The Iraqi Special Tribunal: Securing Sovereignty from the Ground Up

By Michael A. Newton

The Federalist Society
for Law and Public Policy Studies

The Iraqi Special Tribunal: Securing Sovereignty From the Ground Up

Michael A. Newton*

Introduction

The exercise of punitive criminal accountability pursuant to domestic laws is at the heart of our understanding of what it means to have a society built on the rule of law, which in turn makes it the *sine qua non* of true sovereignty. It is so essential and so basic that the pursuit of justice often becomes a focal point of the mission for military forces deployed to a society where the legislative and judicial systems have become corrupted, replaced, or have simply collapsed under the weight of tyranny or corruption. Indeed, the civilian population demands justice and an end to repression even in the immediate aftermath of operations in areas where the citizens suffer from extreme poverty and overwhelming material needs.[1] The priority that the common people attach to the restoration of true justice perhaps reflects an inchoate realization that the freedom from oppression achieved by external military intervention cannot be sustained without the restoration of effective and fair mechanisms for societal justice. The elation that Iraqi citizens expressed as the statues of Saddam fell in Baghdad testified to their deep desire for a restoration of a society built on the rule of law rather than one dominated by the whims of a dictator supported by the machinery of bureaucratic oppression.

To this end, the Governing Council in Iraq sought to make the creation of an accountability mechanism for punishing those responsible for the atrocities of the Ba'athist regime one of its earliest priorities.[2] After months of debate, drafting, and consideration of expert advice solicited from the Coalition Provisional Authority, the Iraqi Governing Council issued the Statute of the Iraqi Special Tribunal (IST) on December 10, 2003.[3] The announcement of the Statute culminated a developmental process that was under the auspices of the Legal Affairs subcommittee of the Iraqi Governing Council led by Judge Dara. By sheer coincidence, the announcement of the Iraqi Special Tribunal preceded the capture of Saddam by

---

* Judge Advocate General's Corps, United States Army. Presently assigned to the Department of Law, United States Military Academy at West Point. Previously served as the Senior Advisor to the Ambassador-at-Large for War Crimes Issues, United States Department of State. Lieutenant Colonel Newton may be reached by e-mail at michael.newton@usma.edu. The opinions, and conclusions of this paper, as well as its faults, are solely those of the author. They do not necessarily reflect the views of the Judge Advocate General, the United States Army, the United States Department of State, or any other federal entity.

[1] Georges Anglade, *Rules, Risks, and Rifts in the Transition to Democracy in Haiti*, 20 FORDHAM INT'L L.J. 1176, 1190 (1997)("In the presence of an inhuman spectacle of misery and its urgent material needs, one tends to forget that the primary needs of people are liberty, justice, and security. Because a pauper also needs justice, the object of a transition to democracy becomes the modern organization of justice in a State of law. This demands destruction of the old military-police apparatus in order to give birth to another organization in charge of public order. It also requires that the institutions of justice and the body of functionaries that make them work be reconsidered so as to produce a "just justice" and in order to guarantee a "free freedom." Haiti must reconstruct judicial power separate from the executive power, which too often has controlled judicial power. Justice by law is thus the initial goal in the transition to democracy as well as the object of the transition itself. It is essentially through the achievement of this goal that Haiti can unite a country broken in two, and create a single people from two profoundly antagonistic factions. Economic analysis also poses justice as a preliminary condition necessary to development.")

[2] Interview with David Hodgkinson, Office of Human Rights and Transitional Justice, Coalition Provisional Authority, Baghdad, December 11, 2003.

[3] *Available at* http://www.cpa-iraq.org/human_rights/Statute.htm [hereinafter IST Statute].

only four days. The Iraqi people almost universally supported the concept of prosecuting Saddam inside Iraq rather than simply transferring him to an external judicial forum.[4]

To coincide with the announcement of the Statute, The Iraqi Governing Council and Coalition Provisional Authority (CPA) requested that the Defense Institute of International Legal Studies (DIILS)[5] present a seminar on investigating and prosecuting international crimes in an Iraqi domestic structure. The diverse group of 96 Iraqi judges, prosecutors, and lawyers who gathered in Baghdad were among the first Iraqis outside the Governing Council to review the Statute. Members of this group repeatedly and enthusiastically referred to Saddam's regime as the "entombed regime." Truth-based trials that conform to the principles of fundamental fairness will be a tangible demonstration that Iraqi society is on the road to a future built on the values of justice and personal liberty.

In that sense, the trial records generated from the work of the Iraqi Special Tribunal can be best conceived as the grave marker that will memorialize the misdeeds of the senior Ba'athists who subverted the rule of law in Iraq for nearly a quarter century. This article will briefly review the main structural aspects of the Iraqi Special Tribunal, pause to postulate the legality of its promulgation during the period of coalition occupation in Iraq, and conclude with some observations regarding the relationship between the IST and Iraqi sovereignty.

The Structure of the Iraqi Special Tribunal

Organs of the Tribunal

The Iraqi jurists who gathered in Baghdad in December 2003 were anxious to learn about the best practices for ensuring a neutral and effective judicial system free to function beyond the reach of political control. The Statute echoes this concern by mandating in its very first provision that the IST "shall be an independent entity and not associated with any Iraqi government departments."[6] Because the Iraqi domestic system is built on a civil law model, the IST is the most modern effort to meld common and civil law principles into a consolidated system that comports with accepted standards of justice. The Tribunal is structured similarly to the currently existing *ad hoc* international tribunals in that it contains one or more Trial Chambers,[7] and an Appeals Chamber[8] which is chaired by the President of the Tribunal who is

---

[4] Bathsheba Crocker, *Iraq: Going it Alone, Gone Wrong*, *in* WINNING THE PEACE: AN AMERICAN STRATEGY FOR POST-CONFLICT RECONSTRUCTION 281 (Robert C. Orr ed., 2004)

[5] *See http://www.dsca.mil/diils/* The Defense Institute of International Legal Studies (DIILS) provides education teams to address over 300 legal topics, with a focus on Justice Systems, the Rule of Law, and the execution of disciplined military operations. Since its inception in 1992, DIILS officers have presented programs tailored to the needs of the host country to over 19,000 senior military and civilian government officials from 113 nations around the world. Seminars are designed for an audience of 40 to 60 military and civilian executive personnel from the host country, and take place both in the host nation and in the United States.

[6] IST Statute, art. 1(a), *supra* note 4. On May 8, 2004 Ambassador Bremer issued Coalition Provisional Authority Memorandum Number 12: Administration of Independent Judiciary on May 8, 2004, which laid out the governmental structures and procedures needed to ensure a robust and independent judiciary, *available at* http://www.cpa-iraq.org/regulations/20040508_CPAMEMO12_Administration_of_Independent_Judiciary.pdf.

[7] Each of which, according to Article 4 of the Statute, will consist of five "permanent independent judges" and independent reserve judges. IST Statute, art. 4(a), *supra* note 4.

responsible for exercising oversight of the "administrative and financial aspects of the Tribunal."[9]

Additionally, the Tribunal will contain a Prosecutions Department of up to twenty prosecutors.[10] Reflecting the concern of Iraqi jurists who watched the Ba'athist machinery corrode the rule of law, the Statute makes clear that "[e]ach Prosecutor shall act independently. He or she shall not seek or receive instructions from any Governmental Department or from any other source, including the Governing Council or the Successor Government."[11]

Lastly, up to twenty Tribunal Investigative Judges will be responsible for gathering evidence of crimes within the jurisdiction of the IST "from whatever source" considered "suitable."[12] As they investigate individuals for the commission of crimes proscribed under the Statute, the Investigative Judges will serve for a term of three years under terms and conditions as set out in the preexisting Iraqi Judicial Organization Law. Nevertheless, the Investigative Judges "shall act independently as a separate organ of the Tribunal" and "shall not seek or receive instructions from any Governmental Department, or from any other source, including the Governing Council or the Successor Government."[13]

Jurisdictional Reach of the IST

The principle that states are obligated to use domestic forums to punish violations of international law has roots that run back to the ideas of Hugo Grotius.[14] As early as 1842, Secretary of State Daniel Webster articulated the idea that a nation's sovereignty also entails "the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states, and which have for their object the mitigation of the miseries of war."[15] Though internationalized judicial mechanisms have permanently altered the face of international law,[16] the Iraqi Special Tribunal is built on the truism that that sovereign states retain primary responsibility for adjudicating violations of international law.[17]

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 IST covers any Iraqi national or resident of

---

[8] The Appeals Chamber has "the power to review the decisions of the Trial Chambers." IST Statute, art. 3, *supra* note 4.
[9] IST Statute, art. 4(c)(ii), *supra* note 4.
[10] IST Statute, art. 8, *supra* note 4.
[11] IST Statute, art. 8(b), *supra* note 4.
[12] IST Statute, art. 7(i), *supra* note 4.
[13] IST Statute, art. 7(j), *supra* note 4
[14] *See* RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT (1999).
[15] JOHN BASSETT MOORE, 1 A DIGEST OF INTERNATIONAL LAW 5-6 (1906).
[16] *See generally* PAUL R. WILLIAMS & MICHAEL SCHARF, PEACE WITH JUSTICE ?: WAR CRIIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA (2002).
[17] The necessity for domestic states to use domestic criminal forums and penal authority to enforce norms developed in binding international agreements is perhaps one of the most consistent features of the body of law known as international criminal law. *See, e.g.,* Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, G.A. Res. 2670, GAOR 3rd Sess., Pt.1 U.N. Doc. A/810, at 174, *entered into* force 12 January 1951 (Article V obligates High Contracting Parties to enact the necessary domestic legislation to give effect to the criminal provisions of the Convention.)

Iraq charged with crimes listed in the Statute that were committed between July 17, 1968 and May 1, 2003 inclusive. In addition, its geographic jurisdiction extends to acts committed on the sovereign soil of the Republic of Iraq, as well as those committed in other nations, including crimes committed in connection with Iraq's wars against the Islamic Republic of Iran and the State of Kuwait.

Articles 11-13 of the Statute establish the competence of the Tribunal to prosecute genocide (Article 11), crimes against humanity (Article 12), and war crimes committed during both international and non-international armed conflicts (Article 13). These substantive provisions are perhaps the most significant aspect of the Statute because they accurately incorporate the most current norms under international humanitarian law into the fabric of Iraqi domestic law for the first time. In addition, Article 14 conveys jurisdiction over a core group of crimes defined in the Iraqi criminal code. The Iraqi lawyers involved in drafting the Statute demanded inclusion of a select list of domestic crimes because the proscribed acts were so corrosive to the rule of law inside Saddam's Iraq. Article 14 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.

For pundits or armchair lawyers tempted to dismiss the Tribunal as a bald assertion of coalition power, Article 14 reveals the offenses 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 was a vital necessity for the IST if it is to achieve its higher goal of helping to heal the wounds inflicted on Iraqi society by the Ba'athists.

Furthermore, Article 14(a) implicitly signifies the urgent priority that the Iraqis attach to judicial independence. While the Statute itself mandates the independent functioning of both the Investigative Judges and the Prosecution, there is no such correlative provision regarding the judges serving in either the Trial or Appeals Chambers. This gap led Human Rights Watch to recommend that the judges be required in writing to act independently and receive no instructions from any external source.[18] The International Covenant on Civil and Political Rights

[18] Memorandum to the Iraqi Governing Council on The Statute of the Iraqi Special Tribunal, para. A.1., December 2003, *available at* http://www.hrw.org/backgrounder/mena/iraq121703.htm.

requires a "fair and public hearing by a competent, independent, and impartial tribunal established by law," and the provision of fair trials in the IST will be an important aspect of its legitimacy.[19] The jurists who gathered in Baghdad in December 2003 expressed a great deal of outrage at the manner in which the Hussein regime imposed its will on the Iraqi people through the use of Special or "Revolutionary" courts conducted by untrained minions.[20] The very fact that the Iraqis demanded the inclusion of Article 14(a) warrants the conclusion that they will be keenly sensitive to any attempts to exert political control over the conduct of trials and fiercely resistant to external attempts to manipulate the IST.

Procedural Rights for the Accused[21]

The Coalition Provisional Authority Order that delegated authority to the Iraqi leaders to promulgate the Statute required that the IST meet "international standards of justice."[22] Under the terms of the Statute, the Trial Chambers must "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."[23] To illustrate the transformation of justice in a free Iraq, the Statute specifies that "[n]o officer, prosecutor, investigative judge, judge or other personnel of the Tribunal shall have been a member of the Ba'ath Party."[24]

Furthermore, the Statute incorporates a full range of trial rights that, in the aggregate, are fully compatible with applicable human rights norms. Echoing the fundamental guarantees of the International Covenant on Civil and Political Rights, Article 20 of the Statute reads as follows:

> 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.

---

[19] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 UN GAOR (Supp. No. 16) at 52, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (1967).
[20] Rajiv Chandrasekaran, *Tribunal Planners Hope to Start Trials by Spring*, WASH. POST, A1 (Dec. 16, 2003).
[21] The Iraqi lawyers selected this term rather than that used in the International Criminal Court negotiations. 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* U.N. Doc. PCNICC/2000/INF/3/Add.2 (2000), *reprinted in* KNUT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 14 (2002).
[22] *See* Coalition Provisional Authority Order # 48: Delegation of Authority Regarding and Iraqi Special Tribunal, available at http://www.cpa-iraq.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf.
[23] IST Statute, art. 21(b), *supra* note 4.
[24] IST Statute, art. 33, *supra* note 4.

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 defense 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;
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.

The Promulgation of the Statute Under the Law of Occupation

United Nations Security Council Resolution 1483 affirmed the need for an accountability mechanism for the crimes and atrocities committed under Saddam's regime, and specifically called upon the Coalition Provisional Authority to "promote the welfare of the Iraqi people through the effective administration of the territory."[25] The law of belligerent occupation simultaneously imposed a highly developed system of rights and duties on the Coalition Provisional Authority.[26] The baseline principle of occupation law is that the civilian population should continue to live their lives as normally as possible. As a result of this baseline, the occupier has a range of duties towards the civilian population, even while maintaining legal rights to conduct operations and provide for security of military and civilian persons and property.

Pursuant to the baseline principle of normality, the Hague Regulations prescribed the rule that the occupying power must respect "unless absolutely prevented, the laws in force in the country."[27] Nevertheless, the international legal regime is not so inflexible as to elevate the

[25] S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483, para. 4 (2003).
[26] *See generally* Regulations annexed to Hague Convention IV Respecting the Laws and Customs of War on Land, 1907, *entered into force* Jan. 26, 1910, *reprinted in* Documentation on the Laws of War 73 (3d ed., eds. Adam Roberts & Richard Guelff 2000)[*hereinafter* 1907 Hague Regulations],Geneva Convention Relative to the Protection of Civilians in Time of War, arts. 47-78, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 [hereinafter Civilians Convention].
[27] 1907 Hague Regulations, *supra* note 27, art. 43.

provisions of domestic law and the structure of domestic institutions above the pursuit of justice. The promulgation of the IST based on the Chapter VII mandate of Resolution 1483 conformed to the law of occupation as it has been interpreted and developed.

International law allows a 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. 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 "*nécessite*."[28] In the post World War II context, this meant that the Allies could set the feet of the defeated Axis powers "on a more wholesome path"[29] rather than blindly enforcing the institutional and legal constraints that were the main bulwarks of tyranny.[30]

Article 64 of the 1949 Geneva Conventions explained the implications of Article 43 in more concrete and precise terms. In ascertaining the implications of Article 64 with regard to the occupation in Iraq, it is important to realize its drafters did not extend the "traditional scope of occupation legislation."[31] In the Geneva Convention, the law developed to amplify the concept of necessity understood to be embedded in the old Hague Article 43. Article 64[32] 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 fulfill

---

[28] Yoram Dinstein, *Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding* , 1 PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH HARVARD UNIVERSITY OCCASIONAL PAPER SERIES 8 (Fall 2004). *See also* E.H. Schwenk, *Legislative Powers of the Military Occupant Under Article 43, Hague Regulations* 54 YALE L.J. 393 (1945).

[29] MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 223-7 (1959).

[30] For example, German forces were able to commit almost unthinkable brutalities under the shield of Nazi sovereignty based on the *Fuehrerprinzip* (leadership principle) imposed by Hitler to exercise his will as supreme through the police, the courts, the military, and all the other institutions of organized German society. The oath of the Nazi party stated: "I owe inviolable fidelity to Adolf Hitler; I vow absolute obedience to him and to the leaders he designates for me." DREXEL A. SPRECHER, INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT 1037-38. 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, II TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 100 (1947).

[31] G. SCHWARZENBERGER, THE LAW OF ARMED CONFLICT 194 (1968).

[32] Civilians Convention, *supra* note 27, art. 64.

> 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 summation of these interlinked provisions is that the concept of necessity under Article 64 was broad enough to permit the CPA to delegate the authority for promulgation of the IST to the Governing Council. 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 pursuant to the 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.[33] The subsequent promulgation of CPA Policy Memorandum # 3 on June 18, 2003 was also based on the treaty obligation to eliminate obstacles to the application of the Geneva Conventions because it amended key provisions of the Iraqi Criminal Code in order to protect the rights of the civilians in Iraq as required in the Geneva Conventions.[34] Though Policy Memorandum # 3 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 June 18, 2003 Policy Memorandum #3 expressly focused on the "need to transition" to an effective administration of domestic justice weaned from a "dependency on military support."[35]

The Second paragraph of Article 64 is the key to understanding the promulgation of the IST. Juxtaposed against the text of Article 64, Article 47 of the IVth Convention implicitly concedes power to the occupying force to "change the institutions or government" of the occupied territory, so long as those changes do not deprive the population of the benefits of the IVth Convention. The Commentary to the IVth Geneva Convention makes 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 IVth Geneva Convention.[36] Arguably, direct CPA promulgation of the Statute and the accompanying reforms to the existing Iraqi court system could have been justified based on any of the three permissible purposes (*i.e*. fulfilling its treaty obligation to protect civilians,

---

[33] Coalition Provisional Authority Order Number # 7, 9 June 2003, Doc. No. CPA/MEM/9 Jun 03/03 §§ 2 and 3, *available at* http://www.cpa-iraq.org/regulations/index.html#Orders.

[34] Coalition Provisional Authority Memorandum Number 3: Criminal Procedures was revised on June 27, 2004, *available at* http://www.cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures__Rev_.pdf. Articles 64-78 of the IVth Convention detail a range of specific rights belonging to the civilian population of the occupied territory that correspond to those generally accepted as core human rights provisions, *inter alia*, the right to a fair trial with the accompanying due process, credit for pretrial confinement, etc. *Cf.* International Covenant on Civil and Political Rights, G.A. Res. 2200A)XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), art. 14, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 (describing analogous provisions derived from international human rights law).

[35] Copy on file with author.

[36] *See* IV COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 274 (O.M. Uhler & H. Coursier eds. 1960)(explaining the intended implementation of the language of Article 47, Civilians Convention, *supra* note 27, art. 47("any change introduced" to domestic institutions by the occupying power must protect the rights of the civilian population).

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, the CPA would not have been barred by Article 47 and could have found affirmative authority in Article 64 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 delegation of authority to the Governing Council to establish the IST meant that it was grounded in the soil of sovereignty rather than simply being viewed as a vehicle for foreign domination. The delegation of authority to the Governing Council to develop and implement the IST in turn increases the legitimacy and long range utility of the IST as a vehicle for restoring respect for the rule of law inside the citizenry of Iraq. In light of the demands of the local population for a system of fair justice, the imposition of individual criminal responsibility on regime elites is far more beneficial to the ultimate restoration of respect for the rule of law when its genesis and execution are the responsibility of Iraqi officials whose interests are directly linked to the long term welfare of the Iraqi people.

The Validity of the IST as a Domestic Mechanism

The IST was created by the Iraqi authorities with the support of international experts in a context that does not warrant the creation of an internationalized accountability mechanism. The best justice is that closest to the people, both from the standpoint of efficiency and utility. Why? Because crimes are being handled in a timely fashion in the country where people see justice being done. That's where the physical evidence is located and where the victims live. That's where justice can be achieved in the most expeditious manner which also does the most to restore long term societal stability.

United States policy is rightly focused on encouraging states to exercise their sovereign rights to pursue accountability for war crimes and other egregious violations of international and domestic law rather than simply abdicating to an internationalized process. There has never been an internationalized process created simply based on the nature of the underlying offenses as international norms. The United States Ambassador-at-Large for War Crimes has explained this as follows:[37]

> the international practice should be to support sovereign states seeking justice domestically when it is feasible and would be credible . . . . International tribunals are not and should not be the courts of first redress, but of last resort. When domestic justice is not possible for egregious war crimes due to a failed state or a dysfunctional judicial system, the international community may through the Security Council or by consent step in on an ad hoc basis as in Rwanda and Yugoslavia.

Even in the context of the Nuremberg Tribunal, it is important to note that the Moscow Declaration specifically favored punishment through the national courts in the countries where

[37] Review of Terrorism Suspects Policies, Hearing on DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism, Before the United States Senate Committee on the Judiciary, 107th Congress (2001) (statement of Pierre-Richard Prosper, United States Ambassador--at--Large for War Crimes Issues).

the crimes were committed.[38] The military commissions established in the Far East similarly incorporated the principle that the international forum did not supplant domestic mechanisms.[39]

The current *ad hoc* tribunals were both created in contexts where justice would not be achieved or even pursued in domestic forums. The International Criminal Tribunal for the Former Yugoslavia (ICTY) was created to fill the domestic enforcement void caused by the dictatorial control that the Milosevic regime exercised over the Yugoslav judicial system.[40] Similarly, in the context of the genocide and societal chaos in Rwanda, the Security Council created the International Criminal Tribunal for Rwanda (ICTR) where there would have otherwise been a prosecutorial void due to the total disarray of the domestic judicial system.[41] Based on the clear textual tenet of complementarity,[42] even the most ardent advocates of the International Criminal Court (ICC)[43] concede that the very best world is one in which the ICC focuses on a smaller number of more severe or difficult prosecutions while states remain responsible for prosecuting the vast majority of offenses.[44]

---

[38] IX Department of State Bulletin, No. 228, 310, *reprinted in* REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIBUNALS 11, DEPARTMENT OF STATE PUBLICATION 3080, WASHINGTON D.C. (1945). The Moscow Declaration was actually issued to the Press on November 1, 1943. For an account of the political and legal maneuvering behind the effort to bring this stated war aim into actuality, see PETER MAGUIRE, LAW AND WAR: AN AMERICAN STORY 85-110 (2000). The Declaration 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 offenses where a single country had no greater grounds for claiming jurisdiction than another country. Justice Jackson recognized this reality in his famous opening statement. He 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." Opening Statement to the International Military Tribunal at Nuremberg, II TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 99 (1947). He further clarified that any defendants who succeeded in "escaping the condemnation of this Tribunal … will be delivered up to our continental Allies." *Id*. at 100.

[39] *See* Regulations Governing the Trial of War Criminals, General Headquarters, United States Army Pacific, AG 000.5, 24 September 1945, para 5(b)("[p]ersons 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).

[40] S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993). *See Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808* (1993), U.N. SCOR, 48th Sess., U.N. Doc. S/2-5704 ¶ 26 (1993)(the "particular circumstances" of the impunity in the Former Yugoslavia warranted the creation of the international tribunal).

[41] S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994). *See generally* VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL COURT FOR RWANDA (1998).

[42] *See* Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001). *Rome Statute of the International Criminal Court*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, arts. 17, 19(1), 19(2), and 20(3), *reprinted in* 37 I.L.M. 998 (1998)[hereinafter Rome Statute].

[43] Rome Statute, *supra* note 43, arts. 12–19.

[44] History shows that the overwhelming number of prosecutions for violations of international humanitarian law and other serious crimes have come in national forums as opposed to international tribunals. For example, in contrast to the original twenty-four defendants charged before the International Military Tribunal at Nuremberg, Allied zone of occupation courts exercising sovereign power on German soil sentenced over five thousand Germans for war crimes. MARJORIE WHITEMAN, 11 DIGEST OF INTERNATIONAL LAW 947-56 (1968). The United States convicted 1814 (with 450 executions); the French convicted 2107 (109 executed); the British convicted 1085 (240 executed); there are no reliable numbers for the thousands executed by the Russians. M. CHERIF BASSIOUNI, CRIMES AGAINST

The circumstances in Iraq do not warrant creation of an internationalized accountability mechanism because the Iraqi judiciary and people stand ready to take on the challenge of what will almost certainly be a range of incredibly complex trials. Without doubt, the IST will handle cases brought against generally unsympathetic individuals that require time-consuming applications of sophisticated international norms. Having said that, the Statute itself erects a delicate balance between budding Iraqi sovereignty and the proper implementation of international norms. There are a range of issues which manifest the intent of the Iraqis to enforce international law without completely surrendering control or authority over the IST to the international community.

The Bar Affiliation of Counsel

When interpreting the provisions of international law found in Articles 11-13, the Statute permits the Trial and Appellate Chambers to "resort to the relevant decisions of international courts or tribunals as persuasive authority for their decisions."[45] Instead of simply permitting international expertise to dominate the IST, the Statute requires that an accused "is entitled to have non-Iraqi legal representation, so long as the principal lawyer of such suspect is Iraqi."[46] Furthermore, subject to one narrow exception (see below), the judges, investigative judges, prosecutors, and the Director of the Administrative Department shall be Iraqi nationals.[47] These provisions indicate a willingness to incorporate international expertise and current jurisprudence into a process that has the earmarks of Iraqi justice, which in turn will make it acceptable and legitimate to the civilian population as a whole.

The Issue of International Advisors

Even as they sought to retain the Iraqi nature of the IST, the Governing Council recognized that legitimacy in the eyes of the world would also contribute to the long term rehabilitation of Iraq into the community of nations. To that end, the Statute *requires* the appointment of non-Iraqi experts to work in an advisory capacity to facilitate the work of the Trial and Appellate Chambers, the Investigative Judges and the Prosecutions Department. International experts appointed within the specified offices of the IST are to be persons of "high moral character, impartiality, and integrity."[48] The provision requiring the appointment of international experts to advise the Investigative Judges reveals the underlying intent of the Governing Council and the important role projected for such advisors:[49]

> The Chief Tribunal Investigative Judge shall be required to appoint non-Iraqi nationals to act in advisory capacities or as observers to the Tribunal Investigative Judges. The role of the non-Iraqi nationals and observers shall be to provide

---

HUMANITY IN INTERNATIONAL CRIMINAL LAW 532 (2d ed. 1999). Similarly, from 1946 to 1948, Australian, American, Filipino, Dutch, British, French, Chinese, and Australian courts convicted some 4,200 war criminals in the Pacific theater. MARJORIE WHITEMAN, 11 DIGEST OF INTERNATIONAL LAW 1005 (1968).

[45] IST Statute, art. 17(b), *supra* note 4.

[46] IST Statute, art. 18(c), *supra* note 4.

[47] IST Statute, art. 28, *supra* note 4.

[48] IST Statute, arts. 6(c), 7(o), and 8(k), *supra* note 4.

[49] IST Statute, art.7(n), *supra* note 4.

> assistance to the Tribunal Investigative Judges with respect to the investigations and prosecution of cases covered by this Statute (whether in an international context or otherwise), and to monitor the protection by the Tribunal Investigative Judges of general due process of law standards. In appointing such advisors, the Chief Tribunal Investigative Judge shall be entitled to request assistance from the international community, including the United Nations.

The provisions addressing the appointment of non-Iraqi judges are similar, but preserve an important degree of Iraqi autonomy. Instead of a mandatory requirement to appoint international judges, the Statute simply provides that "[t]he Governing Council or the Successor Government, if it deems necessary, can appoint non-Iraqi judges who have experience in the crimes encompassed in this statute, and who shall be persons of high moral character, impartiality and integrity."[50] The combination of these provisions indicates that the distinguished judges and lawyers who helped create the Special Tribunal strove to build a structure influenced by and properly informed by international standards and jurisprudence without being dominated and manipulated by such external forces. This is surely an appropriate balance for those seeking to restore respect for the rule of law inside Iraqi society and the judiciary that serves that society.

The Issue of Punishments

One of the most important efforts to balance the enforcement of international norms with the preservation of Iraqi sovereign concerns is also one of the most visible and controversial. Article 24(a) of the Statute provides that the possible penalties for the IST are those "prescribed by Iraqi law (especially Law Number 111 of 1969 of the Iraqi Criminal Code), save that for the purposes of this Tribunal, sentences of life imprisonment shall mean the remaining natural life of the person." This provision conceivably permits the imposition of the death penalty for the gross violations of international law outlined in the Statute (genocide, crimes against humanity, and war crimes). Even in this sensitive area, the drafters took a bow to the importance of international norms by specifying that the penalty for crimes described in Articles 11-13 "which do not have a counterpart under Iraqi law shall be determined by the Trial Chambers taking into account such factors as the gravity of the crime, the individual circumstances of the convicted person and relevant international precedents."[51] These provisions raise the specter in some minds that the core goal of the IST is for vengeance to be achieved through the veneer of a judicial process.

However, the possibility that the Iraqi authorities could impose the death penalty for the gross violations of international law during the Ba'athist regime cannot be divorced from the rather extensive due process guarantees embedded in the Statute. Indeed, no fair reading of the Statute could lead to the conclusion that the drafters of the IST had no interest in seeking justice via a legitimate and truth-based institution. In addition, human rights law specifically envisions that the decision whether to abolish or enforce the death penalty in domestic penal systems is

[50] IST Statute, art. 4(d), *supra* note 4.
[51] IST Statute, art. 28(d), *supra* note 4.

reserved to national processes.[52] The fact that none of the internationalized accountability mechanisms in the world today have the power to impose the death penalty should not be dispositive for the Iraqis as they address the problems of their recent past. The paradoxical result of a binding rule of international law that forbade the imposition of the death penalty for gross violations of international law would be to make the enforcement of those norms less likely.

Conclusion

When faced with the challenge of implementing humanitarian law, the only guarantee is that the task is difficult and the progress slow. The creator of the Hague Peace Conference, Czar Nicholas, cautioned that "[o]ne must wait longer when planting an oak than when planting a flower."[53] The IST has the potential to become a strong force for rebuilding the rule of law inside Iraq. Those Iraqis and non-Iraqi advisors who dedicate themselves to helping the IST achieve this lofty goal deserve the support, both legal and financial, of those individuals and nations that share that objective.

[52] International Covenant on Civil and Political Rights, G.A. Res. 2200A)XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), art. 6 para. 2, 14, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

[53] JAMES BROWN SCOTT, THE HAGUE PEACE CONFERENCES OF 1899 AND 1907 xiv (1915).