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Saddam Hussein's Trial in Iraq: Fairness, Legitimacy & Alternatives, a Legal Analysis

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SADDAM HUSSEIN`S TRIAL IN IRAQ
FAIRNESS, LEGITIMACY & ALTERNATIVES

- A LEGAL ANALYSIS -

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A father whose 19 year old son was executed by the Government's security forces in connection with the Al-Sadr uprising of 1999 reflected on his strong desire for revenge but concluded:

*"That is not the way...I have seen my life and I have buried my son...I want justice."*¹

I. INTRODUCTION

With the questioning of Saddam Hussein in front of the Iraqi High Criminal Court² on October 19, 2005,³ a trial began that has been labelled by some as "the trial of the century"⁴. Whether this is true or not, the proceedings in Baghdad receive high publicity and are under close scrutiny by major human rights organisations⁵, legal experts⁶, and indeed the general public, as the news coverage is extensive. Why does the trial attract so much attention one may wonder and why do so many people care about ensuring fair proceedings for an ex-dictator on trial for major human rights violations, a dictator that himself made extensive use of a special Revolutionary Court guaranteeing fast executions but by no means due process of law.

¹ Human Rights Watch, Ali Hassan Majid and the Basra Massacre of 1999, February 2005, at 23; Human Rights Watch Briefing Paper, at 18, available at: <http://hrw.org/backgrounder/mena/iraq1005/index.htm>. (All Websites quoted last visited: April 16, 2006).

² The court was formerly known as Iraqi Special Tribunal, it has subsequently been renamed.

³ "Hussein's First Trial is Opening but Clarity May Still be Far Off", New York Times, October 18, 2005, at A1.

⁴ See Michael Scharf, "Grotian Moment: The Hussein Trial Blog", "Is the Saddam Hussein Trial one of the most important trials of all time?" Issue # 10, at <http://www.law.case.edu/saddamtrial/>; "The Trial of the Century", CBS News, April 22, 2006, available at: <http://www.cbsnews.com/stories/2003/12/15/news/opinion/courtwatch/main588751.shtml>.

⁵ See Human Rights Watch Briefing Paper, *supra* note 1; "Iraq – Iraqi Special Tribunal – Fair trials not guaranteed", Amnesty International, available at: <http://www.amnestyusa.org/countries/iraq/document.do?id=82AFEE4B414DC6D180256FE90052E0E1>

⁶ See e.g. "Grotian Moment: The Saddam Hussein Trial Blog", *supra* note 4; Ash Ü Bali, "Justice under Occupation, Rule of Law and the Ethics of Nation-Building in Iraq", 30 Yale J. Int'l L. 431-472; M. Cherif Bassiouni, "Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal" Cornell Int'l L.J. 101-166; Michael A. Newton, "The Iraqi Special Tribunal: A Human Rights Perspective", available at: http://www.law.case.edu/saddamtrial/documents/Newton_Article_on_the_IST.pdf.

In answering this question the optimistic legal scholars might first of all point to the fact that - as will be discussed later - international law requires a fair trial and for those who believe in the rule of law, this will indeed be an important reason to turn their eyes towards Baghdad.

But there is more to it. The trial held in the fortified “Green Zone” in the middle of Baghdad is special in many ways.

First there is the hope that this trial might serve as a model for Iraq and might help to re-establish trust in the judicial system and its protection against the deprivation of rights which has been strongly eroded by the past 23 years of Saddam’s reign and to thereby allow the country a “new start” based on firm legal principles. In order to help Iraq through the very delicate transition phase, shifting away from a violent suppressive dictatorship towards a fragile new democracy, the trial will need to open avenues for reconciliation, provide justice for those whose rights were violated and publicly acknowledge the atrocities that have happened in the past decades.⁷

Further more by holding Saddam accountable, the current criminal proceedings add yet another name to the list of recent precedents in which heads of state had to face charges for violating international law.⁸ The trial might thereby serve as another mosaic stone in establishing the rule of law and deter others from stepping over the lines drawn by international agreements and custom in the area of international criminal law.

⁷ See also Goldstone, “The Trial of Saddam Hussein: What Kind of Court Should Prosecute Saddam Hussein And Others For Human Rights Abuses?”, 27 *Fordham Int’l L.J.* 1490, 2003-2004 at 1503-1504.

⁸ See the proceedings against General Pinochet in Spain and Chile, against Slobodan Milosevic in front of the ICTY, the Ex Rwandan Prime Minister Kambanda in front of the ICTR and now against former Liberian Head of State Charles Taylor in front of the Special Court for Sierra Leone.

However, the trial is also being perceived as closely connected to the heavily criticised U.S. led invasion of Iraq that has been claimed by many to infringe international law⁹ and was founded on assumptions which turned out to be false.¹⁰ As the U.S. played a major part in setting up the tribunal, the trial is in danger of at least being perceived as “victor’s justice” and mere show by the world audience, finding guilty a dictator who by many - including high officials such as the Iraqi President Jalal Talabani or the Commander in Chief of the U.S. Army President Bush - has already been declared guilty.¹¹

To establishing model proceedings in Iraq and avoid mock trial’s the trial needs to be fair. It has been said that in light of Saddam’s past it would be bitterly ironic to transform him into the “poster boy for fair trials and due process,”¹² which might be true. Nevertheless, it is necessary to do so, in order to establish a trustworthy and fair judicial system in Iraq, displaying that any accused, even one considered guilty by so many for the most heinous crimes, will receive a fair trial and be presumed innocent until otherwise proven.

There is a lot at risk in Iraq at the moment and the world audience is watching. Whether the proceedings in front of the Iraqi High Criminal Court are fair and legitimate and whether the trial in Baghdad is the soundest solution to achieve the aforementioned objectives is the subject of this paper. In addressing it, the factual background will be provided first, followed by the legal analysis.

⁹ S.C. Res. 1441, U.N. Doc. S/RES/1441 (2002) did not authorize the use of force by the coalition as it did not authorize the use of “all necessary means”, the term commonly employed by the Security Council under Chapter VII. For a discussion of the legality of the U.S led invasion see e.g : Bellamy, Alex J. “International Law and the War with Iraq”, 4 Melb J. Int’l L. 497 (2003).

¹⁰ „U.S. Gives Up Search For Iraq WMD”, BBC News, January, 12, 2005, available under: <http://news.bbc.co.uk/2/hi/americas/4169107.stm>.

¹¹ Jalal Talabani: “*Saddam Hussein is a war criminal and he deserves to be executed 20 times a day for his crimes against humanity*”, Chicago Tribune, “Talabani Says Saddam Confessed to Crimes”, AP, Published September 7, 2005; Georg W. Bush: “*This is a disgusting tyrant who deserves justice, the ultimate justice*”, BBC News, December 17, 2003, <http://news.bbc.co.uk/2/hi/americas/3326311.stm>. See also Abdul Aziz Hakim, leader of the largest political party in Iraq: “*This criminal deserves the death penalty, the highest punishment*” Washington Post, “At Chaotic Trial of Hussein Iraqi Victims Tell of Torture”, December 6, 2005, at A22.

Law Prof. Linda Malone “*it is ironic to anyone watching this trial that Hussein, who is such an icon of injustice, is now trying to transform himself into the poster boy for fair trials and due process.*”, in “Law Experts Divided Over Legitimacy of Tribunal”, Los Angeles Times, October 20, 2005.

II. FACTUAL BACKGROUND

A) THE INVASION OF IRAQ AND THE INSTALLATION OF THE COURT

To be able to assess the legitimacy of the Court's installation, it is important to keep the timeline of the invasion in mind: A U.S. led coalition began its military action against Iraq on March 19, 2003.¹³ Very short after that, on May 1, 2003, the end of major combat operations was declared by U.S. President George W. Bush which was followed by a formal occupation of Iraq. After transferral of the power to the Interim Government on June 28, 2004, the U.S. declared an official end to the occupation on June 30, 2004. Elections on January 30, 2005, resulted in the construction of a Transitional National Assembly, which drafted an Iraqi constitution that was adopted by vote on 15, October 2005.¹⁴ Elections for an Iraqi government finally took place on December 15, 2005.

The Court was installed during the ongoing occupation of Iraq. Only a few days prior to Saddam's capture by Coalition Forces on December 13, 2003¹⁵ the Iraqi Governing Council authorized by, in cooperation with and subject to the approval of the Coalition Provisional Authority (CPA) - the administrative body created by the coalition as the occupying power - promulgated the Statute of the Iraqi Special Tribunal (IST) on December 10, 2003.¹⁶ The Iraqi Governing Council as the promulgating body consisted of Iraqi members handpicked by the CPA.¹⁷

¹³ For the following see: "Timeline Iraq, a chronology of key events", BBC News, available under: http://news.bbc.co.uk/1/hi/world/middle_east/country_profiles/737483.stm.

¹⁴ See "Iraq voters back new constitution", BBC World News, October 25, 2005, available under: http://news.bbc.co.uk/1/hi/world/middle_east/4374822.stm.

¹⁵ BBC "Saddam Hussein captured December 2003", available under http://news.bbc.co.uk/1/shared/spl/hi/middle_east/03/v3_iraq_timeline/html/saddam_captured.stm

¹⁶ See: Coalition Provisional Authority Order Number 48 with IST Statute as Appendix A, available under: <http://www.cpa-iraq.org/regulations/#Orders>; see also: Bassiouni, "Post-Conflict Justice in Iraq", Cornell Int'l L.J. 101, at 119-20.

¹⁷ "Hussein's Lawyers Aim to Focus on Occupation", Wall Street Journal, Oct. 2, 2005, at A 9B.

The U.S. has further been involved through the Department of Defence's Regime Crimes Liaison Office, which has played a major role in the tribunal's installation by training judges and prosecutors, building courtrooms, providing resources and personnel for investigations or evidence gathering and by training the court's staff.¹⁸ The U.S. provided for the tribunal's funding and spend U.S. \$ 75 million dollars¹⁹ to install and support it, a sum that has since risen to U.S. \$ 128 million.²⁰

On August 11, 2005, the elected Iraqi Transitional Assembly revoked the original IST Statute and adopted an amended version, which also changed the courts name to Iraqi Higher Criminal Court (IHCC).²¹

Saddam's trial finally began in the trial chamber on October 19, 2005 in which all defendants pled non guilty. During that time Baghdad was, and to the present time still is, constantly shaken by terrorist attacks which have not halted before the court room doors. Only a day into the trial, on October 20, 2005, one of the defence lawyers for Awad Hamed al-Bander,²² former chief justice of the Iraqi Revolutionary Court who is also on trial before the court, was kidnapped by a group of armed men and found shot dead later the same day. A few weeks later on Nov. 8, 2005 two other lawyers representing Saddam's co defendants were attacked, one of them killed, the other one seriously wounded.²³ This attack brought the number of killings associated with the court up to 8, including one of its judges.²⁴

¹⁸ Bassiouni, *supra* note 16, at 121-22; Leila Sadat, "Indigenous Solution or (U.S.) Occupation Court ?", at 2, available at : [http://www.law.case.edu/saddamtrial/documents/Leila_Sadat_Indigenous_Solution_or_\(U.S.\)_Occupation_Court.pdf](http://www.law.case.edu/saddamtrial/documents/Leila_Sadat_Indigenous_Solution_or_(U.S.)_Occupation_Court.pdf).

¹⁹ See Wall Street Journal, *supra* note 17, at A 9B.

²⁰ See Leila Sadat, *supra* note 18, at 2; Human Rights Watch, Briefing paper, *supra* note 1, at 17; £ 1.2 million were additionally provided by the UK Foreign and Commonwealth Office, see UK FCO, Frequently Asked Questions on Iraq available under <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1024313967149>

²¹ There seems to be some confusion conc. the correct English translation of the court's Arabic name, whereas the unofficial English translation available under <http://www.law.case.edu/saddamtrial/content.asp?id=2> refers to the court as *Iraqi High Criminal Court* (the expression used in this paper), Human Rights watch calls it: *Supreme Iraqi Criminal Tribunal*, Human Rights Watch Briefing paper, *supra* note 1; the New York Times refer to it as the *Iraqi High Tribunal*, N.Y. Times, "Ambush of Defense Lawyers In Hussein Trial Kills One", November 8, 2005, at A8

²² See Trial Watch under: <http://www.trial-ch.org/trialwatch/profiles/en/facts/p407.html>.

²³ "Ambush of Defense Lawyers In Hussein Trial Kills One", N.Y. Times, November 9, 2005, at A8.

²⁴ *id.*

While the U.S. occupation has long ended and the sovereignty is back in the hands of the Iraqi people, U.S. forces, staff, and infrastructure are still desperately needed to ensure a minimum of security and stability in the country. Coalition troops are still present in large numbers in Iraq²⁵ and they are struggling against a strong insurgency that has already killed more U.S. soldiers than the actual combat operations ever did.²⁶ Sectarian violence has increased dramatically over the last months and has since then cost hundreds of lives. Many believe that Iraq is either on the verge of a civil war or already in it.²⁷

B) THE COURT'S JURISDICTION, STRUCTURE & STATUTORY PROVISIONS

The erected court is not part of the regular judiciary system of Iraq. The Court has jurisdiction over Iraqis as well as non-Iraqi residents in Iraq²⁸ accused of genocide, crimes against humanity and war crimes committed in the territory of Iraq or elsewhere since July 17, 1968 up until May 1, 2003, the date on which the formal occupation of Iraq began.²⁹ In addition to these three crimes which are also enlisted in the statutes of the International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC), the Iraqi statute adds three further crimes³⁰ derived out of and with reference to Iraqi law. These are described as the “Intervention in the judiciary or the attempt to influence the functions of the judiciary”, “the wastage and squander of national resources” as well as “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”.

²⁵ Presently (April 2006) there are 133.000 American troops in Iraq, see Donald Rumsfeld, Radio Interview on WABC News Talk Radio, N.Y., April 7, 2006, available at <http://www.defenselink.mil/transcripts/2006/tr20060407-12841.html>

²⁶ See “A look at U.S. Military Deaths in Iraq”, N.Y. Times, November 17, 2005, also available at: <http://www.nytimes.com/aponline/international/AP-Iraq-US-Deaths.html>.

²⁷ See e.g. “Iraq’s civil war nightmare”, BBC News, 23 February 2006, available at:

http://news.bbc.co.uk/2/hi/middle_east/4741616.stm, “Iraq in civil war, says former (Iraqi) Prime Minister”, BBC News, 19 March 2006, available at http://news.bbc.co.uk/2/hi/middle_east/4821618.stm.

²⁸ Iraqi High Criminal Court Statute, Article 1.2, unofficial translation available at: http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf

²⁹ *id.*

³⁰ IHCC Statute, Articles 14.1, 14.2, 14.3

The statute declares Iraqi Criminal Procedure Law for applicable³¹ and therefore relies on inquisitory criminal proceeding as known in a lot of civil law countries, placing more power and responsibility on the judge compared to the typical common law adversary system.

The trial is preceded by an investigation performed by an investigative Judge³², who also has the power to question suspects, witnesses and victims in order to gather evidence. If the Investigative Judge finds a *prima facie* case as being established, the Judge will prepare an indictment and refer the case to the (trial) court³³.

The trial chamber of the IHCC consists of five,³⁴ the appeals chamber provided by the statute of nine judges.³⁵ The Statute requires judges, members of the prosecution committee as well as the court's staff³⁶ and the principal defence lawyer of the accused³⁷ to be Iraqi nationals. Non-Iraqis may at the discretion of the court be approved as advisors to the court³⁸, a non Iraqi judge may however sit in case a State is one of the parties and this is deemed necessary.³⁹ No Non-Iraqi judge is currently sitting on the case before the court.⁴⁰

The court is therefore a truly national court, not an international one as the ICTR, the ICTY or the ICC or what is referred to as a "hybrid court", such as the Special Court for Sierra Leone which

³¹See IHCC Statute Article 16; Iraqi Criminal Procedure Law (English Translation) available at:

<http://www.iraqispecialtribunal.org/en/laws/LawOnCriminalProceedings.htm>.

³² IHCC Statute, Article 8.

³³ IHCC Statute, Article 18.3.

³⁴ IHCC Statute, Article 4.1.

³⁵ IHCC Statute, Article 4.2.

³⁶ IHCC Statute, Article 28.

³⁷ IHCC Statute, Article 19.4 B.

³⁸ IHCC Statute, Article 7.2 (general assistance), Article 8.9 (advisors for Investigative Judges) Article 9.7 (advisors for prosecutors).

³⁹ IHCC Statute, Article 3.5.

⁴⁰ Human Rights Watch Briefing Paper, *supra* note 1, at 6.

(being set up in cooperation with the U.N.) is composed of national as well as international judges, the latter being nominated by the Secretary General of the U.N.⁴¹

The penalties that are prescribed by the statute are those of Iraqi law,⁴² which does include the death penalty, usually administered by hanging.⁴³ As Iraqi law does not include crimes like genocide, war crimes and crimes against humanity and therefore does not provide for any sentences for perpetrators of these crimes, the Statute refers to the sentencing for the crimes of murder and rape which are prohibited under Iraqi law.⁴⁴ These might be included in one of the crimes punishable under the Statute such as genocide. A premeditated killing or a killing as a result of the use of toxic substances or explosives is for example punishable by death under Iraqi law⁴⁵ and the death penalty might consequently be imposed if these acts were committed by the accused as part of a war crime, genocide or crime against humanity. If the crime lacks any counterpart under Iraqi law the Court has to determine the punishment taking into account factors such as the gravity of the crime and individual circumstances.⁴⁶

The trial is televised and broadcasted around the world with a twenty minute delay to allow censoring and avoid unforeseen events.⁴⁷ Saddam originally had the right to represent himself (like Milosevic had) but according to the revised statute he now merely has got the right to “use a lawyer of his own choosing.⁴⁸” As the other accused Saddam is represented by legal counsel of his choice in front of the court. As required by the statute his main defense counsel is Iraqi but he has a defense

⁴¹ For more information on the Special Court for Sierra Leone visit the official website under: <http://www.sc-sl.org/index.html>.

⁴² IHCC Statute, Article 24.1.

⁴³ See “3 Set to Hang as Executions Return to Iraq”, N.Y. Times, August 17, 2005.

⁴⁴ IHCC Statute, Article 24.4.

⁴⁵ see Paragraph 406 (1) – a, b of the Iraqi Penal Code of 1969, available under:

http://www.law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf

⁴⁶ IHCC Statute, Article 24.5.

⁴⁷ For a discussion whether the trial should be televised see Issue # 2, Grotian Moment Blog, *supra* note 6.

⁴⁸ IHCC Article 19.4 D.

team comprised of international jurists, amongst them former U.S. attorney general Ramsey Clark,⁴⁹ whose involvement has spurred quite some publicity.

C) THE CASE CURRENTLY BEFORE THE COURT

While Saddam is on trial in Iraq at the time of writing, he is not indicted for the major crimes he allegedly committed. Besides the ongoing torture and killing of dissidents, these would especially include the Anfal campaign⁵⁰ (gassing of Iraqi Kurds – killing 50.000 - 100.000 including the gassing of the village of Halabja,⁵¹ killing 5000 civilians), the 1991 massacre after a Kurdish Shiite uprising,⁵² which was encouraged by the coalition forces pulling out of Iraq at the time, the assault on the Marsh Arabs (including the bombardment of villages, the employment of torture and disappearances, displacing at least 100.000),⁵³ the waging of war against Iran employing chemical weapons and the invasion of Kuwait in 1990.

Instead Saddam is being tried for the alleged reprisals after a failed assassination attempt against him. The incident took place in 1982 in the town of al-Dujail and supposedly led to summary executions, lengthy imprisonments and show trials with finally 148 people dead. 96 were hanged in Abu Ghraib prison and 46 died under torture, including four additional inmates who were accidentally added to the group.⁵⁴ According to the Iraqi Tribunal this incident was chosen as it is

⁴⁹ See “Why I’m Willing to defend Hussein”, Ramsey Clark, L.A. Times, 24. January 2005, available at: <http://www.commondreams.org/views/05/0124-26.htm>.

⁵⁰ See „The Anfal Campaign Against the Kurds”, Human Rights Watch, New York 1993, available at: <http://www.hrw.org/reports/1993/iraqanfal/>.

⁵¹ See “1988 Thousands die in Halabja gas attack”, BBC News, 16. March, 2005 available at: http://news.bbc.co.uk/onthisday/hi/dates/stories/march/16/newsid_4304000/4304853.stm.

⁵² See Human Rights Watch, „The 1991 Uprising in Iraq And its Aftermath” available at: <http://www.hrw.org/reports/1992/Iraq926.htm>.

⁵³ See “Iraq: Devastation of Marsh Arabs”, Human Rights Watch, available at: <http://www.hrw.org/press/2003/01/iraq012503.htm>.

⁵⁴ “Prosecutors in Hussein Case Tie Him to Order to Kill 148” NY Times, March 1, 2006, at A1.

very well documented and a relatively clear and simple case.⁵⁵ The prosecution introduced evidence directly linking Saddam to the executions, including a document which supposedly carried his signature, signing off the alleged Dujail perpetrators to be executed. It is however not clear with which crimes within the court's jurisdiction Saddam has actually been charged as the indictments have not been made available to the public.⁵⁶ Looking at the statute it is likely that the killing of 148 men and boys might constitute a crime against humanity within the courts jurisdiction (Art 12 IHCC Statute), being "wilful murder" as part of a "widespread" but more likely "systematic attack" directed against the civilian population.

Despite the argument that the Dujail case might be easy to prove, the decision to start the proceedings with this case is problematic. The IHCC Statute⁵⁷ requires the punishment issued by the Court to be executed within 30 days of the date when the judgement becomes final. If Saddam was sentenced to death this would mean that he might never be put on trial for many of the most gruesome crimes he allegedly committed which would jeopardize the high hopes that accommodate the trial in terms of the country's reconciliation. The injustice done to many victims by Saddam's regime needs to be addressed by the criminal proceedings. Although it will hardly be possible to indict Saddam for every single criminal act, e.g. every torture or disappearance allegedly committed, major crimes amounting to crimes against humanity or genocide as punishable by the IHCC should be addressed before the court. It is doubtful to say the least that sentencing Saddam for the killings in Dujail would soothe the wounds of those who lost relatives and friends in the Anfal campaign. The pragmatic approach that the case of Dujail is supposed to be easier to prove and well documented is unlikely to be accepted by many victims. However, the court might try to find a way around the execution deadline found in Art. 27.2 and has indeed said that it plans up to 12 trials for Saddam.⁵⁸

⁵⁵See "Hussein's First Trial Is Opening But Clarity May Still Be Far Off", NY Times, October 18, 2005, at A11; "The first case: Dujail", CBC News Online, October 18, 2005 at http://www.cbc.ca/news/background/iraq/first_case.html, for a positive evaluation of this approach see Michael Scharf, Grotian Moment Blog, Issue #11 *supra* note 6.

⁵⁶ Human Rights Watch, Briefing Paper, *supra* note 1, at 6.

⁵⁷ IHCC Statute Art. 27.2.

⁵⁸ See „At Trial in Iraq, Witness Tell About Torture”, NY Times, 6, December 2005, at A 11.

He has now been officially indicted for genocide, crimes against humanity and war crimes committed in an internal conflict for the Anfal campaign but it is still unclear when the proceedings in this case are going to start.⁵⁹

To avoid Saddam's execution to be carried out the court might for example declare an execution incompatible with an ongoing proceeding in another case before the court and interpret the provision in a way that the punishment must be executed within 30 days after a judgement has been issued and no other proceedings are pending. However this is an exception not provided for by the language of the statute and it might be criticised as arbitrary and not founded in law.

It should be noted that such an interpretation of the statute would also lead to a situation in which an accused sentenced to death has to wait for his penalty for what is likely to be several years during ongoing criminal proceedings. With regards to the extreme psychological stress for the convicted and the so called "death row phenomenon" this might amount to "cruel and inhumane treatment" and has for example been declared incompatible with the European Human Rights Convention.⁶⁰ The Human Rights Committee as the body responsible for interpreting the International Covenant on Civil and Political rights (ICCPR), which is applicable to Iraq⁶¹, has however declined to interpret the parallel provision in the ICCPR forbidding cruel and inhuman treatment in the same way.⁶² The Committee did not want to lay pressure on states to encourage (speedy) executions.

This dilemma – taking the ECHR point of view that long imprisonment on death row might amount to cruel and inhumane treatment - would best be solved by excluding the death penalty from the penalties that might be imposed by the court. Although the death penalty is not prohibited by the

⁵⁹ See "Hussein Charged with Genocide in 50.000 deaths", NY Times, April 5, 2006, at A6.

⁶⁰ Soering v. United Kingdom, ECHR (1989), Series A, No. 161.

⁶¹ See list of ratifications/accessions in U.N. Treaty Database at <http://untreaty.un.org/sample/EnglishInternetBible/partI/chapterIV/treaty5.asp>

⁶² Johnson v. Jamaica (No.588/1004), UN Doc. CCPR/C/56/D/588/1994 (1996); For more information see e.g. Patrick Hudson, "Does the Death Row Phenomenon Violate a Prisoner's Human Rights under Interantional Law", EJIL (2000), Vol. 11 No. 4, 833-856, also available under: <http://www.ejil.org/journal/Vol11/No4/110833.pdf>.

ICCPR there are strong international tendencies in outlawing it⁶³ and it is banned from the Statutes of the ICTY, ICTR and the ICC.

Along with Saddam seven more people are accused for their alleged involvement in the case, amongst them are Taha Jassin Ramadan⁶⁴, Iraq's former Vice-President, Barsan Ibrahim al-Tikriti,⁶⁵ who is a younger half brother Saddam's and former director of general intelligence (Mukhabarat) as well as Awad Hamed al-Bander,⁶⁶ former chief justice of the Iraqi Revolutionary Court.

III. LEGAL ANALYSIS

A) THE COURT 'S LEGITIMACY

There are several legal treaties and norms applicable to the installation of the court as well as to the proceedings in front of it. During the war and especially the time of occupation, in which the original IST statute was promulgated and the tribunal was installed, the Geneva Conventions and the Hague Convention⁶⁷ applied. The U.S. as well as Great Britain are parties to the Conventions.⁶⁸ The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (commonly referred to as IV. Geneva Convention)⁶⁹ includes several provisions governing the powers of an occupying power. Among these is Article 64 which provides that subject to security threats

⁶³ See Protocol Nr.6 to the European Convention on Human Rights; 2. Optional Protocol to the ICCPR.

⁶⁴ See Trial Watch under: <http://www.trial-ch.org/trialwatch/profiles/en/facts/p254.html>.

⁶⁵ See Trial Watch under: <http://www.trial-ch.org/trialwatch/profiles/en/facts/p147.html>.

⁶⁶ See Trial Watch under: <http://www.trial-ch.org/trialwatch/profiles/en/facts/p407.html>.

⁶⁷ Online available under: <http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm>.

⁶⁸ See Treaty Information of the International Committee of the Red Cross under: <http://www.cicr.org/ihl.nsf/Pays?ReadForm>.

⁶⁹ On-line available under: <http://www.yale.edu/lawweb/avalon/lawofwar/geneva07.htm>.

“... and 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 said laws.”

Art. 43 of the Hague Regulations compels the occupying power to ensure public order and safety and to respect the laws in force in the country, unless absolutely prevented.

It has been argued both for and against the legality of the installation of the tribunal based on these provisions.⁷⁰ It is clear that the court is a tribunal which was newly created under the control of the Coalition Provisional Authority and it does not belong to the regular Iraqi legal system. The defence further more raises the argument that the occupation was illegal under international law and therefore the installation of the tribunal must also be illegal as it was set up through an official act during the occupation.⁷¹

Defending the Court's installation it has for example been claimed that the tribunal was necessary as a measure to “restore, and ensure, as far as possible, public order and safety” as provided by Art. 42 of the Hague Regulations just as the Security Council used its obligation to “maintain or restore international peace and security” to create the ICTR and ICTY under its Chapter VII UNC powers.⁷²

Notwithstanding this dispute the current tribunal receives strong legitimacy through the fact that its statute has subsequently been amended and approved by the Iraqi Transitional Assembly. The court is also expressly mentioned and empowered by the Iraqi Constitution.⁷³ Adopted on October 15, 2005, its Article 130 reads as follows

⁷⁰ See Bassouini *supra* note 6, 136; Michael Newton, *supra* note 6, at 7.

⁷¹ Najib Nuaimi, member of the defense team, cited in “Witness at Hussein trial describes alleged torture” CNN, December 6, 2005, available at: <http://edition.cnn.com/2005/WORLD/meast/12/05/saddam.hussein.trial/>.

⁷² Michael Newton, *supra* note 6, at 7.

⁷³ English version of the constitution available at: <http://msnbc.msn.com/id/9719734/>.

“The Iraq High Criminal Court shall continue its duties as an independent judicial body, in examining the crimes of the defunct dictatorial regime and its symbols. The Council of Representatives shall have the right to dissolve by law the Iraqi High Criminal Court after the completion of its work.”

There might still be doubts whether the Iraqis really had the free choice to abandon the court had they wanted to do so. After all, it had been set up, financed and provided with a full legal framework and the proceedings had already started. Furthermore the support in troops and the infrastructural help Iraq receives by the U.S. is substantive and vital for the country. Nevertheless the court has been approved by the Iraqi people through a direct vote in adopting the constitution as well as through the Transitional Assembly, a body elected by the Iraqi people, when it amended the Court's Statute.

B) JURISDICTION, NULLUM CRIMEN SINE LEGE & HEAD OF STATE IMMUNITY

There is little doubt that Iraq has got jurisdiction to prosecute Saddam. Whereas it is generally recognised that a country can exercise so called universal jurisdiction to trial perpetrators at least for crimes against humanity and genocide⁷⁴ there is no need to rely on this principle here, as Iraq is putting Saddam on trial itself. Under international law a country generally has jurisdiction especially for crimes committed on its territory, by its citizens or against its citizens. In the case of Saddam there are therefore numerous links which give Iraq jurisdiction over Saddam: the fact that Saddam is an Iraqi is a sufficient link to the country for the country to prosecute him for any committed crimes. Most of the crimes were also allegedly committed in Iraq and further more against Iraqis each factor independently would also grant the country jurisdiction.

⁷⁴ See Bassiouni, “Universal Jurisdiction for International Crimes, Historical Perspectives and Contemporary Practice”, 42 Va. J. Int'l L. 81 2001-2002.

One might wonder if Saddam and his co defendants can be tried for crimes that have not been prohibited by the Iraqi criminal code such as genocide or crimes against humanity as it is a basic principle of international law that a crime and its punishment have to be proscribed by law before the crime has been committed (“*nullum crimen sine lege*” / “*nulla poena sine lege*”). But although this might have still been doubtful during the days of Nuremberg, it is clear that crimes against humanity and genocide as well as war crimes are proscribed by (international) law today. Genocide is especially prohibited by the Genocide Convention to which Iraq is a party⁷⁵ and war crimes are covered by the Geneva Conventions signed by Iraq.⁷⁶ Both prohibitions are also recognised by customary international law just as the prohibition of crimes against humanity is.⁷⁷ That an individual can be put on trial based on these international norms has been clearly established and is enshrined in customary international law today looking at the precedents of Nuremberg and Tokyo as well as those set through the ICTR and the ICTY. The 100 ratifications of the ICC statute⁷⁸ provide further evidence of general support to prosecute the aforementioned international crimes.

As the issue of head of state immunity has been brought up in connection with Saddam’s case⁷⁹ it shall also be addressed here briefly. Looking at the developments in international law especially during the last decade it is now pretty clear that Saddam could not raise the defence of head of state immunity under international law was he facing an international tribunal or foreign court. Head of state immunity is derived from the state’s sovereignty which generally is protected against intrusions or aggression from other sovereign states under international law. But as Saddam’s home country Iraq is putting him on trial, the discussion that arose around the planned trial of Pinochet in Spain, Milosevic in The Hague or the Ex-Rwandan Prime Minister Kambanda before the ICTR does not

⁷⁵ Accession: 20. January 1959, see UN Treaty Collection under <http://www.unhchr.ch/html/menu3/b/treaty1gen.htm>.

⁷⁶ See Database of the ICRC <http://www.cicr.org/ihl.nsf/Pays?ReadForm&c=IQ>.

⁷⁷ See Bassiouni, *supra* note 73.

⁷⁸ As of 14. November 2005, see <http://www.icc-cpi.int/asp/statesparties.html>.

⁷⁹ See e.g. Linda Malone, “Does Saddam have Head of State Immunity”, Grotian Moment: The Saddam Hussein Trial Blog”, Issue #7, *supra* note 6.

have to be repeated here. There might be a problem of head of state immunity granted by Iraqi law. Such a national immunity would however not impose any restrictions on other states to persecute Saddam and Iraq would infringe its international obligations arising out of the cited conventions by not putting Saddam on trial for the international crimes prohibited by them.

C) FAIR TRIAL PROCEEDINGS

Iraq (just as the U.S. and the United Kingdom are) is a party to the International Covenant for Civil and Political Rights (ICCPR)⁸⁰ which in its Art. 14 sets numerous basic minimal requirements for a fair trial such as the presumption of innocence, the right of the accused to be informed promptly of any charges against him or the right to receive a trial without undue delay.

The statute and its application have been closely analysed by Amnesty International⁸¹ and Human Rights Watch⁸² who both have criticized various shortcomings. It however has to be acknowledged as a starting point that the IHCC statute does include the basic guarantees requested by the “list” in the ICCPR.⁸³

Nevertheless insufficient access of the accused to their defense counsels during the investigation phase has been criticised as well as a lack of equality of arms and adequate time and facilities for preparation. Human Rights Watch has pointed out⁸⁴ that the statute’s provision requesting the lead defence council to be an Iraqi national effectively excludes any lawyer with experience in the

⁸⁰ See U.N. Treaty Database at <http://untreaty.un.org/sample/EnglishInternetBible/partI/chapterIV/treaty5.asp>.

⁸¹ Amnesty International report, *supra* note 4, this analysis is however not absolutely accurate any more as Amnesty International concentrated on the old IST statute before it was amended by the Transitional National Assembly.

⁸² Human Rights Watch Briefing Paper, *supra* note 1.

⁸³ See Amnesty International Report, *supra* note 4.

⁸⁴ Human Rights Watch Briefing Paper, *supra* note 1, at 13.

complex procedures connected to crimes of such a magnitude as genocide and crimes against humanity (e.g. gained through working at the ICTY or ICTR).

It has also been criticised that the tribunal does not require the guilt of the accused to be proven beyond a reasonable doubt, as typically required in common law countries and as required in front of the ICTY, ICTR or ICC.⁸⁵ Instead the Tribunal will find a verdict “*based on the extent to which it is satisfied by the evidence presented (...)*.”⁸⁶ On the other hand it has been said that the “beyond a reasonable doubt” standard is unheard of in many civil law countries.⁸⁷ It all in all will heavily depend on how the IHCC will apply the standard provided by the statute. The same is true for the application and interpretation of the enlisted Iraqi crimes in the tribunal’s jurisdiction which due to their extremely vague and broad wording are open to very arbitrary interpretation.

Art. 14 ICCPR further more includes the general requirement of:

“a fair and public hearing by a competent, independent and impartial tribunal established by law.”

In this regard major problems arise especially out of the highly instable security situation in Iraq. With hardly a day without terrorist attacks that have even been precisely targeted against members of the defence, fair trial proceedings are much harder to guarantee. Human Rights watch pointed out the “*serious obstacles that the defence may encounter in locating and protecting witnesses on behalf of defendants, obtaining access to documents and securing the attendance of international experts it may wish to call in support.*”⁸⁸

⁸⁵ ICTY Rules of Procedure and Evidence, Rule 87 (a), ICTR Rules of Procedure and Evidence, Rule 87 (a), Rome Statute, Art.66 (3).

⁸⁶ Code of Criminal Procedure, Paragraph 213, available at: http://www.law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf.

⁸⁷ See Bassouini in Comments on Issue #18 in Grotian Moment Blog, *supra* note 6.

⁸⁸ *Id.*

And even with considerable protection offered by the Court employing U.S. or U.S. paid security forces the defence is likely to encounter problems as it will often need to rely on people who strongly oppose the coalition's involvement as well as the IHCC and its jurisdiction.

Due to the highly insecure situation the court has to rely even more on coalition forces and foreign personnel that may at least be perceived as biased and having an own interest at stake in the proceedings. As weapons of mass destructions were never found and the ties between Al Qaida and Saddam were at best very remote the only remaining justification that might be accepted by the public is the argument that the intervention was necessary to stop ongoing and massive human rights violations committed by the dictator now on trial. An acquittal how ever unlikely would therefore be detrimental for the coalition's remaining moral justifications for the war.⁸⁹

In response to the killings of defense attorneys, the Iraqi Bar temporarily boycotted the court and the defense several times requested the trial to be moved to a location outside Iraq.⁹⁰ The court has however rejected and dismissed the motions filed, apparently without providing any written explanation or statement elaborating on its ruling.

The decision to use a purely national tribunal composed solely of Iraqi judges poses more problems. The impartiality of the judges as well as their legal expertise is doubtful. It has to be kept in mind that the court is applying international criminal law when it considers war crimes, crimes against humanity and genocide which are no easy and clear cut provisions and the statute itself points out that the court may resort to the decisions of International Criminal Courts in interpreting these

⁸⁹ Whether there would have been a legal justification for the use of force against Iraq based on the controversial doctrine of humanitarian intervention is highly doubtful; even more so in the light of the necessary "re-labelling" of the military action into a humanitarian mission after no weapons of mass destruction were found.

⁹⁰ Michael Newton, Grotian Moment Blog, "Are the Murders of Defense Council going to derail the trial ? Should the IST relocate outside Iraq ?", Issue # 19, *supra* note 6.

crimes.⁹¹ Although their knowledge and intelligence has been praised by those U.S. experts in international law chosen by the Department of Defence to train them⁹², they will surely not have the expertise somebody would have who worked in this area for years or was even involved in legal disputes before the ICTY or ICTR. Just as somebody might explain you in great detail how to drive a car this obviously does not substitute own practice or ensure that the trainee will actually do a good job. Furthermore the people who trained the judges (and whom the judges might rely on when difficult legal questions arise) were chosen by one of the parties involved in the conflict. Even if these experts did not present a biased view, the way they were chosen is open to critique and does not help to promote the perception of fair and impartial tribunal judges. According to the New York Times some of the trial judges are also relying on American Officials to arrange green cards for them to move to the U.S. after the trials are over, as taking part in the trial would end any prospect of leading a normal life in Iraq⁹³.

The judges might also have somehow been personally affected by Saddam's suppressive reign. The court has been subject to a de-Ba'thification and the Statute excludes any person who has previously been a member of the disbanded Ba'th Party from working on the court.⁹⁴ Exclusion on the basis of Ba'th party membership makes it more likely that the remaining judges have either directly or indirectly been personally subject to the regime's suppression. As Professor Newton who took part in training the Judges points out in connection to the "pool of Iraqis that were initially considered for various positions inside the Iraqi Special Tribunal" – surprisingly without addressing the threat to impartiality – :

⁹¹ IHCC Article 17 (4)

⁹² See Michael Scharf, Grotian Moment Blog, "Can Saddam Hussein get a fair trial ?", Issue # 8, *supra* note 6.

⁹³ "Hussein Lawyers Refuse To Work With Iraqi Court", NY Times, October 27, 2005, at A 14.

⁹⁴ IHCC Statute, Article 33.

“As a microcosm of Iraqi society, the overwhelming majority of that original group of 96 legal professionals had suffered the loss of immediate family members to the criminal act of the regime. One judge was the only survivor of seven brothers.”⁹⁵”

A judge who is personally involved to such an extent is obviously in great danger of rendering a biased decision not based on the rule of law. Rule 7.4 of the Rules of Evidence does however require a judge to withdraw from any case in which his impartiality or independence may reasonably be doubted and Rule 8 allows any party to challenge a judge’s impartiality. Although these rules are an important tool to help to ensure an impartial trial, they will also need to be applied in a manner that will ensure impartiality and not allow picking judges, that have suffered the loss of family members or close friends to the acts of the regime.

In a personal talk with Professor Newton he assured me that most of the judges in the original pool were later disqualified by the Iraqis as they were afraid of a possible threat to impartiality.

However, the newly presiding judge on the court, Judge Raouf Abdul Rahman is a Kurd from the city of Halabja, which is the city that was so severely targeted by Saddam during the Anfal campaign. According to Professor Newton, Judge Raouf was originally even supposed to preside over the Anfal trial before he was redirected to be the new presiding judge in the current proceedings when Judge Amin decided to resign.

When the presiding judge Rizgar Amin resigned early this year, he highlighted another threat to the trial’s fairness: political interference in the courts independence. As pointed out, Saddam has been declared guilty by high officials such as the Iraqi President Jalal Talabani who wanted the trial to start as soon as possible and said: *“Saddam is a war criminal and he deserves to be executed 20*

⁹⁵ Michael Newton, *supra* note 6, at 4.

times a day for his crimes against humanity” or Abdul Aziz Hakim, leader of the largest political party in Iraq, according to witch “*this criminal deserves the death penalty, the highest punishment.*”⁹⁶ This fact by itself would not be so troubling as long as there was no actual interference with the court’s work. But as membership in the Ba’th Party was a prerequisite for admission to judicial training under the former government⁹⁷ the IHCC Statute’s Art. 33 de-ba’thification provision would exclude most qualified lawyers from the court and it apparently has not been enforced strictly but rather selectively by Iraq’s new rulers and was employed to pressurize the court.⁹⁸ When 19 members of the court were supposed to be excluded under this provision Iraq’s president interfered to block the effort.⁹⁹ Others have however been expelled from the court under this rule. When Judge Rizgar Amin, the presiding judge, resigned, he complained about governmental interference after he had been repeatedly criticized by Iraqi politicians for being too lenient with Saddam.¹⁰⁰ The judge that was actually supposed to take his seat from within the judiciary panel apparently was sidestepped under Art. 33 and Judge Raouf became the new presiding judge.¹⁰¹ Of the panel of 5 judges who started out on the trial 3 have been replaced.¹⁰² This sort of selective enforcement poses a great risk to the trial’s fairness and the independence and impartiality of the court.

So is the trial fair? A final assessment is hardly possible at this point in time but it is clear that the trial is facing grave challenges and the odds are not in favour of fair proceedings. Although there are visible efforts to arrange for a fair trial, the security situation the trial is being held in, which allowed for the assassination of members of the court and the defence team, the pressure from inside Iraq, the executive’s involvement and the reliance on the coalition to conduct the trial as well as the lack of

⁹⁶ See Talabani cited in Chicago Tribune and Hakim cited in Washington Post, both *supra* note 6.

⁹⁷ See “Hussein’s First Trial Is Opening But Clarity May Still Be Far Off”, NY Times, October 18, 2005, at A11.

⁹⁸ See NY Times *id.*

⁹⁹ “Iraqi Leader Vows to Block Purges on Hussein Tribunal”, NY Times, July 29, 2005, at A9.

¹⁰⁰ “Iraq tries to convince Saddam judge to stay” Reuters, Jan 15, 2006, available at:

<http://www.msnbc.msn.com/id/10842074/from/RL.1/>; “Kurd to Preside at Hussein Trial, Set to Resume today”, NY Times, January 24, 2006, at A12.

¹⁰¹ “Saddam Hussein trial is postponed”, BBC News, January 24, 2006, available at:

http://news.bbc.co.uk/2/hi/middle_east/4641958.stm.

¹⁰² “Kurd to Preside at Hussein Trial, Set to Resume today”, NY Times, January 24, 2006, at A12.

experienced judges in international law and their training through the U.S. have created a situation which is very far from being ideal

D) THE PERCEPTION OF THE TRIAL

In the light of the aforementioned the trial is not only in danger of actually not complying with the ICCPR standard for a fair trial but it might also not be perceived as fair by the Iraqi as well as by the world audience. As pointed out in the introduction the court needs to serve different purposes, besides helping to deter other heads of state around the globe from engaging in similar actions there is the hope that it might reconcile victims, offer public acknowledgment of crimes committed and serve as a model trial for the post Saddam Iraqi justice system. Especially concerning the latter aspects it is not only important that the court will actually hold a fair trial but that this trial will also be perceived as such.¹⁰³ Even if close scrutiny might one day reveal that the procedures were actually fair and in conformity with international standards, a trial that is not believed to be so by the overwhelming majority of the audience watching, will leave the victims unsatisfied, will not reconcile the country or provide for a positive new start. If people end up thinking of this trial as victor's justice, where the powerful simply hold a mock trial over the imprisoned and *per se* guilty, it will be a failure. At best the perception might change over the years and essays and books written might prove that the trial - if so - was actually fair but this will be too late to achieve many of the goals set.

The trials shortcomings and possible stumbling blocks have been pointed out and the audience seems to be highly sceptical about it. While reactions concerning the trial are mixed, in Iraq some still support Saddam whereas many others want him to be executed immediately most of the reactions directly addressing the fairness of the trial are troubling. Far from being a representative study - which would be worth undertaking – you find the following statements about the trial: “It`s

¹⁰³ See also Goldstone, *supra* note 7 at 1504.

*a historic farce, not a historic trial*¹⁰⁴, *“He won’t get a fair trial in Iraq”*¹⁰⁵, *“This is just a show to distract the Iraqi people”*¹⁰⁶, *“Everyone agrees, ask anyone you want if it’s a fair trial. They’ll all say it’s unprofessional. It’s simply a farce. I’ve never seen in my life such a trial”*¹⁰⁷.” *“These are the occupiers so if you’re talking about public perception, this is what comes across into homes.”*¹⁰⁸ By referring to his contacts in Iraq Professor Bassiouni points out: *“My impression is that there are two distinct scenes that are playing out contemporaneously. The first is the witnesses’ testimony which is touching people’s hearts, and the defendants and their lawyers, which are playing on national pride since the trial is seen in part as being the U.S. vs. Saddam. In short, it is like having a 2-ring circus.”*¹⁰⁹

G) ALTERNATIVES – PRESENT & PAST

Looking at the fair trial pitfalls of the current tribunal, the question arises whether there were any alternative venues to prosecute Saddam as well as what can still be done to improve the present situation.

As a starting point the trial could be moved away from Baghdad and outside of Iraq. Although a trial in the country where the crimes were committed, close to the general public, the victims, witnesses and the locations of the crimes is generally favourable to a trial held abroad as it also offers the additional advantage of “facility building,” Baghdad does not do the trial any good. As pointed out, the lack of security in Iraq and its capital leads to insufficient protection for defence lawyers, judges,

¹⁰⁴ Furad Saadadeen, 35, Iraqi Resident, quoted by NY Times, “Iraqis Watch the Trial on TV, With Emotions Running High”, October 20, 2005, at A12.

¹⁰⁵ Ismail Maki, Iraqi, quoted by AP, October 18, 2005, MSNBC article available at: <http://www.msnbc.msn.com/id/9742717/from/RL.2/>.

¹⁰⁶ Iraqi quoted by AP, *id.*

¹⁰⁷ Jordanian quoted by PBS, December 13, 2005, “Jordanian view of Saddam’s Trial”, available at:

http://www.pbs.org/newshour/bb/middle_east/july-dec05/jordan_12-13.html (according to the report general support was high for Saddam’s eventual punishment in Jordan, however there was no belief that justice was been done by the court in Baghdad running the risk that Saddam’s reputation was enhanced rather than sullied by the legal proceedings).

¹⁰⁸ George Hawatmeh, former editor of the Jordan times, quoted by PBS, *id.*

¹⁰⁹ Cherif Bassiouni in the Grotian Moment Trial Blog, Essay # 22, *supra* note 6.

witnesses, court personal, international advisors and (foreign) experts which threatens to undermine the trial's fairness. Especially international experts and advisors might be reluctant to travel to Baghdad to testify. Also, with security the way it is, the trial is already removed from the public as it is held in a fenced of zone, which is heavily guarded, allowing only restricted access to the court.¹¹⁰ Further more the political pressure is high on the court just as the level of reliance on coalition forces to conduct the proceedings.

It has however been argued that no place is really safe from terrorist attacks¹¹¹ and that moving the proceedings would be “*subordinating civilized society to the forces of anarchy and lawlessness.*”¹¹² And although the deaths of the defense counsels were tragic, they themselves had decided to have their names and faces broadcasted during the trial and denied security protection offered by the court through U.S. forces.¹¹³ The argument that protection by the court might lead to an interference with the work done by the defense as their every step would be followed by coalition security forces – very likely perceived as biased by the defense and the witnesses it wants to rely on - has been rejected with the argument that in a civil law system such as Iraq, the neutral investigative judge has already conducted the whole investigation and the lawyers therefore need not do so themselves..¹¹⁴ Finally it has been said that moving the trial would delay it and pose serious problems to the defense to present their witnesses to the court.¹¹⁵

But none of these arguments are convincing. The argument that moving the trial might seem like surrendering to terrorist attacks, is a dangerous one when talking about an individual's right to a fair trial. It is against the very idea of human rights as rights of individuals to decide not to move a trial out of a symbolic reason – not to give in to terrorists - while thereby sacrificing a fair trial for the

¹¹⁰ See Washington Post, *supra* note 8.

¹¹¹ Michael Newton, Grotian Moment Blog, “Are the Murders of Defense Council going to derail the trial ? Should the IST relocate outside Iraq ?”, Issue # 19, *supra* note 6.

¹¹² Michael Newton, *id.*

¹¹³ Michael Scharf, *id.*

¹¹⁴ Michael Scharf, *id.*

¹¹⁵ Michael Scharf *id.*

individual concerned. And even though the Iraqi system employs an “objective investigative judge” it is of course part of a good attorney’s job to dig out as much evidence as he can to support his client, to find witnesses not found by the judge and move every stone possible to prove his case. Maybe in a stable environment, when trying an easy case, the argument that the neutral investigative judge has done all necessary discovery deserves some credit, but surely not in cases of this magnitude. The proceedings before the ICTY and the ICTR have shown that trials for genocide, war crimes and crimes against humanity are no easy cases. They involve thousands of pages of documents and by affecting many peoples’ lives, they involve so much evidence and potential witnesses that by no means an attorney can assume to have all relevant documents on his table when seeing the investigative judge’s results. And whereby it is probably true that no place is absolutely safe when it comes to terrorist attacks, a place like Dubai¹¹⁶ surely is much safer than terror stricken Baghdad with a strong insurgency still fighting coalition forces and daily bombings.

Although the ICTR and ICTY have been criticised for the problems resulting out of their distant location away from the place where the crimes have been committed they surely did prove that such trials are possible and that an adequate defense can be guaranteed. Witnesses are flown in to Arusha, Tanzania where the ICTR sits.¹¹⁷ Furthermore the decision not to accept protection by the defence counsels can not function as an excuse to ignore the danger that these attacks pose for a fair trial. The defense does not recognise the tribunal as legitimate and accuses the occupation as being illegal.¹¹⁸ It does cause severe problems for a defense lawyer to take this position and nevertheless accept protection offered to him by this very institution, especially as a reliance on the courts protection would be clearly visible for everyone (the heavy armoured cars and up to 15 body guards¹¹⁹ can hardly be hidden). If the defense prefers to move the trial this should therefore be seriously considered by the court.

¹¹⁶ Proposed by Laura Dickinson, Grotian Moment Blog, Issue #19, *supra* note 6.

¹¹⁷ See also Goldstone, *supra* note 7, at 1497.

¹¹⁸ See for example posting by member of the defense team Dr. Curtis Doebbler at <http://www.uruknet.info/?p=9016>.

¹¹⁹ “Hussein’s Lawyers Refuse to Work With Iraqi Court”, NY Times., October 27, 2005 at A14.

Aspects criticised also arise out of the heavy involvement of the coalition which could have been avoided by more and heavy international support. A prosecution before the newly created International Criminal Court (ICC) was however not an option as the ICC Statute does not allow prosecutions for crimes committed before it came into force¹²⁰ on 01. July 2002.¹²¹

But there were two other alternatives: the first one was the creation of a hybrid tribunal relying on a mixture of Iraqi nationals and international legal experts from around the world for the positions of judges, prosecutors and defense attorneys. The original IST statute, subsequently amended, at least made the appointment of international legal experts obligatory, even though only as advisors to the court. But just as in Sierra Leone the tribunal could have been set up in cooperation between the U.N. and Iraq. Heavy U.N. instead of U.S. involvement would certainly have given the tribunal more legitimacy in fact as – and of equal and great importance - in perception. However it has been claimed that Iraq was willing to prosecute Saddam by itself and furthermore that Iraq insisted on the death penalty which would not have been available with U.N. involvement. Although this might be true there are obvious similarities with Rwanda which also wanted to have the prosecutions take place within its country and favoured the death penalty.¹²² A trial in Rwanda was however considered to be impossible by the Security Council and in the light of the clear fair-trial provisions of the ICCPR, the role-model character of the proceedings and the reconciliation of the country, one can only agree with Justice Goldstone who pointed out:

*“either you have fair trials or you do not have trials at all”.*¹²³

¹²⁰ Art. 11 section 1 of the ICC Statute, available at: <http://www.un.org/law/icc/statute/romefra.htm>.

¹²¹ See also statement of the ICC president, “International Court’s Canadian president says court can’t try Saddam”, AP, November 07.2005, Canadian Press article available at: <http://www.canada.com/news/world/story.html?id=c9e82d29-dae-415d-98db-fbdf41a1b689>.

¹²² See Goldstone, *supra* note 7, at 1498.

¹²³ Goldstone, *id.*, at 1499.

If Iraq can't guarantee a fair trial by itself it should therefore not hold the trial.

The comparison with Rwanda highlights the second possibility: the establishment of an ad hoc tribunal by the Security Council under its Chapter VII power as in the cases of the ICTR and the ICTY. There has been criticism about these tribunals as trials were lengthy and costly, too remote from the victims and the public but there was no opposition to their fairness. These tribunals are also less likely as being perceived as victor's justice but rather as part of an evolving international criminal legal order. A trial of this importance would have been worth a new tribunal which arguably would also have led to a greater deterrence for any other potential international criminal as it would have resembled a further step towards a truly international criminal system in which perpetrators who have committed international crimes are prosecuted by an international forum.

Although these alternatives were considered, the current U.S. administration did not want to follow this path and from an early stage on was opposed to the idea of an international tribunal but preferred a national tribunal, possibly also because this it could help fashion and influence.¹²⁴

IV. CONCLUSION

Whereas the current tribunal might be called legitimate after its "adoption" through the Iraqi people and it can exercise jurisdiction over the ex-dictator it might not be able to conduct a fair trial. Many already believe that it actually does not do so.

The lack of a broad international involvement in the invasion of Iraq, in the installation of the court and in the trial's conduct which might eventually lead to the imposition of the death penalty - widely abolished throughout this world's democracies - has apparently also led to a broad international opposition against the proceedings. As U.S. Secretary of State Condoleeza Rice

¹²⁴ Bassiouni, *supra* note 6, at 118.

pointed out, there was an effective boycott of the trial.¹²⁵ This boycott will surely not promote the perception of the trial's success or the court's legitimacy and is regrettable when looking at the importance of the trial.

An international tribunal or one with major international involvement conducting the trial outside Iraq could have avoided many of the problems the local national court is facing today and it therefore would have been the better solution. Even though the road to the ICC was barred in order to prosecute Saddam, his trial in Baghdad highlights the advantages of an international court. Growing acceptance of this assessment might lead to the paradox situation in which the decision for a national tribunal without broad international support or involvement in Baghdad could finally end up promoting the idea of a strong international criminal court.

¹²⁵ "Rice hits boycott of trial of Saddam", The Washington Times, December 14, 2005, available at <http://washingtontimes.com/world/20051213-100045-8045r.htm>.