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The Iraqi Special Tribunal: A Human Rights Perspective

Michael A. Newton†

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Introduction

> It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who err, who comes short again and again because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat.
>
> President Theodore Roosevelt[1]

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1. President Theodore Roosevelt, The Man in the Arena: Citizenship in a Republic, Address at the Sorbonne, Paris (Apr. 23, 1910), *available at* http://theodoreroosevelt.org/research/speeches.htm.

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The people of Iraq have a legal and moral right to build a structure for the prosecution of the leading figures in the Ba'athist regime. More to the point, the judges who have risked their lives to build the rule of law in Iraq should rightfully expect the support and encouragement of the world rather than a cautious and lukewarm assurance that the civilized peoples of the world wish them the best. I was involved in the conceptual development and drafting of the Statute for the Iraqi Special Tribunal (IST), and have subsequently spent many hours with the judges and investigators of the court as they prepare to undertake their important work. I have gained a deep respect for the legal ethos and professional courage of the members of the Iraqi bar who have risked their lives and those of their families to serve the Iraqi people. My experience has convinced me that the creation of the IST is not only warranted under the existing structure of international law, but accords with the highest aspirations of those who purport to believe in the rule of law.

The creation of the IST was borne of necessity after the fall of Saddam Hussein's regime. 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. This principle is so essential that the pursuit of justice often becomes a focal point for the 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.[2] Assuming its proper role on behalf of the Iraqi people, the Interim Iraqi Governing Council (the "Governing Council") made the creation of an accountability mechanism for punishing those responsible for the atrocities of the Ba'athist regime one of its earliest priorities.[3] After an extensive and genuine partnership that entailed months of debate, drafting, and consideration of expert advice solicited from the Coalition Provisional Authority (CPA), the Governing Council issued the IST Statute on December 10, 2003.[4] The announcement of the Statute culminated a developmental process carried out under the auspices of the Legal Affairs subcommittee of the Iraqi Governing Council led by Judge Dara, and by sheer coincidence preceded the capture of Saddam Hussein by only four days.

Ancillary to the announcement of the Statute, the Governing Council and CPA requested that the Defense Institute of International Legal Studies (DIILS)[5] present a seminar on investigating and prosecuting international

2. *See* Michael A. Newton, *Harmony or Hegemony? The American Military Role in the Pursuit of Justice*, 19 CONN. J. INT'L L., 231 (2004).

3. Interview with David Hodgkinson, Office of Human Rights and Transitional Justice, Coalition Provisional Authority, in Baghdad, Iraq (Dec. 11, 2003).

4. Statute of the Iraqi Special Tribunal art. 38, Dec. 10, 2003, 43 I.L.M. 231, *available at* http://iraq-ist.org/en/about/statute.htm [hereinafter IST Statute].

5. *See* Defense Institute of International Legal Studies Mission, http://www.dsca.mil/diils/ (last visited Sept. 28, 2005). The Defense Institute of International Legal Studies (DIILS) provides education teams to address over 330 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

crimes in accordance with international norms. The diverse group of ninety-six 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." The members of the Iraqi legal community that we were teaching later formed the pool of Iraqis who were initially considered for various positions inside the IST. I was in the room with those Iraqi judges and prosecutors in Baghdad when they learned of the successful capture of President Hussein. In the frenzy of joy and palpable relief that followed the electric news,[6] one of the judges hugged me and exclaimed "Today is day one!" His spontaneous vision captured the sense of many Iraqis that the definitive end of the Hussein regime was a watershed event for those dedicated to leading Iraq towards stability and sovereignty founded on respect for human rights and the rule of law. In addition, judges have reiterated to me on a number of occasions that they view their important work as the doorway that will expand the influence and application of international humanitarian law across the Arab-speaking areas of the world.

The dedication of the Iraqi legal professionals to restore the rule of law reflects the broader societal thirst for accountability that is a foreseeable feature of a post-conflict civil society emerging from widespread and official governmental human rights abuses.[7] 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 acts of the regime. One judge was the only survivor of seven brothers. The elation of the Iraqi people mirrored that of other societies where the civilian population prized justice and an end to repression in the immediate aftermath of operations even in areas where the citizens suffer from extreme poverty

of the host country to over 23,000 senior military and civilian government officials in 95 nations around the world. Seminars are designed for audiences 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. The members of the joint team of military lawyers knew of the apprehension just prior to the receipt of the news by the judges. A cell phone rang, and one of the judges sprang to his feet and interrupted the ongoing class. He shouted the news, and the entire class disintegrated for the day. The celebratory fire of AK-47s punctuated the Iraqi afternoon and lasted most of the night. The classroom celebration was long and joyous as normally reserved older gentlemen danced and hugged and cried with relief at the news. For a description of the broader mood of the Iraqi people, see Anne Barnard & Michael Kranish, *Baghdad Falls: Euphoric Iraqis Topple Symbols; US Warns That War Not Over*, Boston Globe, Apr. 10, 2003, at A1.

7. Nongovernmental organizations and the U.S. Department of State have catalogued a panoply of human rights abuses under Saddam's rule in Iraq, *inter alia*, the deaths of 50,000 to 100,000, Kurds; the destruction of 2,000 Kurdish villages; the internal displacement of 900,000 Iraqi civilians; summary executions of over 10,000 political opponents; beheadings; prostitution; and the intentional deprivation of food to the civilian population. Office of the Press Secretary, The White House, Past Repression and Atrocities by Saddam Hussein's Regime (Apr. 4, 2003), http://www.whitehouse.gov/infocus/iraq/news/20030404-1.html.

and overwhelming material needs.[8] The demise of the regime fanned the long-subdued embers of hope that the citizenry had never quite forgotten; people began to openly discuss the dim but potent aspiration that they might be able to live in peace and stability secure in the knowledge that the rule of law would protect their home and family. The priority that the common people attach to the restoration of true justice perhaps reflected an inchoate realization that the freedom from oppression achieved by coalition forces could not be sustained without effective restoration of personal accountability based on law. The elation that Iraqi citizens expressed as the statues of Saddam Hussein fell in Baghdad testified to their deep desire for the 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.

The IST was created with the express goal of bringing personal accountability to those Ba'athists that were responsible for depriving Iraqis of their human rights, and of virtually extinguishing the real rule of law for over two decades.[9] It would be ironic indeed if the mechanism created by the Iraqis to address the human rights failings of the past in itself became the vehicle for denying and suppressing human rights into the future. The purpose of this paper is to assess the creation and implementation of the IST in light of relevant human rights norms. From my perspective, the men and women who have committed themselves to serve the IST are the ones who have shouldered the burden of replacing the osmosis of fear that pervaded Iraq under Saddam's rule with the peace and societal stability that flows from a solid rule of law.

It is false to presume that the tribunal will be capable of achieving only the shadow of justice through the vehicle of undermining the core human rights of those who will face charges under its authority. Such an assumption is unwarranted as demonstrated by a closer examination of the structure of the statute and its accompanying rules of evidence and procedure. In particular, the interface of the IST Statute with the preexisting structure of the Iraqi Code of Criminal Procedure reveals a developed web of legal protections that fully accord with existing human rights principles. This

8. *See, e.g.*, 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.").

9. *See* IST Statute, *supra* note 4, art. 1.

paper will discuss the basis under international law that warranted the formation of the IST and describe the salient features of the tribunal's structure. After noting some of the most important points of comparison between the IST and earlier accountability mechanisms, the paper will conclude with a detailed explication of the relationship between the tribunal and the most important of the existing human rights norms related to the process of criminal accountability for crimes derived from international law.

I. Legal Authorities for the Creation of the Iraqi Special Tribunal

A. The Law of Occupation

The relationship of a subjugated civilian population to the foreign power temporarily exercising de facto sovereignty is regulated by the extensive development of the law of occupation.[10] As a matter of legal rights and duties, "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army."[11] This legal test is met when the following circumstances prevail on the ground: First, that the existing governmental structures have been rendered incapable of exercising their normal authority; and second, that the occupying power is in a position to carry out the normal functions of government over the affected area.[12] For the purposes of United States policy, occupation is the legal state occasioned by "invasion plus taking firm possession of enemy territory for the purpose of holding it."[13] Although a state of occupation does not "affect the legal status of the territory in question,"[14] the assumption of authority over the occupied territory implicitly means that the existing institutions of society have been swept aside.

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10. *See generally* Convention (IV) Respecting the Laws and Customs of War on Land, Annex: Regulations Concerning the Laws and Customs of War on Land arts. 42-56, Oct. 18, 1907, 36 Stat. 2277 (entered into force Jan. 26, 1910), *reprinted in* DOCUMENTATION ON THE LAWS OF WAR 73 (3d ed., Adam Roberts & Richard Guelff eds., 2000) [*hereinafter* 1907 Hague Regulations]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 47-78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

11. 1907 Hague Regulations, *supra* note 10, art. 42. *See also* DEPARTMENT OF THE ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE, ¶ 351 (1956) [hereinafter FM 27-10] (devoting the whole of Chapter 6 of the United States Army Field Manual related to the law of armed conflict to explicating the text of the law related to occupation as well as the United States policy related to occupation), *available at* http://www.globalsecurity.org/military/library/policy/army/fm/27-10/.

12. UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 275, ¶ 11.3 (2004).

13. FM 27-10, *supra* note 11, ¶ 352.

14. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims Of International Armed Conflicts, Annex I, art. 4, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (entered into force Dec. 7, 1978) [hereinafter Protocol I]. The United States policy in this regard is clear that occupation confers only the "means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty." FM 27-10, *supra* note 11, ¶ 358.

Because the foreign power has displaced the normal domestic offices, the cornerstone of the law of occupation is the broad obligation that the foreign power "take *all* the measures in his power to restore, and ensure, as far as possible, public order and safety . . . ."[15] In the authoritative French, the occupier must preserve "*l'ordre et la vie publics*" (i.e. "public order and life").[16] On that legal reasoning alone, the establishment of the IST could have been warranted under the inherent occupation authority of the Coalition as an integral part of the strategic plan for restoring public calm and peaceful stability to the civilian population across Iraq. From that perspective, the IST is the intellectual twin to the International Criminal Tribunal for the former Yugoslavia (ICTY) because the United Nations Security Council established the ICTY with a groundbreaking 1993 resolution[17] that was premised on the legal obligation of the Security Council to "maintain or restore international peace and security."[18]

The IST and ICTY[19] are both founded on the assessment by the officials charged with preserving stability and the rule of law that prosecution of selected persons responsible for serious violations of international humanitarian law will facilitate the restoration of societal peace and stability (*l'ordre et la vie publics* in the language of the Hague Regulations). After the first defendant, a Serb named Dusko Tadić, challenged the legality of the ICTY, the Trial Chamber ruled that the authority of the Security Council to create the tribunal was dispositive.[20] Just as the Security Council has the "primary responsibility" for maintaining international peace and secur-

15. 1907 Hague Regulations, *supra* note 10, art. 42 (emphasis added).

16. *Id.* The conceptual limitations of foreign occupation also warranted a temporal limitation built into the 1949 Geneva Conventions that the general "application of the present Convention [law of occupation] shall cease one year after the general close of military operations . . . ." *Id.* art. 6. Based on pure pragmatism, Article 6 of the Fourth Geneva Convention does permit the application of a broader range of specific treaty provisions "for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory . . . ." *Id.* The 1977 Protocols eliminated the patchwork approach to treaty protections with the simple declarative that "the application of the Conventions and of this Protocol shall cease, in the territory of the Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation . . . ." Protocol I, *supra* note 14, art. 3(b).

17. *See* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

18. U.N. Charter art. 39 (giving the Security Council the power to "determine the existence of any threat to peace, breach of the peace, or act of aggression" and it "shall make recommendations, or decide what measures shall be taken in accordance with Article[ ] 41 . . . to maintain or restore international peace and security").

19. *See also infra* note 126 and accompanying text for a similar conclusion in relation to the creation of the Special Court for Sierra Leone on the basis of an agreement between the Security Council and the government of Sierra Leone.

20. Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defense Motion on Jurisdiction (Aug. 10, 1995), *available at* http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm ("[T]his International Tribunal is not a constitutional court set up to scrutinise the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council.").

ity under the United Nations Charter,[21] the law of occupation imposed a concrete legal duty on the CPA to facilitate the return of stability and order to Iraq after the fall of the regime. As criminal forums conceived and created pursuant to the broader responsibility of empowered authorities to maintain or restore peace and security, both the ICTY and IST were appropriate nonmilitary mechanisms (though each was creative in its own time and in different ways).[22]

In the context of Iraq, of course, the legal framework of occupation rests on a delicate balance. On the one hand, the civilian population has no legal right to conduct activities that are harmful to persons or property of the occupying force, and may be convicted or interned based on such unlawful activities.[23] Article 42 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (hereinafter referred to by its more common appellation the "Fourth Geneva Convention") specifically permits the deprivation of liberty for civilians if "the security of the Detaining Power makes it absolutely necessary."[24] Even large-scale internment may be permissible in situations where there are "serious and legitimate reasons" to believe that the detained persons threaten the safety and security of the occupying power.[25] At the same time, the coercive authority of the occupying power is limited by a specific prohibition against making any changes to the governmental structure or institutions that would undermine the benefits guaranteed to civilians under the Geneva Conventions.[26] Thus, the baseline principle of occupation law is that the civilian population should continue to live their lives as normally as possible.

This baseline principle rests on the reality that mere occupation does not effect a transfer of sovereignty; hence, the occupying power must protect the lives and property of the civilian population from the uncertainties inherent in the transfer of political authority to the maximum practicable extent. This concept may be termed the minimalist principle, though some observers have termed it the principle of normality.[27] As a policy priority flowing from the mandates of the Fourth Geneva Convention, domestic law should be enforced by domestic officials insofar as possible, and crimes not of a military nature that do not affect the occupant's security will normally be delegated to the jurisdiction of local courts.[28] The IST fits this legal/policy model precisely as it was created and subsequently ratified by Iraqi authorities as an Iraqi domestic statute.

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21. U.N. Charter art. 24(1).

22. *See supra* note 15 and accompanying text.

23. Geneva IV, *supra* note 10, arts. 68, 78 (permitting detention of civilians for "imperative reasons of security").

24. *Id.* art. 42.

25. *See* Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment (Feb. 20, 2001), *available at* http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf (last visited June 26, 2005).

26. Geneva IV, *supra* note 10, art. 47.

27. *See* JEAN S. PICTET, PRINCIPLES DU DROIT INTERNATIONAL HUMANITAIRE [PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW] 50 (1966).

28. FM 27-10, *supra* note 11, ¶ 370.

However, the international legal regime does not doggedly elevate the provisions of domestic law and the structure of domestic institutions above the pursuit of justice. Despite the minimalist principle, international law allows reasonable latitude for an occupying power to modify, suspend, or replace the existing penal structure in the interests of ensuring justice and the restoration of the rule of law. In its temporary exercise of functional sovereignty over the occupied territory, and as a pragmatic necessity, the occupation authority must ensure the proper functioning, *inter alia*, of domestic criminal processes and cannot abdicate that responsibility to domestic officials of the civilian population who may or may not be willing or able to carry out their normal functions in pursuit of public order.[29] Pursuant to the baseline principle of normality, Article 43 of the 1907 Hague Regulations mandates that the occupying power must respect, "unless absolutely prevented, the laws in force in the country."[30]

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.[31] However, rather than being understood literally, *empêchement absolu* has been interpreted as the equivalent of "*nécessite*."[32] 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"[33] rather than blindly enforcing the institutional and legal constraints that had been the main bulwarks of tyranny.[34]

Article 64 of the Fourth Geneva Convention explained the implications of older 1907 Hague Article 43 language by explaining the exception to the minimalist principle in more concrete terms. In ascertaining the implications of the 1949 Article 64 language with regard to 2003 the occu-

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29. Geneva IV, *supra* note 10, art. 54 ("[T]he Occupying Power may not alter the status of public officials or judges, or in any way apply sanctions to or take measures of coercion or discrimination against them should they abstain from fulfilling their functions for reasons of conscience.").

30. 1907 Hague Regulations, *supra* note 10, art. 43.

31. *Id.*

32. 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).

33. MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 223-27 (1959).

34. 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 (1999). 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 equalled [sic] only by the dynasties of the ancient East." Robert Jackson, *Opening Statement to the International Military Tribunal at Nuremberg*, *in* II TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 99-100 (1947).

pation in Iraq, it is important to realize its drafters did not extend the "traditional scope of occupation legislation."[35] Hence, the law of the Geneva Convention amplified the concept of necessity understood at the time to be embedded in the old Hague Article 43. Article 64 incorporates the preexisting baseline of normality within the confines of protecting the legal rights of the civilian population. Article 64 accordingly reads as follows:

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.
>
> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.[36]

The plain language of Article 64 must be interpreted in good faith in light of the object and purpose of the Fourth Geneva Convention,[37] which seeks to alleviate the suffering of the civilian population and ameliorate the potentially adverse consequences of occupation subsequent to military defeat. The first paragraph balances both the minimalist intent of the framers with the overriding purpose of balancing the concurrent rights of both the civilian population and the right of the occupier to maintain the security of its forces and property. The second paragraph of Article 64 morphed the implicit meaning of "necessary" drawn from the old Hague Article 43 into an explicit authority to amend the domestic laws to achieve the core purposes of the Convention. Article 64 has thus been accepted and implemented by states in light of the common sense reading and the underlying legal duties of the occupier to permit modification of domestic law under limited circumstances.[38]

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35. G. SCHWARZENBERGER, THE LAW OF ARMED CONFLICT 194 (1968).

36. Geneva IV, *supra* note 10, art. 64.

37. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. (1969) (entered into force Jan. 27, 1980).

38. UK MINISTRY OF DEFENSE, THE MANUAL OF THE LAW OF ARMED CONFLICT 293, ¶ 11.56 (2004). *See also* FM 27-10, *supra* note 11, ¶ 371 ("Nature of Laws Suspended or Repealed. The occupant may alter, repeal, or suspend laws of the following types:

> *a.* Legislation constituting a threat to its security, such as laws relating to recruitment and the bearing of arms.
>
> *b.* Legislation dealing with political process, such as laws regarding the rights of suffrage and of assembly.
>
> *c.* Legislation the enforcement of which would be inconsistent with the duties of the occupant, such as laws establishing racial discrimination.").

B. Legal Authority for the Promulgation of the IST

The touchstone of analysis for the promulgation of the IST is to recognize that the CPA mission statement gave it affirmative authority as the "temporary governing body designated by the United Nations as the lawful government of Iraq until such time as Iraq is politically and socially stable enough to assume its sovereignty."[39] On one level, the revalidation by Iraqi authorities of the IST after the return of full Iraqi sovereignty makes an analysis of IST formation under the umbrella authority of the CPA a moot point. At the same time, the IST as it exists today is cloaked in a seamless garment of legality both in terms of its origination and in its ongoing existence as a distinct branch of Iraqi bureaucracy. The CPA posited its power as the occupation authority in Iraq in declarative terms: "The CPA is vested with all executive, legislative, and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war."[40] The appellation "Coalition Provisional Authority" was a literal title in every aspect: 1) It represented the members of the coalition ultimately composed of over twenty nations, 2) it was intended to be a temporary power to bridge the gap to a full restoration of Iraqi sovereign authority, and 3) (perhaps most importantly) it exercised the obligations incumbent on those states occupying Iraq in the legal sense, and conversely enjoyed the legal authority flowing from the laws and customs of war. This understanding of CPA status comports with the diplomatic representations made at the time of its formation.[41] The United Nations Security Council unanimously recognized "the specific authorities, responsibilities, and obligations under applicable international law of these states (the members of the coalition) as occupying powers under unified command (the "Authority")."[42] The CPA was therefore recognized as the entity legally responsible for implementing the obligations imposed by the law of occupation.

Security Council Resolution 1483 passed unanimously on May 22, 2003, and called upon the members of the CPA to "comply fully with their

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39. The Mission Statement read in full as follows:

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

COALITION PROVISIONAL AUTHORITY, OVERVIEW, *available at* http://www.iraqcoalition.org/bremerbio.html (last visited Sept. 29, 2005).

40. Coalition Provisional Authority Regulation Number 1 (May 16, 2003), http://www.cpa-iraq.org/ regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf. The CPA website is the only existing public record of actions taken by the CPA.

41. *See* Letter from the Permanent Representatives of the UK and the US to the UN Addressed to the President of the Security Council, May 8, 2003, UN Doc. S/2003/538, *available at* http://www.globalpolicy.org/security/issues/iraq/document/2003/0608usukletter.htm (last visited June 26, 2005).

42. S.C. Res. 1483, ¶ 4, U.N. Doc. S/RES/1483 (May 22, 2003).

obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907."[43] Resolution 1483 is particularly noteworthy for the formation of the IST because the Security Council specifically highlighted the need for an accountability mechanism "for crimes and atrocities committed by the previous Iraqi regime."[44] The Security Council further required the CPA to exercise its temporary power over Iraq in a manner "consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory."[45] Though strikingly similar to the declaration of allied power in occupied Germany after World War II,[46] CPA Regulation 1 was therefore founded on bedrock legal authority flowing from the Chapter VII power of the Security Council as supplemented by the preexisting power granted to the occupier by the laws and customs of war.[47]

Resolution 1483 operated in conjunction with the residual laws and customs of war to establish positive legal authority for the formation of the IST by the CPA and Governing Council. The subtle linkage between Article 43 of the Hague Regulations and Article 64 gave the CPA broad discretion to delegate the authority for promulgation of the IST to the Governing Council as a matter of necessity. At its core, Article 64 protects the rights of citizens in the occupied territory to a fair and effective system of justice. As a first step, and citing its obligation to ensure the "effective administration of justice," the CPA issued an order suspending the imposition of capital punishment in the criminal courts of Iraq and prohibiting torture as well as cruel, inhumane, and degrading treatment in occupied Iraq.[48] The

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43. *Id.* ¶ 5.
44. *Id.*
45. *Id.* ¶ 4.
46. General Eisenhower's Proclamation said: "Supreme legislative, judicial, and executive authority and powers within the occupied territory are vested in me as Supreme Commander of the Allied Forces and as Military Governor, and the Military Government is established to exercise these powers . . . ." *reprinted in* MILITARY GOVERNMENT GAZETTE, Issue A, June 1, 1946, at 1 (publication of the Office of Military Government for Germany (U.S.)) (copy on file with author).
47. The Fourth Geneva Convention recognized the importance of individual rights enjoyed by the civilian population and the correlative duties of the occupier to that population. The structure of the Fourth Convention rejected the concept of *debellatio* by focusing on the duties that an Occupying Power has towards the individual civilians and the overall societal structure rather than focusing on the relations between the victorious sovereign and the defeated government. Under the rejected concept of *debellatio*, the enemy was utterly defeated and accordingly the defeated state forfeited its legal personality and was absorbed into the sovereignty of the occupier. GREENSPAN, *supra* note 33, at 600-01. The successful negotiation of the Geneva Conventions in the aftermath of World War II marked the definitive rejection of the concept of *debellatio*, under which the occupier assumed full sovereignty over the civilians in the occupied territory. EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 95 (1993). *Debellatio* "refers to a situation in which a party to a conflict has been totally defeated in war, its national institutions have disintegrated, and none of its allies continue militarily to challenge the enemy on its behalf." *Id.* at 92.
48. COALITION PROVISIONAL AUTHORITY, COALITION PROVISIONAL AUTHORITY ORDER NUMBER 7: PENAL CODE (2003), *available at* http://www.cpa-iraq.org/regulations/20030610_CPAORD_7_Penal_Code.pdf.

declaration of a duty to ensure the "effective administration of justice" in CPA Order Number 7 was an inarguable derivative of the duty imposed by Security Council Resolution 1483 to work towards the "effective administration of the territory" of Iraq. Exercising his power as the temporary occupation authority, Ambassador Bremer signed CPA Order Number 7, which suspended some aspects of domestic law and amended the Iraqi Criminal Code in other important ways seeking to suspend or modify laws that "the former regime used . . . as a tool of repression in violation of internationally recognized human rights."[49]

Furthermore, the subsequent promulgation of CPA Policy Memorandum Number 3 on June 18, 2003 was 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.[50] The Fourth Geneva Convention prescribed a range of procedural due process rights for the civilian population in occupied territories that presaged the evolution of human rights norms following World War II.[51] The implementation of these goals in Iraq accorded with the established body of occupation law and simultaneously fulfilled the requirements of Security Council Resolution 1483 pursuant to the duty of all states to "accept and carry out the decisions of the Security Council."[52] Though Policy Memorandum Number 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 Number 3 expressly focused on the "need to transition" to an effective administration of domestic justice weaned from a "dependency on military support."[53]

The second paragraph of Article 64 of the Fourth Geneva Convention is the key to understanding the promulgation of the IST. Juxtaposed against the Article 64 authority to "subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligation under the present Convention,"[54] Article 47 of the Convention makes clear that such "provisions" may include sweeping

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49. *Id.*

50. Coalition Provisional Authority, Coalition Provisional Authority Memorandum Number 3: Criminal Procedures (Revised) (2004), *available at* http://www.iraqcoalition.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures__Rev_.pdf.

51. Articles 64-78 of the Fourth 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. Geneva IV, *supra* note 10, arts. 64-78. *Cf.* International Covenant on Civil and Political Rights art. 14, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (describing analogous provisions derived from international human rights law).

52. U.N. Charter art. 25.

53. Copy on file with author.

54. Geneva IV, *supra* note 10, art. 64(2).

changes to the domestic legal and governmental structures. Article 47 implicitly concedes power to the occupying force to "change . . . the institu. tions or government" of the occupied territory, so long as those changes do not deprive the population of the benefits of the Fourth Geneva Convention.[55] Of particular note to the IST process, Article 47 also prevented the CPA from effectuating changes that would undermine the rights enjoyed by the civilian population "by any agreement concluded between the authorities of the occupied territories and the Occupying Power."[56] Thus, the CPA could not hide behind the fig leaf of domestic decision making to simply stand by as domestic authorities in occupied Iraq created a process that would have undermined the human rights of those Iraqi citizens accused of even the most severe human rights abuses during the period of the "entombed regime." United States Army doctrine reflects this understanding of the normative relationship with the reminder that "restrictions placed upon the authority of a belligerent government cannot be avoided by a system of using a puppet government, central or local, to carry out acts which would have been unlawful if performed directly by the occupant."[57]

The Commentary to the Fourth Geneva Convention also 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 Fourth Geneva Convention.[58] These provisions of occupation law are consistent with the allied experiences during the post-World War II occupations, and were intended to permit future occupation forces to achieve the salutary effects inherent in rebuilding or restructuring domestic legal systems when the demands of justice require such reconstruction. Against that legal backdrop, direct CPA promulgation of the IST Statute and the accompanying reforms to the existing Iraqi court system could have been justified based on any of the three permissible purposes specified in Article 64 of the Fourth Geneva Convention (i.e. fulfilling its treaty obligation to protect civilians, maintaining orderly government over a restless population demanding accountability for the crimes suffered under Saddam, or enhancing the security of coalition forces).

In other words, both Articles 47 and 64 provided a positive right to the CPA to impose a structure on the Iraqis for the prosecution of the gravest crimes of the Ba'athist regime. Given the state of occupation law, the reality of the matter is that the delegation of authority to the Governing Coun-

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55. *Id.* art. 47.

56. *Id.*

57. FM 27-10, *supra* note 11, ¶ 366 (further specifying that "Acts induced or compelled by the occupant are nonetheless its acts").

58. *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: "any change introduced" to domestic institutions by the occupying power must protect the rights of the civilian population).

cil to establish the IST meant that it was grounded in the soil of sovereignty rather than being susceptible to a portrayal of the tribunal as a vehicle for foreign domination. If the CPA had the power to unilaterally create a structure for the prosecution of leading Ba'athists, the decision to delegate responsibility for developing and promulgating the IST to the Iraqi officials follows as a logical extension. Closer examination shows that the formation of the IST under the authority of the Governing Council actually mirrored the practice in World War II occupations in which the British and Americans created guidelines to direct Germany towards democracy, but ultimately gave the Germans great latitude in rebuilding their country.[59]

At the same time, the affirmative obligations of Article 47 required a CPA role to ensure that the judicial structure that emerged as a function of Iraqi domestic politics and was promulgated as a domestic statute fully complied with relevant human rights obligations[60] as well as the specific treaty obligations that inhere to the people of Iraq as "protected persons"

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59. *See* Walter M. Hudson, *The U.S. Military Government and the Establishment of Democratic Reform, Federalism, and Constitutionalism During the Occupation of Bavaria, 1945-47*, 180 MIL. L. REV. 115, 123 (2004).

60. A full discussion of the extent to which human rights law applies in an occupation environment is beyond the scope of this paper. There is a growing awareness that some aspects of human rights may apply extraterritorially alongside the conventional obligations found in occupation law. The precise interrelationship between occupation law and human rights norms is debatable and ill-defined at present. *See, e.g.*, Bankovic a.o. v. Belgium and 16 Other Contracting States (admissibility decision), no. 52207/99, ¶ 71, Eur. Ct. H.R. 2001-XII (2001), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (enter 52207 in "Application Number" field) (declaring in dicta on the one hand that the European Convention may impose obligations on states parties anywhere they exercise "effective control" while in another paragraph, ¶ 80, limiting that gratuitous language to territory that "for the specific circumstances, would normally be covered by the Convention" which means those state parties signatory). *Contra* Issa a.o. v. Turkey (admissibility decision), no. 31821/96, Eur. Ct. H.R. (2000), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (enter 31821 in "Application Number" field, then select 2000 decision).

Obliquely referring to the connection between the two distinct bodies of law, the Inter-American Commission on Human Rights noted in dicta that

> While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination—"without distinction as to race, nationality, creed or sex." Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state—usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.

Coard v. United States, Case 10.951, Inter-Am. C.H.R., Report No. 109/00, OEA/Ser. L./V/II.106, doc. 3 rev. ¶ 37 (1999), *available at* http://www.oas.org.

within the meaning of the Geneva Conventions. The development of the IST Statute was an authentic partnership between Iraqi officials and Coalition officials who had the legal duty to protect the rights of all Iraqis. Nevertheless, the process of developing the statute was opaque to the outside world, which at the time allowed some observers to criticize the IST because of the perception (and assumption) that it would function in fact as a "puppet court of the occupying power."[61] Lawyers hired by Saddam Hussein's wife rapidly played the legitimacy card by claiming that the IST could not impose any punishments lawfully because it lacked legitimacy, or lawful creation.[62]

Despite these early and unfounded criticisms, the delegation of authority to the Governing Council to develop and implement the IST did serve to increase the legitimacy of the institution and enhance the long range utility of the IST as a vehicle for restoring respect for the rule of law to the citizenry of Iraq. The people of Iraq demanded justice, and the eventual imposition of individual criminal responsibility on regime elites is likely to be 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.

II. The Structure of the Iraqi Special Tribunal

A. 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."[63] 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 existing ad hoc international tribunals in that it contains one or more trial

61. Michael P. Scharf, *Is it International Enough?: A Critique of the Iraqi Special Tribunal in Light of the Goals of International Justice*, 2 J. INT'L. CRIM. JUST. 330, 331 (2004) (the gravamen of the criticism was focused on the truisms that the IST statute had been drafted during the occupation by the United States, its funding was coming from the United States, its judges were selected by the U.S.-appointed provisional government, and the judges and prosecutors were to be assisted by U.S. advisors).

62. *See* Rory McCarthy & Jonathan Steele, Legitimacy and Neutrality of Court will be Challenged, THE GUARDIAN (London), July 2, 2004, *available at* http://www.guardian.co.uk/Iraq/Story/0,2763,1252096,00.html.

63. IST Statute, *supra* note 4, art. 1(a). On May 8, 2004, Ambassador Bremer issued Coalition Provisional Authority Memorandum Number 12: Administration of Independent Judiciary, which laid out the governmental structures and procedures needed to ensure a robust and independent judiciary, available at http://www.iraqcoalition.org/regulations/index.html# Memoranda (last visited June 4, 2005).

chambers,[64] and an appeals chamber[65] that is chaired by the president of the tribunal who is responsible for exercising oversight of the "administrative and financial aspects of the Tribunal."[66]

Additionally, the tribunal contains a prosecutions department of up to twenty prosecutors.[67] 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."[68]

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."[69] 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. As a critical aspect of their mandate, 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."[70]

B. 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.[71] The United States Constitution incorporated this idea as an expression of congressional power in Article 1, § 8.[72] As early as 1842, American 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."[73] Though internationalized judicial mechanisms have per-

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

65. The Appeals Chamber has "the power to review the decisions of the Trial Chambers." *Id.* art. 3. The IST Appeals Chamber proceedings should be deemed sufficient to protect the basic human right to an appeal just as the ICTY, ICTR, and ICC appellate chambers have been accepted by states.

66. *Id.* art. 4(c)(ii).

67. *Id.* art. 8(c).

68. *Id.* art. 8(b).

69. *Id.* art. 7(c), (i).

70. *Id.* art. 7(j).

71. *See* Richard Tuck, The Rights of War and Peace: Political Thought and the International Order From Grotius to Kant 102-03 (1999).

72. Empowering the legislative branch to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." U.S. Const. art I, § 8.

73. John Bassett Moore, 1 A Digest of International Law 5-6 (1906).

manently altered the face of international law,[74] the domestic courts of sovereign states are the courts of first resort while international mechanisms provide a useful but not essential backdrop in circumstances where the domestic courts are unable or unwilling to enforce individual accountability for serious violations of international norms.[75] The IST is built on the truism that sovereign states retain primary responsibility for adjudicating violations of crimes defined and promulgated under international law.[76]

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 Iraq charged with crimes listed in the Statute that were committed between July 17, 1968 and May 1, 2003 inclusive.[77] 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.[78]

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).[79] These substantive provisions are perhaps the most significant aspects 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.[80] Article 14 of the IST Statute is one of the strongest pieces of evidence that the drafting of the statute was a genuine collaborative process in which the Governing Council spoke strongly on behalf of the citizens it represented.

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74. *See generally* PAUL R. WILLIAMS & MICHAEL P. SCHARF, PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA (2002).

75. *See* Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 26-27 (2001).

76. 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 art. V, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) (obligating Contracting Parties to enact the necessary domestic legislation to give effect to the criminal provisions of the Convention). Of particular note in the post 9/11 world, the imposition of criminal accountability for acts of terrorism is exclusively reserved to the courts of sovereign states through the welter of treaties created by sovereign states. *See* Michael Newton, *International Criminal Law Aspects of the War Against Terrorism, in* 79 INTERNATIONAL LAW AND THE WAR ON TERROR 323 (Fred L. Borch & Paul S. Wilson, eds., 2003); *see also* M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS 1937-2001 (2001).

77. IST Statute, *supra* note 4, art. 38.

78. *Id.*

79. *Id.* arts. 11-13.

80. *Id.* art. 14.

The Iraqi lawyers involved in drafting the Statute educated the American lawyers about the contents of the Iraqi Criminal Code and 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 accordingly reads as follows:

> The Tribunal shall have the 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.[81]

For armchair lawyers tempted to dismiss the tribunal as a bald assertion of coalition power, Article 14 is a window into the soul of the Iraqi bar because it reveals the 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 would be a necessary component of the broader IST objective of helping to heal the wounds inflicted on Iraqi society by the Ba'athists.

Furthermore, Article 14(a) is especially notable. Inclusion of the domestic offense of involvement in the functions of the judiciary implicitly signifies the urgent priority that the Iraqis attach to judicial independence. The International Covenant on Civil and Political Rights (ICCPR) requires a "fair and public hearing by a competent, independent and impartial tribunal established by law."[82] As a matter of historical record, the mechanics of establishing a judiciary free of political control was the very first question asked as the DIILS team began to teach the jurists assembled in Baghdad in December 2003.[83] Ba'athist deprivation of trial rights and the subsequent imposition of punishment as an extension of Ba'athist political power unrelated to evidence had a traumatizing effect on Iraqi society. The search for truth based on evidence rather than raw power is the essence of a legitimate trial process. The perversion of legitimate judicial functions under the farce of politically motivated playacting was an especially galling

81. *Id.*

82. ICCPR, *supra* note 51, art. 14.

83. *See supra* note 5 and accompanying text.

aspect of Saddam's rule for those trained jurists whose proper judicial functions were bypassed and undermined by the regime.

Given this history, the provision of fair trials in the IST will be an important aspect of its legitimacy and serve as an important contrast to the fraudulent processes under the regime. The right to a fair and public hearing before an independent and impartial tribunal established by law is a basic right derived from both human rights norms[84] and the law of occupation (as a subset of the laws and customs of war).[85] 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.[86] Despite the picayune textual crease pointed out by Human Rights Watch, the very fact that the Iraqis demanded the inclusion of Article 14(a) strongly compels 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.

The early experience of the IST also demonstrates that it is a robust institution that has to date been able to withstand pressures on its independent operation.[87] Awareness of Saddam's successful efforts to undermine the real rule of law through the façade of justice also explains one unusual but little noticed linguistic quirk found in the English translation of the IST's name. 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.[88] As a group,

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84. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of the Victims of Non-International Armed Conflicts, Annex II, art. 6(2), Dec. 12, 1977, 26 I.L.M. 561 (entered into force Dec. 7, 1978) [hereinafter Protocol II]; ICCPR, *supra* note 51, art. 14(1); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; American Convention on Human Rights "Pact of San Jose, Costa Rica" art. 8(1), Nov. 22, 1969, O.A.S. T.S., No. 36, 9 I.L.M. 101 [hereinafter ACHR].

85. Geneva IV, *supra* note 10, art. 147; Geneva Convention Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Convention on Prisoners of War]; Protocol I, *supra* note 14, art. 75(4) (slightly changing the formulation to read as follows "impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure").

86. Memorandum from Human Rights Watch to the Iraqi Governing Council, 'The Statute of the Iraqi Special Tribunal' § A.1., (Dec. 2003), *available at* http://www.hrw.org/backgrounder/mena/iraq121703.htm.

87. For example, when campaigning prior to the national elections held on January 30, 2005, interim Iraqi Prime Minister Ayad Allawi repeatedly sought to gain votes by frequently assuring both domestic and international audiences that the trials of leading Ba'athists (including Saddam Hussein and Chemical Ali) would begin imminently. The IST has thus far resisted exogenous pressures to rush the investigation and prosecution of cases, and has stated that trials would begin when judges are fully trained, and the development of cases is completed by the investigating judges and prosecutors.

88. Rajiv Chandrasekaran, *Tribunal Planners Hope to Start Trials by Spring*, WASH. POST, Dec. 16, 2003, at A1.

they were pleased to see the inclusion of Article 14(a). Despite the fact that the statute plainly covers the full range of crimes recognized under current international law (genocide, crimes against humanity, and violations of the laws and customs of war during both international and non-international armed conflicts), the Iraqi officials who drafted the Tribunal Statute were determined to demonstrate the contrast between the IST and the corrupt judicial farces ordered by the regime. As a deliberate amendment at the very last editing session, the authoritative Arabic text used a different term to make a clear distinction from the "Special" or "Revolutionary" courts run under Ba'athist authority, which resulted in a slightly off kilter English translation. Article 1 of the IST Statute accordingly states "[a] Tribunal is hereby established and shall be known as the "Iraqi Special Tribunal for Crimes Against Humanity."[89] This subtle, but powerful reminder shows the keen judicial awareness of the Iraqi lawyers responsible for the IST statute as well as their commitment to the long-term restoration of the rule of law within Iraq.

C. Procedural Rights for the Accused[90]

The provisions governing the right of the accused are among the most highly scrutinized and vital provisions of the IST Statute. 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."[91] 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."[92] 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."[93]

In its core operative provision, the statute incorporates a full range of trial rights that, in the aggregate, are fully compatible with applicable

89. IST Statute, *supra* note 4, art. 1(a).

90. The Iraqi lawyers selected this term rather than "perpetrator" that was used in the International Criminal Court Elements of Crimes. There was extensive debate during the drafting of the Elements of Crimes for the International Criminal Court over the relative merits of the terms "perpetrator" or "accused." Though some delegations were concerned that the term perpetrator would undermine the presumption of innocence, the delegates to the Preparatory Commission (PrepCom) ultimately agreed to use the former in the Elements after including a comment in the introductory chapeau that "the term 'perpetrator'" is neutral as to guilt or innocence. *See* KNÜT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 9-16 (2002).

91. *See* COALITION PROVISIONAL AUTHORITY, COALITION PROVISIONAL AUTHORITY ORDER NUMBER 48: DELEGATION OF AUTHORITY REGARDING AN IRAQI SPECIAL TRIBUNAL 2 (2003), *available at* http://www.cpa-iraq.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf.

92. IST Statute, *supra* note 4, art. 21(b).

93. *Id.* art. 33.

human rights norms. Echoing the fundamental guarantees of the ICCPR[94] and other human rights instruments,[95] Article 20 of the statute states:

> a) All persons shall be equal before the Tribunal.
>
> b) Everyone shall be presumed innocent until proven guilty before the Tribunal in accordance with the law.
>
> c) In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of the Statute and the rules of procedure made hereunder.
>
> d) In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to a fair hearing conducted impartially and to the following minimum guarantees:
>
> > 1. to be informed promptly and in detail of the nature, cause and content of the charge against him;
> >
> > 2. to have adequate time and facilities for the preparation of his 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.[96]

Article 20 of the IST Statute provides the range of personal rights to breathe life into the esoteric obligation found in Article 20 of the 1970 Interim Constitution of Iraq, which provides that an accused is "innocent, until proved guilty at a legal trial."[97] The Constitution also proclaims in

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94. *See supra* note 51 and accompanying text.

95. *See generally supra* note 79 and accompanying text.

96. IST Statute, *supra* note 4, art. 21(b). This provision of the IST Statute preventing any adverse inference from the silence of the accused is noteworthy because it is the first time that such a protection was specifically found in Iraqi law.

97. AL-DUSTUR AL-MO'AKAT [Provisional Constitution] (1970) (Iraq) art. 20, *reprinted in* UNITED STATES INSTITUTE OF PEACE, IRAQI LAWS REFERENCED IN THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL (2004). The 1970 Interim Constitution is also available at http://www.mallat.com (last visited June 19, 2005). The Iraqi Law on Criminal Proceedings makes clear that the judge must release an accused if "there is insufficient evidence for conviction." Law on Criminal Proceedings with Amendments, Number 23 of 1971, Decree No. 230 Issued by the Revolutionary Command Council, Feb. 14, 1971, ¶ 203 [hereinafter Iraqi Law No. 23 on Criminal Proceedings], *available at* https://www.jagc

evocative terms that "the right of defence is sacred in all stages of investigation and trial in accordance with the provisions of the Law."[98] The parallelism between Article 20 of the Constitution and Article 20 of the IST Statute is pure coincidence, but illustrates a judicial integrity and awareness of individual rights that is ingrained in the Iraqi legal consciousness. During his first appearance before an IST investigative judge, Saddam Hussein challenged the legal authority of the IST and demanded to know "how can you charge me with anything without protecting my rights under the constitution."[99] At the time of this writing, Saddam remains in custody on the authority of the investigative judge who decided at that July 2004 hearing that there was probable cause to believe that he had committed one or more offenses within the jurisdiction of the IST; along with the other leading Ba'athists, he is not currently facing any definite criminal charges, but will eventually benefit from the procedural and personal rights embodied in the IST process.

III. The Human Rights Infrastructure of the Iraqi Special Tribunal

A. The Synthesis of Civil and Common Law in the IST

International tribunals and the more recent phenomenon of internationalized domestic tribunals require a complex intermingling of procedural approaches derived from both civil and common law. Modern accountability mechanisms permit a range of hearsay evidence that would never be admitted for trial purposes in common law courtrooms[100] while often providing provisions for plea agreements designed to enhance the efficiency of adjudication in a manner seldom seen in civil law systems.[101] Civil law systems driven by investigative judges provide for more expeditious trial proceedings which minimize discrimination between rich and poor perpetrators because the investigative judge is charged with collecting

net.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/ (follow "Iraq Criminal Procedure Code" hyperlink).

98. *Id.* All of the judges and investigators with whom I have dealt have been completely comfortable with the presumption of innocence and the duty of the prosecutor to produce evidence sufficient to warrant a guilty verdict.

99. Rupert Cornwell, *Saddam in the Dock: Listen to His Victims, Not Saddam, Says White House*, THE INDEPENDENT (London), July 2, 2004, at 6 (reporting that Hussein stated "[t]his is all theater" at his first pretrial hearing). For those who have observed the Milošević trial, Saddam's statements were eerily familiar. During his initial appearance before the ICTY on July 3, 2001, Milošević challenged the legality of the establishment of the ICTY. In a pretrial motion, Milošević stated "I challenge the very legality of this court because it is not established in the basis of law." *Milosevic Challenges Legality of U.N. Tribunal*, ONLINE NEWSHOUR, Feb. 13, 2002, http://www.pbs.org/newshour/updates/february02/milosevic_2-13.html.

100. GEERT-JAN ALEXANDER KNOOPS, AN INTRODUCTION TO THE LAW OF INTERNATIONAL CRIMINAL TRIBUNALS: A COMPARATIVE STUDY 135-40 (2003).

101. *Id.* at 113-16. *See also* Revised Version of Iraqi Special Tribunal Rules of Procedure and Evidence, rules 57 and 58, *available at* http://www.law.case.edu/war-crimes-research-portal/pdf/IST_Rules_of_Procedure_and_Evidence.pdf (last visited June 19, 2005) (detailing the procedures and substantive provisions for the entry of a guilty plea in the IST).

evidence to support all sides of the case (the defense team is therefore not required to spend its own resources in gathering exculpatory evidence).[102] On the other hand, the adversarial system may be more suited to a full airing of the available evidence in court and may be best suited for the purpose of compiling an accurate and comprehensive record of the history associated with the crimes in question, which after all is one of the vital purposes of individual accountability mechanisms.[103] Paraphrasing Justice Jackson's assessment of the International Military Tribunal at Nuremberg, "no history" of the era of Iraq under Ba'athist rule will be "entitled to authority" if it ignores the factual and legal conclusions that will be presented in open court in the IST.[104]

The procedures for the introduction of evidence are perhaps the most notable aspect of the commingling of common and civil law traditions. The International Military Tribunal at Nuremberg set the precedent for simplifying evidentiary requirements in favor of a full airing of available facts before a panel of judges. Justice Jackson noted "peculiar and technical rules of evidence developed under the common-law system of jury trials to prevent the jury from being influenced by improper evidence constitute a complex and artificial science," and accordingly accepted that rules of evidence at Nuremberg should put the premium on the probative value of the evidence.[105] Justice Jackson also commented on the reality that, while dispensing with rigid rules of evidence gave the International Military Tribunal "a large and somewhat unpredictable discretion," it also permitted both the prosecution and defense to select "evidence on the basis of what it was worth as proof rather than whether it complied with some technical requirement."[106]

Since 1945, rather than operating under restrictive rules of evidence, all of the tribunals applying international humanitarian law have permitted evidence so long as it is relevant and "necessary for the determination of the truth."[107] This standard (drawn from the International Criminal Court Statute) compares favorably to the IST Rule of Procedure that per-

102. UNITED STATES INSTITUTE OF PEACE, SPECIAL REPORT 122, BUILDING THE IRAQI SPECIAL TRIBUNAL: LESSONS FROM EXPERIENCES IN INTERNATIONAL CRIMINAL JUSTICE 6 (2004) [hereinafter SPECIAL REPORT 122], *available at* http://www.usip.org/pubs/specialreports/sr122.html.

103. *See* Michael P. Scharf & Paul R. Williams, *The Functions of Justice and Anti-Justice in the Peace-Building Process*, 35 CASE. W. RES. J. INT'L L. 161, 175 (2003).

104. Robert Jackson, *Report to the President by Mr. Justice Jackson*, *in* REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 432, 438 (1945) (Justice Jackson also wrote: "[w]e have documented from German sources the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people.").

105. *Id.* at xi. Interestingly, as a matter of historical record, the teams of international prosecutors at Nuremberg did not develop the detailed Elements of Crimes that have become an accepted feature of every subsequent international process.

106. *Id.*

107. *See* Rome Statute of the International Criminal Court art. 69(3), July 17, 1998, 2187 U.N.T.S. 90, *available at* http://www.un.org/law/icc/statute/romefra.htm.

mits the Trial Chamber to admit "any relevant evidence which it deems to have probative value."[108] Rather than developing a straitjacket set of rules related to the introduction of evidence, the IST Trial Chamber has the broader mandate to "apply rules of evidence which will best favour a fair determination of the matter before it and [which] are consonant with the spirit of the Statute and general principles of law."[109] Of course, these evidentiary provisions operate against the backdrop of Iraqi procedural law that requires the prosecutor to produce a quantum of evidence sufficient to satisfy the court of the guilt of the defendant.[110]

Regardless of the procedural forms adopted, international law is clear that no accused should face punishment unless convicted pursuant to a fair trial affording all of the essential guarantees embodied in widespread state practice.[111] Common Article 3 (meaning that it is repeated as article 3 in each of the four Geneva Conventions of 1949) states this principle with particularity by requiring that only a "regularly constituted court" may pass judgment on an accused person.[112] Interpreting this provision in light of state practice, the International Committee of the Red Cross (ICRC) concluded that a judicial forum is "regularly constituted if it has been established and organized in accordance with the laws and procedures already in force in a country."[113] Accepting the ICRC benchmark of legitimacy, the IST meets the criteria derived from the law of war better than any of the other tribunals established to adjudicate violations of humanitarian law because it is designed to apply the general principles of criminal law drawn from existing Iraqi criminal law rather than simply supplanting those norms with externally mandated principles. The IST statute provides that the president of the tribunal "shall be guided by the Iraqi Criminal Procedure Law" in the drafting of the rules of procedure and evidence for the admission of evidence as well as the other features of trial.[114] Furthermore, the statute specifically lists the provisions of Iraqi law that contain the general principles of criminal law to be applied "in connection with the prosecution and trial of *any* accused person."[115]

The structure of the IST and its accompanying procedures are similarly valid when measured against applicable human rights principles. The ICCPR phrases the concept noted above as requiring that a tribunal be

108. Revised Version Iraqi Special Tribunal Rules of Procedure and Evidence, *supra* note 101, rule 79. This provision is adjacent to the common sense caveat that the Trial Chamber should "exclude evidence if its probative value is substantially outweighed by the potential for unfair prejudice, considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

109. *Id.*

110. Iraqi Law No. 23 on Criminal Proceedings, *supra* note 97, ¶ 203.

111. For a summary of state practice and its implementation in treaty norms and military manuals around the world, see 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 352-75 (2005) [hereinafter ICRC Study].

112. *See, e.g.*, Geneva IV, *supra* note 10, art. 3.

113. ICRC Study, *supra* note 111, at 355.

114. IST Statute, *supra* note 4, art. 16.

115. *Id.* art. 17(a) (emphasis added).

"established by law."[116] The United Nations Human Rights Commission adopted a functional test that the tribunal should "genuinely afford the accused the full guarantees" in its procedural protections.[117] Litigating its first case, the ICTY was forced to determine whether this human right is violated per se by the prosecution of an accused before a post hoc tribunal created after the commission of the crimes.[118] Noting that the ICCPR drafters rejected language specifying that only "pre-established" forums would provide sufficient human rights protections, the ICTY Appeals Chamber concluded:

> The important consideration in determining whether a tribunal has been "established by law" is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and should that it observes the requirements of procedural fairness.[119]

For the purposes of human rights law, the IST is "established by law" because it is established by the authorities empowered under both international law and the authority of the United Nations Security Council and because it is explicitly designed to provide the full range of human rights to the accused. The IST Statute establishes a firm duty on the court to "ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with this Statute and the rules of procedure and evidence, with *full respect for the rights of the accused* and due regard for the protection of victims and witnesses."[120] Similarly, the Trial Chamber must "satisfy itself that the rights of the accused are respected"[121] and publicly support its decisions with "a reasoned opinion in writing, to which separate or dissenting opinions may be appended."[122] The Iraqi Judicial Law specifies that the judge shall be bound to "preserve the dignity of the judicature and to avoid any thing that arouses suspicion on his honesty."[123] A *priori* conclusion that the IST judges will ignore their professional ethos by

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116. ICCPR, *supra* note 51, art. 14(1).

117. *See* Human Rights Comm., General Comment on Article 14, ¶ 4, U.N. Doc. A/43/40 (1988); Human Rights Comm., Cariboni v. Uruguay, U.N. Doc. A/39/40 (Oct. 27, 1987). The Inter-American Commission has taken a similar approach. *See, e.g.*, Inter-Am C.H.R., Annual Report 1972, OEA/Ser. P, AG/doc. 305/73 rev. 1, 14 March 1973, at 1; Inter-Am. C.H.R., Annual Report 1973, 2-4, OEA/Ser. P, AG/doc. 409/174 (March 5, 1974).

118. *See* MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 104-06 (1997).

119. Prosecutor v. Tadic Case No. IT-94-1-AR72, 1995 WL 17205280, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 45 (Oct. 2, 1995), *available at* http://www.un.org/icty/tadic/appeal/decision-e/51002.htm.

120. IST Statute, *supra* note 4, art. 21(b) (emphasis added).

121. *Id.* art. 21(c).

122. *Id.* art. 23(b).

123. Law of Judicial Organization, Number 160 of 1979, Resolution No. 1724 Issued by the Revolutionary Command Council, Oct. 12, 1979, art. 7, Published by the Ministry of Justice, Official Gazette of the Republic of Iraq, Vol. 23, No. 27 at 2 (July 2, 1980), *reprinted in* UNITED STATES INSTITUTE OF PEACE, IRAQI LAWS REFERENCED IN THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL (2004) (copy on file with author).

willfully undermining the rights of the accused would betray an unseemly smugness and paternalism on the part of the international community.

The fact of the matter is that the IST Statute and Rules of Procedure and Evidence are far from unique in their civil law foundations. Each conflict environment and accountability mechanism has required a slightly different set of blended procedures. For example, in the domestic prosecutions in Argentina, the trials were conducted using special procedures necessitated by the volume of information and the number of victims in comparison to normal crimes.[124] In the case of the IST, the civil law foundations of the Iraqi Criminal Code provided the baseline, which was then modified where appropriate to comply with relevant human rights norms and occupation law. Unlike the ICTY[125] and the Special Court in Sierra Leone (SCSL),[126] the punitive authority of the IST derives from the sovereign authority of the Iraqi people rather than the derivative authority of the United Nations Security Council. The analytical start point for the IST is therefore found in the existing body of Iraqi laws and procedures, even though the eventual destination is on the same intellectual block as the other tribunals. Comparison of the ad hoc tribunals with the treaty based forums such as the International Criminal Court and the Special Court for Sierra Leone reveals that these tribunals borrow the "best" elements of both adversarial and inquisitorial trials. Where there are lacunae that remain in the IST Rules and Procedures, they are automatically filled by resort to the underlying principles of Iraqi domestic law, even as the judges are charged to interpret the substantive international crimes by "resort to the relevant decisions of international courts or tribunals as persuasive authority . . . ."[127]

Finally, the set of principles and rules emplaced at the formation of the IST will likely not solidify as rigid sets of static constraints. If the IST Rules and Procedures prove inadequate to ensure full respect for the rights of the accused as required by the Statute, then the judges may amend the

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124. *See* SPECIAL REPORT 122, *supra* note 102, at 9-10.

125. *See* S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993).

126. The SCSL was established by a treaty between the Government of Sierra Leone and the United Nations to prosecute those with the "greatest responsibility" for violations of international humanitarian law. Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.-Sierra Leone, Jan. 16, 2002, http://www.sc-sl.org/scsl-agreement.html. The Appeals Chamber articulated the SCSL's legal basis in Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction (May 31, 2004), *available at* http://www.sc-sl.org/Documents/SCSL-03-01-I-059.pdf. The Appeals Chamber stated,

> "[I]t was clear that the power of the Security Council to enter into an agreement for the establishment of the court was derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 1 of the Charter and the specific powers of the Security Council in Articles 39 and 41. These powers are wide enough to empower the Security Council to initiate, as it did by Resolution 1315, the establishment of the Special Court by Agreement with Sierra Leone."

Id. at 18.

127. IST Statute, *supra* note 4, art. 17(b).

rules accordingly.[128] The President of the ICTY has said that the frequent amendments to the tribunal rules are necessary because the judges are "pragmatic people" grappling with the balance between truth and justice.[129] The ICTY Rules of Evidence and Procedure have thus been modified more than thirty times. In order to facilitate case management and improve the pace of trials, the ICTY judges have moved away from the common law moorings prevalent at formation of the ICTY and clearly evolved a more civil law centric set of rules and procedures.[130] The conclusion is clear that the IST Rules and Statute are validly promulgated and legally sufficient to protect the fundamental rights of the accused, but may be amended if needed due to the emerging exigencies that may arise in the pragmatic application of the rules as they appear on paper.

B. Cornerstone Procedural Protections for the Accused

No legal issue related to the IST can be definitively determined by reference to a single source. Article 17(a) of the statute sets out a hierarchy of sources that will guide the judges: 1) the statute itself; 2) the Rules of Procedure and Evidence; and 3) the existing body of Iraqi criminal procedure and substantive laws.[131] In addition, the IST Statute makes clear that the judges "may resort to the relevant decisions of international courts or tribunals as persuasive authority for their decisions."[132] The IST Statute is linked to the underlying provisions of Iraqi domestic law and the rules of procedure and evidence to form a tightly woven fabric of legal protections. Accordingly, any conclusions derived about the core principles and protections of the IST can be drawn only after all of the relevant sources are considered. In a sense, the IST is similar to the ICTY in that the judges will rely to some extent on analogy to the national laws of the territory where

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128. *Id.* art. 16 ("The President of the Tribunal shall draft rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters (including regulations with respect to the disqualification of judges or prosecutors), where the applicable law, including this Statute does not, or does not adequately provide for a specific situation. . . . Such rules shall be adopted by a majority of the permanent judges of the Tribunal.").

129. Interview by Ljubica Gojgic with Judge Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia, in Belgrade (Sept. 18, 2003), *available at* www.b92.net/intervju/eng/2003/meron.php. At the time of this writing, there have been thirty-six sets of amendments to the ICTY Rules of Procedure. *See* http://www.un.org/icty/legaldoc/ (last visited June 19, 2005).

130. *See* KNOOPS, *supra* note 100, at 91-100 (listing a number of specific rules changes in the ICTY).

131. IST Statute, *supra* note 4, art. 17(a) ("Subject to the provisions of this Statute and the rules made thereunder, the general principles of criminal law applicable in connection with the prosecution and trial of any accused person shall be those contained: (i) in Iraqi criminal law as at July 17, 1968 (as embodied in The Baghdadi Criminal Code of 1919) for those offenses committed between July 17, 1968 and December 14, 1969; (ii) in Law Number 111 of 1969 (the Iraqi Criminal Code), as it was as of December 15, 1969, without regard to any amendments made thereafter, for those offenses committed between December 15, 1969 and May 1, 2003; and (iii) and in Law Number 23 of 1971 (the Iraqi Criminal Procedure Law).").

132. *Id.* art. 17(b).

the conflict occurred or to what they perceive to be the practices of other states or tribunals in applying the sophisticated set of principles found in international humanitarian law. This is identical to the repeated methodology of the ICTY judges.[133] The difference for the IST judges is that the Iraqi process is explicitly built on the preexisting foundation of domestic law familiar to the judges; hence, the IST Rules of Procedure and the Statute are often silent or incomplete on a given subject precisely because the issue is definitively addressed in the underlying domestic code. This article will conclude by pointing out some of the most notable areas where a casual reading of the IST Statute alone would lead to shallow or incomplete conclusions about the extent of IST protection of the defendant's human rights.

1. Provision of Counsel

Article 20 of the IST Statute provides for the fundamental right "to have adequate time and facilities for the preparation of [the] defense and to communicate freely with counsel . . . in confidence."[134] Such counsel may include non-Iraqi lawyers, so long as the "principal lawyer" is an Iraqi.[135] The IST Statute further provides that the tribunal will pay for the costs of counsel "in any such case if he or she does not have sufficient means to pay for it."[136] The experience of the ICTY indicates that this will be a major expense associated with the IST, as the provision of *gratis* counsel consumed ten percent of the ICTY budget, to the tune of some $10-13 million per year.[137]

The counsel retained by a suspect or accused is then required to "file his power of attorney with the Judge concerned at the earliest opportunity."[138] The judge, in turn, shall consider the counsel to be qualified "in accordance with the *Iraqi law of lawyers*."[139] This small phrase constitutes an important safeguard in the IST process because it means that the counsel who will practice in the IST chambers remain bound by the codes of practice and ethics governing their profession and are qualified in accordance with the rigorous standards found in Iraqi law.[140] In light of the serious allegations of misconduct of counsel in other tribunals,[141] the IST rules provide that a judge or chamber may impose sanctions against coun-

133. M. Cherif Bassiouni, Introduction to International Criminal Law 332 (2003) (referring to the Sentencing Judgments in *Prosecutor v. Erdemovic*, Case No. IT-96-22-T, ¶ 40 (Nov. 29, 1996) and *Prosecutor v. Stevan Todorovic*, Case No. IT-95-9/1-S, ¶¶ 97-107 (July 31, 2001)).

134. IST Statute, *supra* note 4, art. 20(d)(2).

135. *Id.* art. 18(c).

136. *Id.*

137. Special Report 122, *supra* note 102, at 7.

138. Revised Version Iraqi Special Tribunal Rules of Procedure and Evidence, *supra* note 101, rule 48(A).

139. *Id.* (emphasis added).

140. *Id.* rule 48(C).

141. For example, repeated abuses by counsel were responsible for the ICTY shift from paying hourly defense fees to a flat fee system. Special Report 122, *supra* note 102, at 7.

sel whose "conduct remains offensive or abusive, demeans the dignity of the Special Tribunal, [or] obstructs the proceedings."[142] Furthermore, the fact that the principal attorney remains bound by the Iraqi code of professional conduct gives some force to the underlying right of the court to "prevent the parties and their representatives from speaking at undue length or speaking outside the subject of the case, repeating statements, violating guidelines or making accusations against another party or a person outside the case who is unable to put forward a defense."[143]

Apart from providing for the appointment of counsel, the IST gives counsel a robust and visible role. The IST Rules stipulate that the investigating judge must notify all suspects of the following rights "in a language he speaks and understands" during their first appearance for questioning:

> i. The right to legal assistance of his own choosing, including the right to have legal assistance provided by the Defense Office if he does not have sufficient means to pay for it;
>
> ii. The right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning;
>
> iii. The right to remain silent. In this regard, the suspect or accused shall be cautioned that any statement he makes may be recorded and may be used in evidence.[144]

In accordance with Iraqi procedural law, any statement of the accused to the investigating judge is recorded in the written record and "signed by the accused and the magistrate or investigator."[145] Thus, every suspect (to include Saddam Hussein) who has appeared before the IST investigative judges to date has been notified of their rights to counsel and has acknowledged their comprehension of those rights in writing. Those who assume that the IST will ignore and subvert the rights of defendants in the future must also assume that the investigative judges will abandon this established practice, but in doing so they would depart from a foundational aspect of criminal practice in Iraq which by any measure meets human rights standards.

Of course, as would be expected, an accused may voluntarily waive his right to have legal assistance during questioning, but only if the investigative judge determines that the waiver is voluntarily and intelligently made.[146] The investigative judge "shall not proceed without the presence of counsel" when questioning a suspect who has invoked the right to assistance.[147] Furthermore, if a suspect has waived his right to counsel but then invokes that right, "the questioning should be stopped and never

142. Revised Version Iraqi Special Tribunal Rules of Procedure and Evidence, *supra* note 101, rule 50.

143. Iraqi Law No. 23 on Criminal Proceedings, *supra* note 97, ¶ 154.

144. Revised Version Iraqi Special Tribunal Rules of Procedure and Evidence, *supra* note 101, rule 46(A).

145. Iraqi Law No. 23 on Criminal Proceedings, *supra* note 97, ¶ 128.

146. Revised Version Iraqi Special Tribunal Rules of Procedure and Evidence, *supra* note 101, rule 46(B).

147. *Id.* rule 46(C).

resume again until the defence be present."[148] These provisions comport fully with the relevant human rights provisions and are in complete accordance with the practices of other international tribunals.[149]

2. *Conduct of the Defense*

The primary gap on the face of the IST Statute is that it is silent on the actual provisions for the defense of an accused. Of course, Article 20 protects the right to present a full defense, but the Statute itself does not reveal the manner in which those protections can be achieved. Rule 49 of the IST Rules of Evidence and Procedure outlines the functions of the Defense Office as a separate organ inside the IST, beginning with the requirement that the IST Director "shall establish a Defense Office for the purpose of ensuring the rights of accused."[150] From that premise, the defense team operates against the mesh of practice built into the IST framework.

The entire Iraqi criminal justice system is grounded on the role of the investigative judge as an impartial authority whose mandate is to objectively search for all available evidence, both incriminating and exculpatory.[151] Indeed, under Iraqi law, investigating officers "are required to use all available means to preserve evidence of an offense,"[152] and must prepare the written report collating the evidence for the subsequent use of trial judges in the event that charges are documented to warrant a trial.[153] The IST Rules build on this practice by requiring the prosecutor to provide all exculpatory evidence to the defense, as well as any evidence which "may be relevant to issues raised in the Defense Case Statement."[154] Under the

148. *Id.*

149. *See, e.g.*, Rule 63 of the ICTY Rules of Evidence and Procedure, *available at* http://www.un.org/icty/legaldoc/index.htm (last visited June 19, 2005), which reads as follows:

Questioning of Accused

(Adopted 11 Feb 1994, amended 3 Dec 1996)

(A) Questioning by the Prosecutor of an accused, including after the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the accused's counsel is present.

(B) The questioning, including any waiver of the right to counsel, shall be audio-recorded or video-recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall at the beginning of the questioning caution the accused in accordance with Rule 42 (A)(iii).

150. Revised Version Iraqi Special Tribunal Rules of Procedure and Evidence, *supra* note 101, rule 49(A).

151. *See generally* Salvatore Zappala, *The Iraqi Special Tribunal's Rules of Procedure and Evidence: Neither Fish nor Fowl?*, 2 J. CRIM. INT'L JUST. 855 (2004).

152. Iraqi Law No. 23 on Criminal Proceedings, *supra* note 97, ¶ 42.

153. *Id.* ¶ 170. *See also id.* ¶ 213(A) ("The court's its [sic] verdict in a case is based on the extent to which it is satisfied by the evidence presented during any stage of the inquiry or the hearing. Evidence includes reports, witness statements, written records of an interrogation, other official discoveries, reports of experts and technicians and other legally established evidence.").

154. Revised Version Iraqi Special Tribunal Rules of Procedure and Evidence, *supra* note 101, rule 62 (describing exculpatory evidence as "evidence known to the Prosecu-

normal principles of Iraqi law, the trial courts rely on the findings of investigative judges and the written report as being dispositive on factual matters; hence the additional overlay of an IST trial process flavored with the adversarial model could logically lead to longer trials which may or may not serve the true interests of justice from the societal and personal perspectives.[155]

On the other hand, in preparing for a full trial of the issues, the defense team benefits from the underlying provisions of Iraqi criminal procedure law in two major ways. First, the defense team may leverage the power of the investigative process to generate information or perspective relevant to the conduct of the defense. The Iraqi criminal procedure code permits the investigator to appoint, at government expense, one or more experts on matters "connected to the offense being investigated."[156] The investigative judge may retain an expert "of his own accord or based on the request of the parties."[157]

Secondly, in the preliminary investigation stage of any criminal proceeding under the Iraqi civil law system, the investigating judge has full subpoena power to compel the production of relevant evidence. The investigative judge may "issue an order for the arrest of any witness who fails to attend in due time for him to be compelled to attend in order to give evidence."[158] Similarly, the investigating judge has authority to order physical searches of places or persons.[159] The IST rules embody this practice in that "either party" may request that the investigative judge "make such orders, summonses, subpoenas and warrants as may be necessary in the interests of justice."[160]

3. *Prevention of Coercion*

Perhaps the most misunderstood and most vital aspect of the IST structure is the mechanism to prevent the use of any evidence adduced by torture or other improper techniques. Just as in other war crimes trials,

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tor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of a prosecution witness or the authenticity of prosecution evidence.").

155. Zappala, *supra* note 151, at 861. For example, unlike the ICTY and ICTR rules, the IST Rules of Procedure explicitly build in a right of cross-examination for the party who did not call a witness, even as they permit the judges to "put any question to the witness." Revised Version Iraqi Special Tribunal Rules of Procedure and Evidence, *supra* note 101, rule 77.

156. Iraqi Law No. 23 on Criminal Proceedings, *supra* note 97, ¶ 69(A).

157. *Id.*

158. *Id.* ¶ 59(C).

159. *Id.* ¶ 74 ("If it appears to the examining magistrate that a particular person is holding items or papers which would inform the investigation, he may issue a written order for the items to be submitted. If he believes that the order will not be obeyed or is worried that the items will be removed, he may conduct a search procedure in accordance with the paragraphs below.").

160. Revised Version Iraqi Special Tribunal Rules of Procedure and Evidence, *supra* note 101, rule 53(A) (this authority also extends to the right of the trial judge or Trial Chamber to make such orders as "may be necessary for the purposes of the preparation or conduct of the trial.").

cases before the IST may rely in part on evidence obtained prior to the time the defendant or other persons enjoyed a binding right to counsel.[161] Nevertheless, the Trial Chambers of the IST hold the penultimate power to protect the basic human rights of the accused. Though empowered to admit relevant evidence based on its probative value alone, the Trial Chamber should consider "[t]he voluntariness of any statement and any circumstances that might verify or impugn the statement."[162] In particular, the IST rules come closer to a full blown exclusionary rule than almost any foreign jurisdiction by requiring the Trial Chamber to consider whether "the means by which evidence was obtained casts substantial doubt on its reliability."[163]

Apart from the specific admonition noted above to the suspect or accused that any statement may be recorded and used as evidence (which is acknowledged and signed by both the accused and the investigative judge), the IST requirements exceed even United States domestic law by requiring:

> Whenever an Investigative Judge questions an accused, the questioning shall be recorded by audio, video, court reporter or by other means. The accused shall be informed that the questioning is being recorded. At the conclusion of the questioning the accused shall be offered the opportunity to clarify anything he has said, and to add anything he may wish, and the time of conclusion shall be recorded. The content of the recording shall then be transcribed (if done by audio or video) as soon as practicable after the conclusion of questioning and a copy of the transcript supplied to the suspect.[164]

In practice, these recordings and the subsequent transcriptions should more than suffice to persuade fair-minded observers that the IST trial processes and ultimate judgments do not derive from coercive techniques.

These IST procedures are also built on a deeper tradition of respect that is ingrained in Iraqi criminal procedure (though it is fair to assume that the perception of the world is colored by the willful abuses of these basic human rights under the Ba'athist regime). For example, at the investigative stage, a witness "may not be addressed in a declaratory or insinuat-

161. For example, in preparation for the Dachau trials, interrogation teams were sent to prisoner of war camps across the United States. One of the critical pieces of evidence against the camp commander of the Dachau camp came from a former German guard who had been captured in southern France in 1944 and was held at Camp Butler, North Carolina. JOSHUA M. GREENE, JUSTICE AT DACHAU: THE TRIALS OF AN AMERICAN PROSECUTOR 31 (2003).

162. Revised Version Iraqi Special Tribunal Rules of Procedure and Evidence, *supra* note 101, rule 79(E)(ii).

163. *Contra* ICTY Rules of Procedure and Evidence, rule 95, *available at* http://www.un.org/icty/legaldoc/index.htm (last visited June 19, 2005) ("No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."). *See generally* Craig M. Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV. 375, 394 (2001).

164. Revised Version Iraqi Special Tribunal Rules of Procedure and Evidence, *supra* note 101, rule 47.

ing manner and no sign or gesture may be directed at him that would tend to intimidate, confuse or distress him."[165] Any public official or agent who uses torture to extract evidence from "an accused, witness, or informant" also commits a crime under the Iraqi Criminal Code.[166] As a logical extension of this criminal prohibition, Iraqi procedural law prohibits the "use of any illegal method to influence the accused and extract a confession."[167] Finally, the IST incorporates the underlying norm of Iraqi criminal procedure in that the court can accept a confession only if it has been corroborated and when "it is satisfied with it."[168] Similarly, Iraqi law requires that "it is a condition of the acceptance of the confession that it is not given as a result of coercion."[169] Those who ignore these established jurisprudential roots to believe that the IST process will ignore and undermine core human rights protections betray an unseemly smugness that is unwarranted by the actual provisions of law and the IST guarantees as they will be implemented in practice.

Conclusion

The Iraqi people almost universally support the concept of prosecuting Saddam and other Ba'athist officials inside Iraq rather than simply allowing an external tribunal to exercise punitive power.[170] They suffered the injustices and indignities of the Ba'athist regime and have the strongest stake in the restoration of authentic justice. For the ancient Greeks, the pursuit of justice symbolized a quest for order and harmony.[171] Plato conceived of justice as "the highest order of things" on both the personal and societal level.[172] The aspiration for justice embodies the proper balance of power, wisdom, and temperance which in turn generate societal stability. In any case, it seems clear that the choice of punishments should be reserved for sovereign governments answerable to a society in which they

165. Iraqi Law No. 23 on Criminal Proceedings, *supra* note 97, ¶ 64.

166. Iraqi Penal Code No. 111 of 1969, ¶ 333, *reprinted in* UNITED STATES INSTITUTE OF PEACE, IRAQI LAWS REFERENCED IN THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL (2004) (copy on file with author) ("Any public official or agent who tortures or orders the torture of an accused, witness or informant in order to compel him to confess to the commission of an offence or to make a statement or provide information about such offence or to withhold information or to give a particular opinion in respect of it is punishable by imprisonment or by detention. Torture shall include the use of force or menaces.").

167. Iraqi Law No. 23 on Criminal Proceedings, *supra* note 97, ¶ 127 (Mistreatment, threats, injury, enticement, promises, psychological influence or use of drugs or intoxicants are considered illegal methods.).

168. *Id.* ¶ 213(C) (CPA Memorandum 3 deleted the additional language "and if there is no other evidence which proves it to be a lie.").

169. *Id.* ¶ 218 (CPA Memorandum 3 modified this provision by deleting the additional caveats that coercion could include both physical or moral components or even promises or threats.).

170. 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).

171. BRIAN R. NELSON, WESTERN POLITICAL THOUGHT FROM SOCRATES TO THE AGE OF IDEOLOGY 31 (1982).

172. PLATO, THE REPUBLIC OF PLATO 52-53 (Francis MacDonald Cornford trans. & ed., 1945).

live and work rather than the mandarins who minister to the machinery of international politics.[173] The Iraqis deserve the frontline role in serving the needs of their own nation, and their families and their culture. They are best placed to make the difficult decisions over how many of the millions of possible charges should be investigated and where the proper balance between justice and vengeance should be struck.[174] The lawyers and investigators who have risked their lives and endangered their families by agreeing to serve their nation on the IST are patriots worthy of our respect and our assistance.

The formation of the IST as a domestic mechanism created under the authority of a sovereign Iraqi government culminates the developmental arc of recent efforts to implement accountability[175] for violations of international humanitarian law. The IST is closer to the conflict in temporal terms as well as the available evidence and the victims of the crimes.[176] The Iraqi people will determine the legitimacy and ultimate effectiveness of the trials, and they will reap the benefits derived from restoring the rule of law, just as at the time of this writing they are currently paying a disproportionate share of the costs for the insurgents who continue to murder civilians. The IST also represents a return to the first principles of international criminal law because it is grounded in the fertile soil of state sovereignty. In light of the inspiring growth of the field of international criminal law since World War II, it is often forgotten that the Moscow Declaration specifically favored punishment through the national courts in the countries where the crimes were committed "according to the laws of these liberated countries and of the free governments which will be erected therein."[177] The military commissions established in the Far East similarly

173. For a detailed account of the Cold War politics and unraveling of wartime unity that doomed the effort to convene a second International Military Tribunal after World War II to prosecute Major War Criminals, see DONALD BLOXHAM, GENOCIDE ON TRIAL: WAR CRIMES TRIALS AND THE FORMATION OF HOLOCAUST HISTORY AND MEMORY 28-37 (2001).

174. Allied prosecutors had to sift through the trial dossiers of more than 100,000 potential criminals in deciding who should be prosecuted and in what order. *See* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 273 (1992). As another of the hundreds of examples, the victorious allies excluded the Krupps from the dock at Nuremberg for political and policy reasons rather than a sober assessment of how best to serve the needs of German society. BLOXHAM, *supra* note 173, at 22.

175. Some scholars have made a distinction between the *acknowledgement* of severe violations of international norms—whether to remember or forget the abuses—and *accountability* for those crimes—or whether to impose sanctions on those who bear personal responsibility for the abuses. SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING 157 (2004).

176. Who, it should be remembered, also enjoyed basic human rights that were trampled by the regime.

177. 9 DEP'T ST. BULL. 308, 310, *reprinted in* REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIBUNALS 11 (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 86-110 (2001). 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

incorporated the principle that the international forum did not supplant domestic mechanisms.[178] Even the Secretary-General of the United Nations Security Council is persuaded that "no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable."[179]

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. The IST may not be a perfect creation, and it will certainly suffer growing pains as it grapples with the incredibly complex and emotionally charged cases that lie down the road to justice. "Justice" is an intellectual abstraction achieved only through emotional investment and intellectual struggle. The drafters of the IST and those patriots who will implement its provisions are all too aware that willful failure to protect basic human rights could corrode the very core of the society that they have risked their lives to build. If those who claim to support the principles of justice and of the rule of law refuse to help in the name of human rights, they can only do so by turning a blind eye to the rich jurisprudential roots of the IST. As the Iraqis build a rule of law for themselves, those who advocate the rule of law should extend their solidarity rather than seeking to elbow the Iraqis aside and substitute an artificial view of what they deem best for Iraq.

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may be judged and punished according to the laws of these liberated countries and of the free governments which will be erected therein." The text of the Moscow Declaration is available at http://www.yale.edu/lawweb/avalon/wwii/moscow.htm (last visited June 19, 2005). 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." Robert Jackson, *Opening Statement to the International Military Tribunal at Nuremberg*, *in* 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.

178. *See* UNITED STATES ARMY PACIFIC, GENERAL HEADQUARTERS, REGULATIONS GOVERNING THE TRIAL OF WAR CRIMINALS, AG 000.5, Sept. 24, 1945, ¶ 5(b) ("Persons whose offenses have a particular geographical location outside Japan may be returned to the scene of their crimes for trial by competent military or civil tribunals of the local jurisdiction.") (copy on file with author).

179. The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 17, U.N. Doc. S/2004/616, (Aug. 23, 2004), *available at* http://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/pdf/N0439529.pdf?OpenElement.