45 Va. J. Int'l L. 467

Virginia Journal of International Law
Winter 2005

Note

*467 PROSECUTING SADDAM AND BUNGLING TRANSITIONAL JUSTICE IN IRAQ

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*468 I. Introduction

After the U.S.-led coalition (Coalition) ousted the Saddam Hussein regime and appointed an Iraqi Governing Council (IGC), the Coalition in the form of the Coalition Provisional Authority (CPA) and the IGC began to implement transitional justice in Iraq. Their plan for transitioning Iraq from a country governed by an autocratic dictator to a country governed by democratic principles centered on retributive justice. One of the first steps toward administering justice in Iraq began with the creation of an Iraqi Special Tribunal (Tribunal), which will try Iraqi nationals and residents--the most infamous being Saddam Hussein

himself--accused of certain egregious crimes committed between July 17, 1968, and May 1, 2003, in Iraq and elsewhere. [FN1] By December 10, 2003, the IGC promulgated a Statute for the Tribunal, [FN2] and by April 20, 2004, the IGC appointed Iraqi judges to preside over these trials. [FN3]

The need for transitional justice in Iraq is clear. Never before has the world been so poised to bring the rule of international law to bear on the atrocities committed by the Hussein regime. [FN4] The 1990s saw major *469 developments in the prosecution of individuals in various regions of the world, including government officials and heads of state, for violations of international law. Although no prototype or template for transitional justice exists, the Tribunal devised by the Coalition and the IGC will not likely foster democratic governance in Iraq. Rather, the type of justice this Tribunal will produce is likely to be perceived as illegitimate and vengeful, and, as a result, peace and security in Iraq will remain tenuous. The Coalition and the IGC have six centuries of lessons learned by national courts, international and ad hoc tribunals, hybrid courts, and truth and reconciliation commissions from which to benefit. Despite this rich precedent, the Coalition, the IGC, and the Iraqi interim government are in danger of committing the same errors as their predecessors and, consequently, of bungling transitional justice in Iraq.

A three-tiered, context-specific plan to promote peace and reconciliation in Iraq would be more successful. In particular, it should consist of a hybrid court to try the most serious offenders of international and Iraqi law, national courts to prosecute lesser offenders, and a truth and reconciliation commission to investigate and seek confessions from rank and file offenders in exchange for amnesty. In Part II of this note, I describe the events leading up to and including the Tribunal's creation. In Part III, I explain that the current Tribunal is unlikely to establish a firm foundation for democratic development in Iraq based on the rule of law and accountability. Finally, in Part IV, I set *470 forth a more appropriate plan for transitional justice based not only on the history of Iraq, but also on international law.

II. Operation Iraqi Freedom and the Creation of the Tribunal

One year after al-Qaeda attacked the World Trade Center and the Pentagon on September 11, 2001, President George W. Bush addressed the United Nations General Assembly, characterizing Saddam Hussein's regime in Iraq as a "grave and gathering danger" that must be confronted. [FN5] He declared that the United States would take action against Saddam's regime and invited the world to join the effort. [FN6] Citing Iraq's robust biological, chemical, and nuclear weapons program and Saddam's use of chemical weapons during the 1980- 1988 Iran-Iraq War and against his own people, President Bush argued that the Security Council "must move deliberately, decisively, to hold Iraq to account." [FN7] Bush vowed that the Security Council resolutions would be enforced or action would be unavoidable and Saddam's regime would be removed from power. [FN8] Although France, Russia, and China threatened to veto a resolution authorizing a U.S.-led invasion in Iraq and although UN Secretary-General Kofi Annan asserted that the invasion was illegal, [FN9] by *471 October 16, 2002, Congress passed a Joint Resolution authorizing the President to use military force against Iraq. [FN10]

In an effort to garner international support for disarming Iraq, Secretary of State Colin Powell disclosed satellite photographs, recordings of intercepted phone calls, and intelligence reports that, according to Powell, provide "irrefutable" proof of Saddam's "effort to hide things from the inspectors." [FN11] Arguing that Iraq failed to meet the requirements set forth in Security Council Resolution 1441(2002), Powell asserted that Saddam's deception was not limited to a few isolated events. [FN12] Rather, "[t]his is part and parcel of a policy of evasion and deception that goes back 12 years, a policy set at the highest levels of the Iraqi regime." [FN13] Powell explained that in the wake of September 11 the United States does not have

the luxury of "[l]eaving Saddam Hussein in possession of weapons of mass destruction for a few more months or years." [FN14]
Believing that Iraq failed to comply with its international obligations, on March 19, 2003, President Bush authorized the military to use force in order to disarm Saddam's regime pursuant to the Joint Resolution. [FN15] Less than one month later, President Bush announced to the Iraqis that the U.S.-led invasion of Iraq would be successful when "'Saddam's corrupt gang is gone.'" [FN16] In an address to the Iraqi people, he explained, "'We want to give you the chance to rebuild your country; to rebuild your lives; to give your families a chance of a better future. . .. It is in the spirit of friendship and goodwill that we now offer our help.'" [FN17]
On July 14, 2003, following the overthrow of Saddam's regime, Iraq established a new governing council, the IGC, "to serve as 'an *472 expression of the national Iraqi will.'" [FN18] Coalition Provisional Authority Order Number 48 on the Delegation of Authority Regarding an Iraqi Special Tribunal authorized the IGC to "establish an Iraqi Special Tribunal (the "Tribunal") to try Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws." [FN19] Within five months of its own creation, the IGC promulgated the Tribunal's Statute (Statute), issued to the Iraqi people on December 10, 2003. [FN20] The IGC did not enact the Iraq interim constitution, however, until March 8, 2004. The interim constitution itself confirmed that a "special tribunal" would be created to try Iraqis for certain crimes committed from July 17, 1968, to May 1, 2003, in the territory of Iraq or elsewhere. [FN21] On April 21, 2004, the IGC announced that it had appointed judges and prosecutors to indict and try Saddam, but, as of the time of this writing, the Tribunal has not set a trial date and the trial will not likely take place before 2006. [FN22]

III. The Iraqi Special Tribunal Is Flawed and Likely Will Not Provide Transitional Justice in Iraq

A. The Statute for the Iraqi Special Tribunal

Unlike some other war crimes tribunals, the Tribunal is not established pursuant to a UN Security Council resolution [FN23] or a treaty, *473 and it sits in the country where the crimes were committed, in this case Baghdad, Iraq. [FN24] As an occupying power, the United States could set up an international military tribunal for the prosecution of war crimes and other crimes under international law. [FN25] If the United States did so, it would be required to follow certain procedural rules and provide due process protections guaranteed under human rights law and the Geneva Conventions. [FN26] Alternatively, the United States could set up a tribunal with a new regime in the occupied country, or it could go to the UN Security Council for a resolution establishing an international ad hoc tribunal. Instead, the CPA authorized the IGC [FN27] to set up the Tribunal and enact its Statute accordingly. [FN28]
The Statute sets forth the Tribunal's jurisdiction, organization, and administration. [FN29] It first makes clear in Article 1 that the Tribunal is an "independent entity" and "not associated with any Iraqi government departments." [FN30] The Statute also makes clear that the Tribunal's prosecutors and investigative judges are prohibited from "seek[ing] or receiv [ing] instructions from any Governmental Department, or from any other source." [FN31] This distinguishes the Tribunal from the court system designed by Saddam. He subverted and subordinated judicial authority to the executive authority. [FN32] Under his rule, the Iraqi judiciary was not independent, since judges and prosecutors were employees of the Ministry of Justice. [FN33] The judges and prosecutors were accountable to the Minister of Justice and, as such, they were "an extension. . .an *474 alter ego for Saddam Hussein." [FN34] Saddam also established courts within the police, the military, the security forces, and every

major ministry and agency. [FN35] According to Sermid al-Sarraf, a Baghdad-educated attorney now living in the United States, "[j]udicial authority was diluted to a degree that each of the courts reported through an executive power and therefore had no independence." [FN36] As President of Iraq, Saddam even appointed all jurors. [FN37] In addition, no check on the President's power to override any court decision existed: [FN38]

Saddam made it clear in no uncertain terms that in the Baath-ruled Iraq there is no such thing as the separation of branches. . .. The notion of autonomous state powers like the legislative, executive and judiciary was non-existent in Saddam's Iraq. These branches were simply agencies subjected to state power represented by the leader. [FN39]

In short, the Iraqi judiciary was simply an instrument of Saddam's will and, by extension, of Saddam's oppression of Iraqis. [FN40] Because of Saddam's manipulation of the Iraqi judiciary, it is understandable and significant that the IGC placed the requirement that the Tribunal be independent in Article 1 of the Statute.

Article 1 also establishes the Tribunal's jurisdiction. [FN41] The Tribunal asserts jurisdiction over Iraqi nationals or residents who are accused of certain crimes set forth in Articles 11-14 "committed since July 17, 1968 and up until and including May 1, 2003, in the territory of the Republic of Iraq or elsewhere, including crimes committed in connection with Iraq's wars against the Islamic Republic of Iran and the State of Kuwait" and including crimes "committed against the people of Iraq. . .whether or not committed in armed conflict." [FN42] Such crimes *475 consist of genocide, crimes against humanity, war crimes, or violations of certain laws of Iraq. [FN43] The Tribunal is also authorized to prosecute persons who allegedly have committed various crimes of Iraqi law, as broadly defined by Article 14:

(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. . .; (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. [FN44]

For these crimes stipulated in the Statute, no statute of limitations applies. [FN45] Article 15 on Individual Criminal Responsibility makes clear that government officials are not immune from prosecution under the Statute. [FN46] It likewise establishes command responsibility for crimes committed by subordinates. [FN47] Article 29 makes clear that the Tribunal has concurrent jurisdiction with Iraq's national courts to try those accused of violating certain Iraqi laws, while the Tribunal may also exercise primary jurisdiction to try those accused of committing genocide, crimes against humanity, or war crimes. [FN48] The Tribunal receives funding from Iraq's regular governmental budget. [FN49]

In determining criminal liability, the Tribunal is permitted to consider, as persuasive authority, general principles of international law and "relevant decisions of international courts or tribunals." [FN50] To the extent that the Iraqi Criminal Code conflicts with international law, the Code must "be interpreted in a manner consistent with the Statute and with international legal obligations." [FN51]

Article 3 of the Statute establishes the Tribunal's organization. The Tribunal consists of one or more "Trial Chambers," an "Appeals *476 Chamber" that reviews decisions of the Trial Chamber, the "Tribunal of Investigative Judges," a "Prosecutions Department," and an "Administration Department." [FN52] According to the Statute, "permanent independent judges," of whom there are five, and "independent reserve judges" preside over the Trial Chambers. [FN53] The Appeals Chamber is composed of nine members. [FN54] The judges are appointed by the IGC for a five-year term. [FN55]

Articles 5, 6, 7, and 33 stipulate the requisite qualifications each judge must have. Judges must be "persons of high moral character, impartiality, and integrity who possess the qualifications required for appointment to the highest judicial offices," [FN56] and they must

be Iraqi citizens. [FN57] The Statute requires the Tribunal President "to appoint non-Iraqi nationals to act in advisory capacities or as observers to the Trial Chambers and to the Appeals Chamber." [FN58] Specifically, these non-Iraqi citizens are to "provide assistance to the judges with respect to international law and the experience of similar tribunals. . .and to monitor" due process protections. [FN59] Unlike the Iraqi judges, non-Iraqi judges are preferred to have judicial or prosecutorial experience and international war crimes trial or tribunal experience. [FN60]

The Statute creates a Tribunal of Investigative Judges, which is an organ separate from the Trial Chambers. [FN61] It is composed of a maximum of twenty investigative judges who are appointed by the IGC for a three-year term [FN62] and who "initiate investigations. . .and decide whether there is sufficient basis to proceed." [FN63] In the event that an investigative judge believes that the evidence supports an indictment, the chief Tribunal investigative judge prepares the actual indictment if the judge agrees that "a prima facie case has been established by the Tribunal Investigative Judge." [FN64] While the investigative judges are Iraqi *477 nationals, the Statute allows non-Iraqi nationals to advise and observe the investigative judges. [FN65] Iraqi nationals that have been a member of the Ba'ath Party are ineligible to hold a position as "an officer, prosecutor, investigative judge, judge or other personnel of the Tribunal." [FN66] The Statute does not require the judges to have specialty experience in international law, although "due account shall be taken of the experience of the judges in criminal law and trial procedures." [FN67] In fact, the Statute does not require that judges "be serving judges," lawyers, or jurists or have legal training. [FN68]

Article 8 of the Statute provides for a "Prosecutions Department," composed of a maximum of twenty prosecutors, who are appointed by the IGC to prosecute persons suspected of committing serious violations of international law. [FN69] As is the case with judges, the prosecutors must be Iraqi citizens. [FN70] Non-Iraqi citizens, who are appointed by the chief prosecutor, may advise, observe, and assist the prosecutors. [FN71] The Statute does not explicitly require prosecutors to have legal training or prosecutorial experience. [FN72]

The Statute also sets forth due process protections for persons accused of committing serious violations of international and Iraqi law. [FN73] In particular, the accused is entitled to a presumption of innocence; a public, impartial, prompt, and fair hearing; a prompt and detailed description of the charge(s) against him; the right to be assigned free representation if indigent; and the right to cross-examine witnesses that testify against him. [FN74] The Tribunal may prosecute an Iraqi who has previously been "tried by any Iraqi court for acts constituting crimes within the jurisdiction of the Tribunal," provided, inter alia, that "the Tribunal determines that the previous court proceedings were not impartial or independent, were designed to shield the accused from international or Iraqi criminal responsibility, or the case was not *478 diligently prosecuted." [FN75] The CPA also authorizes Iraqi courts to impose "stiffer punishments" based on aggravating circumstances upon "any person who was released from prison pursuant to Revolutionary Command Council Resolution No. 225 [FN76]. . .and is thereafter convicted of another crime." [FN77] The Statute does not explicitly prohibit the death penalty. [FN78]

B. Rule of Law?

The Iraq interim constitution, formally known as the "Law of Administration for the State of Iraq for the Transitional Period," confirms the establishment of a special court to try persons accused of committing genocide, crimes against humanity, war crimes, and violations of certain laws of Iraq-- the crimes over which the Tribunal asserts jurisdiction pursuant to its Statute. [FN79] In fact, an entire three-article chapter of the interim constitution, entitled "The Special Tribunal and National Commissions," is dedicated to the creation of the Tribunal, *479 most of it cross-referencing the Tribunal's Statute. [FN80] Article 15, § I of the interim

constitution, however, clearly states, "Special or exceptional courts may not be established." [FN81] This provision of the interim constitution neither mentions the Tribunal nor clarifies the relationship between Article 15 and the chapter on the Tribunal. While the Tribunal was established three months before the interim constitution came into effect, the interim constitution's three articles providing for the Tribunal and Article 15 appear to contradict each other facially.

Furthermore, it is unclear to what extent the interim constitution itself applies to the Tribunal or, more specifically, whether the Tribunal may be required to apply the interim constitution as a source of law. Article 7, for example, states that Islam "is to be considered a source of legislation." [FN82] It further declares, "No law that contradicts the universally agreed tenets of Islam, the principles of democracy," or certain fundamental rights "may be enacted during the transitional period." [FN83] Presumably, this would include the Statute for the Tribunal; yet, the Tribunal Statute does not mention Islam as a source of law. [FN84] In fact, it does not mention Islam at all, further raising the question of whether the interim constitution applies to the Tribunal.

Likewise, the interim constitution neither specifies what the "universally agreed tenets of Islam" are nor what interpretation of Islam embodies such tenets. [FN85] The interim constitution also fails to explain how conflicts in Iraq's international legal obligations as enshrined in treaties to which Iraq is a party, Iraqi criminal law, and Islam may be resolved. [FN86] By failing to enunciate any clear conflict of laws principles, assuming that Iraqi law enacted before the Ba'ath regime took power does not already provide such rules, the interim constitution leaves open the possibility for intense disagreement regarding the reconciliation of different legal sources.

*480 C. Impartiality and Fairness

1. Security

Although the IGC has designed a Tribunal that aims to foster democracy in Iraq and although Colin Powell has argued that Iraq is much more stable without Saddam, the most important foundation for democratic development--security--has not been firmly established. [FN87] In April 2004 (the same month the IGC appointed the judges that will preside over the Tribunal), 135 American soldiers died in combat-related deaths. [FN88] Still, the Bush administration upheld the June 30 deadline for the transition of governmental power from the CPA to the Iraq interim government, handing over sovereignty to the Iraq transitional government two days early in order to prevent insurgents from sabotaging the event. [FN89]

The Bush administration's determination to begin the trials in spite of the continued violence may be a response to political pressure. The Administration would benefit politically from the prosecution of Saddam as a step toward democratic rule, since it sought to justify Operation Iraqi Freedom during an election year where many opponents of the administration intended to discredit the war as premature and based on faulty intelligence. Apparently, the Tribunal "has been under some pressure to speed the trials." [FN90] The problem with rushing to mete justice--even if it may bring short-term political gains--is that the trial of Saddam has the potential to become principally more about law and politics than justice. This is particularly likely given the fact that Saddam met with his lawyer for the first time on December 16, 2004--just over a year after U.S. forces captured him. [FN91] In fact, few of the Tribunal's most high-profile suspects have been allowed to consult *481 with their attorneys. [FN92] Prosecutors are still gathering forensic evidence from mass graves. [FN93] The Tribunal, if it begins its adjudications prematurely, may be accused of meting out a victor's justice, and the proceedings would undoubtedly be compared to the Nuremberg or Tokyo trials following World War II.

Security must be established before transitional justice can take place. Independence and

impartiality cannot be guaranteed where Iraqi judges, some of whom may be inexperienced jurists in international criminal law and who are under enormous pressure, are tasked to "render justice in a climate of fear and intimidation." [FN94] In fact, some senior Iraqi judges have refused to serve on the Tribunal for this very reason. [FN95] Similarly, few witnesses will be willing to testify if they believe their safety is at risk. For instance, even though the International Criminal Tribunal for Rwanda ("ICTR") sits in Tanzania rather than Rwanda, witnesses testifying before the ICTR still feared that their testimony "could easily encourage [the suspect's] colleagues in Rwanda to intimidate or kill the witness" because the ad hoc tribunal was unsuccessful in establishing a secure environment. [FN96]

If hostilities on the ground have not ceased, then the gathering of evidence likely will be hampered, as it was for the International Criminal Tribunal for the former Yugoslavia (ICTY), for example. [FN97] The ICTY was created by Security Council resolution 827 in May 1993 in order to try those persons who committed serious violations of international law in the territory of the former Yugoslavia since 1991. [FN98] Before the 1995 Dayton Peace Accords, "hostilities on the ground made effecting arrests and gathering evidence extremely difficult." [FN99] Without first establishing peace and security, the Tribunal is likely to be inefficient, last longer, and cost more than would be necessary had *482 Coalition forces first made the situation on the ground sufficiently safe for fair trials to take place.

In fact, the CPA proved unable to ensure the safety of even the police themselves, upon whom U.S. administrators relied to provide security in the future Iraq. While watching a truck with several "heavily armed Shiite militiamen [go] past his police station," one Iraqi policeman remarked, "[w]e came to serve [Najaf], but now we have become targets." [FN100] Marine Lt. Sean Gavigan agrees that "[t]he police are a target. They are threatened, and they have been assassinated." [FN101] As a result, approximately forty percent of the police force quit and ten percent "worked against" the U.S. military. [FN102] Likewise, on April 5, 2004, police in Baghdad abandoned their station when armed men advanced toward them. [FN103] Deputy Police Chief of Baghdad, General Amer Ali Nayef, and his son, also a police officer, were murdered on January 10, 2005. [FN104] If the police cannot even protect themselves, then they surely are not going to be able to protect witnesses, judges, and prosecutors pursuing cases against the most powerful interests, even those who may be on trial.

By July 7, 2004, the insurgency was so widespread that Iraq's interim government adopted a security law, giving the interim government authority to declare martial law and detain suspects during anti-terror sweeps. [FN105] The security law, which has been compared to the U.S. Patriot Act, [FN106] provides Iraqi Prime Minister Ayad Allawi "'extraordinary authorities' to declare curfews, restrict communications, *483 seize assets, restrict civic associations and assume direct command of security forces in areas deemed to be emergency zones," where police may "search and detain people without judicial orders." [FN107] Despite these security measures, the violence in Iraq has continued, and insurgents have targeted Iraqi government officials. On January 4, 2005, for example, Baghdad's Governor Ali al-Haidari was killed. [FN108]

The recent elections in Iraq and Afghanistan may suggest to some that the Tribunal can operate in spite of the insurgency. On October 9, 2004, Afghanistan held its first democratic presidential elections. In the months preceding the elections, Taliban officials warned Afghan voters: "We are sending warning to people to refrain from voting as we have planned to organize attacks with full strength on polling stations. . .. Voters will be responsible themselves if they come under Taliban attack." [FN109] The Taliban have attacked a UN election office and electoral workers in Afghanistan, prompting officials to delay parliamentary elections until April 2005. [FN110] About twelve election workers have been killed. Still, with about 18,000 Coalition troops helping to maintain security, a large number of Afghan voters arrived at polling stations to cast their votes. [FN111] They elected as

president the former interim president of Afghanistan, Hamid Karzai, over seventeen challengers, with 55.3% of the vote. [FN112] The elections, despite some voting irregularities, were widely considered to be fair. [FN113]
To some, the Afghan election's success may seem to suggest that Iraq's elections and perhaps its trials against former Saddam regime officials can also be successful despite continued violence. The security *484 situation in Afghanistan, however, differs markedly from that in Iraq, where the fighting is more serious. The insurgency in Iraq has been growing stronger in recent months, especially since the CPA transferred authority to the Iraqi interim government. As the insurgency focuses its efforts on killing collaborators with the United States, including police officers, translators, and government officials, it appears to be moving the country toward civil war. In September, Powell admitted that the insurgency is getting worse. [FN114] Indeed, more U.S. troops have died since the transfer of sovereignty than were killed during the invasion in the spring of 2003. On September 8, 2004, the number of Americans killed in combat in Iraq topped 1,000. [FN115] In November 2004, that number rose to 1,188. [FN116] By January 27, 2005, the death toll topped 1,420. [FN117] The fighting remains intense, and the violence is widespread. Military experts expect this to be a protracted war. [FN118] The fighting reached such a level of intensity in some parts of Iraq that on November 8, 2004, Allawi declared a state of emergency for most of Iraq lasting at least sixty days in anticipation of a U.S. assault on Falluja. [FN119] Today, the security situation in Iraq is much worse than in Afghanistan. Still, the recent elections in Iraq demonstrated that Iraqi voters were willing to turn out in higher than expected numbers to exercise their electoral rights.
Initially, the Bush administration stated that direct elections would not be held in Iraq until at least July 1, 2004, due mainly to security concerns. [FN120] In September 2004, UN Secretary-General Kofi Annan expressed doubt at the possibility of "credible elections if the security conditions continue as they are now." [FN121] Annan removed all UN *485 employees from Baghdad after the August 2003 bombing of the UN headquarters that killed twenty-two international workers, including UN Special Envoy to Iraq Sergio Vieira de Mello. [FN122] In early December 2004, UN adviser Lakhdar Brahimi expressed doubt that elections would take place due to the poor security conditions. [FN123] In fact, the Canadian government refused to send observers to monitor the Iraqi elections, [FN124] and some election officials were sufficiently intimidated by insurgents that they resigned. [FN125]
The Bush administration, however, insisted that parliamentary elections needed to take place on January 30, 2005, arguing that any further delay would signal capitulation to insurgents who were attempting to thwart the elections. [FN126] The Iraqi Election Commission announced on November 21, 2004, that elections would indeed be held on January 30 despite continued violence. [FN127] Likewise, Prime Minister Allawi maintained in the period leading up to the elections that they would be held in January even as he acknowledged that some areas would not be able to participate because of security concerns. [FN128] The same week that Allawi declared his intentions to go ahead with elections, 300 people in Iraq died as a result of surging violence, including bombings and kidnappings. [FN129] As the elections neared, insurgent attacks intensified against Iraqi government, security, and election officials. [FN130] Yet, by mid-January 2005, the United Nations seemed more optimistic about the elections. Chief UN election adviser Carlos Valenzuela asserted on January 18, "I do think it's possible to *486 hold elections that are credible under such difficult circumstances." [FN131] On that same day, three electoral candidates were murdered by a suicide bomb. [FN132] Candidates campaigned from underground cells and feared public appearances. [FN133]
Amid unprecedented security measures, elections for a 275-seat transitional national assembly, which will write Iraq's new constitution and select a transitional government, did take place on January 30, 2005. [FN134] In the immediate aftermath of the elections, UN officials, [FN135] Iraqi government officials, Iraqi political parties, [FN136] and world

leaders hailed the elections as a success due, in large part, to the higher than expected voter turnout. [FN137] In spite of some voters' fear of attack, an estimated eight million Iraqis, or sixty percent of registered voters, voted in the election, [FN138] and at least 6,000 electoral commission workers participated. [FN139] Voters even turned out in Mosul, a city whose residents supposedly endured the heaviest intimidation. [FN140] Even where polling stations were attacked, voters "refused to go home, steadfastly waiting to cast their votes as policemen swept away bits of flesh." [FN141] Approximately fifty people died in various attacks. [FN142] Some electoral irregularities were reported, but the UN-supported International Mission for Iraqi Elections maintained that the elections "generally m[et] international standards." [FN143]

*487 While the election may indicate that some democracy-building in Iraq is possible even during a continued insurgency, this does not necessarily suggest that the Tribunal can effectively operate under the same conditions. The unprecedented level of security provided on January 30 cannot be maintained for the duration of the Tribunal's work. On the day of the elections, authorities imposed various security measures, including "shoot-on-site curfews, closed foreign borders, a ban on cars and travel restrictions within Iraq." [FN144] Iraq was essentially under martial law that day, and even despite these measures, about fifty people died. The United .States increased its military support from 138,000 to 150,000 troops in Iraq--a level unmet since the Baghdad invasion. [FN145] According to military officers, these security measures cannot be maintained for a long period of time. [FN146] Consequently, the measures will not likely be sustainable throughout the Tribunal's operation. [FN147] It is too early to determine, furthermore, whether insurgents will now target newly-elected officials or voters. Just four days after the elections, insurgents killed twenty-nine people in Iraq in several attacks including car bombs and ambushes, thereby demonstrating that the insurgents refuse to allow a lull in violence. [FN148] This is particularly troubling for the Tribunal, considering that protecting witnesses, evidence, and even defendants will require substantial and sustained security measures.

Initially, Allawi announced that Iraq would have "very transparent and very just" trials that would begin in October 2004, despite his admission that the insurgency was widespread. [FN149] Yet, October came and went without any trials. Later Allawi asserted that trials for at least some of the former Ba'athist leaders would begin in mid-December 2004. Former Iraqi general Ali Hassan al-Majid, known as "Chemical Ali," former defense minister Sultan Hashem Ahmed al-Juhyi, and their attorneys did appear before a panel of judges on December 18, 2004, in *488 an interrogatory hearing. [FN150] Yet, a senior U.S. official said that the actual trials will not begin anytime soon because of the lack of security. [FN151]

Although the IGC appointed all the Tribunal's judges by April 20, 2004, the IGC refuses to announce their names for fear of their safety. [FN152] In early March 2005, a judge and a lawyer for the Tribunal were killed after a British newspaper revealed the judge's identity. [FN153] Other war crimes trials and tribunals, including the ICTY and the ICTR, have been located outside the country where the conflict occurred and where the crimes were committed due to lack of security. In fact, a new site for the Tribunal must be built because the original site was "deemed unsafe because it can't withstand mortar and small-arms fire." [FN154] The fact that the Tribunal must be able to endure armed attacks suggests that the situation is not sufficiently secure to hold trials. [FN155] Likewise, intensifying violence has kept the Tribunal's investigators from visiting mass grave sites and witnesses, thereby making the collection of evidence difficult. [FN156] It makes little sense to hold criminal trials when a multinational military force is combating insurgents and terrorists. Considering that the Tribunal will sit in Iraq while the conflict is ongoing, there is a special danger that witnesses and judges will be intimidated and fair trials cannot be guaranteed.

Perhaps more importantly, because of security concerns, the Iraqi people themselves likely

will not be able to observe the trials--which was presumably the main reason why the Tribunal sits in Iraq [FN157]--and Iraqi journalists likely will not be able to provide independent coverage of those trials. This means that the Tribunal could set a bad precedent for the development of democracy. Because the IGC promulgated the *489 Statute and appointed the judges behind closed doors, the Iraqi people--those whom the Tribunal ultimately serves--could not participate in the making of the Tribunal. [FN158] This top-down method lacked transparency and happened so quickly that Iraqis were seemingly sidelined and prevented from taking part in the process of transitional justice. Even if the Iraqis were included in the negotiations, it is unlikely that they would have felt secure enough to debate openly and without restraint. Simply put, the process of setting up the Tribunal should be as important as the trials themselves. Popular participation in the process would legitimize the Tribunal and make disputing its outcomes difficult. The Tribunal's very creation could have been an opportunity for the CPA and the IGC to promote democracy, the rule of law, and reconciliation in Iraq. Instead, the process may set a dangerous precedent, whereby the rule of law represents the will of the appointed few rather than the elected representatives of the people.

Certainly, popular participation in constitution-making has proven essential to the success of post-conflict societies, most notably in South Africa. In 1990, South Africa began an ambitious constitutional reform process, an integral part of which was public participation. [FN159] Focusing on the process of constitutional reform, the Constitutional Assembly made a concerted effort to make the process as representative and as inclusive as possible, thereby enhancing the legitimacy and broad support that the constitution enjoyed. [FN160] Elites of various countries undergoing constitutional reform reject consultation with the population because, according to the elites, the public is uneducated and illiterate. [FN161] This contention has been disproved in Rwanda, where, like South Africa, the constitutional assembly engaged the public in decision-*490 making and constitution-making. [FN162] "The goal of such a process is legitimacy--'a sense that the constitution belongs to [the people], and that the document truly reflects the values, history and culture of their country. . .. [H]istory reminds us that legitimacy lends considerable force to a government.'" [FN163] In these countries, a participatory model of constitution-making has been favored over top-down models.

The process of constitution-making is similar to the creation of a Tribunal to the extent that both seek to establish rule of law. Furthermore, popular participation in that process is a way to ensure that the rule of law will be respected, upheld, and maintained. Iraqis should have the opportunity to voice their concerns and interests in the Tribunal's Statute, since the Tribunal is presumably created for their benefit. For example, people may express preferences for public trials and the method by which the trials are made public. Iraqis may explain whether and how they would like to create a record of the atrocities and whether they believe Iranians and Kuwaitis should contribute to the record. The draft Statute, however, was not published before its adoption, thereby preventing the Iraqi people from participating in the Tribunal-making process. [FN164]

Some may argue that Tribunal proceedings and the prosecution of Saddam must occur immediately so that Iraqis may begin state-building. [FN165] The Tribunal itself was established about one year after Baghdad fell and four months after Saddam was captured by the Coalition. However, the type of Tribunal needed for immediate prosecution may not be the same type of Tribunal necessary to provide the best governance in the long-term. Legal instruments such as the Statute have the potential to define the limits of permissible action in Iraq. Making the transitional justice as inclusive as possible will lay a firm foundation for democratic governance, which is essential for Iraq's long-term interests.

*491 2. The IGC and Its Judicial Appointments

The Statute authorizes the current IGC and its successors to appoint judges and prosecutors to the Tribunal. [FN166] The IGC's power of appointment raises the concern that the Tribunal's judges and prosecutors are not sufficiently insulated from executive influence. For the past four decades, Iraq's judiciary has proven susceptible to executive pressure because Saddam placed the judiciary under executive control. [FN167] The role of the courts was not to "say what the law is" [FN168] or to defend the law according to the manner in which Iraqi legislators--as representatives of the Iraqi people-- intended. Rather, Saddam made the courts accountable to himself and his administration alone. [FN169] Given the fact that the Iraqi judiciary has long been manipulated by the executive, the Tribunal's judges and prosecutors may still be susceptible to executive control. Each path toward transitional justice is context-specific. "Are you confident, given the nature of Hussein's rule over the past 25 years, you will be able to find impartial jurists, prosecutors and detectives that you can cull from the system and who will operate within a due process framework and be sympathetic from a human rights perspective?" asks Paul Van Zyl of the International Center for Transition Justice. "Can we get there in the long term? Yes, but not right away." [FN170]

The possibility of undue influence upon the Tribunal is amplified by the fact that the judges and prosecutors are not given a lifetime term or a term that would simply expire upon the Tribunal's expiration. Instead, judges serve for a five-year term, [FN171] and investigative judges and prosecutors serve a three-year term. [FN172] Nothing in the Statute makes them ineligible to serve multiple terms, assuming the Tribunal's work continues beyond the length of their terms. [FN173] The IGC determines who will serve on the Tribunal, and judges may feel pressure to issue *492 judgments as directed or desired by the IGC in order to preserve their own judicial tenure. [FN174] Yet, the courts and prosecutors must be independent in order to fulfill the Tribunal's mandate--to establish a firm foundation for the rule of law and democratic governance, and to foster transitional justice in Iraq successfully and efficiently. These goals will only be achieved if the trials are sufficiently fair and impartial to lend the Tribunal legitimacy in the eyes of the Iraqi people. The Statute's failure to provide adequate procedural protections for judges raises the possibility that they will not be sufficiently insulated from executive influence to conduct fair trials.

Arguendo, even if the IGC did not exercise its appointment power to influence the Tribunal's decisions, any Tribunal whose judges or prosecutors are selected by the IGC will not likely enjoy widespread legitimacy in Iraq because the IGC itself was appointed by an occupying power. As argued by Adel Safty:

[T]he Iraqi Governing Council has been appointed by the occupying power; it has not been elected by the people. In this sense, it cannot claim to be competent to render justice on behalf of the people of Iraq. Therefore, the criminal tribunal set up by the Iraqi Governing Council does not meet the test of "independence and impartiality." [FN175] In striving so ardently for "an Iraqi process with decisions by Iraqis," [FN176] the IGC may prevent those decisions from being impartial, fair, and representative of the Iraqi people's desire for transitional justice.

In fact, the IGC itself can hardly be considered "an Iraqi process with decisions by Iraqis," because many Iraqis do not regard the IGC as representative. Grand Ayatollah Ali Sistani, the highest ranking Shiite cleric in Iraq, issued a fatwa last June, criticizing the selection of the IGC by the CPA. [FN177] "The occupation officials do not enjoy the authority to appoint the members of a council that would write the constitution. General elections must be held so that every eligible Iraqi can choose someone to represent him." [FN178] According to Wisal Najib al-Awazi, dean *493 of political science at Mesopotamia University in Baghdad, "[t]he Governing Council is in a serious crisis, and they will never get out of it. The people now feel that this council is imposed by the Americans." [FN179] The IGC, the Iraqi interim government, and the newly-elected Iraqi government must give the Iraqi people a sense of

ownership over the Tribunal. As Van Zyl notes:

[If] the U.S. government is too closely associated with these trials, if it either overtly or covertly seeks to control these trials they won't be legitimate in Iraq, they won't be legitimate in the region, and this incredibly important opportunity to send a signal not just to Iraq but to the Middle East as a whole will be lost. [FN180] The effect will likely be the same if the U.S. government is perceived as interfering with the elections, even absent any actual attempt at control.

Likewise, the Iraqi interim government is "beset by challenges to [its] popular legitimacy and effectiveness, and by grave risks to Iraqis who have joined the experiment in representative government." [FN181] Iraqis believe the interim government is illegitimate since its officials are unelected. [FN182] Local council members are unelected as well, because the CPA was concerned "that religious extremists and Ba'athists would manipulate the [elections]." [FN183] In order to avoid such manipulation, the CPA screened council candidates. "As a result, the councils were filled with people who owed their jobs more to the CPA than to the public." [FN184] As one council member stated, "The community saw us as tools of the Americans." [FN185] The Sadr City district council chairman was murdered and then "strung from a pole" with "[a] sign hanging from his neck accus[ing] him of being an American spy." [FN186] Similarly, Chairman of the Education Committee Yacoub Youssef was accused of "collaborating with U.S. forces," received fourteen death threats, and *494 "was almost gunned down on his way to work." [FN187] During the occupation alone, over 100 Iraqi government officials were assassinated. [FN188] Since then, the Iraqi deputy foreign minister and a senior official in the Education Ministry were killed. [FN189] Because of the need for heavy security, reaching out to the public through community meetings, for example, has been difficult, if not impossible for Iraqi officials. [FN190] These officials, considered by their constituents as serving American interests, cannot be expected to gain legitimacy and the people's trust without a secure environment in which to campaign.

One of the most prominent figures of the now-dissolved IGC is Ahmed Chalabi, a long-time Iraqi opposition figure in the West who led one of the foremost opposition movements, the Iraqi National Congress (INC). [FN191] Born in Iraq in 1945, Chalabi is a son of a wealthy banking family, and after he left Iraq in 1956, he lived mostly in the United States and London. [FN192] He was a math student at Chicago University and the Massachusetts Institute of Technology. [FN193] "Chalabi is often described as a controversial figure, charismatic and determined but crafty and cunning at the same time." [FN194] In fact, some opposition figures have accused him "of using the INC to further his own ambitions." [FN195] Chalabi provided significant pre-war intelligence to the Bush administration, "suggest[ing] that Saddam posed an imminent threat to the United States because of his weapons of mass destruction." [FN196] During the occupation, the United States appointed Chalabi to the IGC; yet, al-Watan, a Qatari newspaper, argues that he is a "failure[]" [FN197] and *495 "not even qualified to run a grocery shop." [FN198] Even worse, he "is mistrusted by ordinary Iraqis." [FN199]

After Chalabi's appointment to the IGC, his nephew, Salem Chalabi, was appointed by the IGC as Director General of the Tribunal. [FN200] The decision is controversial for several reasons. For one thing, it raises the question of whether appointments are based on merit or familial ties. The appointment could not likely have been based on merit, since Salem Chalabi is a U.S.-educated lawyer who is not educated in Iraqi law. [FN201] Some are also concerned that the appointment is both elitist and imperialist. "Many Iraqis are already frustrated with their inability to reach those in power, and the man running the tribunal is seen by some as one of those special few who access and control the corridors of power." [FN202] Although Iraqis want a Tribunal that will prosecute Saddam, "any perception [that] it's an American creation, not genuinely independent, could diminish the public perception of its power."

[FN203] The fact that "[Salem] Chalabi's business partner Mark Zell runs a law firm with the [United States] Undersecretary of Defence Douglas Feith, a key neo-conservative architect of the Iraq war," does not help his image. [FN204] Perhaps more troubling, "Feith's Pentagon office oversees the distribution of [Iraq's] reconstruction contracts." [FN205] Salem Chalabi's directorship may enhance the perceptions that the Tribunal represents a "victor's justice and that there's little separation of powers in the new Iraq." [FN206]

The reality is that Iraq and the rest of the world are watching the Tribunal closely. Important to transitional justice "is choosing personnel who will inspire public trust and respect." [FN207] Nothing less than "the *496 highest levels of transparency and propriety must be followed to ensure that whatever the decision of the [T]ribunal is or the court is, that it's going to be generally accepted." [FN208] The Tribunal's decisions may not be generally accepted if people question the integrity of its judges. [FN209]

More recently, both Salem and Ahmed Chalabi have come under significant scrutiny from Iraqi and U.S. officials. In May 2004, senior U.S. officials accused Ahmed Chalabi of sharing U.S. intelligence with Iran so sensitive that its revelation could "get Americans killed"--an accusation that Chalabi denies as being politically motivated. [FN210] This comes as a reversal in U.S. relations with Chalabi, who told the United States prior to its invasion of Iraq that "Saddam put his biological weapons labs in trucks," a major assertion made by Secretary Powell in his address to the United Nations. [FN211] In preparation for the war, the United States established and trained the Free Iraqi Forces militia as part of Ahmed's Iraqi National Congress. [FN212] After the Coalition toppled Saddam's regime, the United States selected Ahmed to serve on the IGC. [FN213] The pre-war intelligence provided by Chalabi to aid the Bush administration's case for the war in Iraq has been largely discredited, as no weapons of mass destruction have been found in Iraq. [FN214] In spring 2004, the Pentagon stopped financing Chalabi. [FN215] Then in early August 2004, Iraqi Judge Zuhair al-Maliky of the Central Criminal Court ordered the arrest of both Ahmed and Salem Chalabi, charging Ahmed with counterfeiting and Salem with the murder of an Iraqi official. [FN216] Judge al-Maliky dismissed the charges against Ahmed due to insufficient evidence. [FN217]

*497 Ahmed claims that "the charges were the initiative of American advisors to [al-Maliky]--whom [the Chalabis] characterized as an American puppet." [FN218] Al-Maliky "is not a bona fide Iraqi judge, but rather an unqualified person who was put in his position by the American occupation authorities." [FN219] According to the Chalabis, al-Maliky is nothing more than a "puppet" for the Bush administration. [FN220] Essentially, "[t]he charges against the Chalabis. . .signal an open political fight with Mr. Maliky over the [Iraqi] special tribunal" and represent "a troublesome issue for the interim Iraqi government, which has been working to shrug off accusations that the Americans retain extensive influence." [FN221]

As for Salem, he was removed from the Tribunal and replaced by Amer Bakis as Director. Salem has said that Allawi "is attempting to take control of the Iraqi Special Tribunal for political purposes" and that the interim government has brought trumped-up murder charges to ensure that it has complete control. [FN222] Salem further maintains that the interim government removed him because he hindered the government's efforts to grant amnesty to senior Ba'ath Party officials. [FN223] That the Tribunal is already experiencing instability, turmoil, and allegations of illegitimacy does not bode well for the interim government. Installing Bakis as Director may not alleviate doubts about the Tribunal's independence, since Salem claims that Bakis "will be taking instructions directly from the prime minister." [FN224]

Similarly, the IGC has not done much to garner the Iraqi people's support since its appointment. It is "[l]osing support from Iraqis who see its members as aloof and mostly interested in self-promotion." [FN225] Catriss Youhana, an Iraqi secretary, said, "I cannot see any progress for the last six months. They are giving only speeches. I don't trust any of them."

[FN226] Similarly, Ahmed Abdul Satter Mahdi, an Iraqi manager of a construction company, remarked, "[t]hey don't interact with the citizens. And they don't deal with all the obstacles Iraqis are facing *498 right now, or how to solve those problems." [FN227] An Oxford Research nationwide survey released over one year ago "found that nearly three-fourths of Iraqis had little or no confidence in the government led by U.S. administrator Paul Bremer and the Governing Council." [FN228]

As expected, certain Security Council members have been hesitant to support the IGC. [FN229] The IGC has not formally been recognized by the United Nations as the government of Iraq. Even though many member states preferred to wait until elections were held in Iraq in order to formally recognize the IGC as the government of Iraq, the United Nations Security Council did recognize the IGC as "the principal bodies of the Iraqi interim administration, which. . .embodies the sovereignty of the State of Iraq during the transitional period until an internationally recognized, representative government is established and assumes the responsibilities of the [CPA]." [FN230] Amr Moussa, the head of the Arab League, has made it clear that "the only legitimate Iraqi government that can be recognized is one that emerges after elections." [FN231] If the IGC, its Tribunal, and the interim government are widely perceived as illegitimate by Iraqis and the international community, transitional justice in Iraq will not be successful.

3. Past and Present Ba'ath Party Members Need Not Apply

The Statute prohibits any Iraqi who has been a Ba'ath Party [FN232] member from serving the Tribunal in any key official position. [FN233] Article 33 states in its entirety, "No officer, prosecutor, investigative judge, *499 judge or other personnel of the Tribunal shall have been a member of the Ba'ath Party." [FN234] The fact that the Statute includes a blanket prohibition on Ba'athist judges may not be surprising. After all, the courts established under Saddam's rule were riddled by accusations of corruption [FN235] and partiality. As mentioned earlier, Saddam appointed Iraq's judges, and all senior judges were Ba'ath Party members. In fact, most legal officials were at least nominal Ba'ath Party representatives. Judges were expected to rule according to Saddam's dictates. [FN236] Some judges were fired or imprisoned for delivering judgments that displeased the government. [FN237] "[T]he senior members of the Iraqi bench had become political functionaries who knew that their primary goal was obeying the regime, with their secondary duty being administering justice to the Iraqi people." [FN238] Judges would often decide cases based on considerations of bias, favoritism, bribes, and tribal affiliations. [FN239] Trials would often last a few days, and some would last a morning or an hour. [FN240] The fact that judges typically handled "20 to 30 cases a day" in Saddam's Iraq demonstrates the summary nature in which judges adjudicated cases. [FN241]

In addition, the Tribunal was created primarily to prosecute Ba'ath Party members accused of war crimes, genocide, and crimes against humanity. Having Ba'athist judges adjudicate criminal trials brought against their fellow party members may comprise the integrity of the judicial process. Even worse, some judges may be implicated in crimes perpetrated by members of the Saddam regime or, because of their ties to the Ba'ath Party, may be sympathetic to Ba'athist defendants. Perhaps just as troubling is the possibility that some judges may have been victims of torture, imprisonment, or forced exile by Saddam. In that case, no credible judicial system could allow victims to serve as *500 judges in the trial of the alleged perpetrators. Judges must be impartial and perceived as impartial by the community over which they preside if they are to enjoy legitimacy and authority.

On the other hand, a blanket prohibition on judges who are Ba'ath Party affiliates may not be prudent. The prohibition will not only cause a large number of Iraqi judges and lawyers to become unemployed, but it also likely will alienate and disenfranchise a cadre of legal professionals who may become embittered and criticize the Tribunal's authority, impartiality,

and fairness. It is true that "[t]he continued presence and exercise of power by people who participated in the regime of atrocity ironically provides both constant reminders and routinized forgetting of what happened," so purging those people "can have a purification effect." [FN242] At the same time, however, "'lustration'. . .can also sweep in too many people, unfairly." [FN243]

Excluding Ba'ath Party members from serving on the Tribunal may cause a post-conflict situation similar to that of the former Yugoslavia, where overcorrection has been a problem. After the conflict in Kosovo, few ethnic Serbian judges were willing to serve on domestic courts, leaving mostly ethnic Albanian judges to comprise the judiciary. [FN244] According to Laura Dickinson:

[W]ithout representation of Serbs within the judiciary, the independence of the decision-making, key to legitimacy among the entire local population, was severely in question. In fact, several judgments imposed against Serbian defendants by panels of ethnic Albanian judges were later thrown out by panels that included international judges, due to concerns about lack of due process and insufficient evidence. [FN245]

The Kosovo experience demonstrates the possibility of "overly zealous prosecution for past crimes" committed by members of the old regime who are being prosecuted before an Albanian panel. [FN246] Similarly, few Indonesians remained in East Timor after independence, so they were "the ones most likely to face trial for committing atrocities, raising *501 concern about whether they could receive a fair trial under the newly created Timorese system." [FN247] Since Ba'ath Party members and former Ba'ath Party members are prohibited from serving on the Tribunal, the court will be composed of judges appointed by the new regime, the IGC, which itself was appointed by the victor of the war against Iraq. Such a Tribunal could lead to show trials and politically motivated trials, especially when no international judges serve on the Tribunal and when no international actors have any real authority in the Tribunal to protect the alleged perpetrators' due process rights. Admittedly, the Statute permits the IGC or the elected Iraqi government--in its discretion--to appoint non-Iraqi judges. Yet, at the very least, the Tribunal may be perceived as a potent tool used to expose and implicate political enemies. Of course, when Saddam is tried before a Tribunal composed of exiled Iraqi and/or non-Ba'athist judges, he will likely use its composition as the centerpiece of his defense. [FN248]

In fact, when Saddam was arraigned on June 30, 2004, before an Iraqi judge, he identified himself as "Saddam Hussein, the president of Iraq," and refused to recognize the court by disputing the judge's credentials and saying, "[t]his is all a theater, the real criminal is Bush." [FN250] He continued, "everyone knows this is theater by Bush, the criminal, in an attempt to win the election." [FN251] Hussein concluded, "It doesn't really matter whether you convict me or not. That's not what's important. But what is important is that you remember that you're a judge. Don't mention anything about the occupying forces. This is not good. Judge in the name of the people. This is the Iraqi way." [FN252] The arraignment, conducted on the grounds of one of Hussein's former palaces, was videotaped, allowing Iraqis to see their ousted ruler for the first time since he was captured by U.S. forces on December 13, 2003. *502 According to Salem Chalabi, former Director General of the Tribunal, the proceedings "demonstrate[] that the accountability process is starting.. . . A psychological barrier has been broken." [FN253] Iraqi Prime Minister Ayad Allawi said, "[w]e will show that justice will prevail, regardless of how long it will take to be implemented. . .. We want to put this bad history behind us and to move with the spirit and national unity and reconciliation." [FN254]

A continent away at The Hague, another former head of state is making the same argument as Hussein. Milosevic has turned the ICTY into a political platform from which to discredit the Tribunal and argue that its purpose "is to produce false justification for the war crimes of NATO committed in Yugoslavia." [FN255] He added, "[b]y reason of illegitimacy of its

creation, the selective and political nature of its powers and purposes as well as the inherent and inescapable weaknesses in structure, administration and operations. . .the Tribunal lacks power and independence." [FN256] In response, Presiding Judge Richard May warned, "Mr. Milosevic, we are not going to listen to these political arguments." [FN257] On another occasion, Milosevic told the panel, "[y]ou are not a judicial institution; you are a political tool." [FN258] These proceedings were broadcast throughout Serbia, and "[Milosevic's] approval rating in Serbia doubled during the first weeks of his trial," [FN259] not the sort of reaction one would like in Iraq given the tenuous security situation. "Milosevic has gone from the most reviled individual in Serbia to number four on the list of most admired Serbs." [FN260]

Likewise, "Yugoslav President Vojislav Kostunica, Milosevic's successor, denounced the [ICTY]. . .saying that he is skeptical about Milosevic's prospects for a fair trial" because he claims that the *503 Tribunal is prejudiced against Serbs. [FN261] "So far we have seen much politics, a huge media spectacle but least of what this court should be about, trying the defendant of serious crimes," Kostunica said. [FN262] As Kostunica's comments demonstrate, Milosevic's ability to drag out the trial by emphasizing politics rather than law has threatened the ICTY's reputation. The Tribunal in Iraq can learn from the experience of the ICTY and avoid creating a court that is vulnerable to the perception of bias and politically motivated decisions. Meaningful accountability, fair proceedings, and sustainable reconciliation may not be possible without including Ba'ath Party members.

Certainly, a proportionate number of Ba'ath Party members may be selected to sit on the Tribunal after they are sufficiently vetted so that the Tribunal may meet international standards of justice. [FN263] The vetting process, however, will be essential, as proven by the experience of the ICTR. Seven years after the ICTR was established pursuant to UN Security Council Resolution 955, witnesses informed prosecutors for the Tribunal that one of their defense investigators--who was on the ICTR payroll--was a man who participated in the 1994 Rwandan massacres. [FN264] About six months later, Defense Investigator Joseph Nzabirinda was arrested on suspicion of a 1994 murder. [FN265] Consequently, the ICTR's reputation has suffered tremendously, as the tribunal is rumored to harbor genocide suspects. [FN266] A thorough vetting process, therefore, is necessary before any judge serves on the Iraqi Tribunal.

There may be a special need to investigate Ba'athists and former Ba'athists selected to preside over the Tribunal's proceedings not only because the Iraqi judiciary under Saddam lacked independence, but also because it may be composed of judges who are perpetrators of the very crimes for which the Tribunal seeks to hold defendants accountable. *504 Likewise, they must be vetted for complicity in human rights violations and corruption. Furthermore, judges, defense attorneys, and prosecutors must be disqualified if they are victims of such crimes and thus potentially could be motivated by revenge. The Iraqi interim government has readmitted some senior Ba'ath Party security officials to their old government posts because Allawi needed their help and experience to combat the insurgency. [FN267] Several of these security officials were not adequately investigated before resuming their posts. In September 2004, U.S. forces arrested General Talib Abid Ghayib al-Lahibi for associating with insurgents. The month before, U.S. forces arrested Police Chief of Anbar Province Jaadan Muhammad Alwan for charges stemming from his ties to insurgents. The arrests of these two officials demonstrate the danger in readmitting former Ba'athists into the government.

Of about 25 million Iraqis, between 1 and 1.5 million were affiliated with the Ba'ath Party. Out of those, only 50,000 are considered to be "full members" of the party. [FN268] Many Ba'athists are members out of expediency instead of ideological commitment because party affiliation was the only way to advance professionally in a one-party state. "[M]embership is required to hold office, for promotions, to obtain economic advantages, and to avoid

harassment." [FN269] Allawi himself became a member of the Ba'ath Party in the 1960s when he was a medical student. [FN270] Thousands of teachers and medical technicians similarly joined the party in order to advance their careers. If excluded from public service, many former Ba'athists will be innocent victims of the purges. An effective vetting process would help distinguish the criminals from those who joined the party for these reasons. Because of the risk that criminals may be reemployed by the government, the process is essential to convince the Iraqi people that the reformed judicial system is insulated from trial by victim and trial by perpetrator.

In May 2003, the Coalition began the vetting process by removing corrupt and biased judges and replacing them with judges selected by community leaders. Thus far, the judges have displayed integrity in the *505 face of overwhelming pressure from pro-Ba'athist intimidators and others attempting to compromise their verdicts. Lieutenant Colonel Craig Trebilcock, an Army Judge Advocate General (JAG) reserve officer who has overseen the restoration of Iraqi courts, recounts that "[t]he Chief Judge of Babil Province, sixty miles south of Baghdad, was unsuccessfully targeted in his home by a rocket-propelled grenade (RPG) as a result of his dedication to reform." [FN271] He added, "[t]he new Chief Judge in Ad Diwaniya. . .personally defended his courthouse from looters in April and May 2003, sitting on the bench during the day and serving as an armed security guard for the courthouse at night." [FN272] These judges, as the product of a successful vetting process, may give Iraqis a sense of relief that judicial reform is underway.

The Ba'athists should not be discounted and excluded from the trials altogether. They can provide valuable legal and cultural expertise. Without knowing who the Tribunal's judges are, evaluating their level of Iraqi legal experience is impossible, but clearly, Ba'athist and former Ba'athist judges are familiar with the former judicial system under Saddam and may provide an important cultural context that the other judges may not be able to share. In addition, having members of both parties working side by side will promote long-term stability. Also, considering the breadth of the Tribunal's jurisdiction, many suspects will be tried, and the Tribunal will require an adequate number of judges to provide those suspects a prompt hearing. Harmonizing vengeance and forgiveness is a challenge for transitional justice, and ultimately it requires a balancing of different factors in specific contexts. In this case, the IGC should reconsider its wholesale prohibition on Ba'athist Party members and its implications for justice and reconciliation.

4. International Players Lack Authority

Fueling concerns of victor's justice are fears that the IGC is dominated by "political factions that matured in exile" that are more concerned with the trial of Saddam than they are with improving Iraqis' general welfare. [FN273] According to at least one report, the IGC's "major *506 theme has been the importance of exacting a suitable form of revenge on the leaders who tyrannized the country for 35 years." [FN274] In the past, many post-conflict states have opted for adjudication mechanisms that require international judges to serve on criminal tribunals with their domestic counterparts in order to enhance the tribunal's credibility. [FN275] A recent legal development in seeking justice for international atrocities in post-conflict situations has been the hybrid tribunal, created in response to the criticisms of both international ad hoc tribunals, such as the ICTY and ICTR, and purely domestic courts. As described by Dickinson:

Hybrid courts are courts in which both the institution and the applicable law consist of a blend of the international and the domestic: foreign judges sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local lawyers working with those from other countries; and at the same time, the judges apply domestic law that has been reformed to include international standards. [FN276]

In August 2000, the Government of Sierra Leone and the UN, for example, established a

hybrid court "to prosecute persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes, and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone." [FN277] As part of the agreement between the UN and the Government of Sierra Leone establishing the court, two international judges selected by the UN Secretary-General (with a preference for judges from the region) and one Sierra Leonean judge appointed by the Government of Sierra Leone would preside over the court's proceedings. [FN278] On June 3, 2004, the court began *507 adjudicating suspects, including the top guard of the Civil Defense Forces (the pro-government militia) Sam Hinga Norman, for crimes against humanity. [FN279]

The potential for domestic "political capture of [the] judicial process" [FN280] is illustrated by the international community's attempts to set up a criminal tribunal in Cambodia to prosecute the senior leadership of the Khmer Rouge. [FN281] Beginning in 1997, the UN and Cambodia discussed the establishment of a tribunal; however, the discussions derailed three years later mainly due to UN concerns that Cambodian plans for the tribunal "would not guarantee independence, impartiality and objectivity." [FN282] According to William Burke-White, "international justice in Cambodia has been captured by a sub-group of the political elite that has controlled negotiations with the United Nations" over the tribunal's establishment. [FN283] The political elite, many of whom have had either strong connections to the Khmer Rouge or who are former Khmer Rouge members, disagree on whom the tribunal should have the authority to prosecute. [FN284] Given persistent political instability in Cambodia, the government fears that prosecuting Khmer Rouge leaders would sacrifice popular support for its regime. [FN285] In addition, such trials may scare "former Khmer Rouge officers and rank and file, who have already surrendered, into turning back to the jungle and renewing the guerilla war in Cambodia." [FN286]

The Cambodian government, therefore, was unable to comply with international standards for investigating and prosecuting suspects, including the guarantee that the government would arrest those indicted and would appoint independent, international prosecutors and a majority of international, rather than Cambodian, judges. [FN287] In other words, the Cambodian government wanted to control the tribunal by having a *508 majority of Cambodian judges. [FN288] The UN apparently refused to approve a tribunal that did not resolve issues of bias. [FN289] However, on October 4, 2004, the UN and the Cambodian government brokered an agreement paving the way for the UN-backed tribunal, and the parliament passed legislation ratifying the agreement. Both international and Cambodian judges will preside over the tribunal, but the Cambodian judges will comprise the majority of judges. [FN290] In all, five judges--two international and three Cambodian--will adjudicate the cases brought before the trial chamber. Still, many human rights groups remain concerned that the Cambodian majority makes the tribunal vulnerable to government manipulation. [FN291]

The UN's preference for an international judge majority signals the need for international judges to be able to exercise some authority if impartiality and objectivity are to be preserved. In Kosovo, for example, the UN created a hybrid court comprised of both international and national judges to punish less high-profile offenders that the ICTY did not have the capacity to prosecute. [FN292] As mentioned earlier, few Serbian judges would serve on the court, meaning that the Kosovar Albanian majority dominated the court. [FN293] Although one international judge presided over the trials, the Albanian judges could outvote the international judge, and, as a result, the court lost credibility. [FN294] Eventually, this problem led the UN to reform the Kosovar judiciary so *509 that by December 2000, a majority of international judges presided over the court. [FN295] The hybrid court generated verdicts that were supported by the Serbs and Albanians alike. [FN296]

However, "[w]hen a tribunal is perceived as a foreign agent, imposing its will on a national

system, it quickly loses credibility." [FN297] Even where international and domestic actors share responsibilities, people may question "who is really controlling the process" and to what extent the international actors understand local needs and customs. [FN298] The hybrid court of East Timor, for example, was criticized for minimizing local participation. There, the UN Security Council tasked the UN Transitional Administration in East Timor (UNTAET), inter alia, to rebuild state institutions, including the judiciary. [FN299] Thus, UNTAET created the Special Panels for Serious Crimes in East Timor and granted them exclusive jurisdiction over allegations of crimes involving genocide, war crimes, crimes against humanity, and torture committed between January 1 and October 25, 1999. [FN300] In addition to the UN's funding and operating the tribunal, the tribunal's staff mostly consists of international prosecutors, investigators, and case managers. [FN301]

Yet, where East Timorese shared responsibility for the management of the judiciary with the UN, they often felt "sidelined" [FN302] to the extent that by August 2002, "no East Timorese defenders were helping to defend any serious crimes cases." [FN303] According to one official, "[t]hey [felt] that [the tribunal] has nothing to do with them." [FN304] Thus, on the one hand, international actors' controlling the process appears *510 imperialistic. On the other hand, lack of a certain measure of international control raises fairness and impartiality concerns since national courts are subject to political manipulation. The risk that the process may appear imperialistic is perhaps larger in the case of the Tribunal since members of the international community are the victors. No total cure for the Tribunal's legitimacy problems exists, but a Tribunal that properly balances several different factors--international and domestic--may ultimately provide a workable solution.

IV. A Community of Courts as a Transitional Justice Alternative

The Iraqi Tribunal, in its current form, is ill-equipped to deal with atrocities committed under Saddam's regime and to help Iraqis come to terms with their past. If the Tribunal is to establish accountability, reconciliation, and the rule of law in Iraq, then it must be reformed based on a balance of several factors, including public participation, increased authority for international actors, and the use of local professional and structural resources. Since the 1990s, the international community has seen a proliferation of intrastate conflict. After securing even a fragile peace, states searched for ways to enable their people to deal with the mass atrocities committed during conflict. The international legal community has responded with a variety of innovative mechanisms, such as ad hoc tribunals, regional courts like the European Court of Justice, the International Criminal Court ("ICC"), truth and reconciliation commissions, hybrid courts, and courts of universal jurisdiction. [FN305] Plans for transitional justice must be based on the specific context that these mechanisms will serve. For Iraq, using several different mechanisms may be the most appropriate way to achieve reconciliation after several decades of human rights abuses. Specifically, Iraq should first create a hybrid court with primary jurisdiction to try those most responsible for crimes of international and Iraqi law. Then, Iraq's national courts should have complementary jurisdiction to prosecute lower-rank perpetrators for the same crimes. Finally, a truth and reconciliation commission should offer pardons to the rank and file offenders in exchange for confessions of crimes committed. Together, these bodies will form a system, designed *511 specifically for Iraq itself based on its culture, history, and resources, that lies somewhere "between vengeance and forgiveness." [FN306]

A. The Hybrid Court

Hybrid courts are emerging enforcement mechanisms of international criminal law that generally have been used in post-conflict situations where no viable judiciary exists, either because the judiciary is too politically charged to deliver fair trials or because the judiciary's

infrastructure was destroyed during conflict. [FN307] Designed to try those most responsible for human rights atrocities, hybrid courts have been called many names, including "mixed tribunals," "quasi-international courts," "semi-internationalized tribunals," [FN308] "internationalized tribunals," [FN309] and "special courts." [FN310] Yet, they all share certain basic characteristics. As mentioned earlier, they combine international and domestic legal personnel and law and thus fall somewhere between ad hoc tribunals and purely domestic courts. [FN311] These courts have been created in East Timor, Kosovo, and Sierra Leone, and they may operate in Cambodia. [FN312] A hybrid court for Iraq, similar to those just mentioned, is also permitted under the Tribunal Statute, which authorizes the IGC or the newly-elected Iraqi government to appoint international judges. [FN313] Although not a complete solution, the success of hybrid courts has been generally encouraging.

Hybrid courts were designed to take the best attributes of ad hoc tribunals and those of domestic courts and combine them into one tribunal. [FN314] Two ad hoc tribunals--the ICTY and ICTR--were established by the UN Security Council pursuant to Chapter VII of the *512 UN Charter. Their jurisdiction is restricted such that the ICTR can only hear cases from the Rwandan genocide of 1994, and the ICTY can only hear cases over crimes in the territory of the former Yugoslavia since 1991; therefore, any role these tribunals will play in future criminal law enforcement is limited. [FN315] Still, the ad hoc tribunals have made significant contributions to the development of international law [FN316] and have articulated the "Pinochet principle"--the principle that a person may be prosecuted and held legally responsible for violations of international law despite that person's status or ostensible grants of amnesty [FN317]--by piercing the veil of sovereign immunity and prosecuting Slobodan Milosevic, the former Yugoslav President, [FN318] and Jean Kambanda, former Prime Minister of Rwanda. [FN319]

1. Criticisms of Ad Hoc Tribunals

Still, the ad hoc tribunals have been widely criticized for several reasons. [FN320] For example, the tribunals do not sit physically close to the territory wherein the crimes were committed, often because removal from the scene of the crimes is necessary to ensure the tribunal's independence and security. Distance between the tribunal and the territory it serves has affected both judicial reconstruction and retributive justice. The ICTY "has been much criticized for its lack of connection to the national context of the cases it adjudicates. The ICTY staff, for example, have only had 'occasional contacts and exchanges' in the affected region, rather than the kind of local engagement" necessary *513 to have an impact upon the development of domestic courts as well as the people's awareness of the tribunal's work. [FN321]

Likewise, the ICTY uses legal procedures, laws, and languages that are unfamiliar to people in the region, leading to "gross distortions and disinformation" about the tribunal. [FN322] "As a result, many misunderstood the tribunal and its work, and the tribunal became a political football for certain unscrupulous politicians in the region." [FN323] Moreover, the ad hoc tribunals "[do] little to foster national reconciliation or capacity-building." [FN324] While these tribunals may help restore peace and security to their respective regions, they do not help develop or improve upon the domestic judiciary's ability to prosecute individuals for war crimes. The ad hoc tribunals "have failed 'to assist in preparing the local prosecutors and courts to carry out investigations and trials' and have only marginally contributed to judicial reconstruction." [FN325] In short, the ICTY, because of its seat in The Hague, has been regarded as more than just inaccessible; [FN326] it has failed to establish the sustainable connection to the local populations necessary for successful judicial reconstruction and transitional justice in the region.

Although the ICTR is closer to Rwanda because it is seated in Arusha, Tanzania, the tribunal also suffers from lack of physical proximity. [FN327] Initially, Rwandans generally perceived

the ICTR unfavorably, in part because many Rwandans believed "its seat should have been located in Rwanda itself" and because they were unfamiliar with the tribunal's adversarial common law methods. [FN328] However, the tribunal somewhat compensated for its lack of proximity with efforts to make the proceedings more transparent. [FN329] The ICTR's Outreach Program to educate Rwandans about the tribunal and to keep them informed of its progress has helped improve the tribunal's image. [FN330] *514 Nonetheless, the African media is often forced to rely upon other media outlets, which have historically taken a negative view of the tribunal, to disseminate information about the ICTR's proceedings. [FN331] Thus, as one commentator has argued, "[t]he lack of original, direct coverage of the tribunal by African media allows the domination of distorted perspectives that do not relate its work to the overall development and promotion of the rule of law in Africa." [FN332]

Ad hoc tribunals lack legitimacy not only because they are located far from the sites where the atrocities were committed, but also because they are "purely international processes." [FN333] Ad hoc tribunals are staffed by international judges and prosecutors. [FN334] On the one hand, such international actors may be necessary to ensure that the tribunals are sufficiently independent to establish individual criminal liability. On the other hand, the tribunals may not be perceived as legitimate by the country they were designed to serve. Ad hoc tribunals are staffed by international judges and prosecutors. [FN335] In the case of the ICTY, "[t]he ICTY was established by Security Council resolution, without the consent of the Federal Republic of Yugoslavia;" and thus, the "country did not support its creation." [FN336] According to Dickinson, "some consider the ICTY an imposition of Western European powers and the United States and thereby tainted by imperialism." [FN337]

With an all-international staff, the ad hoc tribunals also fail to develop local judicial capacity or infrastructure. [FN338] By having both international and national actors actively involved in the adjudicatory process, the international actors can share their knowledge and experience of international law, and domestic actors can share their understanding of local customs and culture. [FN339] Sharing responsibility can *515 enhance the tribunals' legitimacy and provides opportunities for cross-fertilization of national and international norms. [FN340]

The ad hoc tribunals are also criticized for being slow, unproductive, inefficient, and costly. [FN341] The ICTR, for example, concluded nine cases by 2003, [FN342] will not likely try more than 150 suspects in total, [FN343] and has a budget close to $120 million a year. [FN344] Likewise, the ICTY completed about thirty-four individual trials by 2003, [FN345] had a $256 million budget for 2002-2003, [FN346] and had a 1,400 person-strong staff. [FN347] From 1995 to 2003, the "[UN] Security Council '[paid] some $1.6 billion. . .to operate International Criminal Tribunals in Yugoslavia and Rwanda."' [FN348] The slow pace is largely unavoidable because of the tribunals' structure. Witnesses must be brought to the tribunals from large distances, the proceedings are often conducted in several languages that must be translated, and due process guarantees to ensure fair trials often cause delays. [FN349] The ad hoc tribunals are also constructed "from scratch" and must "be dismantled" at the end of their mandate, further increasing their costs. [FN350] The result is that ad hoc tribunals are unable "to try more than a fraction of the perpetrators responsible for mass crimes." [FN351] Disadvantages associated with international ad hoc tribunals, therefore, have led legal scholars and policymakers to seek alternative mechanisms for restorative justice.

2. Criticisms of National Courts

Much like international ad hoc tribunals, national courts have certain weaknesses that make them inappropriate for reconciliation in post-conflict situations. The most obvious disadvantage is the judiciary's dilapidated condition after sustained conflict. [FN352] War-torn countries may *516 be so politically and socially divided that they have neither the legal infrastructure to investigate and prosecute persons who committed atrocities nor the resources

to build it. [FN353] The international community at times has offered to provide the judicial mechanisms necessary to hold perpetrators accountable. The UN Security Council established the ICTY, for example, because the former Yugoslavia had no adjudicatory mechanisms capable of holding trials. [FN354] In such cases, the international community provides not only the court itself but also the legal and administrative staff to investigate allegations, prosecute and defend suspects, and preside over trials.

Still, the ICTY is planning its "exit strategy," and, in order to complete its cases by 2008 as mandated by the UN Security Council, the ICTY is seeking to refer cases to Bosnian courts. [FN355] Even assuming that Bosnian courts have the necessary legal infrastructure to try cases referred to it by the ICTY, the tribunal is concerned about "the political influence brought to bear on judges and prosecutors, the often 'mono-ethnic' composition of the local court, the difficulty of protecting the victims and witnesses effectively, the court personnel's lack of training and the backlog of cases at the courts." [FN356] National courts are often vulnerable to political manipulation, particularly in countries that are emerging from conflict. Consequently, the effectiveness and legitimacy of the courts may be undermined. When the Cambodian government wanted to prosecute former members of the Khmer Rouge party who committed human rights atrocities from 1975-1979 in Cambodia, the UN was concerned that that tribunal designed by the government--which included officials that had close ties to the Khmer Rouge party--did not contain sufficient procedural protections to ensure "independence, impartiality, and objectivity." [FN357] In fact, the Cambodian government wanted to control the tribunal by having a majority of Cambodian judges sit on the court. [FN358] The UN "doubt[ed] the government's capacity to maintain an independent, impartial judiciary," [FN359] so it demanded that the government give up its control *517 over the tribunal. [FN360] In Kosovo, the judiciary "was also tainted by the former oppressive regime, undermining public confidence in, and the broad societal legitimacy of, the system as a whole." [FN361]

The Indonesian tribunal provides an example of a national court's inability to conduct fair trials. The UN originally recommended that an international tribunal be established to prosecute Indonesian military and government officials for human rights abuses committed in 1999. [FN362] The Indonesian government rejected the idea and insisted that it would create its own court. [FN363] In January 2003, three years after the crimes were committed, the Indonesian government set up its own human rights tribunal. [FN364] The tribunal, however, has not followed international standards for fair trials. Not only do several judges lack trial experience, but many are also closely connected to the Indonesian military, whose members have been accused of committing atrocities against the East Timorese in 1999. [FN365] When judges who may not be closely tied to the military are sitting, Indonesian military officers sit in their courtrooms and intimidate them. [FN366] The U.S. government has described the Indonesian courts as being "subordinated to the executive" and tainted by "pervasive corruption." [FN367] Despite the fact that the tribunal statute requires a ten year minimum prison sentence, the court sentenced Abilio Soares to three years in prison for committing crimes against humanity. [FN368] The courts have also found that ten Indonesian military officers, police officers, and civilians were not involved in the 1999 atrocities in East Timor, despite eyewitness testimony to the contrary. [FN369] According to one report, "[t]he organizers of mass destruction and murder are being acquitted or, if the evidence overwhelmingly indicates guilt, they are given lenient sentences." [FN370] Not surprisingly, East *518 Timorese witnesses are reluctant to testify because the courts have failed to provide them with sufficient protection. [FN371]

In short, domestic courts may be stacked with judges and prosecutors from the former regime, "which may have backed the commission of widespread atrocities. Thus, the state may continue to employ the very people who failed to prosecute or convict murderers or torturers

or ethnic cleansers." [FN372] The state, alternatively, could purge the judges and prosecutors from the previous regime, "resulting in an enormous skill and experience deficit, as well as the danger of show trials and overly zealous prosecution for past crimes." [FN373] As noted earlier, several Serbian judges refused to serve after the Dayton Peace Accords, leaving mostly ethnic Albanians to adjudicate cases. Consequently, "the independence of the decision making--a key factor in establishing the court system's perceived legitimacy among the entire local population--was severely imperiled." [FN374] International judges later dismissed judgments issued by Albanian judges against Serbian defendants "due to concerns about lack of due process and insufficient evidence." [FN375] Given these problems, purely domestic institutions often fail to garner legitimacy sufficient to restore justice and promote reconciliation in post-conflict societies. Recognizing that neither purely international nor purely domestic tribunals provide the best conditions for transitional justice, a new legal mechanism--the hybrid court--was designed as the "next-generation tribunal" [FN376] to resolve the problems associated with international and domestic courts. [FN377]

3. Hybrid Courts

Hybrid courts tend to satisfy the domestic state's needs and the international community's standards. Established by agreement between the state and the UN rather than by Security Council resolution under Chapter VII, these courts can have both the outside legitimacy of *519 international courts and the national legitimacy of domestic courts. They can share resources: those provided by the international community, including personnel, funding, and legal experience, and those provided by the state, including local personnel, infrastructure, and cultural awareness. In addition, less funding may be necessary for hybrid courts than for international courts, since hybrid courts make use of the domestic judicial infrastructure and are closer in physical proximity to where the crimes were committed, meaning that transferring witnesses, evidence, and personnel will be less costly. Close physical proximity also facilitates reconciliation, since the local population can attend trials and review news reports from local sources. Since resources and experience are shared, hybrid courts enhance or rehabilitate domestic capabilities to prosecute individuals. In short, hybrid courts represent an improved vehicle for transitional justice. Their effectiveness has been tested in Sierra Leone, East Timor, and Kosovo.

a. Sierra Leone

Sierra Leone's legal system was mostly destroyed at the end of the country's civil war. [FN378] Its judges and lawyers fled the country, its infrastructure was severely damaged, [FN379] and Sierra Leone lacked the funds to create a court. [FN380] The Special Court for Sierra Leone ("Special Court"), an exceptional institution, was established by treaty between the UN and the government of Sierra Leone in order to hold accountable "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996." [FN381] The Special Court has concurrent, but primary, jurisdiction with Sierra Leone's national courts. [FN382] It is composed of eight trial and appeals judges--three appointed by Sierra Leone and five appointed by the UN *520 Secretary-General [FN383]--and sits in Sierra Leone. [FN384] The Special Court's mandated duration is three years, and because it was not established pursuant to the Security Council's Chapter VII powers, it is funded by voluntary contributions. [FN385] In other words, "[w]hile the [UN] created the Special Court, the organization doesn't control it." [FN386]

The Special Court began its work "in record time," and Prosecutor David Crane made clear that it would "indict the most senior leadership of all parties responsible for the atrocities in the Sierra Leone war." [FN387] In June 2003, the Special Court indicted Liberian President Charles Taylor for war crimes related to his role in the Sierra Leone war. [FN388] In fact, this is the first time a sitting head of state has been indicted for war crimes. [FN389] In March

2003, the Special Court also arrested Sam Hinga Norman, former Minister of State Security for Sierra Leone, on charges of crimes against humanity. [FN390] Norman's arrest was significant because it demonstrated that even "a victor could be held to the same standards as the defeated." [FN391] The Special Court's work has been successful in commanding increased respect in Sierra Leone and the international community. [FN392]

In addition to the Special Court, Sierra Leone also has a Truth and Reconciliation Commission (TRC), as first proposed in the Lome Peace Accords, to investigate and seek confessions from those who bear lesser responsibility for crimes committed during the Sierra Leone war. [FN393] Unlike the Special Court, the TRC is a national institution, legally based in Sierra Leonean law. [FN394] Its TRC is a "'quasi-judicial institution with powers to issue subpoenas and administer oaths and affirmations, but no *521 power to enforce those provisions legally."' [FN395] Mass prosecutions in post-conflict situations may destabilize the country and lead to continued hostilities, so having both a TRC and a tribunal is a compromise--whereas the tribunal holds criminally accountable those most responsible for the atrocities during war, the TRC helps to create a dialogue and an historical record of the atrocities with the cooperation of lesser perpetrators. [FN396] "The goal of the processes is to reconcile ex-combatants and victims, and to reintegrate the ex-combatants back into the society they brutalized during the war through the mechanism of an institution of justice." [FN397]

The Special Court and the TRC have been working well together despite the fact that their subject matter jurisdictions overlap. While the Special Court is limited to prosecuting those most responsible for human rights abuses, the TRC may investigate and seek confessions from any person and for any human rights violations. [FN398] Their caseloads are different, as well; while the Special Court is not expected to try more than twenty-four cases, the TRC will likely conduct many more investigations than that. [FN399] In addition, the Special Court's jurisdiction extends only to crimes that took place after November 30, 1996, while the TRC's temporal jurisdiction extends from March 23, 1991, to July 7, 1999, which corresponds roughly to the actual duration of the Sierra Leone war. [FN400] It may be that without "a well-defined relationship between the two institutions, Sierra Leoneans are confused about the respective roles the institutions are supposed to play." [FN401] However, although the overlapping jurisdictions may be a source of tension, the two institutions have thus far avoided any significant conflict. [FN402] Despite the fact that this is the first time that the UN has helped establish a court and a TRC with similar jurisdictions, the overlapping processes have *522 thus far appeared to be appropriate for dealing with the human rights abuses committed during the Sierra Leonean civil war.

b. East Timor

The hybrid tribunal was first used in East Timor and has generally not been as successful as its Sierra Leonean counterpart. [FN404] When the UN Security Council established UNTAET, it authorized UNTAET to begin rebuilding state institutions and to "exercise all legislative and executive authority, including the administration of justice" [FN405]--a difficult task, considering that the judicial system had been destroyed during the conflict following the referendum on independence. [FN406] Reportedly, "[l]ibraries, court equipment, and case records had been looted or destroyed. After the referendum, most East Timorese who had acquired legal, political, and administrative experience. . .fled to Indonesia," resulting in a "judicial vacuum." [FN407] The UN, however, rejected suggestions that an ad hoc tribunal be established for three main reasons: (1) the political will within the Security Council to create another ad hoc tribunal was lacking; (2) a great deal of funding would be required; and (3) reconstruction of the local judiciary and the restoration of justice were necessary. [FN408] Instead, UNTAET established Special Panels for Serious Crimes ("Special Panels") as part of East Timor's national court system and granted them exclusive

and universal jurisdiction to try persons suspected of committing genocide, war crimes, crimes against humanity, torture, murder, and certain sexual offenses. [FN409] The courts were authorized to apply international human rights treaties and Indonesian penal law as it existed prior to October 25, 1999, unless that law contradicted international standards, UNTAET's mandate, or other regulations. Reconciling these sources proved to be a challenge for judges and attorneys alike. [FN410] The Special Panels were to *523 be composed of "both East Timorese and international judges." [FN411] UNTAET also established the Serious Crimes Unit (SCU) (officially established as the "Department of Prosecution of Serious Crimes"), staffed by international prosecutors and investigators, to investigate offenses during the 1999 conflict. [FN412]

Despite early hopes that the Special Panels would hold offenders accountable, their performance has been disappointing. For example, the Special Panels have been unable to prosecute many of the people they indicted because Indonesia has refused to comply with extradition requests and to assist with investigations. [FN413] Although "the SCU has investigated and filed 45 indictments for serious crimes against 140 individuals. . ..result[ing] in trials and convictions of thirty-one individuals, spanning all levels of the Indonesian military and East Timorese militia command structure," the trials have generally not followed international standards of fairness and due process. [FN414] In at least fourteen cases, the accused did not call any witnesses. [FN415] Additionally, "the accused have been routinely detained beyond the seventy-two-hour limit and before their preliminary hearings. Some of the accused have been left in prisons for months or even years while awaiting trial." [FN416] The delay is partly due to the Special Panels' inability to provide translators or even judges. [FN417] In 1999, a total of "sixty people in East Timor had law degrees. None of them had served as judges, prosecutors or defenders under Indonesian rule. Of the seven judges sworn into officer in January 2000, none had previous judicial experience." [FN418] Because the Special Panels lack resources, some trials have no transcripts of the proceedings. [FN419] In one case, the judges used another judge's notes taken on a laptop computer during the trial. [FN420] Perhaps *524 more disturbingly, "in the cases that have been prosecuted. . .the judges neglected to apply international law or applied it incorrectly, and handed down harsh sentences for low-level perpetrators." [FN421]

The East Timorese defenders were also overpowered by international prosecutors. [FN422] In 2001, the Special Panels only had six defense attorneys to represent all of the defendants. [FN423] In 2003, only ten public defenders existed in East Timor, and none had trial experience. [FN424] The East Timorese defense attorneys felt that their international counterparts dominated the Special Panels to such a degree that they "consider [ed] the hybrid tribunal to belong exclusively to the internationals." [FN425] In other words, local defenders felt that the tribunal had "nothing to do with them," so they concentrated on defending suspects accused of committing ordinary crimes and effectively abandoned defending those accused of serious crimes. [FN426] International legal experts also tended to direct, rather than mentor, their East Timorese counterparts, thereby hindering capacity-building efforts. [FN427]

The defendants themselves have suffered from their defenders' lack of experience, administrative support, and library or Internet resources. [FN428] In fact, "[t]he quality of the defense in the early cases likely violated the right of the defendants to effective counsel." [FN429] Whereas the prosecution is funded by the UN, the defense is funded through the budget of East Timor. [FN430] Without additional funding for the defense, few witnesses can be brought in court to testify on behalf of the defense, and their protection cannot be assured. [FN431] At one point East Timor President Gusmao said, "I consider it not to be in the national interest to realize a judicial process of this nature in East Timor." [FN432] Given these problems, many have understandably criticized the Special Panels for being inefficient,

for minimizing local participation, and for *525 failing to uphold due process protections. Still, recent events may improve the tribunal's reputation. On May 10, 2004, the Special Panels "issued an arrest warrant for Indonesia's former military leader and current presidential candidate General Wiranto for human rights abuses perpetrated. . .in 1999." [FN433] Prosecutors have hailed the arrest warrant as a positive step for the tribunal, after blaming judges for permitting "political obstacles" to block issuance of a warrant. [FN434]

Like Sierra Leone, East Timor also created a Commission for Truth, Reception, and Reconciliation (CTRR) "to focus on repatriating refugees, documenting human rights abuses, and creating human rights safeguards for the future." [FN435] It is composed of five to seven East Timorese commissioners and may investigate human rights abuses committed between April 25, 1974, and October 25, 1999. [FN436] The UN has also made a concerted effort to keep the East Timorese public informed of the CTRR and Special Panels' activities. [FN437]

c. Kosovo

UN Security Council 1244 authorized the UN Mission in Kosovo (UNMIK) to "perform[] basic civilian administrative functions," which included administration of the courts and, more generally, the establishment of civil law and order. [FN438] Since the judiciary "was destroyed or severely damaged during the conflict," a new judicial system had to be reconstructed. [FN439] This proved to be a formidable task. Not only were the legal libraries and court buildings themselves damaged, but "[l]ocal lawyers and judges were scarce, and those available lacked experience, as most ethnic Albanians had been barred from the judiciary for many years, and Serbian judges and lawyers mostly fled or refused to serve." [FN440] The ICTY did not have the capacity to prosecute all individuals suspected of committing serious violations *526 of international law. [FN441] It would only try those most responsible for mass human rights abuses. [FN442] International involvement was necessary to strengthen the capacity and independence of the domestic courts so that they could preside over the remaining cases. [FN443]

Although the ICTY retained primary jurisdiction, the Kosovo War and Ethnic Crimes Court--created in 2000 by UNMIK as a part of the national court system-- would have concurrent jurisdiction to try "less high profile offenders" for "war crimes, other serious violations of international humanitarian law, and serious ethnically-motivated crimes." [FN444] Applicable law included both international and domestic law, and in the event that the two conflicted, international law would take precedence. [FN445] At first, the "international judges had minimal impact, as they did not comprise a majority on the panels." [FN446] In order to rectify this, UNMIK required a majority of international judges to sit on the panels with the aim of ensuring the panels' impartiality and independence. [FN447] With this change, the quality of the court's judgments increased. [FN448] Likewise, foreign and domestic lawyers often worked on cases together, thereby allowing cross-fertilization of experience and cultural awareness that ultimately enhanced domestic judicial capabilities. [FN449] The court has self-reported its operations as "generally successful," but commentators have noted that its performance presents a "mixed record" on the whole. [FN450]

What has been described as "a UN-supported special court" in Serbia began its first trial on March 9, 2004. [FN451] Six men are accused of massacring about 192 prisoners of war in Croatia in 1991. [FN452] Although the ICTY has been generally reluctant to trust domestic courts in the region, the ICTY apparently referred the case to the Serbian special *527 court, which will be "a test of the local judiciary." [FN453] The ICTY, having a limited mandate and funds, cannot hear the cases of all those suspected of committing atrocities in the former Yugoslavia. The perceived impartiality and fairness of this first case for the Serbian court will determine whether the ICTY will hand over cases to Serbian national courts in the future.

B. Toward a Hybrid-National Court System for Iraq

In determining the appropriateness of any enforcement mechanism, transitional justice architects must balance several factors--effectiveness, cost, and legitimacy--based on the specific cultural and political context and the goals sought to be achieved: "establishing individual responsibility, enabling the dismantling of institutions responsible for perpetrating the commission of atrocities, establishing an accurate historical record, providing a cathartic process for victims, and deterring further instances of violence." [FN454] Iraq has a variety of retributive justice mechanisms from which to choose, but international ad hoc tribunals, national courts, and the ICC are unlikely candidates.

The Security Council could conceivably establish another ad hoc tribunal for Iraq under Chapter VII of the UN Charter, but this is doubtful, since these tribunals are so costly. The international community recently created the ICC so that, among other considerations, it could avoid having to build an ad hoc tribunal after every conflict. [FN455] For example, the United States' recent suggestion that an ad hoc tribunal be established to prosecute violators of international criminal law in Darfur, Sudan, has "received a chilly reception at the [UN]," where some countries are likely to oppose an ad hoc tribunal in favor of using the ICC. [FN456] At least twelve members of the Security *528 Council prefer the ICC. [FN457] In fact, a [UN]-appointed commission of inquiry for Sudan has recommended in its report that the ICC prosecute those accused of committing genocide, war crimes, and crimes against humanity. [FN458] The commission stated that establishing an ad hoc tribunal would take too much time and money. According to the commission, the ICC "is the only credible way of bringing alleged perpetrators to justice" because of the ICC's "entirely international composition," its "set of well defined rules of procedure and evidence," and the fact that it "could be activated immediately." [FN459] Although the United States acknowledges that it would most likely have to provide most of the funding for its proposed ad hoc tribunal, the United Nations' special adviser for the prevention of genocide, Juan Mendez, said that the U.S. plan was impractical. [FN460]

Even if the Security Council were interested in setting up an ad hoc tribunal for Iraq, the Bush administration would likely veto any resolution to that effect. As Burke-White has noted, "[g]iven the outright hostility that the Bush administration has shown toward international criminal justice and the recent testimony of the U.S. War Crimes Ambassador that the ad hoc tribunals should end their work by 2008, it seems highly unlikely that the United States would support their proliferation." [FN461] Also, the CPA already authorized the IGC to establish a tribunal, which essentially is a specialized national court, to prosecute violations of international and Iraqi law, thereby making an ad hoc tribunal redundant and moot. [FN462]

Could the ICC still assert jurisdiction over crimes committed in Iraq from July 17, 1968, to May 1, 2003? The Rome Statute sets forth certain preconditions for ICC jurisdiction. First, it limits the ICC's jurisdiction ratione temporis to crimes "committed after the entry into force of [the] *529 Statute" on July 1, 2002. [FN463] For states that later become a party to the ICC, the Rome Statute also limits the ICC's temporal jurisdiction to crimes "committed after the entry into force of [the] Statute for that State." [FN464] Iraq has neither signed nor ratified the Rome Statute. [FN465] Second, the ICC only has jurisdiction over "persons for the most serious crimes of international concern," [FN466] including genocide, crimes against humanity, and crimes of aggression. [FN467] Third, the Rome Statute imposes conditions for the exercise of jurisdiction where state parties refer cases to the ICC or the prosecutor initiates cases. Article 12(2) requires that the state where the crime occurred or the state of the defendant's nationality be a state party or that the state accept jurisdiction with respect to the individual in question. [FN468] Article 13 enables the ICC to exercise jurisdiction when the Security Council, acting under Chapter VII of the UN Charter, refers the case to the ICC prosecutor. [FN469] In the event that the Security Council refers a case to the prosecutor, the Rome Statute waives the requirement that the national or territorial state be a party to the

statute. [FN470] Another limit on the ICC's jurisdiction is the principle of complementarity. [FN471] In other words, the ICC may not assert jurisdiction over a case that is being "investigated or prosecuted by a State which has jurisdiction" unless the state is "unwilling or unable to prosecute" or unless the state investigated the case and decided not to prosecute. [FN472]

Considering the ICC's jurisdictional limitations, it is unlikely that the ICC will assert jurisdiction over Iraqis who committed serious violations of international law between July 17, 1968, and May 1, 2003, simply on the basis of complementarity, if not for other reasons. While the ICC would be unable to prosecute persons who committed serious crimes before July 1, 2002, it may be able to try those suspected of *530 committing certain crimes after July 1, 2002. [FN473] Still, the Iraqi Tribunal has primary jurisdiction to investigate and prosecute those persons based on complementarity. [FN474] If the ICC finds that the Tribunal is "unwilling or unable to prosecute," however, it is not completely inconceivable that the ICC would exercise its jurisdiction and take up cases where prosecution has been unjustifiably delayed or where proceedings are not "being conducted independently or impartially." [FN475] In making this determination, the ICC may "consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence. . .to carry out its proceedings." [FN476] To further avoid ICC jurisdiction, Iraq may offer evidence that its courts meet "internationally recognized norms and standards" for the independent and impartial prosecution of illegal conduct. [FN477] The point of this discussion is not to exhaust all the possibilities under which the ICC may assert jurisdiction over cases that the Tribunal is trying, but to delineate the circumstances under which that may happen.

1. The Hybrid Court

A hybrid court should be the centerpiece of Iraq's transitional justice system. A hybrid court would lend the trials greater legitimacy because it combines international and national judges, prosecutors, and defenders. The Tribunal Statute authorizes the Iraqi government to appoint experienced international judges if the government deems such judges necessary. [FN478] Of course, advantages and disadvantages will accompany a particular retributive justice plan, no matter what its design. The test for the system's effectiveness must be based on a balancing of many context-specific factors. In the case of Iraq, national judges, prosecutors, and defenders must be the sine qua non of the hybrid court for capacity-building and domestic legitimacy. The international component is not as obvious because, unlike many post-conflict situations beginning in the 1990s, this conflict took place between two sovereign nations, one of whom is now the victor and *531 occupying power. Because there is a risk that the trials could be perceived as show trials or a victor's justice, the United States, and perhaps its Coalition partners, should not be represented in the hybrid court. Some Iraqi judges are hesitant to sit on the bench with American lawyers because "[t]he public will say that outsiders are deciding the process." [FN479] In order to ensure as much impartiality and fairness as possible when selecting international actors, the UN Secretary General should select the international representatives from a list prepared by the UN General Assembly with a preference for legal personnel from the region. Iraqi judges seem to approve of this measure, believing that UN involvement "would stop the impression that the whole thing is run by Americans"--an impression shared by the Arab media and Saddam supporters alike. [FN480]

Nonetheless, having international judges, prosecutors, defenders, and investigators is essential to the hybrid court's legitimacy because the Iraqi judges may be biased--against Ba'ath Party members for example--and may over-punish, as some judges did in Kosovo. The inclusion of international judges is all the more important given the possibility that many persons who were tried in Iraqi courts during Saddam's rule may be retried by the Tribunal "if the Tribunal determines that the previous court proceedings were not impartial or independent, were

designed to shield the accused from international or Iraqi criminal responsibility, or the case was not diligently prosecuted." [FN481] The potential for bias is built into the Tribunal as it currently exists. Thus, the Tribunal should have structural protections to counteract any prejudices Iraqi judges may have and to protect the integrity of the judicial process. This may be achieved, in part, by having a system of checks whereby international judges preside over trials with Iraqi judges. A structure should be designed so that it contains as many procedural protections as possible to anticipate and prevent partiality.

International actors provide another key element of transitional justice--capacity-building and international legal expertise. According to the Statute, Iraqi judges are not required to have legal education, although it does mention that Iraqi jurists on the Tribunal "could be *532 lawyers and jurists (who should have the necessary experience and qualifications)." [FN482] The Statute further states that judges must "possess the qualifications required for appointment to the highest judicial offices." While the Statute thus seems to require substantial qualifications, the precise meaning of "necessary experience and qualifications" and "qualifications required for appointment to the highest judicial offices" is unclear. Therefore, there is no clear guidance as to the level, type, and length of experience that judges are required to have in order to prosecute Iraqis suspected of the highest violations of international law.

Some of the Tribunal's judges would prefer to have experienced international lawyers or jurists on the bench because the Iraqi judges who have been selected to serve on the Tribunal are unfamiliar with international law. [FN483] After receiving some international law training in London, the judges still believe that they "are unprepared to tackle full-fledged trials any time soon." [FN484] To one judge, international law was a "whole new body of law." [FN485] The judges agree that they need more training before they can adjudicate crimes under international law International actors, then, would complement the Tribunal's international legal experience and knowledge, while Iraqi personnel would contribute national legal experience and knowledge as well as cultural understanding--all of which are essential ingredients of transitional justice.

For successful cross-fertilization of norms, legal experience, and knowledge of both Iraqi and international law, both parties must share in the process such that neither the international actors nor the national actors are marginalized. The Tribunal and its personnel can strengthen Iraq's judicial capacity by emphasizing the importance of the process itself while maintaining a sense of Iraqi ownership and meaningful exchange between local and international actors. Cherif Bassiouni, however, criticized the way in which the United States has heretofore influenced the Tribunal's design. He remarked:

[T]he State Department spent a whole year with over 40 distinguished Iraqi expatriate jurists. . .who worked for a year to *533 prepare a review of all of the Iraqi laws and how to reform them, one day just out of the clear blue sky, the Department of Justice decided to throw all that overboard and send[] a group of six distinguished federal judges to Iraq to make an assessment of what is needed to reform the Iraqi justice system. Now, these judges, with all due respect to them. . .probably did not know where Iraq was on the map the day before they were contacted, who have no idea what the Iraqi legal system[s] are, are going to go and evaluate that system, without the benefit of all of the experts who are available. [FN486]

As Bassiouni's comments suggest, the U.S. government's actions will be perceived by some as imperialistic and insensitive to local needs and capabilities. In fact, the Iraqi Jurists Association, referring to an arrest warrant issued against Shiite leader Muqtada Sadr, asked the CPA: "What justice are you talking about? You have dismissed 170 justices of their offices and violated the independence of justice here." [FN487] These local actors cannot be discounted and precluded from participating in the process, because their knowledge of local law, judicial structures, and historical context is invaluable to determining the type of

transitional justice mechanisms that will most likely yield national reconciliation in Iraq. Iraq had a well-developed and fully functioning judicial system before Saddam took power, whose jurists-- lawyers, judges, and professors--are either still in Iraq or are exiled and are willing to serve. [FN489] They will be the Tribunal and Iraq's richest judicial resource, and they should be the foundations of any transitional justice plan the IGC or the elected Iraqi government implements.

As noted earlier, not only should Iraqi judges be selected with a preference for those with legal experience, but Iraqi judges should, in fact, be required to have a formal legal education and trial experience since Iraq has hundreds of capable jurists. Before Saddam was in power, "Iraq had a well established legal system--not only in terms of [its] codification, but a tradition in its various law schools and its scholarship, and in its judges and prosecutors and its legal *534 profession." [FN490] Even after Saddam, "[t]here are highly educated and highly experienced judges, lawyers, [and] many of the judges for instance are the best legal minds." [FN491] These judges and lawyers should be involved in the rebuilding effort because they will comprise and rebuild the judicial system in post-Saddam Iraq.

The power of appointment, however, is held by the IGC, and the IGC may not necessarily select Tribunal judges from Iraq's existing or former judicial system. [FN492] The IGC's appointment power alone should be cause for having international actors serving on the Tribunal with at least as much Tribunal authority and power as the Iraqi judges, since the IGC is regarded by many Iraqis as illegitimate. [FN493] Any Iraqi judges that the IGC selects will almost surely lack widespread legitimacy. Also, the IGC may appoint judges to the Tribunal that it thinks will carry out the IGC's political agenda, and thus the trials may become politicized. The risk is real since Iraqi courts have been politicized for the last thirty years. [FN494] The Tribunal should be designed in such a way that any arguments made by Saddam to discredit the Tribunal in the eyes of the Iraqi public will be ineffective. The presence of both international and local judges will be self-reinforcing and will help legitimize the Tribunal. Yet, for this to be true, the international judges must have at least as much power as the Iraqi judges to decide cases. In other words, Iraqi judges cannot be a majority of the judges on the panel; otherwise, as demonstrated in Cambodia and Kosovo, the international judges will become irrelevant and incapable of ensuring impartiality. [FN495]

In order to enhance the Tribunal's legitimacy further, former and current Ba'ath Party members should not be automatically ineligible to serve on the Tribunal. [FN496] As discussed above, completely purging or lustrating Ba'ath Party members may lead to overcorrection and unfair trials against Iraqis with ties to the Ba'ath Party. Of course, the Iraqi judges closely affiliated with the Ba'ath Party should be vetted, but they *535 should not be summarily excluded. If the country is to achieve national reconciliation, Iraqis from all ethnic, religious, and political sectors should be able to participate in the process. Moreover, the trials' outcomes will likely command more respect if current or former Ba'ath Party members are among the Tribunal judges that may deliver guilty verdicts to current or former Ba'ath Party defendants.

According to the Statute, the Tribunal will sit in Baghdad. [FN497] On one hand, this will give Iraqis the opportunity to observe the trials themselves, to hear witness testimony, to testify, and to participate directly in the transitional justice process. In the long term, increased participation fosters the rule of law and democracy. Trials will be less costly since witnesses and evidence will be closer and easier to gather. On the other hand, having the Tribunal sit in Baghdad could create serious instability, especially by those insurgents who support the Ba'ath Party and its reign. If security is not established first and foremost, witnesses, judges, and prosecutors will be intimidated and the fairness of trials will be compromised. Ensuring that the trials are fair and impartial must be the chief aim of transitional justice in Iraq.

One issue that will likely be raised is whether U.S. servicemen and women will be prosecuted

for crimes against the Iraqi people committed during the invasion and occupation. As recently as April 7, 2004, the IGC called for "investigations into the American military use of 'deliberate' force against civilians." [FN498] One IGC council member said that the CPA "deliberately used force and opened fire on peaceful demonstrators" on April 6, 2004, during a U.S. offensive in Fallujah. [FN499] Then on April 29, 2004, reports alleging that U.S. soldiers tortured Iraqi prisoners at Abu Ghraib jail--where members of the international community allege that the Iraqi government tortured prisoners--were made public. [FN500] Iraqis and Americans saw images of "a hooded captive standing on a box with wires attached to his hands, and naked prisoners stacked in a human pyramid while jeering troopers look on laughing." [FN501] Apparently, "[t]he prisoner standing on the box was told that if he fell *536 off he would be electrocuted." [FN502] Then, "[o]ther captives were forced to pose in humiliating positions, some of them simulating sex acts, as soldiers gave the thumbs up." [FN503] Almost immediately, a U.S. Army spokesperson expressed that he was "appalled" [FN504] and called the acts "shameful," and President Bush stated that he considered the abuse "'abhorrent.'" [FN505] Six soldiers were charged with "dereliction of duty, cruelty, maltreatment, assault and indecent acts with another person" by a court martial. [FN506] President Bush addressed the Iraqi people, the Senate called for hearings to investigate the allegations of abuse, a military spokesman apologized to the people of Iraq, and Secretary of Defense Donald Rumsfeld said he would personally see to it that the abuse was not repeated. [FN507]

In any event, by the June 30 handover, British and U.S. troops were granted immunity from prosecution in Iraq. [FN508] This assurance of immunity continues the immunity already enjoyed by British and U.S. soldiers under CPA Order 17, an agreement between the CPA and British and U.S. soldiers that protected the soldiers from prosecution in Iraq. [FN509] Still, British and U.S. troops may be prosecuted under their domestic laws. [FN510] In fact, on July 28, 2004, the U.S. military initiated its first murder investigation of a U.S. soldier serving in Iraq charged with the murder of an Iraqi citizen. [FN511] Since then, a U.S. military judge sentenced Army Specialist Armin Cruz to eight months confinement after he pleaded guilty to abusing prisoners at the Abu Ghraib prison in Baghdad; [FN512] two Navy SEALs were court-martialed for mistreating an Iraqi detainee who died after he was transferred to the U.S. Army; [FN513] ten *537 soldiers were charged with murder in Iraq; [FN514] and Staff Sergeant Ivan Frederick was sentenced to eight years in prison for charges stemming from abuse at the Abu Ghraib prison. [FN515] According to the Pentagon, as of December 15, 2004, 130 U.S. troops had either been punished or charged in connection with alleged abuses of prisoners in Iraq, Afghanistan, or Guantanamo Bay. [FN516]

During his trial at the ICTY, Milosevic introduced the "to quoque" or "you too" argument. [FN517] In the United States, this argument is typically referred to as "unclean hands." According to Michael Scharf, there is precedent for this argument, beginning with Nuremberg, where German Grand Admiral Karl Doenitz was charged with "waging unrestricted submarine warfare." [FN518] Given "an affidavit obtained by Doenitz's lawyer from U.S. Admiral Chester Nimitz, indicating that the United States Navy had used the same tactic in the Pacific, the Nuremberg Tribunal acquitted Doenitz of the charge." [FN519] Picking up on this precedent, Milosevic argued, inter alia, that NATO had committed war crimes as well. [FN520] "When several respected human rights organizations urged the Tribunal to investigate the possibility that NATO had committed war crimes during the 1999 intervention, the then Prosecutor, Louise Arbour. . .assigned the task to her Legal Adviser [and former NATO lawyer], William Fenrick." [FN521] As may be expected, "Fenrick's report. . . concluded that NATO had committed no indictable offenses." [FN522] Saddam's attorneys will likely use these examples and arguments when he is on trial at the Tribunal in what will surely be the emotionally-charged aftermath of the U.S.-led invasion and

subsequent occupation.
*538 Regardless, the Tribunal should concentrate on trying the most high-ranking Iraqi government officials and those responsible for serious violations of international law, like previous hybrid courts. Reports estimate that Saddam's regime executed between 300,000 and 1.3 million people. [FN523] Given the scope of the Tribunal's temporal jurisdiction alone, a large number of people should be prosecuted, but the Tribunal will only be able to try a limited number of people. [FN524] Indeed, Salem Chalabi has estimated that the Tribunal will try approximately 100 suspects. [FN525] Thus, suspects could languish in prisons for long periods of time and, as a result, be denied certain due process protections. Prison overcrowding and the consequent detention conditions overcrowding may create would also be problematic. In light of all the aforementioned factors, a hybrid court should be the cornerstone of transitional justice in Iraq, rather than the Tribunal the IGC has created.
2. The National Courts
Since the Tribunal lacks the capability to try all those Iraqis accused of committing certain international and Iraqi crimes, the Iraqi national courts must fill the gap by trying lesser-ranked officials and Iraqis who are considered less responsible for violations of international and Iraqi law. While the Tribunal and the Iraqi national courts may exercise concurrent jurisdiction over violations of Iraqi law, the national courts should have broader concurrent, but subordinate, jurisdiction with the Tribunal. As discussed above, domestic courts in post-conflict societies are sometimes criticized for failing to guarantee due process protections. However, the Iraqi judicial system is well-developed and has the capacity to hold these trials, as it has several qualified judges and attorneys who, after being sufficiently vetted, are ready to serve. Of course, the Iraqi judicial system must be reformed so that the courts are structurally protected from undue executive influence. The national courts must be returned to the type of well-developed legal system that existed before Saddam subordinated the judiciary to the executive. In *539 other words, the courts must be independent and insulated from political pressures, and separation of powers must be preserved. Indeed, Bassiouni suggests that:
[W]hat needs to be done is not to rebuild the legal system from scratch, but rather to remove all of these encumbrances from the legal system which existed in Iraq until the late '60s and then reconstitute its judiciary to ensure that they're impartial and free from the political biases and pressures that were placed on them since the Ba'ath regime took place. [FN526] Judges and attorneys may need training on international law, but this could be provided by international actors.
Domestic courts or other traditional justice mechanisms have been used to support the work of ad hoc tribunals and hybrid courts in the former Yugoslavia and Rwanda, for example. [FN527] Rwanda intends to utilize gacaca, a traditional form of justice, to share the ICTR's heavy caseload and to enable local community leaders to resolve disputes as a way to integrate perpetrators back into society. [FN528] Gacaca, meaning "justice on the grass," is an informal system of adjudication used in Rwanda since the pre-colonial period, when villagers brought a dispute to the community before taking it to the king. [FN529] "The village-based courts bring citizens, prisoners and victims' families before panels of locally elected judges to discuss their roles and experiences during the 100-day genocide. The judges then issue verdicts." [FN530] On June 24, 2004, Rwandan President Paul Kagame authorized an expansion of the gacaca system after its two-year trial period. [FN531]
In a less successful attempt to address crimes fairly, Indonesia held trials within its national judicial system that were widely regarded as *540 partial, thereby necessitating the creation of a hybrid court in East Timor. [FN532]
A possibility exists that Iraq's national courts may decide cases based on political motivations or bias--either from judges that served in the pre-Saddam judicial system or from judges that

served during Saddam's rule. Yet, this factor must be balanced with other factors that weigh in favor of local courts, including a heavy caseload, limited funding, and the need for local ownership of and participation in the process if Iraq's courts ever are to be fully and independently functioning. Therefore, while a hybrid court should try the most high-profile and responsible offenders because those cases will be most closely scrutinized, the national courts should decide the cases of less high-profile and responsible perpetrators, after ensuring that the proper procedural and structural protections are in place and after sufficiently vetting judges that served both before and during Saddam's regime. In short, having Iraqi national courts try individuals who are considered to be less responsible, lower profile, and accused of crimes not as serious as those covered by the Tribunal will provide the most practical way to mete out justice in Iraq.

C. Truth and Reconciliation Commission

Desmond Tutu has argued that restorative justice seeks "(1) to affirm and restore the dignity of those whose human rights have been violated; (2) to hold perpetrators accountable...; and (3) to create social conditions in which human rights will be respected." [FN533] Several countries emerging from conflict have utilized TRCs to achieve each of these goals in restorative justice. Since originating in Argentina, TRCs have been used in twenty countries, including most notably South Africa, Brazil, Chile, and El Salvador. [FN534] In mid-2004, the first American TRC was established in Greensboro, North Carolina, twenty-five years after Ku Klux Klan members and American Nazis attacked participants during an anti-Klan rally in an African American housing *541 project. [FN535] The Greensboro TRC was modeled after the TRCs in South Africa and Peru. [FN536]

A TRC is "an official organization created to investigate and record human rights abuses that have occurred in a nation's past." [FN537] They have no judicial authority in the sense that they cannot "establish culpability or impose penalties." [FN538] TRCs are set up with the "purpose of investigating and recording human rights violations. . .to help ease a state's transition from civil war and unrest toward a more democratic or participatory form of government." [FN539] Specifically, TRCs provide a forum whereby victims and perpetrators alike testify about the crimes they committed or the crimes that were committed upon them. [FN540] Their testimony is recorded and available for the public at large as a historical record of the nation's past, or "a commonly acknowledged history" with the aim of moving ahead. [FN541] The record serves as an acknowledgement of the victims' suffering and an instrument for their rehabilitation. Additionally, the record allows perpetrators to disclose the atrocities they committed in exchange for amnesty, thereby facilitating their reintegration into society. [FN542] In sum, TRCs provide a "historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence." [FN543]

Transitional justice theorists who compare TRCs with trials often present them as incompatible and irreconcilable. As a group, such theorists "are split over whether postwar regimes require war crimes prosecutions or amnesties before the society can emerge into a rule of law." [FN544] Those who support restorative justice argue that forgiveness is imperative to healing, and retributive systems do not promote *542 forgiveness or stability. [FN545] Adversarial-style prosecution "provides little opportunity for victims to tell their stories or for perpetrators to seek forgiveness." [FN546] Those who prefer retributive justice argue that punishment deters future human rights violations and also fosters healing for the victims of those violations. [FN547] The general trend is that states are turning more to retributive justice to transition from conflict toward the rule of law and democratic governance. This is evidenced by the establishment of the ICC, the development of universal jurisdiction, and the increasing commitment to the state's duty to prosecute the most serious

violations of international law. [FN548]
Even more recent is the combination of restorative and retributive justice within one state in order to achieve national reconciliation. Sierra Leone and East Timor, as discussed earlier, have both a hybrid tribunal and a TRC. [FN549] Iraq should design a multi-tiered transitional justice system as well: the first tier, a hybrid court to try those most responsible for serious violations of Iraqi and international law; the second tier, national court prosecutions of less serious and less high profile offenders; and the third tier, a TRC where rank and file perpetrators are invited to seek forgiveness in exchange for the truth. In a country like Iraq, where for decades the former regime's most egregious crime was its silence and deception, truth is the remedy. Perpetrators are held accountable by their communities and the rule of law is preserved, thereby fostering national reconciliation. Persons who do not appear before the TRC will not receive amnesty and may be prosecuted. Indeed, Iraq's new national security law authorizes Prime Minister Allawi not only to declare a state of emergency, but also to offer low-level insurgents a full pardon if the insurgents agree to a cease-fire and if the Prime Minister believes the amnesty would promote stability. [FN550] *543 While the interim government is preparing offers of amnesty, it has not made any formal offers to insurgents. [FN551]
Including a TRC in Iraq's transitional justice system will have the many benefits commonly associated with restorative justice, such as creating an accurate historical record of the abuses committed by Saddam's regime. It will provide a forum whereby victims and perpetrators will be able to tell their entire story, without fear that their testimony will be compromised or shortened by adversarial trial procedures or time constraints. To encourage victims and perpetrators to participate, the TRC should be composed of trusted, neutral members of the national and international community. Because the TRC is not a judicial mechanism that will issue criminal sentences, the TRC may be composed of an Iraqi majority and an international minority; however, international actors--recommended by the General Assembly and selected by the UN Secretary-General, for example--should be included to ensure that the historical record is impartial. The TRC can also investigate abuses and include its findings in the record or demand that perpetrators confess to the TRC and seek forgiveness, lest they be indicted by prosecutors for the national courts or the Tribunal. In its investigations, the TRC can learn more about the causes and extent of the atrocities so that it may make recommendations for legal and political reform. The TRC should work toward the rehabilitation and reintegration of victims and perpetrators to ensure their peaceful co-existence, without which sustainable security in Iraq cannot be achieved. As a result, Iraq will be better able to move ahead as a nation with a clear understanding of its past and a firm foundation of rule of law.
Another instrument that the state must utilize in conjunction with the TRC for this transitional justice plan to be successful in Iraq is the media. The Tribunal, the national courts, and the TRC must share resources to ensure that their activities are well-publicized and that the public has the opportunity to contribute to the decision-making process. Keeping the public informed and involved, through a public outreach program such as that used by the ICTR for example, is imperative to transitional justice, since the justice Iraq seeks to serve is ultimately for the public's benefit. At the same time, clear guidelines that delineate the respective jurisdiction and authority of the TRC and the courts should *544 be established before they begin their work so that any tension between these bodies can be avoided. If this is achieved, combining restorative and retributive justice can provide a powerful vehicle for Iraq to deal with its past and embrace its future with a solid foundation in the rule of law and democratic governance.

V. Conclusion

The plan for Iraq proposed in this Article is a three-tiered approach designed to transition an unstable state emerging from a "dictatorship with a legacy of gross human rights abuses"

toward a state that respects the rule of law and seeks democratic governance. [FN552] According to Todd Howland and William Calathes, "[t]he classic justifications and retributionist goals for punishment, retribution, deterrence, rehabilitation, and incapacitation are the results of an individual nation's developed value system and are usually only attainable, symbolically or realistically, with a multi-layered and complex criminal justice approach." [FN553] No plan for transitional justice will be successful without considering the context for which the plan is intended, and no one can predict which system will work best for Iraq, whether it be restorative justice, retributive justice, or a combination of the two. Ultimately, the design, as envisioned in this Article, must be based on a balancing of several factors, and the architects of the system must try every mechanism until one mechanism proves most suitable for Iraq. The best solution will likely be a three-tiered structure of hybrid courts, national courts, and a TRC. With time, this transitional justice scheme may be better tailored to what is happening on the ground. Time will tell what adaptations need to be made, but historical precedent has proven that the best solution is a combination of the various tools available to the international community. Whatever the scheme may be, it requires the international community's sustained commitment to building trust, respect, and confidence in Iraq's legal system.

*545 In planning for transitional justice, perhaps emphasis should be placed on the need to forgive, rather than the need to forget what happened during Saddam's reign, and then to build a new country. As noted by Rwandan Supreme Court Justice Geraldine Mugwaneza, "'Reconciliation' is a language for politicians" because to victims, reconciliation means going beyond themselves and forgiving their perpetrators. [FN554] Reconciliation is a long process. Some victims, in fact, may never reach it. Ultimately, reconciliation must be achieved on an individual basis, and the three-tiered approach to transitional justice recommended herein provides the starting point on this journey toward forgiveness.

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[FN1]. Statute of the Iraqi Special Tribunal art. 1(b) (2003) [hereinafter Tribunal Statute].

[FN2]. Id.

[FN3]. Iraq Leaders Create Tribunal for Saddam, USA Today, Apr. 20, 2004, at http://www.usatoday.com/news/world/iraq/2004-04-20-saddam-tribunal_x.htm.

[FN4]. To cite a few recent examples in other contexts, on May 25, 2004, the International Criminal Tribunal for the Former Yugoslavia indicted former Croatian General Mirko Norac--a hero to many Croatians--for war crimes. ICTY Indicts Former Croatian General for War Crimes, U.N. Wire, May 26, 2004, at http://www.unwire.org/UNWire/20040526/449_24266.asp. Then on May 28, 2004, a Chilean court revoked General Augusto Pinochet's immunity from criminal prosecution, thereby allowing attorneys to prosecute the former dictator for human rights abuses. Court Strips Pinochet of Immunity, CNN, May 28, 2004, at http://www.ireport.net/qx/2782/Court.strips.Pinochet.of.immunity. By the end of 2004, Pinochet was indicted for kidnapping and murder, and a Chilean judge ruled that Pinochet was mentally fit to stand trial. Larry Rohter, Chilean Judge Says Pinochet Is Fit for Trial, N.Y. Times, Dec. 14, 2004, at A1, available at http://query.nytimes.com/gst/abstract.html?

res=F40711FD3D540C778DDDAB0994DC404482. Prosecutor for the International Criminal Tribunal of Rwanda David Crane said in June 2004 that he may indict Muammar Qadhafi of Libya. War Crimes Trials Begin in Sierra Leone, U.N. WIRE, June 3, 2004, at http://www.unwire.org/UNWire/20040603/449_24508.asp. Furthermore, the International Criminal Court announced in June 2004 that it will investigate war crimes allegations in the Democratic Republic of the Congo. ICC to Investigate D.R.C. War Crimes as Court's First Case, U.N. WIRE, June 24, 2004, at http://www.unwire.org/UNWire/20040624/449_25184.asp. UN Secretary General Kofi Annan has also suggested that suspects accused of committing human rights atrocities in Darfur, Sudan, should be prosecuted at the ICC. Evelyn Leopold, Annan: Sudan Suspects Should go to Global Court, Reuters, Jan, 19, 2005, at http://www.alertnet.org/printable.htm?URL=/ thenews/newsdesk/N19407676.htm. In a recent national poll conducted by the Afghan Independent Human Rights Commission, the majority of Afghans polled believed that bringing human rights offenders to justice for violations stemming from conflicts beginning in the 1980s will contribute to the peace and stability of the country. Sima Samar and Nader Nadery, Afghanistan: A Cry for Justice, Int'l Herald Trib, Feb. 3, 2005, at 6, available at http:// www.iht.com/articles/2005/02/02/opinion/edsamar.html.

[FN5]. President George W. Bush, Remarks to the United Nations General Assembly (Sept. 12, 2002), available at http:// www.whitehouse.gov/news/releases/2002/09/20020912-1.html.

[FN6]. Id.

[FN7]. Id.

[FN8]. Id.

[FN9]. Security Council Resolution 1441(2002) held Iraq in "material breach of its obligations under relevant resolutions," including, inter alia, obligations to declare its chemical, biological, and nuclear production capabilities and to cooperate with international weapons inspectors. U.N. SCOR, 57th Sess., 4644th mtg. at 1, U.N. Doc. S/RES/1441 (2002). The Security Council further warned that Iraq would face "serious consequences" if it failed to fulfill these obligations. Id. According to the United States and the United Kingdom, Iraq did not fulfill these obligations, justifying invasion. French President Jacque Chirac said that the United States and the United Kingdom's invasion "breached international legality." Chirac: War Breaches International Law, Middle East Online, Mar. 21, 2003, at http://www.middle-east-online.com/english/?id=4777. He added: "France will not accept a resolution tending to legitimize the military intervention and giving the American and English belligerents powers over the administration of Iraq." Id. Kofi Annan has said, "I have indicated [the invasion] was not in conformity with the UN Charter...it was illegal." Iraq War Illegal, Says Annan, BBC, Sept. 19, 2004, available at http://news.bbc.co.uk/2/hi/middle_east/3661134.stm.

[FN10]. Authorization for Use of Military Force against Iraq, Pub. L. No. 107-243, 116 Stat. 1498 (2002) [hereinafter "Joint Resolution"].

[FN11]. Secretary Colin Powell, Remarks to the United Nations (Feb. 5, 2003), available at http://www.state.gov/secretary/rm/2003/17300.htm.

[FN12]. Id.

[FN13]. Id.

[FN14]. Id.

[FN15]. President George W. Bush, Remarks to the Nation (March 19, 2003), available at http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html.

[FN16]. Linda D. Kazaryn, "Your Nation Will Be Free," Bush Tells Iraqis, Am. Forces Info. Service, Apr. 10, 2003, available at http:// www.defenselink.mil/news/Apr2003/n04102003_200304103.html.

[FN17]. Id.

[FN18]. Casi Vinall, Iraqi Governing Council Holds First Meeting, Am. Forces Info. Service July 14, 2003, available at http:// www.defenselink.mil/news/Jul2003/n07142003_200307145.html.

[FN19]. Coalition Provisional Authority Order Number 48, Delegation of Authority Regarding an Iraqi Special Tribunal, § 1, cl. 1 (Dec. 9, 2003), available at http://www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_ and_Appendix_A.pdf

[FN20]. Tribunal Statute, supra note 1. Iraq is party to the International Covenant on Civil and Political Rights, the International Covenant on Economic and Social Rights, the Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination against Women.

[FN21]. Iraqi Interim Const. (Law of Administration for the State of Iraq for the Transitional Period, 2004) art. 48.

[FN22]. Saddam's Judges Being Kept Secret for Safety's Sake, N.Y. Times, Apr. 21, 2004; U.N. Hussein Rejects War Crimes Charges in Court Appearance, U.N. WIRE, July 1, 2004, available at http:// www.unwire.org/UNWire/20040701/449_25470.asp; Nick Wadhams, Prospects for Saddam Trial Still Uncertain, Dallas News, Dec. 12, 2004, at http:// www.dallasnews.com/sharedcontent/nationworld/iraq/121204ccjrkkcwintsaddam.2024ef0.html.

[FN23]. The benefit to having a tribunal established pursuant to a Security Council resolution is that the court or its officers acting on its behalf could compel governments to arrest indictees wanted by the court. Otherwise, the court must rely on the good will of governments to execute its arrest warrants. See U.N. Charter arts. 40, 43, 48, 50.

[FN24]. Tribunal Statute art. 2.

[FN25]. The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[FN26]. Id.

[FN27]. Tribunal Statute art. 32 (defining the "IGC" as the "Governing Council of Iraq established on July 13, 2003." Then any powers given to the IGC pursuant to the Statute are transferred to the "Successor Government.").

[FN28]. Coalition Provisional Authority Order Number 48, Delegation of Authority Regarding an Iraqi Special Tribunal, § 1, cl. 1 (Dec. 9, 2003).

[FN29]. Tribunal Statute art. 1-15.

[FN30]. Id. art. 1.

[FN31]. Id. art. 7-8.

[FN32]. Judy Aita, Iraqi Jurists Plan for Return to the Rule of Law (May 19, 2003), available at http://tokyo.usembassy.gov/e/p/tp-20030521b2.html.

[FN33]. The New Iraq, PBS, May 13, 2003, available at http:// www.pbs.org/newshour/bb/middle_east/jan-june03/iraq_05-13.html (quoting Feisal al-Istrabadi).

[FN34]. Id.

[FN35]. Aita, supra note 32.

[FN36]. Id.

[FN37]. United Nations Development Programme on Governance in the Arab Region: Iraq: Judiciary, at http://www.undp-pogar.org/countries/iraq/judiciary-pw.html.

[FN38]. Jurist, Iraq, at http://jurist.law.pitt.edu/world/iraq.htm (last visited May 7, 2004).

[FN39]. Tariq Ali Saleh, Transitional Justice in Iraq, at http:// 216.239.41.104/search?q=cache:EKGLpweNVT0J:www.ssrc.org/programs/gsc/publications/ICA_memos/Panel4.Saleh.doc+%2B%22tariq+ali+saleh%22+%2B%22transitional+justice+in+iraq%22&hl=en (last visited May 7, 2004).

[FN40]. The New Iraq, supra note 33 (quoting Feisal al-Istrabadi).

[FN41]. Tribunal Statute art. 1.

[FN42]. Id. art. 1(b).

[FN43]. Id. art. 10-14 (describing the elements of each crime).

[FN44]. Id. art. 14.

[FN45]. Id. art.17(d).

[FN46]. Id. art. 15, § 6(c).

[FN47]. Id. art. 15, § 6(d)-(e).

[FN48]. Id. art. 29.

[FN49]. Id. art. 35.

[FN50]. Id. art. 17.

[FN51]. Id. art. 17(c).

[FN52]. Id. art. 3.

[FN53]. Id. art. 4.

[FN54]. Id.

[FN55]. Id. art. 5(c), (e).

[FN56]. Id. art. 5.

[FN57]. Id. art. 28.

[FN58]. Id. art. 6.

[FN59]. Id.

[FN60]. Id.

[FN61]. Id. art. 7.

[FN62]. Id.

[FN63]. Id. art. 18.

[FN64]. Id. art. 18-19.

[FN65]. Id. art. 7.

[FN66]. Id. art. 33.

[FN67]. Id. art. 5.

[FN68]. Id.

[FN69]. Id. art. 8.

[FN70]. Id. art. 28.

[FN71]. Id. art. 8(j).

[FN72]. See id. art. 8.

[FN73]. Id. art. 20.

[FN74]. Id.

[FN75]. Id. art. 30.

[FN76]. Persons released pursuant to this resolution received amnesty. Text of Iraqi amnesty decree, BBC News, Oct. 20, 2002, available at http://news.bbc.co.uk/1/low/not_in_website/syndication/monitoring/media_ reports/2344057.stm. On October 20, 2002, Saddam issued a decree authorizing amnesty to all prisoners. Id. Those prisoners found guilty of murder would be released unless "no reconciliation has been reaches with the families of the murdered." Id. Then, on December 19, 2003, after the coalition ousted Saddam, Paul Bremer, as the Administrator of the CPA, declared that "any person who was released from prison pursuant to Revolutionary Command Council Resolution No. 225, dated October 20, 2002, and is thereafter convicted of another crime may be sentenced using rules that allow stiffer punishments based on aggravating circumstances." CPA Public Notice: Increased Sentences for Persons Convicted of Crimes after Receiving Amnesty (Dec. 19, 2003), at http://www.iraqcoalition.org/regulations/20031228_Increased_Sentences_for_Persons_Convicted_of_Crimes.pdf. Judges are permitted "to impose significantly longer sentences than are otherwise authorized for the particular offense." Id. Neither this public notice nor the Statute explains what effect the amnesty and the public notice have upon the Tribunal and its sentencing guidelines. Presumably, the general amnesty will remain valid, but any recipient of that amnesty who later commits a crime is eligible for more severe punishment pursuant to the CPA's public notice.

[FN77]. CPA Public Notice: Increased Sentences, supra note 76.

[FN78]. In fact, Interim Minister of State Adnan al-Janabi "temporarily reinstated a limited version of its death penalty" that applies in "exceptional cases, such as murder, kidnapping." According to al-Janabi, "This law has come at this time to inform Iraqis that those who commit crimes against them, or those who kill Iraqis, should be executed." In 2003, then-Coalition Administrator Paul Bremer suspended Iraq's death penalty. Allawi Makes Surprise Visit to Najaf, CNN, Aug. 8, 2004, available at http://www.cnn.com/2004/WORLD/meast/08/08/iraq.main/index.html.

[FN79]. Iraq Interim Const. art. 48-51.

[FN80]. Id. art. 7.

[FN81]. Id. art. 15, § I.

[FN82]. Id. art. 7.

[FN83]. Id. art. 7.

[FN84]. See Tribunal Statute art. 17.

[FN85]. See Iraq Interim Const. art. 7.

[FN86]. The Afghanistan Constitution has similar problems. See Afg. Const.

[FN87]. The United States Mission to the European Union, World More Secure without Taliban and Saddam, Powell Says, Nov. 18, 2003, at http://www.useu.be/Categories/Defense/Nov1803PowellLeMonde.html, Cf. Iraq without Saddam More Dangerous, U.S. Was Warned, Iraq Net, Apr. 19, 2004, at http://www.iraq.net/displayarticle3049.html.

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[FN89]. U.S. Returns Sovereignty to Iraq, CNN, June 28, 2004, at http://www.cnn.com/2004/WORLD/meast/06/28/iraq.handover/.

[FN90]. Robert Worth, Iraqi Premier Says Ex-Leaders Will Face Charges Next Week, N.Y. Times, Dec. 14, 2004, at http://www.occupationwatch.org/article.php? id=8274&printsafe=1.

[FN91]. Saddam Meets with Attorney for First Time, CNN, Dec. 16, 2004, at http://www.cnn.com/2004/WORLD/meast/12/16/iraq.main/.

[FN92]. PM: Iraq Trials to Open Next Week, CNN, Dec. 14, 2004, at http://www.cnn.com/2004/WORLD/meast/12/14/iraq.trials/.

[FN93]. Worth, supra note 90.

[FN94]. Adel Safty, Will Saddam Get Any Justice at His Trial?, Gulf News, Jan. 19, 2004, at http://www.gulfnews.com/Articles/opinion.asp? ArticleID=108380.

[FN95]. Id.

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[FN97]. David Tolbert, The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings, 26 Fletcher Forum 5, 7 (2002).

[FN98]. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

[FN99]. Tolbert, supra note 97, at 7.

[FN100]. Hamza Hendawi, Iraqi Police Abandon Posts during Uprising, The Guardian Unlimited, Apr. 8, 2004, at http://www.freerepublic.com/focus/f-news/1113957/posts.

[FN101]. Ron Harris, Ineffective and Under Fire, STL Today, Apr. 18, 2004, at http://www.stltoday.com/stltoday/news/stories.nsf/News/Nation/11D8F4B77446AFA886256E7900382EA8? OpenDocument&Headline=Ineffective+and+under+fire.

[FN102]. Connie Cass, General: Much of Iraq's Forces Have Quit, USA Today, Apr. 21,

2004, available at www.usatoday.com/news/world/iraq/2004-04-22-iraq-forces-quit_x.htm.

[FN103]. Hendawi, supra note 100.

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[FN108]. Richard A. Oppel, Jr. & David E. Sanger, 5 U.S. Troops Are Killed, and Baghdad Governor Is Slain, N.Y. Times, Jan. 4, 2005, at A1. [hereinafter Oppel & Sanger].

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[FN121]. Iraqi PM Says January Elections Will Go Ahead, MSNBC, Sept. 19, 2004, available at http://www.msnbc.msn.com/ id/6043209/print/1/displaymode/1098.

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[FN124]. Doug Struck, Canadians Won't Sent Observers for Election, Wash. Post, Dec. 21, 2004, at A18.

[FN125]. Robin Fields, Allawi Agrees: Some Areas of Iraq Won't Be Able to Vote, Los Angeles Times, Jan. 12, 2005, at A3.

[FN126]. Oppel & Sanger, supra note 108.

[FN127]. Iraq Sets Date for First Post-Saddam Election, CNN, Nov. 21, 2004, at http://www.cnn.com/2004/WORLD/meast/11/21/iraq.main/.

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[FN137]. World Leaders Praise Iraqi Poll, BBC, Jan. 31, 2005, at http:// news.bbc.co.uk/1/hi/world/middle_east/4220551.stm.

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[FN140]. Id.

[FN141]. Edward Wong, Iraqis Who Died While Daring to Vote Are Mourned at Martyrs, N.Y. Times, Feb. 2, 2005, at A1.

[FN142]. Id.

[FN143]. Negus, supra note 136.

[FN144]. World Leaders Praise Iraqi Poll, supra note 137.

[FN145]. Thom Shanker & Eric Schmitt, Security Efforts Hold Insurgents Mostly at Bay, N.Y. Times, Jan. 31, 2005, at A1.

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[FN148]. Deadliest Attacks Since Iraq Election Kill 29, MSNBC, Feb. 4, 2005, at http://www.msnbc.msn.com/id/6874656/.

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[FN154]. Mohyeldin, supra note 151.

[FN155]. Other war crimes trials and tribunals, including the ICTY and the ICTR, have been located outside the country where the conflict occurred and where the crimes were committed due to lack of security.

[FN156]. Mohyeldin, supra note 151.

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[FN158]. See Subhi Mejahid & Alaa Abul Eneen, Iraqi Governing Council 'Illegitimate': Azhar, IslamOnline.Net, Aug. 26, 2003, at http://www.islam-online.net/English/News/2003-08/26/article05.shtml; see also Coalition Provisional Authority Order Number 48, Delegation of Authority Regarding an Iraqi Special Tribunal, § 1, cl. 1 (Dec. 9, 2003) (authorizing the IGC solely to set up a criminal tribunal); Amnesty Int'l, Iraq: Tribunal Established without Consultation (Dec. 10, 2003), at http:// web.amnesty.org/library/Index/ENGMDE141812003?open&of=ENG-366; see also Steven Komarow, Iraqi Governing Council in a "Serious Crisis," USA Today, Mar. 12, 2003, available at http://www.usatoday.com/news/world/iraq/2003-12-03-council_ x.htm.

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[FN162]. Adrien Katherine Wing & Mark Richard Johnson, The Promise of a Post-Genocide Constitution: Healing Rwandan Spirit Injuries, 7 Mich. J. Race & L. 247, 310 (2002).

[FN163]. Id. (alteration in original).

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[FN165]. See generally Robert Worth, At Least 7 Killed as Bomb Explodes in Iraqi City, N.Y. Times, Dec. 15, 2004, available at http:// www.nytimes.com/2004/12/15/international/middleeast/15cnd-iraq.html? ex=1260853200&en=4b226913cf3db02d&ei=5090&partner=rssuserland.

[FN166]. Tribunal Statute art. 5, 7, 8.s

[FN167]. The New Iraq, supra note 33 (interview with Feisal al-Istrabadi); Aita, supra note 32 (citing statement of Sermid Al-Sarraf).

[FN168]. Marbury v. Madison, 5 U.S. 137, 177 (1803).

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[FN170]. Marcia Coyle, Toward an Iraqi Legal System, The Nat'l Law Journal, Apr. 25, 2003, at http://www.law.com/jsp/article.jsp?id=1050369446809 (quoting Paul van Zyl, director for country programs at the International Center for Transition Justice).

[FN171]. Tribunal Statute art. 5.

[FN172]. Id. arts. 7-8.

[FN173]. Id. arts. 5-8.

[FN174]. See id. art. 5.

[FN175]. Safty, supra note 94.

[FN176]. U.S. Sends Team to Develop Saddam Case, N.Y. Times, Mar. 6, 2004, available at http://www.chron.com/cs/CDA/ssistory.mpl/special/iraq/2436863 (quoting Salem Chalabi).

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[FN179]. Komarow, supra note 158.

[FN180]. CNN Live Sunday: Iraqi Governing Council Wants to Try Hussein (CNN television broadcast, Dec. 14, 2003) at http:// www.cnn.com/TRANSCRIPTS/0312/14/sun.08.html (quoting Paul Van Zyl, director for country programs at the International Center for Transition Justice).

[FN181]. Rajiv Chandrasekaran, Death Stalks an Experiment in Democracy, Wash. Post, June 22, 2004, at A1.

[FN182]. Id.

[FN183]. Id.

[FN184]. Id.

[FN185]. Id.

[FN186]. Id.

[FN187]. Id.

[FN188]. Id.

[FN189]. Id.

[FN190]. See id.

[FN191]. Iraqi Governing Council, The Global Security Organization, May 4, 2004, at http://www.globalsecurity.org/military/world/iraq/igc.htm.

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[FN194]. Id.

[FN195]. Id.

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[FN198]. Profile: Ahmed Chalabi, supra note 192.

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[FN208]. The World Today, supra note 202 (quoting Steve Mark, Chair of Australian section

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