IHT derives from the sovereign authority of the Iraqi people rather than the derivative authority of the UN Security Council. The analytical starting point for the IHT is therefore found in pre-existing Iraqi law and procedure.

For example, tribunals enforcing international humanitarian law have permitted evidence as long as it is 'relevant' and 'necessary for the determination of the truth'.<sup>48</sup> This standard, quoted here from the Rome Statute, compares favourably to the IHT Rule of Procedure that permits the Trial Chamber to admit 'any relevant evidence which it deems to have probative value'.<sup>49</sup> Of course, these evidentiary provisions operate against the backdrop of Iraqi practice that requires the prosecutor to produce a quantum of evidence sufficient to satisfy the court of the guilt of the defendant.<sup>50</sup> Rather than developing a straitjacket set of rules related to the introduction of evidence, the civil law groundings of the IHT Trial Chamber convey the broader mandate to 'apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and general principles of law'.<sup>51</sup>

45 *Building the Iraqi Special Tribunal: Lessons from Experiences in International Criminal Justice*, US Institute of Peace Special Report 122, p. 9, available at <<http://www.usip.org/pubs/specialreports/sr122.html>>.

46 UNSC Res. 808 (22 Feb 1993).

47 The SCSL was established by a treaty between the government of Sierra Leone and the United Nations to prosecute those with the 'greatest responsibility' for violations of international humanitarian law: Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (UN Sierra Leone 16 Jan. 2002), available at <<http://www.sc-sl.org/scsl-agreement.html>>. The Appeals Chamber articulated the SCSL's legal basis in *Prosecutor v. Charles Taylor (Decision on Immunity from Jurisdiction)*, SCSL-2003-01-I, 31 May 2004, available at <<http://www.sc-sl.org/SCSL-03-01-I-059.pdf>>. The Appeals Chamber stated, 'It was clear that the power of the Security Council to enter into an agreement for the establishment of the court was derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 1 of the Charter and the specific powers of the Security Council in Articles 39 and 41. These powers are wide enough to empower the Security Council to initiate, as it did by Resolution 1315, the establishment of the Special Court by Agreement with Sierra Leone,' *ibid.*, p. 18.

48 Rome Statute, above note 38, Article 69 (3), repr. in 37 ILM 999 (1998).

49 Revised Version Iraqi Special Tribunal Rules of Procedure and Evidence, Rule 79 (hereinafter Revised IST Rules), available at <[http://www.law.case.edu/war-crimes-research-portal/pdf/IST\\_Rules\\_of\\_Procedure\\_and\\_Evidence.pdf](http://www.law.case.edu/war-crimes-research-portal/pdf/IST_Rules_of_Procedure_and_Evidence.pdf)>. This provision is adjacent to the common sense caveat that the trial chamber should 'exclude evidence if its probative value is substantially outweighed by the potential for unfair prejudice, considerations of undue delay, waste of time, or needless presentation of cumulative evidence'.

50 Law on Criminal Proceedings with Amendments, Number 23 of 1971, Decree No. 230. Issued by the Revolutionary Command Council (hereinafter Iraqi Law No. 23 on Criminal Proceedings), 14 Feb. 1971, para. 203, reprinted in *Iraqi Laws Referenced in the Statute of the Iraqi Special Tribunal*, US Institute of Peace, 2004 [203].

51 Revised IST Rules, above note 49, Rule 59 (Second).

Regardless of the procedural forms adopted, international law is clear that no accused should face punishment unless convicted pursuant to a fair trial affording all the essential guarantees embodied in widespread state practice.<sup>52</sup> Article 3 common to the 1949 Geneva Conventions states with particularity that only a ‘regularly constituted court’ may pass judgment on an accused person.<sup>53</sup> Interpreting this provision in the light of state practice, the ICRC concluded that a judicial forum is ‘regularly constituted if it has been established and organized in accordance with the laws and procedures already in force in a country’.<sup>54</sup>

Accepting this benchmark of legitimacy, the IHT meets the criteria of Common Article 3 better than other extant tribunals because it is designed from the ground up to apply general principles and specific norms drawn from existing Iraqi criminal law, rather than simply supplanting those norms with externally mandated principles. The IHT Statute provides that the President of the Tribunal shall ‘be guided by the Iraqi Criminal Procedure Law’ in the drafting of the rules of procedure and evidence for the admission of evidence as well as the other features of trial.<sup>55</sup> Furthermore, the Statute specifically lists the provisions of Iraqi law that contain the general principles of criminal law to be applied in connection with the prosecution and trial of ‘any accused person’ (emphasis added to highlight the non-discriminatory intent of the drafters).<sup>56</sup> Where there are lacunae that remain in the IHT Rules and Procedures, they are automatically filled by resort to the underlying principles of Iraqi domestic law, even as the judges are charged with interpreting the substantive international crimes by ‘resort to the relevant decisions of international courts or tribunals as persuasive authority’.<sup>57</sup> This represents an admirable harmonization of international and domestic norms.

These matters were far more than an esoteric concern for the founders of the IHT. The drafters of the Statute were adamant that its structure and operation be perceived in contradistinction to the corrosive effects of Ba’athist efforts to use a charade of justice as a tool for subverting the people’s rights. Like the Nazi regime before them,<sup>58</sup> the ruling regime in Iraq created ‘Special’ or ‘Revolutionary’ courts to impose political punishments at the hands of obedient minions rather than trained legal professionals.<sup>59</sup> As a deliberate amendment at the very last editing session, the authoritative Arabic text used a different term to make a clear distinction from the ‘Special’ or ‘Revolutionary’ courts run under Ba’athist authority, which resulted in a slightly off-kilter English translation. Despite its substantive coverage of war crimes, genocide and crimes against humanity, Article

52 For a summary of state practice and its implementation in treaty norms and military manuals around the world, see J.-M. Henkaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (hereinafter ICRC Study), ICRC/Cambridge University Press, 2005, Vol. I, pp. 352–75.

53 Fourth Geneva Convention, Article 3.

54 ICRC Study, above note 52, p. 355.

55 IHT Statute, above note 2, Article 16.

56 Ibid., Article 17 (First).

57 Ibid., Article 17 (Second).

58 I. Müller, *Hitler’s Justice: The Courts of the Third Reich*, Harvard University Press, 1991, pp. 153–73.

59 R. Chandrasekaran, ‘Tribunal planners hope to start trials by spring’, *Washington Post*, 16 Dec. 2003, Art 1.

1 of the original IST Statute accordingly stated: ‘A Tribunal is hereby established and shall be known as the “Iraqi Special Tribunal for Crimes Against Humanity”.’<sup>60</sup> This subtle but powerful reminder shows the keen sensitivity of the Iraqi lawyers responsible for the IHT Statute as well as their commitment to the long-term restoration of the rule of law within Iraq. It is notable that the first trial before the IHT includes at least one Ba’athist official who was implicated in corrupting the process of fair and orderly criminal proceedings in violation of Article 14(a) of the IHT Statute.

The structure of the IHT and its accompanying procedures are similarly valid when measured against applicable human rights principles. The ICCPR phrases the concept noted above as requiring that a tribunal be ‘established by law’.<sup>61</sup> The UN Human Rights Commission adopted a functional test that the tribunal should ‘genuinely afford the accused the full guarantees’ in its procedural protections.<sup>62</sup> Litigating its first case, the ICTY was forced to determine whether this human right is per se violated by the prosecution of an accused before a post hoc tribunal created after the commission of the crimes.<sup>63</sup> Noting that the ICCPR drafters rejected language specifying that only ‘pre-established’ fora would provide sufficient human rights protections, the ICTY Appeals Chamber concluded that

The important consideration in determining whether a tribunal has been ‘established by law’ is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and that it observes the requirements of procedural fairness.<sup>64</sup>

For the purposes of human rights law, the IHT is ‘established by law’ because it is designed to provide the full range of human rights to the accused. Moreover, the IHT Statute establishes a firm duty on the court to ‘ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with this Statute and the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses’.<sup>65</sup> By extension, the Trial Chamber must ‘satisfy itself that the rights of the accused are respected’,<sup>66</sup> and publicly support its decisions with ‘a reasoned opinion in writing, to which separate or dissenting opinions may be appended’.<sup>67</sup> The Iraqi Judicial

60 IST Statute, above note 9, Article 1 (a).

61 ICCPR, above note 12, Article 14 (1).

62 General Comment on Article 14, HR Comm 43rd Sess. Supp. No. 40 [4], UN Doc. A/43/40; *Cariboni v. Uruguay* HR Comm 159/83 39th Sess. Supp. No. 40 (1988) UN Doc. A/39/40. The Inter-American Commission has taken a similar approach. See e.g. Inter-American Court of Human Rights Annual Report (1972), OEA/Ser. P, AG/doc. 305/73 rev. 1 (14 March 1973) 1; Inter-American Court of Human Rights Annual Report (1973), OEA/Ser. P, AG/doc 409/174 (5 March 1974), 2–4.

63 M. P. Scharf, *Balkan Justice: The Story behind the First International War Crimes Trial since Nuremberg*, Carolina Academic Press, 1997, pp. 104–6.

64 *Prosecutor v. Duško Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, 2 Oct. 1995, 45 (*Dule case*), available at <<http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>>.

65 IHT Statute, above note 2, Article 21 (Second).

66 *Ibid.*, Article 21 (Third).

67 *Ibid.*, Article 23 (Second).

Law specifies that the judge shall be bound to ‘preserve the dignity of the judicature and to avoid anything that arouses suspicion on his honesty’.<sup>68</sup> An *a priori* conclusion that the IHT judges will ignore their professional ethos by wilfully undermining the rights of the accused would betray an unseemly paternalism on the part of the international community. In fact, though the al Dujail trial has at times been turbulent in the courtroom and often unpredictable, it has proceeded based on the procedural rules specified in the Statute, its implementing rules and underlying Iraqi criminal procedure law.

### Procedural rights for the accused<sup>69</sup>

The provisions governing the rights of the accused are among the most highly criticized yet vital provisions of the IHT Statute. The Coalition Provisional Authority Order that delegated authority to the Iraqi leaders to promulgate the Statute required that the tribunal meet ‘international standards of justice’.<sup>70</sup> In accordance with underlying Iraqi procedural codes, the IHT Rules stipulate that the investigating judge must notify all suspects of the following rights during their first appearance for questioning:

- i. The right to legal assistance of his own choosing, including the right to have legal assistance provided by the Defence Office if he does not have sufficient means to pay for it;
- ii. The right to have interpreting assistance if he cannot understand or speak the language used in questioning;
- iii. The right to remain silent. In this regard, the suspect or accused shall be cautioned that any statement he makes may be used in evidence.<sup>71</sup>

In accordance with basic standards of representation, if a suspect expresses the desire to be represented by an attorney, the investigative judge must

68 Law of Judicial Organization, Number 160 of 1979, Resolution No. 1724 issued by the Revolutionary Command Council (12 Oct. 1979), Article 7, published by the Ministry of Justice, *Official Gazette of the Republic of Iraq*, Vol. 23 No. 27, 2 (2 July 1980), reprinted in *Iraqi Laws Referenced in the Statute of the Iraqi Special Tribunal*, US Institute of Peace, 2004.

69 The Iraqi lawyers selected this term rather than ‘perpetrator’ that was used in the International Criminal Court Elements of Crimes. There was extensive debate during the drafting of the Elements of Crimes for the International Criminal Court over the relative merits of the terms ‘perpetrator’ or ‘accused’. Though some delegations were concerned that the term ‘perpetrator’ would undermine the presumption of innocence, the delegates to the Preparatory Commission (PrepCom) ultimately agreed to use the former in the Elements after including a comment in the introductory chapeau that ‘the term ‘perpetrator’ is neutral as to guilt or innocence’. See UN Doc. PCNICC/2000/INF/3/Add.2 (2000), in K. Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2002, p. 14.

70 Coalition Provisional Authority Order No. 48: Delegation of Authority regarding an Iraqi Special Tribunal, available at <[http://www.cpa-iraq.org/regulations/20031210\\_CPAORD\\_48\\_IST\\_and\\_Appendix\\_A.pdf](http://www.cpa-iraq.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf)>.

71 Revised IST Rules, above note 49), Rule 27. This rule should be understood in light of the requirement that the investigative judge may not question the witness or suspect ‘in a declaratory or insinuating manner’ or direct any sign or gesture ‘that would tend to intimidate, confuse or distress him’. Iraqi Law No. 23 on Criminal Proceedings, above note 50), para. 64 A.



end the examination and may not resume until an attorney for the suspect is present.<sup>72</sup> Any statement of the accused to the investigating judge is recorded in the written record and ‘signed by the accused and the magistrate or investigator’ as required by Iraqi law.<sup>73</sup> Thus all suspects who have appeared before the IHT investigative judges to date have each been notified of their rights to counsel and have acknowledged their comprehension of those rights in writing. These provisions are reflective of the practices of other international tribunals, though they are drawn from the domestic system.<sup>74</sup> Critics who assume that the IHT will ignore and subvert the rights of defendants in the future must also assume that the investigative judges will abandon this established practice, but in doing so they would depart from a foundational aspect of criminal practice in Iraq which by any measure meets human rights standards.

In its core operative provision, the Statute incorporates a range of trial rights that, in the aggregate, are compatible with applicable human rights norms. Echoing the fundamental guarantees of the ICCPR and other human rights instruments, Article 19 of the Statute states,

- a) All persons shall be equal before the Tribunal;
- b) Everyone shall be presumed innocent until proven guilty before the Tribunal in accordance with the law;
- c) In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of the Statute and the rules of procedure made hereunder;
- d) In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to a fair hearing conducted impartially and to the following minimum guarantees:
  1. To be informed promptly and in detail of the nature, cause and content of the charge against him;
  2. To have adequate time and facilities for the preparation of his defence and to communicate freely with counsel of his own choosing in confidence. The accused is entitled to have non-Iraqi legal representation, so long as the principal lawyer of such accused is Iraqi;
  3. To be tried without undue delay;

72 Iraqi Law No. 23 on Criminal Proceedings, above note 50). For example, Saddam was questioned by the investigative judge in the presence of defence counsel Khalil Abd Salih Al-Dulaimi on 12 June 2005 regarding the Dujail massacre. Available at <<http://www.iraqispecialtribunal.org/en/press/releases/0017e.htm>>.

73 Ibid., para. 128.

74 See e.g. Rule 63 of the ICTY Rules of Evidence and Procedure, available at <<http://www.un.org/icty/legaldoc-e/index.htm>>, which reads as follows: Questioning of Accused (Adopted 11 Feb. 1994, amended 3 Dec. 1996) (A) Questioning by the Prosecutor of an accused, including after the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the accused’s counsel is present. (B) The questioning, including any waiver of the right to counsel, shall be audio-recorded or video-recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall at the beginning of the questioning caution the accused in accordance with Rule 42(A)(iii).

4. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
5. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute and Iraqi law; and
6. Not to be compelled to testify against himself or to confess guilt, and to remain silent, without such silence being a consideration in the determination of guilt or innocence.<sup>75</sup>

These affirmative rights were intended to breathe life into the esoteric obligation found in Article 20 of the 1970 Interim Constitution of Iraq, which provides that an accused is ‘innocent until he is proven guilty in a legal trial’.<sup>76</sup> The constitution also proclaims in evocative terms that ‘the right of defence is sacred in all stages of investigation and trial in accordance with the provisions of the Law’.<sup>77</sup>

International practitioners have observed that the provision of international defence attorneys might have been the surest method of achieving a process perceived to be fair around the world. While international attorneys may support the defence, the lead defence attorney is required to be an Iraqi, and any counsel retained by a suspect or accused is required to ‘file his power of attorney with the Judge concerned at the earliest possible opportunity’.<sup>78</sup> The judge, in turn, shall consider the counsel to be qualified ‘in accordance with the *Iraqi law on lawyers*’.<sup>79</sup> Rather than an attempt to minimize international influence, this small phrase constitutes an important safeguard because it reflects the intent of Iraqi drafters to ensure that defence counsel remain bound by the codes of practice governing their profession and are qualified in accordance with the rigorous standards found in Iraqi law.<sup>80</sup> In the light of the serious allegations of misconduct of counsel in other

75 This provision of the IHT Statute preventing any adverse inference from the silence of the accused is noteworthy because it is the first time that such a protection was specifically found in Iraqi law. This provision amended Paragraph 179 of the 1923 Iraqi Law on Criminal Proceedings to comply with relevant human rights norms. The previous Iraqi procedural rule stated that ‘The court may ask the defendant any question considered appropriate to establish the truth before or after issuing a charge against him. A refusal to answer will be considered as evidence against the defendant.’

76 1970 Interim Constitution of Iraq, above note 37, Article 20. The Iraqi Law on Criminal Proceedings makes clear that the judge must release an accused if ‘there is insufficient evidence for conviction’. Iraqi Law No. 23 on Criminal Proceedings, above note 50, para. 203.

77 1970 Interim Constitution of Iraq, above note 37, Article 20. All of the judges and investigators with whom I have dealt have been completely comfortable with the presumption of innocence and the duty of the prosecutor to produce evidence sufficient to warrant a guilty verdict.

78 Revised IST Rules, above note 49, Rule 48 (A).

79 Ibid. (emphasis added).

80 Ibid., Rule 48 (C).

tribunals,<sup>81</sup> the IHT Rules provide that ‘a Judge or Criminal Court may impose legal proceedings against counsel, if in its opinion, the Council’s [*sic*] conduct becomes offensive or abusive or demeans the dignity and decorum of the Special Tribunal or obstructs the proceedings’.<sup>82</sup> The fact that the principal attorney remains bound by the Iraqi code of professional conduct gives some force to the underlying right of the court to ‘prevent the parties and their representatives from speaking at undue length or speaking outside the subject of the case, repeating statements, violating guidelines or making accusations against another party or a person outside the case who is unable to put forward a defence’.<sup>83</sup>

All in all, these terms give teeth to the obligation of the trial chambers to ‘ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with this Statute and the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses’.<sup>84</sup>

## Legal authority for the creation of the Iraqi Special Tribunal

### The legal backdrop of occupation

All of the procedural and substantive components of the IHT function in the shadow cast by its inception during the Coalition occupation. The circumstances surrounding the Tribunal’s formulation are at once the most potent legal and political hurdle to its long-term reputation. In view of the revalidation of the Statute by Iraqi authorities following the return to full sovereignty, an analysis of its formation under the umbrella of the Coalition Provisional Authority becomes a moot point. However, the development of the IHT has served to clarify the normative content of occupation law in relation to the principles of transitional justice. The relationship of a subjugated civilian population to a foreign power temporarily exercising *de facto* sovereignty is regulated by the extensive development of the law of occupation.<sup>85</sup> In terms of legal rights and duties, Iraq was considered as occupied territory when it was ‘actually placed under the authority of the hostile army’.<sup>86</sup> This legal criterion is fulfilled when the following

81 For example, repeated abuses by counsel were responsible for the ICTY shift from paying hourly defence fees to a flat fee system. Bassiouni, above note 44, p. 6.

82 Revised IST Rules, above note 49, Rule 31 (First) (emphasis added).

83 Iraqi Law No. 23 on Criminal Proceedings, above note 50, para. 154.

84 IHT Statute, above note 2, Article 21(b).

85 See in general Regulations annexed to Hague Convention IV of 1907 respecting the Laws and Customs of War on Land (hereinafter 1907 Hague Regulations), entered into force 26 Jan. 1910, repr. in A. Roberts and R. Guelff (eds.), *Documentation on the Laws of War*, 3rd edn, Oxford University Press, Oxford, 2000, p. 73; Fourth Geneva Convention, Articles 47–78.

86 1907 Hague Regulations, *ibid.*, Article 42. See also *The Law of Land Warfare, Department of the Army Field Manual 27-10*, Washington, 1956, para. 351 [FM 27–10]. The entire Chapter 6 of the *US Army Field Manual* relating to the law of armed conflict is devoted to explaining the text of the law on occupation and US occupation policy.

circumstances prevail on the ground: first, that the existing government structures have been rendered incapable of exercising their normal authority; and second, that the occupying power is in a position to carry out the normal functions of government over the affected area.<sup>87</sup> For the purposes of US policy, occupation is the legal state occasioned by ‘invasion plus taking firm possession of enemy territory for the purpose of holding it’.<sup>88</sup> Although a state of occupation does not ‘affect the legal status of the territory in question’,<sup>89</sup> the assumption of authority over the occupied territory implicitly means that the existing institutions of society have been swept aside.

Because the foreign power has displaced the normal domestic offices, the cornerstone of the law of occupation is the broad obligation that the foreign power – ‘the occupant’ – must ‘take *all* the measures in his power to restore, and ensure, as far as possible, public order and safety’.<sup>90</sup> In the authoritative French, the occupier must preserve ‘l’ordre et la vie publics’ (public order and life).<sup>91</sup> On that legal reasoning alone, the establishment of the IST could have been warranted under the inherent occupation authority of the Coalition as an integral part of the strategic plan for restoring public calm and peaceful stability to the civilian population across Iraq. From that perspective, the IST is the intellectual twin to the ICTY because the UN Security Council established the ICTY with a groundbreaking 1993 resolution<sup>92</sup> that was premised on the legal authority of the Security Council to ‘maintain or restore international peace and security’.<sup>93</sup>

As criminal fora conceived and created pursuant to the broader responsibility of the authorities empowered to maintain or restore peace and security, both the ICTY and the IHT were appropriate non-military mechanisms (though each was creative in its own time and in different ways). The IHT and ICTY were both founded on the assessment by the officials charged with

87 *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, Oxford University Press, Oxford, 2004, p. 275, para. 11.3.

88 *US Army Field Manual 27-10*, above note 86, para. 352.

89 Protocol I, above note 15, Article 4. The US policy in this regard is clear that occupation confers only the ‘means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty.’ *US Army Field Manual*, above note 86, para. 358.

90 1907 Hague Regulations, above note 85, Article 43 (emphasis added).

91 *Ibid.* The conceptual limitations of foreign occupation also warranted a temporal limitation built into the 1949 Geneva Conventions that the general application of the law of occupation ‘shall cease one year after the general close of military operations’, Fourth Geneva Convention, Article 6. Based on pure pragmatism, Article 6 of the Fourth Geneva Convention does permit the application of a broader range of specific treaty provisions ‘for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory’, *ibid.* The 1977 Protocols eliminated the patchwork approach to treaty protections with the simple declaration that ‘the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation’, Protocol I, above note 15), Article 3(b).

92 UNSC Res. 827 (25 May 1993).

93 UN Charter, Article 39 (giving the Security Council the power to ‘determine the existence of any threat to the peace, breach of the peace, or act of aggression’ and it ‘shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security’).

preserving stability and the rule of law that prosecution of selected persons responsible for serious violations of international humanitarian law would facilitate the restoration of peace and stability (*'l'ordre et la vie publics'* in the wording of the 1907 Hague Regulations). After the first defendant, a Serb named Duško Tadić, challenged the legality of the ICTY, the trial chamber ruled that the authority of the Security Council to create the Tribunal was dispositive.<sup>94</sup>

Just as the Security Council has the 'primary responsibility' for maintaining international peace and security,<sup>95</sup> the CPA had a concrete legal duty to facilitate the return of stability and order to Iraq after the fall of the regime. Indeed, the CPA Mission Statement read as follows:

The Coalition Provisional Authority (CPA) is the name of the temporary governing body which has been designated by the United Nations as the lawful government of Iraq until such time as Iraq is politically and socially stable enough to assume its sovereignty. The CPA has been the government of Iraq since the overthrow of the brutal dictatorship of Saddam Hussein and his deeply corrupt Baath Regime in April of 2003.

### *The minimalist principle*

The legal framework of occupation rests on a delicate balance that has been particularly challenged by the events on the ground in Iraq. On the one hand, the civilian population has no lawful right to conduct activities that are harmful to persons or property of the occupying force, and may be convicted or interned on the basis of such unlawful activities.<sup>96</sup> Article 42 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War, more frequently referred to as the Fourth Geneva Convention, specifically permits the deprivation of liberty for civilians if 'the security of the Detaining Power makes it absolutely necessary'.<sup>97</sup> Even large-scale internment may be permissible in situations where there are 'serious and legitimate reasons' to believe that the detained persons threaten the safety and security of the occupying power.<sup>98</sup> At the same time, the coercive authority of the occupying power is limited by a specific prohibition against making any changes to the governmental structure or institutions that

94 'This International Tribunal is not a constitutional court set up to scrutinize the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council.' *Prosecutor v. Tadić (Decision on the Defence Motion on Jurisdiction)*, IT-94-1, 10 August 1995, available at <<http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm>>.

95 UN Charter, Article 24(1).

96 Fourth Geneva Convention, Articles 68 and 78 (permitting detention of civilians for 'imperative reasons of security'). See also Human Rights Watch, *A Face and a Name: Civilian Victims of Insurgent Groups in Iraq*, Vol. 17, No. 9 (E), October 2005 (finding that the insurgents in Iraq who are indiscriminately targeting civilians and Western contractors are not entitled under the Geneva Conventions to conduct hostilities and are thus committing war crimes).

97 Fourth Geneva Convention, Article 42.

98 *Prosecutor v. Delalić, Mucić, Delić, and Landžo (Čelebići) (Judgment)*, IT-96-21-T, 20 Feb. 2001.

would undermine the benefits guaranteed to civilians under the Geneva Conventions.<sup>99</sup>

Thus the baseline principle of occupation law is that the civilian population should continue to live their lives as normally as possible. This concept may be termed the minimalist principle, though some observers have termed it the principle of normality.<sup>100</sup> As a policy priority flowing from the mandates of the Fourth Geneva Convention, domestic law should be enforced by domestic officials insofar as is possible, and crimes not of a military nature that do not affect the occupant's security will normally be delegated to the jurisdiction of local courts.<sup>101</sup> The IHT Statute fits this legal/policy model precisely, as it was created and subsequently ratified by Iraqi authorities as an Iraqi domestic statute.

However, occupation law does not doggedly elevate the provisions of domestic law and the structure of domestic institutions above the pursuit of justice. Despite the minimalist principle, international law allows reasonable latitude for an occupying power to modify, suspend or replace the existing penal structure in the interests of ensuring justice and the restoration of the rule of law. In its temporary exercise of functional sovereignty over the occupied territory, and as a pragmatic necessity, the occupation authority must ensure the proper functioning, *inter alia*, of domestic criminal processes and cannot abdicate that responsibility to domestic officials of the civilian population who may or may not be willing or able to carry out their normal functions in pursuit of public order.<sup>102</sup> In accordance with the baseline principle of normality, Article 43 of the 1907 Hague Regulations stipulates that the occupying power must respect, 'unless absolutely prevented, the laws in force in the country'.<sup>103</sup>

### *The legitimacy of the Iraqi High Criminal Court under occupation law*

The duty found in Article 43 of the Hague Regulations to respect local laws unless 'absolutely prevented' (in French 'empêchement absolu') imposes a seemingly categorical imperative. However, rather than being understood literally, 'empêchement absolu' has been interpreted as the equivalent of 'nécessité'.<sup>104</sup> Under the obligations of modern human rights law, the occupier may amend local law to 'remove from the penal code any punishments that are "unreasonable,

99 Fourth Geneva Convention, Article 47.

100 J. S. Pictet, *The Principles of International Humanitarian Law*, ICRC, Geneva, 1967, p. 50.

101 *US Army Field Manual*, above note 86, para. 370.

102 Fourth Geneva Convention, Article 54: 'The Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.'

103 1907 Hague Regulations, above note 85, Article 43.

104 Y. Dinstein, 'Legislation under Article 43 of the Hague Regulations: Belligerent occupation and peacebuilding', No. 1, Fall 2004, Program on Humanitarian Policy and Conflict Research, Harvard University Occasional Paper Series 8. See also E. . Schwenk, 'Legislative powers of the military occupant under Article 43, Hague Regulations', *Yale Law Journal*, No. 54 (1945), p. 393.

cruel, or inhumane” together with any discriminatory racial legislation’.<sup>105</sup> For example, the Israeli decision to confer the vote in mayoral elections on women who had not formerly enjoyed this right would probably comport with the Article 43 obligation of an occupier.<sup>106</sup> In the post-Second World War context, this meant that the Allies could set the feet of the defeated Axis powers ‘on a more wholesome path’<sup>107</sup> rather than blindly enforcing the institutional and legal constraints that had been the main bulwarks of tyranny.<sup>108</sup>

Article 64 of the Fourth Geneva Convention clarified the old Hague Article 43 by explaining the exception to the minimalist principle in more concrete terms. In ascertaining the implications of Article 64 with regard to the occupation in Iraq, it is important to realize that its drafters did not extend the ‘traditional scope of occupation legislation’.<sup>109</sup> Hence the law of the Geneva Convention amplified the concept of necessity understood at the time to be enshrined in the old Hague Article 43. Article 64 incorporates the baseline of normality within the confines of protecting the legal rights of the civilian population. It accordingly reads as follows:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

The plain language of Article 64 must be interpreted in good faith in the light of the object and purpose of the Fourth Convention,<sup>110</sup> which seeks to

105 L. C. Green, *The Contemporary Law of Armed Conflict*, Juris, Huntington, NY, 1999, p. 259.

106 Ibid.

107 M. Greenspan, *The Modern Law of Land Warfare*, University of California Press, Berkeley, 1959, pp. 223–7.

108 For example, the oath of the Nazi party was: ‘I owe inviolable fidelity to Adolf Hitler; I vow absolute obedience to him and to the leaders he designates for me.’ D. A. Sprecher, *Inside the Nuremberg Trial: A Prosecutor’s Comprehensive Account*, University Press of America, Lanham, 1999, pp. 1037–8. Accordingly, power resided in Hitler, from whom subordinates derived absolute authority in hierarchical order. This absolute and unconditional obedience to the superior in all areas of public and private life led in Justice Jackson’s famous words to ‘a National Socialist despotism equaled only by the dynasties of the ancient East’. Opening Statement to the International Military Tribunal at Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal*, Vol. II, 1947, p. 100.

109 G. Schwarzenberger, *The Law of Armed Conflict*, Stevens, London, 1968, p. 194.

110 Vienna Convention on the Law of Treaties, Article 31(1), 27 January 1980, 1155 UNTS 331, reprinted in 8 ILM (1969).

alleviate the suffering of the civilian population and ameliorate the potentially adverse consequences of occupation subsequent to military defeat. The first paragraph strikes a balance between the minimalist intent of the framers and the overriding purpose of making due allowance for both the rights of the civilian population and the concurrent right of the occupier to maintain the security of its forces and property. The second paragraph of Article 64 morphed the implicit meaning of ‘necessary’ drawn from the old Hague Article 43 into an explicit authority to amend the domestic laws in order to achieve the core purposes of the Convention. Article 64 has thus been accepted in the light of the common-sense reading and the underlying legal duties of the occupier to permit modification of domestic law under limited circumstances.<sup>111</sup>

### Legal authority for the formation of Iraqi Special Tribunal

The IHT as it exists today is cloaked in a seamless garment of legality both in terms of its origination and in its ongoing existence as a distinct branch of Iraqi bureaucracy. The touchstone of analysis for the promulgation of the original Tribunal Statute in December 2003 is to recognize that the CPA mission statement gave it affirmative authority as the ‘temporary governing body designated by the United Nations as the lawful government of Iraq until such a time as Iraq is politically and socially stable enough to assume its sovereignty’.<sup>112</sup> The CPA posited its power as the occupation authority in Iraq in declarative terms: ‘The CPA is vested with all executive, legislative, and judicial authority necessary to achieve its objectives, to be exercised under relevant UN Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war.’<sup>113</sup>

The appellation ‘Coalition Provisional Authority’ was a literal title in every aspect: (i) it represented the two states legally occupying Iraq (the United States and the United Kingdom) as well as the coalition of more than twenty other states referred to in Resolution 1483 as working ‘under the Authority’; (ii) it was intended to be a temporary power to bridge the gap to a full restoration of Iraqi sovereign authority; and (iii) (perhaps most importantly), it exercised the obligations incumbent on those states occupying Iraq in the legal sense, and conversely enjoyed the legal authority flowing from the laws and customs of war. This understanding of CPA status comports with the diplomatic representations

111 *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, Oxford University Press, Oxford 2004, p. 275 [11.56]. US doctrine states that the ‘occupant may alter, repeal, or suspend laws of the following types: a. Legislation constituting a threat to its security, such as laws relating to recruitment and the bearing of arms. b. Legislation dealing with political process, such as laws regarding the rights of suffrage and of assembly. c. Legislation the enforcement of which would be inconsistent with the duties of the occupant, such as laws establishing racial discrimination’. *US Army Field Manual 27-10*, above note 86), para. 371.

112 Overview of Coalition Provisional Authority, available at <<http://www.iraqcoalition.org/bremerbio.html>>.

113 Coalition Provisional Authority Regulation 1, available at <[http://www.cpa-iraq.org/regulations/20030516\\_CPAREG\\_1\\_The\\_Coalition\\_Provisional\\_Authority\\_.pdf](http://www.cpa-iraq.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf)>.



made at the time of its formation.<sup>114</sup> The UN Security Council unanimously recognized ‘the specific authorities, responsibilities, and obligations under applicable international law of these states [the members of the Coalition] as occupying powers under unified command (the Authority)’.<sup>115</sup>

Though strikingly similar to the declaration of Allied power in occupied Germany after the Second World War,<sup>116</sup> CPA Regulation 1 was founded on bedrock legal authority flowing from the Chapter VII power of the Security Council as supplemented by the pre-existing power granted to the CPA under the law of occupation.<sup>117</sup> Security Council Resolution 1483 was passed unanimously on 22 May 2003, and called on the members of the CPA to ‘comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907’.<sup>118</sup> Resolution 1483 is particularly noteworthy for the formation of the IHT because the Security Council specifically highlighted the need for an accountability mechanism ‘for crimes and atrocities committed by the previous Iraqi regime’.<sup>119</sup> The Security Council further required the CPA to exercise its temporary power over Iraq in a manner ‘consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory’.<sup>120</sup>

Resolution 1483 operated in conjunction with the residual laws and customs of war to establish positive legal authority for the formation of the IHT by the CPA and Governing Council. The subtle linkage between Article 43 of The Hague Regulations and Article 64 gave the CPA broad discretion to delegate the authority for promulgation of the Tribunal to the Governing Council as a matter

114 See Letter from the Permanent Representatives of the United Kingdom and the United States to the United Nations, addressed to the President of the Security Council, 8 May 2003, UN Doc. S/2003/538, available at <<http://www.globalpolicy.org/security/issues/iraq/document/2003/0608usukletter.htm>>.

115 SC Res. 1483, 22 May 2003, preamble.

116 General Eisenhower’s Proclamation said, ‘Supreme legislative, judicial, and executive authority and powers within the occupied territory are vested in me as Supreme Commander of the Allied Forces and as Military Governor, and the Military Government is established to exercise these powers.’ Reprinted in *Military Government Gazette, Germany, United States Zone*, Office of Military Government for Germany (US 1 June 1946), 1 Issue A (copy on file with author).

117 The Fourth Geneva Convention recognizes the importance of individual rights enjoyed by the civilian population and the correlative duties of the occupier to that population. The structure of the Fourth Convention focused on the duties that an Occupying Power has towards the individual civilians and the overall societal structure rather than on the relations between the victorious sovereign and the defeated government. Under the rejected concept termed ‘*debellatio*’, the enemy was utterly defeated and accordingly the defeated state forfeited its legal personality and was absorbed into the sovereignty of the occupier. Greenspan, above note 107, pp. 600–1. The successful negotiation of the Geneva Conventions in the aftermath of the Second World War marked the definitive rejection of the concept of *debellatio*, under which the occupier assumed full sovereignty over the civilians in the occupied territory. E. Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, 1993, p. 92. *Debellatio* ‘refers to a situation in which a party to a conflict has been totally defeated in war, its national institutions have disintegrated, and none of its allies continue militarily to challenge the enemy on its behalf. *Ibid.*, p. 59.

118 SC Res. 1483, 22 May 2003, para. 5.

119 *Ibid.*, preamble.

120 *Ibid.*, para. 4.

of necessity. At its core, Article 64 protects the rights of citizens in the occupied territory to a fair and effective system of justice. As a first step, and citing its obligation to ensure the ‘effective administration of justice’, the CPA issued an order suspending the imposition of capital punishment in the criminal courts of Iraq and prohibiting torture as well as cruel, inhumane, and degrading treatment in occupied Iraq.<sup>121</sup> Exercising his power as the temporary occupation authority, Ambassador Bremer signed CPA Order No. 7, which amended the Iraqi Criminal Code in other important ways seeking to suspend or modify laws that ‘the former regime used ... as a tool of repression in violation of internationally recognized human rights’.<sup>122</sup>

Furthermore, the subsequent promulgation of CPA Policy Memorandum No. 3 on 18 June 2003, which amended key provisions of the Iraqi Criminal Code in order to protect the rights of the civilians in Iraq,<sup>123</sup> was based on the treaty obligation to eliminate obstacles to the application of the Geneva Conventions. The Fourth Geneva Convention prescribed a range of procedural due process rights for the civilian population in occupied territories that presaged the evolution of human rights norms following the Second World War.<sup>124</sup> The implementation of these goals in Iraq accorded with the established body of occupation law and simultaneously fulfilled the requirements of Security Council Resolution 1483 pursuant to the duty of all states to ‘accept and carry out the decisions of the Security Council’.<sup>125</sup> Though the said Policy Memorandum effectively aligned Iraqi domestic procedure and law with the requirements of international law, it was at best a stopgap measure that was neither designed nor intended to bear the full weight of prosecuting the range of crimes committed by the regime. Indeed, Section 1 of the original 18 June 2003 Policy Memorandum No. 3 expressly focused on the ‘need to transition’ to an effective administration of domestic justice weaned from a ‘dependency on military support’.<sup>126</sup>

The second paragraph of Article 64 of the Fourth Geneva Convention is the key to understanding the promulgation of the IHT. Juxtaposed against the Article 64 authority to ‘subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention’, Article 47 of the Convention makes it clear that such ‘provisions’ may include sweeping changes to the domestic legal and governmental structures. Article 47 implicitly concedes power to the occupying force to ‘change ... the institutions or government’ of the occupied territory, as long as those changes do not deprive the population of the benefits of

121 Coalition Provisional Authority Order Number 7 (9 June 2003) Doc. No. CPA/MEM/9 (3 Jun 2003) [2] [3], available at <<http://www.cpa-iraq.org/regulations/index.html#Orders>> (copy on file with author).

122 Ibid.

123 Coalition Provisional Authority Memorandum Number 3 was revised on 27 June 2004, available at <[http://www.cpa-iraq.org/regulations/20040627\\_CPAMEMO\\_3\\_Criminal\\_Procedures\\_Rev\\_.pdf](http://www.cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures_Rev_.pdf)>.

124 ICCPR, above note 12, Article 14 (describing analogous provisions derived from international human rights law).

125 UN Charter, Article 25.

126 Copy on file with author.

that Convention.<sup>127</sup> Of particular note for the negotiation of the IHT, Article 47 also prevented the CPA from effecting changes that would undermine the rights enjoyed by the civilian population 'by any agreement concluded between the authorities of the occupied territories and the Occupying Power'.<sup>128</sup>

Thus the CPA could not have lawfully hidden behind the fig-leaf of domestic decision-making and simply stood aside if domestic authorities in occupied Iraq had sought to create a process that would have undermined the human rights of those Iraqi citizens accused of even the most severe human rights abuses during the period of the 'entombed regime'. US Army doctrine reflects this understanding of the normative relationship with the reminder that 'restrictions placed upon the authority of a belligerent government cannot be avoided by a system of using a puppet government, central or local, to carry out acts which would have been unlawful if performed directly by the occupant'.<sup>129</sup>

The Commentary to the Fourth Geneva Convention on the protection of civilians also makes it clear that the occupying power may modify domestic institutions (which would include the judicial system and the laws applicable thereto) when the existing institutions or government of the occupied territory operate to deprive human beings of 'the rights and safeguards provided for them' under the Fourth Convention.<sup>130</sup> These provisions of occupation law are consistent with the Allied experiences during the post-Second World War occupations, and were intended to permit future occupation forces to achieve the salutary effects inherent in rebuilding or restructuring domestic legal systems when the demands of justice require such reconstruction. Against that legal backdrop, direct CPA promulgation of the Statute and the accompanying reforms to the existing Iraqi court system could have been justified on the basis of any of the three permissible purposes specified in Article 64 of the Fourth Convention (i.e. fulfilling its treaty obligation to protect civilians, maintaining orderly government over a restless population demanding accountability for the crimes suffered under Saddam, or enhancing the security of Coalition forces).

In other words, both Articles 47 and 64 provided a positive right to the CPA to impose a structure on the Iraqis for the prosecution of the gravest crimes of the Ba'athist regime. Given the state of occupation law, the reality of the matter is that the delegation of authority to the Governing Council to establish the IHT meant that the Tribunal was grounded in Iraqi sovereignty rather than susceptible to portrayal as a vehicle for foreign domination. If the CPA had the power unilaterally to create a structure for the prosecution of leading Ba'athists, the decision to delegate responsibility for developing and promulgating the IST to the

127 See also *US Army Field Manual 27-10*, above note 86, para. 365.

128 *Ibid.*

129 *US Army Field Manual 27-10*, above note 86, para. 366 (further specifying that 'Acts induced or compelled by the occupant are nonetheless its acts').

130 J. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. IV, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 274 (explaining the intended implementation of the provision in Article 47 that any change introduced to domestic institutions by the occupying power must protect the rights of the civilian population).

Iraqi officials follows as a logical extension. Closer examination shows that the formation of the IST under the authority of the Iraqi Governing Council actually mirrored the practice in Second World War occupations in which the British and Americans created guidelines to direct Germany towards democracy, but ultimately gave the Germans great latitude in rebuilding their country.<sup>131</sup>

## Conclusion

Although it had its genesis during a period of occupation, the IHT was lawfully promulgated by the Iraqis under international norms, and as such should be entitled to the respect and assistance of the leaders and lawyers outside Iraq who support restoration of the rule of law. In any event, the choice of punishments should be reserved for sovereign governments answerable to a society in which they live and work, rather than external players. The inclusion of the death penalty as a permissible punishment for the IHT derived from pre-existing Iraqi law and has generated controversy outside Iraq. However, permitting external players to supersede the established set of domestic punishments would be a modern form of legal colonialism that would have undermined the drafters' aspirations for the Iraqi people to accept the IHT's verdicts, both guilty and innocent, as authoritative and legitimate.<sup>132</sup>

It has been controversial in no small part due to the political circumstances surrounding the invasion of Iraq and the termination of Ba'athist tyranny. Nevertheless, Iraqi jurists are best placed to determine the sequence of trials and choice of accused that will help create the conditions in which democratic freedom can flourish. The first case began on 19 October 2005 and involved an assassination attempt on Saddam Hussein carried out by civilians in the village of al Dujail and the retaliatory killings that followed. Some observers and Iraqis criticized the Dujail case on the grounds that the crimes against civilians were not of a scale comparable with other violations under Ba'athist rule.<sup>133</sup> On 4 April 2006, the second case was referred for trial, charging Saddam Hussein and six co-accused with egregious crimes committed against the Kurdish population during the Anfal campaigns in 1988.<sup>134</sup> The Anfal trial will test the maturity of the IHT in applying international law, as it is an enormously complex series of events

131 W. M. Hudson, 'The US military government and the establishment of democratic reform, federalism, and constitutionalism during the occupation of Bavaria 1945–47', 180 *Military Law Review* 115 (Summer 2004), p. 123.

132 For a detailed account of the Cold War politics and unravelling of wartime unity that doomed the effort to convene a second International Military Tribunal after the Second World War, see D. Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory*, Oxford University Press, Oxford, 2001, pp. 28–37.

133 For a justification of the al Dujail charges in response to some of the media critics, see <[http://www.law.case.edu/saddamtrial/entry.asp?entry\\_id=15](http://www.law.case.edu/saddamtrial/entry.asp?entry_id=15)>.

134 The official fact sheet on the Anfal case referral released by the IHT is available at <[http://www.law.case.edu/saddamtrial/entry.asp?entry\\_id=106](http://www.law.case.edu/saddamtrial/entry.asp?entry_id=106)>.

that highlight the suffering under Ba'athist rules and may well raise the first genocide jurisprudence that the Iraqis will face.

The creation of the IHT as a component of the domestic justice system comports with the reality that the field of international criminal law has emerged as an interrelated system in which domestic fora are responsible for implementing international norms. The UN Secretary-General recently commented that without human rights and the rule of law 'any society, however well armed, will remain insecure; and its development, however dynamic, will remain precarious'.<sup>135</sup> The tribunals created by international efforts have an important role, but are in no way elevated to a de facto hierarchical supremacy; they have been the courts of last resort rather than the courts primarily charged as the optimal first response. The pursuit of accountability for international crimes is one of the unifying themes that should bind humanity in common purpose with the people of Iraq and the Iraqi jurists as they pursue justice in the chambers of the Iraqi High Criminal Court.

135 UN Secretary-General Kofi Annan, A new mindset for the United Nations, UN Doc. SG/SM/10325, available at <<http://www.un.org/News/Press/docs/2006/sgsm10325.doc.htm>>.