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The Iraqi High Court; A retrospective and prospective view

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Abstract

Over the course of its existence, the chief transitional justice mechanism in Iraq – the Iraqi High Court - has attracted an admirably sized assemblage of detractors, naysayers and critics. When examined in light of the normative values widely agreed to underly 21st century notions of transitional justice however, the necessity for the IHC as opposed to an alternative transitional mechanism becomes apparent. Various financial, logistical, ideological and political barriers precluded reliance on an ad-hoc Tribunal, hybrid court, or trial of Saddam and his regime by the ICC; in this environment, the formation of the IHC represented a useful and necessary compromise.

Further, the IHC in its current incarnation is a flawed but fixable tool. Its brief life has been marred by poor perceptions of its legitimacy, criticisms regarding the professionalism of its participants, and criticisms regarding its juridical remit. That the IHC refuses to engage in a rigorous and comprehensible legal exegesis in response to these problems does little to inure both the domestic and international communities it was ostensibly designed to serve. Nonetheless, with concentrated efforts it remains possible for the IHC to fix some of these shortcomings – and the perceptions of the shortcomings – and redeem itself in time to participate

meaningfully and functionally in the rebuilding of Iraq.

I. Introduction

In May 2003 major combat operations in Iraq ended and Saddam's successors – the Coalition forces and interim Iraqi government - began the intimidating task of reestablishing the rule of law in the post-war state.¹ Faced with a ‘looted’ and ‘burnt out’ judicial infrastructure and serious security threats,² and under intense scrutiny from an international community convinced that the conflict amounted to an illegal use of force,³ the management of transitional justice represented a daunting task for the states and individuals responsible for governing Iraq. Nonetheless, necessity required that some mechanism by which to try a “serial human-rights violator and threat to the world”⁴ and the military regime under his command be created, and in December 2003 the Iraqi Special Tribunal (IST) was born.⁵

1 President Bush declared on May 1, 2003 that combat operations ended in Iraq, forty-three days after the March invasion. David E. Sanger, *Bush Declares 'One Victory in a War on Terror,'* N.Y. TIMES, May 2, 2003, at A1.

2 John C. Williamson, *Establishing Rule of Law in Post-War Iraq: Rebuilding the Justice System*, 33 GA. J. INT'L & COMP. L. 229, 230-32 (2004).

3 See generally Asli Ü. Bâli, *Nation-Building in the Middle East: Justice under Occupation, Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT'L L. 431, 462 (2005). See also *Iraq War Illegal, Says Annan*, BBC NEWS, Sept. 16, 2004, http://news.bbc.co.uk/2/hi/middle_east/3661134.stm (quoting then-U.N. Secretary-General Kofi Annan that the U.S.-led invasion of Iraq was “not in conformity with the UN Charter” and was therefore illegal); Jeff Sallot, *Legal Experts Say Attack on Iraq Is Illegal*, GLOBE & MAIL (CAN.), Mar. 20, 2003, at 10 (establishing that dozens of Canadian law professors and experts in international law considered the attack on Iraq illegal); Press Release, International Commission of Jurists, ICJ Deplores Moves Towards a War of Aggression on Iraq (March 18, 2003), available at http://www.icj.org/news.php3?id_article=2770&lang=en (asserting that the attack on Iraq constituted an illegal invasion that amounted to a war of aggression.).

4 Kevin Sullivan, *Iraq may be Blair's legacy*, WASH. POST, <http://www.businessmirror.com.ph/05162007/perspective01.html>

5 Bruce Zagaris, *Iraq Governing Council Establish [sic] Special Tribunal and Saddam Hussein is Arrested*, 20 INT'L ENFORCEMENT L. REP. 76, 76 (2004). For an excellent account of the events surrounding the formation of the IST read Ryan Swift, *Occupational Jurisdiction: A Critical Analysis of the Iraqi Special Tribunal*, 19 N.Y. INT'L L. REV. 99, 104-09 (2006). See also Tom Parker, *Prosecuting Saddam: The Coalition Provisional Authority and the Evolution of the Iraqi Special Tribunal*, 38 CORNELL INT'L L.J. 899 (2005).

Concerns over the legality of the IST in light of the US status as occupying power in 2005 led to the revocation of its founding statute (the IST Statute) and the promulgation of a revised law establishing the Iraqi High Court (IHC or Tribunal). There is much disagreement regarding the translation of the Iraqi court's name. The unofficial English translation of the October 2005 statute legitimating the court refers to the court as the *Iraqi High Criminal Court*. Law of the Supreme Iraqi Criminal Tribunal, Official Gazette of the Republic of Iraq, Issue No. 4006, October 18, 2005 available at <http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf> [hereinafter IHC Law]. Human Rights Watch identifies it the Supreme Iraqi Criminal Tribunal. Human Rights Watch Briefing Paper, at 18, available at <http://hrw.org/backgrounders/mena/iraq1005/index.htm>. The New York Times refers to the organ

Its inception was timely; a mere week after its mandate took effect Saddam Hussein was arrested in Tikrit. On October 15, 2005 the Tribunal's first trial (the 'al-Dujail trial') of Saddam and eight other defendants commenced.⁶ Convicted of murder and crimes against humanity at the conclusion of the al-Dujail trial, Saddam was sentenced to death on November 5, 2006.⁷ Though Saddam was being prosecuted for genocide and war crimes in a concurrently proceeding second trial (the 'Anfal trial') he was hanged one month after the al-Dujail sentence,⁸ resulting in the posthumous termination of the charges that were the concentration of the second trial.⁹

Saddam has been executed but the work of the IHC is not done. Its creators were eager to see between 10 and 15 trials take place under its jurisdiction¹⁰ and as of June 24, 2007 the court had only issued a final judgment in its second case (the 'Anfal' trial).¹¹ As a country of paramount importance to the stability of the Middle East it is essential that, as the transitional process continues, the Iraqi people and the international community find a degree of satisfaction with the consequences of the Tribunal's efforts. Unfortunately due to serious shortcomings of the IHC confidence in the court remains low, and many are convinced that alternative transitional justice mechanisms, had they been implemented in 2003, would have provided

as the Iraqi High Tribunal. *Ambush of Defense Lawyers In Hussein Trial Kills One*, N.Y. TIMES, November 8, 2005, at A8. In this paper the court in its current incarnation will be referred to as the IHC or the Tribunal. Likewise, if an aspect of the the court preceding October 2005 is discussed, the abbreviation IST will be used.

⁶ *Timeline: Saddam Hussein Dujail Trial*, BBC NEWS, http://news.bbc.co.uk/2/hi/middle_east/4507568.stm. See also Bruce Zagaris, *Special Iraqi Tribunal Will Try Saddam Hussein in Next Few Months*, 21(8) INT'L ENFORCEMENT L. REP. § Law of War, at ¶ 6 (2005).

⁷ *Saddam Hussein Sentenced to Die*, ABC NEWS, Nov. 6, 2006, <http://www.abcnews.go.com/GMA/IraqCoverage/story?id=2629997&page=1>.

⁸ The Anfal trial began on August 21, 2006. *Hussein executed with 'fear in his face'*, CNN NEWS, Dec. 30, 2006, <http://www.cnn.com/2006/WORLD/meast/12/29/hussein/index.html>.

⁹ In the 'Anfal' trial the IHC heard evidence regarding the genocidal and international criminal acts of the six other defendants. See *Saddam's genocide trial begins in Iraq*, USA TODAY, Aug. 21, 2006, available at http://www.usatoday.com/news/world/iraq/2006-08-21-saddam-trial_x.htm; *Saddam, cousin discussed exterminating Kurds*, MSNBC, Jan. 8, 2007, <http://www.msnbc.msn.com/id/16522265/>

¹⁰ ITCJ, *Briefing Paper Creation and First Trials of the Supreme Iraqi Criminal Tribunal* (Oct. 2005), at 18, available at <http://www.ictj.org/images/content/1/2/123.pdf>.

¹¹ For a list of defendants and charges, see ICTJ, *Iraq: Tribunal Must Improve Efforts in Anfal Trial* (Aug. 2006) available at <http://www.ictj.org/images/content/5/8/585.pdf>. For a chronology of events in the case, see Michael J. Kelly, *The Anfal trial against Saddam Hussein*, 9 J. GENOCIDE RES. 235, 438-242 (2007).

relevant constituencies with a mechanism more capable and appropriate than the Tribunal for dealing with Ba'ath party members accused of serious violations of international law.¹²

In Part II of this paper I refute this assertion, arguing that alternatives to the IHC were neither feasible nor desirable. To that end, I provide a brief overview of the goals of transitional justice, argue an affirmative defense for the selection of the IHC in light of the mainstream normative approach to valuating those goals and explain why the adoption of alternative mechanisms - a trial at the ICC, by an ad-hoc or hybrid Tribunal – were undesirous and unlikely. Then, in an effort address the concerns of critics and maximize the potential of the Tribunal to satisfy the goals of transitional justice in an Iraqi context, in Part III I acknowledge the parade of shortcomings the IHC is perceived to embody and in Part IV recommend specific reforms that the IHC and the global community should undertake as the IHC continues to exercise its judicial mandate.

Part II. Transitional Justice and the IHC

A. The purpose of transitional justice

To understand why the IHC was the best tool available for use in Iraq it is first necessary to clearly identify the aims of transitional justice, understand how those aims conflict with one another and endorse one of the normative approaches that balances between and among those aims.

The term 'transitional justice' refers to a range of possible accountability mechanisms

12 See e.g. Michael Scharf, *Ten Lessons From the Saddam Trial*, Feb. 17, 2007, generated from October 7, 2006 Cleveland Experts Meeting available at <http://law.case.edu/saddamtrial/>; *Iraq: Flawed Tribunal Not Entitled to U.N. Legitimacy*, Human Rights Watch, Jan. 15, 2004 available at <http://hrw.org/english/docs/2004/01/15/iraq6942.htm>; Open Society Institute & United Nations Foundation, *Iraq in Transition: Post-Conflict Challenges & Opportunities* (June 2004), at 86 available at http://www.soros.org/initiatives/washington/articles_publications/publications/iraq_20041112/iraq_Transition.pdf; Michael Posner, *Prosecuting Saddam: Tribunals Face Challenges to Legitimacy*, Human Rights First, Dec. 15, 2003, http://www.humanrightsfirst.org/media/2003_alerts/1215.htm; Human Rights Watch, *Iraq: Law Creating War Crimes Tribunal Flawed*, Dec. 11, 2003, <http://www.hrw.org/press/2003/12/iraq121103.htm>.

intended to address international crimes committed by a regime and, more abstractly, to the objectives for which these mechanisms have been created. These objectives are legion; expressing condemnation, cataloging a historical record of crimes, airing grievances, establishing the rule of law or common morality (and discouraging “self help”), sending a warning to other leaders, protecting, creating and enforcing international norms, transferring responsibilities, meting out punishment, sustaining democracy and/or territorial integrity, providing reparations, encouraging social reconciliation and restoring an independent judiciary have all been acknowledged as important goals of the transitional process.¹³ To effectuate these goals the international community has, with varying degrees of success and efficacy, relied on a diverse collection of instruments to address international human rights abuses; the ICC, hybrid courts, international tribunals and truth seeking commissions have become cornerstones of the global effort to hold individuals accountable for egregious international offenses.

Because of the great number of purposes for which transitional justice has been utilized in any particular situation the transitional justice process will be subject to some strain. The tension can manifest in many forms: as potential incomparability between transitional ideals (ie, in a post-conflict environment it may be difficult to create and enforce international norms without alienating domestic constituencies and deemphasizing local social reconciliation) or as a conflict between groups who assert that their particular transitional needs outweigh those of another interested constituency (ie, it may be difficult to reconcile the transitional needs of a

13 M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT'L L.J. 327, 334-336 (2005) citing M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409 (2000). See also Adam M. Smith, *Transitional Justice in Iraq: The Iraqi Special Tribunal and the Future of a Nation*, 14 INT'L AFF. REV. 1, 8-17 (2005); M. Cherif Bassiouni, *Searching for Justice in the World of Realpolitik*, 12 PACE INT'L L. REV. 213 (2000); Michael J. Frank, *Justice for Iraq, Justice for All*, 57 OKLA. L. REV. 303, 312-17 (2004). See generally Bâli, *supra* note 3; David Luban, *Beyond Moral Minimalism; Response to Crimes Against Humanity*, 20(3) ETHICS & INT'L AFF. 353 (2006); Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMP. & INT'L L. 375, 398 (1997); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2546 (1991).

post-conflict society with those of the 'intervening' society for a variety of political, social and practical reasons). But the academic community has not sat idly by while these conflicts germinate. In fact, several authors have proposed diverse and creative approaches to transitional justice in an attempt to consistently balance the aims of groups participating in a transitional justice mechanism and calculate which potential transitional forum will be, or perceived to be, the 'best' alternative in a particular situation. Jamie O'Connell has recommended that the potential for juridical environments to "maximize [the] psychological benefit to survivors while minimizing their possible harm"¹⁴ be emphasized regardless which community, international or domestic, executes the transitional justice mandate. Frédéric Mégret has suggested that when deciding which population should set the transitional agenda, "representational" considerations be taken into account. This would require "that persons tried for international crimes [are] tried by tribunals that adequately 'represent' the nature of the crimes at stake."¹⁵ Carsten Stahn has asserted that justice, when administered by a transitional administration (as opposed to an international or more permanent domestic authority) following foreign intervention, should prioritize the "need to develop a targeted restoration of justice and security in post-conflict situations," and enhance credibility, *ex post*, for the intervention.¹⁶

These approaches, though innovative, do not comport with those of most cognoscenti who frame the debate over relevant goals and constituencies using the language of legitimacy, sovereignty and political compromise.¹⁷ The majority of commentators acknowledge that "the

14 Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46(2) HARV. INT'L L.J. 295, 341 (2005).

15 Frédéric Mégret, Symposium, *In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice*, 38 CORNELL INT'L L.J. 725, 727 (2005) (also questioning more generally whether "it [is] legitimate for the international community to claim a case for itself regardless of local demands for transitional justice[.]").

16 Carsten Stahn, *Justice Under a Transnational Administration: Contours and Critique of a Paradigm*, 27 HOUS. J. INT'L L. 311, 315-16 (2005)

17 See e.g., John Dermody, *Beyond Good Intentions: Can Hybrid Tribunals Work After Unilateral Intervention?*, 30 HASTINGS INT'L & COMP. L. REV. 77, 82 (2006); Olaoluwa Olusanya, *The Statute of the Iraqi*

social and political realities of a particular transitional context will affect the kind of justice that can be pursued,¹⁸ and that complementarity - the “truism that sovereign states retain primary responsibility for adjudicating violations of crimes defined and promulgated under international law”¹⁹ - is a decisive factor in the planning of the form and substance of transitional justice.²⁰ In this paper the mainstream approach is employed as a framework for evaluating the IHC.

B. An affirmative defense of the IHC

The atrocities committed by the Ba’ath party under Saddam’s rule are well documented, paradigmatic violations of international law.²¹ During the 1980-1988 war with Iran, Iraq was accused of using chemical weapons,²² a charge that was “conclusively verified by an international team of specialists dispatched . . . by the United Nations Secretary General”²³ to Hoor-ul-Huzwaizeh. In 1985, Saddam Hussein systematically destroyed Kurdish villages using a combination of chemical weapons²⁴ and conventional military force;²⁵ by 1988, Iraqi forces

Special Tribunal for Crimes Against Humanity— Progressive or Regressive?, 5(7) GERMAN L.J. 859, 866 (2004); Bâli, *supra* note 3, at 548.

18 Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transnational Justice*, 15 HARV. HUM. RTS. J. 39, 44 (2002) (emphasis added). For more on the role of politics in transitional justice, read Eric A. Posner & Adrian Vermeule, *Transitional Justice and Ordinary Justice*, Public Law and Legal Theory Working Paper No. 40 (2003), at 3; Mégret, *supra* note 15, at 727 (2005); Ruti Teitel, Symposium, *The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT’L L.J. 837, 847 (2005); Judy Barsalou, *Trauma and Transitional Justice in Divided Societies*, United Nations Institute of Peace (Apr. 2005) at 3, available at <http://www.usip.org/pubs/specialreports/sr135.pdf>.

19 Michael A. Newton, *The Iraqi High Criminal Court: Controversy and Contributions*, 83 INT’L REV. RED CROSS, 399, 404 (2006).

20 See Kingsley Chiedu Moghalu, *Saddam Hussein’s Trial Meets the ‘Fairness’ Test*, 20(4) ETHICS & INT’L AFF. 517, 520 (2006). See generally Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or, The European Way of Law)*, 47 HARV. INT’L L.J. 327, 340 (2006); Bartram S. Brown, *Primacy or complementarity: Reconciling the jurisdiction of national courts and international criminal tribunals*, 23 YALE J. OF INT’L L. Vol. 386 (1998); Teitel, *supra* note 18, at 852; William W. Burke-White, *A Community of Courts: Towards a System of International Criminal Law Enforcement*, 24(1) MICH. J. INT’L L. 1, 9 (2002).

21 For a catalog of the crimes against humanity committed by Saddam and other regime participants, turn to Elizabeth Chamblée, *Post War Iraq: Prosecuting Saddam Hussein*, 7 CAL. CRIM. L. REV. 1 (2004).

22 David B. Merkin, Note, *The Efficacy of Chemical-Arms Treaties in the Aftermath of the Iran-Iraq War*, 9 B.U. INT’L L.J. 175, 184 (1991).

23 Julian Perry Robinson & Jozef Goldblat, *FactSheet: Chemical Warfare in the Iraq-Iran War*, Stockholm Int’l Peace Res. Inst. (May 1984) available at <http://projects.sipri.se/cbw/research/factsheet-1984.html> (reporting that “[f]rom an unexploded bomb found at an Iraqi-attack site, the UN team drew a sample which its analysts in Sweden and Switzerland later found to be high-quality mustard gas”).

24 Saddam’s regime used mustard and nerve gas against at least sixty villages and the town Halabja, killing

had killed at least 182,000 Kurds and destroyed at least 4,000 Kurdish villages.²⁶ During the first three months of Iraq's 1991 annexation and occupation of the state of Kuwait it is estimated that 5000 Kuwaiti's were arrested and 600 were killed.²⁷ A report submitted to the UN Security Council revealed the discovery by the U.S. military of "at least two dozen [Iraqi] torture sites in Kuwait City, most of which were [in] police stations or sports facilities."²⁸ Similar facilities, and mass graves, have been discovered throughout Iraq²⁹ and evidence indicates that the facilities were used to oppress Iraqi Shiites and prisoners of war, at times testing biological agents on detained persons.³⁰ Finally, Saddam and his followers have been accused of

5,000 people and resulting in 80,000 refugees fleeing to Iran. Until 1988, no government had ever used chemical weapons against its own people. Human Rights Watch, *Genocide in Iraq: The Anfal Campaign Against the Kurds* (1993), at 61, available at www.hrw.org/reports/1993/iraqanfal/.

25 Including mandatory relocation of Kurds to concentration camps, and summary executions upon arrival. *Id.* at 107.

26 Staff of Senate Comm. On Foreign Relations, 102d Cong., 1st Sess, Staff, *Report on Kurdistan in the Time of Saddam Hussein* 56 (Comm. Print 1991).

27 Paul Sperry, *Saddam's 'gruesome' Kuwaiti war crimes*, WorldNet Daily, Apr. 5, 2005, available at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=31896 citing Report on Iraqi War Crimes (Desert Shield/Desert Storm) (Unclassified Version), U.N. SCOR, 48th Sess., at 13, U.N. Doc. S/25441 (1993). See also THABIT A.J. ABDULLAH, *A SHORT HISTORY OF IRAQ: FROM 636 TO THE PRESENT*, 193 (2003); Neil A. Lewis, *Hussein, In Jail, Reportedly Said Little of Value*, N.Y. TIMES, July 2, 2004, at A1; Simon Sebag Montefiore, *Tyrants on Trial*, N.Y. TIMES, July 2, 2004, at A19.

28 U.N. Doc S/25441, *supra* note 28.

29 Kenneth Katzman, *Iraq: Weapons Programs, U.N. Requirements, and U.S. Policy*, CRS Issue report for Congress, Order code IB92117, at 3 (Sept. 2, 2003) available at <http://www.fas.org/man/crs/IB92117.pdf> ("Since the fall of the regime, U.S. teams have discovered about 60 mass graves containing primarily Shiites and Kurds that Saddam Hussein had characterized as a threat to the regime.").

30 See generally, *Intelligence Community Analysis of Iraq's Biological Weapons Program*, in Congressional Reports: Report of the Select Committee on Intelligence on the U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq (Jul. 7, 2004) at 143, available at <http://a257.gakamaitech.net/7/257/2422/13jul20041400/www.gpoaccess.gov/serialset/creports/pdf/s108-301/sec4.pdf>. See also Anne Barnard, *Mosque Attacks Fuel Fears of Iraq Civil War*, BOSTON GLOBE, Mar. 23, 2004, at A6; *Iraqi Anthrax Bomb Test on Prisoners Reported*, ATLANTA J. & CONST., Jan. 19, 1998, at 6A.

The development of biological weapons violated Iraq's obligations according to the Biological Weapons Convention, to which it acceded after the Gulf War. In 1995 "Iraq disclosed [. . .] the existence of a biological warfare capability. Iraqi officials admitted that they had produced the biological warfare agents anthrax (8,500 L), botulinum toxin (19,000 L), and aflatoxin (2,200 L) after years of claiming that they had conducted only defensive research. Baghdad also admitted preparing biological warfare-filled munitions, including 25 Scud missile warheads (5 with anthrax, 16 with botulinum toxin, and 4 with aflatoxin), 157 aerial bombs, and aerial dispensers, during the Persian Gulf War, although they were not used." JULIE A. PAVLIN, EDWARD MEITZIN, JR & LESTER C. CAUDLE, *Biological Warfare Defense*, Chapter 28 in MILITARY PREVENTIVE MEDICINE: MOBILIZATION AND DEPLOYMENT, VOLUME 1 (2004), at 631.

squandering the resources of Iraq in the pursuit of WMD's and embezzling public monies.³¹

In order to try the Ba'ath regime for these crimes, on December 13, 2003 the Iraqi Governing Council, authorized by and in cooperation with the CPA, promulgated the Statute of the IST on December 10, 2003.³² On August 11, 2005, the elected Iraqi Transitional Authority adopted an amended version of the original IST Statute, revoking the original Statute and renaming the IST the IHC.

When considered in light of the dominant normative approach to transitional justice, it is clear why the IHC was a logical and appropriate choice for the adjudication of the international crimes of the Ba'ath regime. In the last decade international criminal law has, whenever possible, acknowledged and assigned a preferential role for domestic courts in the adjudication of the crimes of presumed human rights violators.³³ The assumption of guiding transitional justice in Iraq was therefore that the Iraqi state would have first crack at the Ba'ath regime,³⁴ a presumption that seems especially appropriate in light of the determination “that there were sufficient 'clean' . . . and competent lawyers and jurists within Iraq who could be drawn upon [. . .]” to try Saddam.³⁵

31 Bassiouni, *supra* note 13, at 338.

32 *See supra* note 5.

33 Upon assuming office in 2003, the ICC prosecutor Luis Moreno Ocampo, stated “As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.” Statement by the Prosecutor (16 June 2003), *available at* <http://www.icc-cpi.int/otp/otpceremony.html>. *See generally* Anne-Marie Slaughter, *supra* note 20.

34 I will deliberately forgo lengthy discussion regarding *which* 'Iraqi people' have an interest in the IHC proceedings, beyond acknowledging that Saddam deliberately fomented conflict along all of the tribal, geographic, religious, and ethnic lines that comprise Iraqi society. *See* Mark Magnier, *Iraqis Are Looking for a Strong Leader*, L.A. TIMES, Apr. 4, 2004, at A10. In a situation where so many groups were marginalized, it is probably appropriate to follow the approach of the Working Group, and assume that as a single ‘country’ and ‘people’ Iraqis have the primary interest in crimes primarily committed against them as such, and not as members of a particular religious faith or ethnic group. *See* The Working Group on Transitional Justice in Iraq, *Transitional Justice in Post-Saddam Iraq: The Road to Re-establishing Rule of Law and Restoring Civil Society - A Blueprint* (March 2003) at Appendix D, *available at* www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf [hereinafter Working Group].

35 ICTJ, *Iraqi Voices; Attitudes Towards Transitional Justice and Social Reconstruction*, Occasional Paper Series, (2004), at 34, *available at* http://www.hrcberkeley.org/download/Iraqi_voices.pdf [hereinafter Iraqi Voices].

Additionally, the issue of trial legitimacy was zero-sum for Iraqis; either the international community would be relegated to the sidelines of the trial process, or the litmus test of legitimacy would be failed in the eyes of the Iraqi communities transitional justice was designed to serve³⁶. The either/or paradigm developed for two reasons. First, the crimes of Saddam's regime were mostly against the Iraqi people or took place in Iraq;³⁷ an important point noted by those who guided the transitional justice process intending that the trials be regarded as legitimate across Iraqi society.³⁸ Second, and more generally, the acrimonious relationship between the Iraqi people and the UN (the result of a perceived historically tepid response on the part of that body to Ba'ath atrocities)³⁹ precluded serious consideration of involving the international community vis-à-vis that organ in any capacity beyond an advisory role.

For Iraqi political reasons too the IHC was an appropriate choice. At the time of the IST's (and IHC's) creation the Iraqi government was actively engaged in the process of capacity-building as individuals of various tribes, ethnicities and religious faiths attempted to work

See also John C. Williamson, *Establishing Rule of Law in Post-War Iraq: Rebuilding the Justice System*, 33 GA. J. INT'L & COMP. L. 229, 231 (2004) (commenting, as Senior Advisor to the Ministry of Justice, on his impressions and those of the Iraqi officials he worked with, thusly: "we found that the judges and prosecutors were generally well-educated and had a fairly sophisticated view of the law. Most felt that they had been marginalized under Saddam, and they were quite eager to prove that they could handle the responsibilities that shifted to them with the dissolution of the parallel court system.").

³⁶ Iraqi Voices, *supra* note 35, at 31. *See also* Somini Sengupta & John F. Burns, *Hussein's Trial Offers Both Peril and Promise to Iraq and U.S.*, N.Y. TIMES, July 1, 2004, at A1.

³⁷ Statement by Prime Minister Ibrahim al-Jaafari *quoted in Saddam trial slated to open Wednesday*, Oct. 15, 2005, http://www.courtTV.com/trials/saddam/101805_ap.html. *See also* Iraqi Voices, *supra* note 35, at 32; Foreign and Commonwealth Office, *Saddam Hussein: crimes and human rights abuses*, November 2002, available at <http://www.c-span.org/resources/pdf/hrdossier.pdf>; Moghalu, *supra* note 21, at 520.

³⁸ *See* Working Group, *supra* note 35, at 5.

³⁹ Dr. Tariq Ali Al-Salih, a participant in the Working Group on Transitional Justice in Iraq, wrote "I agree with the majority opinion of Iraqi jurists that mixed criminal courts should be avoided because such courts would lead to sensitivities in the Iraqi judicial sector and the Iraqi society in general." *Id.* at 101. Another prominent Iraqi exile who took part in the US State Department's planning for postwar Iraqi justice expressed the same sentiment rather more succinctly, stating that "Iraqis don't want to be imposed upon by a huge UN tribunal bureaucracy. The UN had 15 years to call for a tribunal. . . . If the international community had done its job, we wouldn't need a tribunal now." P. Landesman, *Who v Saddam?*, N.Y. TIMES, July 11, 2004, at *quoting* Sermid Al-Sarraf. *See also* Iraqi Voices, *supra* note 35, at 29-30.

together in a newly fashioned democratic government.⁴⁰ No doubt those policy makers responsible for setting the transitional agenda were especially attuned to the potential for domestic trials to be an occasion for political and social norm-establishment.⁴¹

Practicality also dictated that the desires of the United States were considered in the formation of a transitional justice mechanism, as Ba'ath leadership was captured mostly by US forces.⁴² Since preventing Americans from being prosecuted in international *fora* was a political priority of the then-United States administration⁴³ only a court with jurisdictional limitations precluding the trial of American service members would have received the approval of the US (and the subsequent transfer of the prisoners to the physical jurisdiction of court authorities). As will be discussed in more detail in Section C, a domestic Tribunal was the only trial option that endorsed this limitation.

C. Alternatives to the IHC

The selection and development of the IHC as the preferred venue for the trial of Ba'ath offenders was internationally unpopular, and resulted in the ostracization and dismissal of the court as a transitional *filius nullius*.⁴⁴ Before the conclusion of the al-Dujail trial many authors had suggested that alternative venues - the ICC, an ad-hoc Tribunal or a hybrid court - would

40 Following the ratification of the constitution of Iraq on October 15, 2005, a general election to elect a permanent 275-member Iraqi National Assembly was called for on December 15, 2005 .

41 See Working Group, *supra* note 34, at Appendix Y. For a discussion of some of the challenges Iraq has had to overcome, including a death of political common ground between political peers and leaders and their constituencies. See Patrick Basham, *Can Iraq Be Democratic?*, No. 505 POLICY ANALYSIS 1, 4 (2004), available at <http://www.cato.org/pubs/pas/pa505.pdf>; JOSEPH BRAUDE, *THE NEW IRAQ: REBUILDING THE COUNTRY FOR ITS PEOPLE, THE MIDDLE EAST AND THE WORLD* xiv (2003); Marina Ottaway et al., *Democratic Mirage in the Middle East*, Carnegie Endowment for International Peace Policy Brief, October 2002, at 7, available at <http://www.carnegieendowment.org/files/Policybrief20.pdf>.

42 *List of 55 most wanted Iraqis and their status*, USA TODAY, Dec. 14, 2003, http://www.usatoday.com/news/world/iraq/2003-08-21-mostwanted-list_x.htm.

43 See William W. Burke-White, *supra* note 20, at 12-13.

44 F. BYRDSALL, *THE HISTORY OF THE LOCO-FOCO OR EQUAL RIGHTS PARTY; ITS MOVEMENTS, CONVENTIONS AND PROCEEDINGS WITH SHORT CHARACTERISTIC SKETCHES OF PROMINENT MEN* 70 (Clement & Packard; New York 1842) (“While the worlds law stigmatized him, *nullius fillius*, the son of nobody, an outcast. . .”).

have provided a superior forum for transitional justice.⁴⁵ A review of the alternatives, however, leads to the conclusion that the IHC, evaluated against the alternatives and considered in light of the rationales already mentioned, was the superior and appropriate mechanism for transitional justice in Iraq.

1. The International Criminal Court

By 2002 the world had an international court capable of prosecuting individuals for flagrant violations of international law.⁴⁶ Practical and political limitations made dependence on the Court unlikely though. Neither the US nor Iraq was a party to the Rome Statute, and the International Criminal Court's jurisdiction extends only to crimes committed after its creation⁴⁷ - a limitation that, were Ba'ath party members to have defended themselves before it, would have precluded the Court from hearing evidence regarding a significant number of humanitarian and human rights violations.⁴⁸ Additionally, while reliance on the ICC was considered briefly by the United States,⁴⁹ the idea was ultimately dismissed based on the potential for the conduct of

45 See Daniel J. Hendy, Note, *Is a Truth Commission the Solution to Restoring Peace in Post-Conflict Iraq?*, 20 OHIO ST. J. ON DISP. RESOL. 527 (2005).

46 The Rome Statute for the International Criminal Court was adopted on July 17, 1998, and in accordance with its provisions, came into force on July 1, 2002 after sixty states had ratified it. For a comprehensive background of the creation of the ICC, read ROY S. LEE, ED., *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE--ISSUES, NEGOTIATIONS, RESULTS*. (Kluwer Law International, 1999). See also George Yacoubian, Jr., Anna N. Astvatsaturova & Tracy M. Proietti, *Iraq and the ICC: Should Iraqi Nationals be Prosecuted for the Crime of Genocide before the International Criminal Court?*, 1(1) WAR CRIMES, GENOCIDE, & CRIMES AGAINST HUMANITY 47, 66, 72 (2005) (arguing that Iraqi nationals be prosecuted at the ICC for the crime of genocide.).

47 Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, art. 11, U.N. Doc. A/CONF. 183/9 [hereinafter Rome Statute].

48 James Podgers, *Legal Experts Ponder a Trial for Saddam Hussein*, 2(7) A.B.A. J. E-REPORT 3 (Feb. 21, 2003); Michael Posner & Fiona McKay, *The Iraqi Justice System: Challenges in Responding to Iraq's Past Abuses of Human Rights*, 42(3) JUDGES' J. 14, 16 (2003).

49 See Frank, *supra* note 13, at 303; George S. Yacoubian, *supra* note 48, at 60. On February 15, 2005, the Iraqi Interim Government did adopt a decree acceding to the ICC, however the measure was revoked - presumably at the insistence of the United States - and no further attempts have been made. See Haider Rizvi, *Groups Urge Iraq to Join International Criminal Court*, Inter-Press Service, Aug. 8., 2005, <http://www.commondreams.org/headlines05/0808-06.htm>.

United States military service members in Iraq to come under ICC scrutiny.⁵⁰

2. Ad-Hoc Tribunals

Under its Chapter VII powers the UNSC could have established an ad-hoc international criminal Tribunal for Iraq.⁵¹ Generally, Tribunals have been viewed as positive developments in international law that provide a measure of victim justice and ready a state for more responsible government,⁵² and initially NGO's, academics, the Iraqi National Congress and even the US endorsed the creation of an ad-hoc tribunal (referred to as the ICTI).⁵³ Meeting the legitimacy requirements of the international community, an ICTI would have retained subject-matter jurisdiction over crimes against humanity, genocide, and war crimes,⁵⁴ relied on the same appellate body as the ICTY and ICTR to hear appeals, applied existing "conventional international humanitarian law which has beyond all doubt become part of customary

50 Olusanya, *supra* note 17, at 865. See also Colonel M. Tia Johnson, *The American Servicemembers' Protection Act: Protecting Whom?*, 43 VA. J. INT'L L. 405, 430-33 (2003).

51 Ad-hoc Tribunals survived challenges to the Security Council's power to create them under Articles 39 and 40 of the United Nations Charter. See *Prosecutor v. Kanyabashi*, Decision on the Defense Motion on Jurisdiction, Case No. ICTR-96-15-T, 19-29 (ICTR Trial Chamber June 18, 1997), available at <http://www.ictr.org/wwwroot/ENGLISH/cases/Kanyabashi/decisions/180697.pdf>; *Prosecutor v. Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, PP 14-48 (ICTY App. Chamber Oct. 2, 1995), available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>.

52 See e.g., David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. WORLD AFF. 7, 9 (2002); Erik Møse, *Impact of Human Rights Conventions on the Two ad hoc Tribunals*, in MORTEN BERGSMO & ASBJØRN EIDE (EDS.), HUMAN RIGHTS AND CRIMINAL JUSTICE FOR THE DOWNTRODDEN: ESSAYS IN HONOUR OF ASBJØRN EIDE 179, 191-93 (2003).

53 Human Rights Watch, *Justice For Iraq; A Human Rights Watch Policy Paper* (December 2002) available at <http://www.hrw.org/backgrounder/mena/iraq1217bg.htm>. See also Jennifer K. Elsea, *Options for Trying Saddam Hussein for International Crimes*, CRS Report for Congress, Order Code RS21705, at 4 (April 7, 2004), available at http://digital.library.unt.edu/govdocs/crs/data/2004/upl-meta-crs-8531/RS21705_2004Apr07.pdf?PHPSESSID=ee5edd13cafe18dbc4f6e16a0776b2fe; M. Cherif Bassiouni, *Iraq Post-Conflict Justice: A Proposed Plan*, available at http://www.law.depaul.edu/institutes_centers/ihrli/_downloads/Iraq_Proposal_04.pdf; David J. Scheffer, *Forum Options for Prosecution of Iraqi Atrocity Crimes*, Testimony before the Comm. on Gov't Aff., U.S. Senate, April 10, 2003, available at <http://www.senate.gov/~govt-aff/041003scheffer.pdf>.

54 Statute of the International Criminal Tribunal Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. Annex, U.N. Doc. S/RES/827, art. 8 (1993) available at http://www.icls.de/dokumente/icty_statut.pdf [hereinafter ICTY]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955, art. 8, available at <http://www.un.org/ictr/statute.html> [hereinafter ICTR].

international law,⁵⁵ and provided the panoply of procedural protections necessary to ensure international standards of due process in an environment utilizing relevant international legal expertise.

Several factors however, doomed any proposal for the ICTI from the start. If the behavior of its predecessors is any indication, an ad-hoc Tribunal would have been situated outside Iraq⁵⁶ and acted ‘independent’ from the region it ostensibly would have been created to serve.⁵⁷ International law has been moving away from relying on transitional justice mechanisms with this propensity by slowly accepting that “[i]t is unlikely that international trials will, all other things being equal, be as effective at comprehending the complex domestic and social causes that led to the crimes and at giving an account of them.”⁵⁸ An ad-hoc Tribunal's predisposition towards physical and psychological insulation and the recognition of the negative consequences that would have followed,⁵⁹ combined with the Iraqi political and public

55 Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808, P 29, U.N. Docs. S/25704, S/25704/Corr.1 (1993), *reprinted in* 2 VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 8 (Transnational Publishers, Inc., 1995).

56 See David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RIGHTS J. 30, 37 (2006) (“[I]t would have been impossible to establish the ICTY in war-torn Yugoslavia. . .”).

57 The ICTY, for example, has been chastised for its lack of connection to the national interests of the cases it adjudicates; it has been typified as having merely “occasional contacts and exchanges with the affected region, rather than [actual] engagement.” William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729, 734 (2003). The ICTY conducts its proceedings in a language unfamiliar to regional natives, applies unfamiliar international law and is generally considered ‘inaccessible’ by domestic constituencies. The ICTR, which sits in Tanzania, is less removed from the *situs* of transgressions in Rwanda than the ICTY is to the former Yugoslavia. The distinction, however, has made little difference to many Rwandans who believe that “its seat should have been located in Rwanda itself.” Kingsley Chiedu Moghalu, *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26 FLETCHER F. WORLD AFF. 21, 28-29 (2002).

58 Mégret, *supra* note 15, 729-30. See also William W. Burke-White, *supra* note 19, at 3 (2002).

59 What are the negative consequences of ‘independence’? The troubled relationship between the ICTY and regional peoples has resulted in negative publicity and the spread of misinformation regarding court proceedings, eventually resulting in the exploitation of the ICTY's weaknesses by opportunistic politicians. Tolbert, *supra* note 57, at 13. See also Marieke L. Wierda, *What Lessons Can Be Learned from the Ad Hoc Criminal Tribunals?*, 9 U.C. DAVIS J. INT'L L. & POL'Y 13, 17 (2002); Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301 (2003). Independent Tribunals also “fail to assist in preparing the local prosecutors and courts to carry out investigations and trials and have only marginally contributed to judicial reconstruction.” Burke-White, *infra* note 58, at 734. See also Varda Hussain, *Note, Sustaining Judicial Rescues:*

prerequisite that transitional justice minimize the role of the UN, made the creation of a Tribunal for Iraq an unlikely option.

It is also important not to forget that the votes, or at least quiescence, of the five permanent UNSC members would have been necessary for the formation of an ICTI. Though the UNSC did pass Resolution 1483, affirming “the need for accountability for crimes and atrocities committed by the [regime]” and calling upon Member States to “deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice,”⁶⁰ the dubious pretenses under which the Iraqi invasion was undertaken decreased the likelihood that the international community would have been willing to shoulder the bill associated with transitional justice for Iraq.⁶¹

Finally, even if the logistical, budgetary and domestic political issues could have been overcome to the satisfaction of Iraqi and international parties, the divisive issue of protection of American service members precluded the establishment of the ICTI. The insistence by the US that its military personnel remain exempt from international judicial oversight has for the last decade been a contentious issue between the US and the international community at large.⁶² It is difficult to imagine that the US would have capitulated and endorsed an ICTI with the potential

The Role of Outreach and Capacity-Building Efforts in War Crimes Tribunals, 45 VA. J. INT'L L. 547, 562-564 (2005); Laura A. Dickinson, *The Relationship between Hybrid Courts and International Courts: The Case of Kosovo*, 37 NEW ENG. L. REV. 1059, 1068 (2003).

⁶⁰ UN Doc. S/Res 1483 (2003), May 22, 2003, ¶ 1, ¶ 3.

⁶¹ The high cost of justice (and the limited number of prosecutions that can result from the financial restrictions) is an oft-cited downside to ad-hoc tribunals. See e.g., Wierda, *supra* note 58, at 20; Ralph Zacklin, *The Failures of the Ad-Hoc Tribunals*, 2 J. INT'L CRIM. JUST. 541 (2004); Patricia Wald, Lecture at Harvard Law School, *Inside A War Crimes Tribunal: Does International Justice Really Work?* (Feb. 6, 2002); Katherine Boyle, *Uncertain Future for War Crimes Tribunals*, Institute for War and Peace Reporting (November 3, 2006) available at <http://www.globalpolicy.org/intljustice/general/2006/1103uncertain.htm>; José E. Alvarez, *Trying Hussein: Between Hubris and Hegemony*, 2 J. INT'L CRIM. JUST. 319, 325 (2004). In fact, it is not unimaginable that the high cost of justice under an ICTI was the singular reason for its failure-to-launch; a proposal for a Tribunal for East Timor has also been scuttled for budgetary reasons. Nelson Belo & Christian Ranheim, *Prosecuting Serious Crimes in East Timor*, Address at Justice and Accountability in East Timor: International Tribunals and Other Options 5-7 (Oct. 16, 2001), available at <http://www.etan.org/lh/pdfs/justeng.pdf>.

⁶² Johnson, *supra* note 51, at 430.

to hear prosecutions against American service members. Likewise, an attempt to create an ICTI with jurisdictional limitations protecting US forces would have been met with resistance by the other members of the UNSC as they withheld the affirmative votes necessary to establish an ad-hoc Tribunal.⁶³

3. Hybrid Courts

The recognition that many problems endemic to ad-hoc Tribunals could not be overcome through improved design or implementation crystallized among international practitioners through the nineties, and efforts were made to devise transitional justice mechanisms that met international standards and regional needs in a more focused and cost effective manner.

“Hybrid” courts - relying on a mix of domestic and international personnel and law - became the generally accepted answer. Created by agreement between a state and the UNSC, hybrid courts have a reputation for combining “. . . both the outside legitimacy of international courts and the national legitimacy of domestic courts, [. . .] enhanc[ing] or rehabilitat[ing] domestic capabilities to prosecute individuals [and requiring] less funding [. . .] than international courts.”⁶⁴

The hybrid courts of Sierra Leone, East Timor,⁶⁵ and Kosovo are often ballyhooed as an

63 Nor should it be taken for granted that an ad-hoc Tribunal, even without restrictive jurisdictional language in its founding statute, would have been any more 'unbiased' than the IHC in its judicial zeal. Other ad-hoc Tribunals have also been criticized for protecting human rights violators with nationalities of strong states to the detriment of weaker ones. José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 397-398 (1999).

64 Danielle Tarin, Note, *Prosecuting Saddam and Bungling Transitional Justice in Iraq*, 45 VA. J. INT'L L. 467, 518-519 (2005). For an excellent work on the development and performance of hybrid courts, read CESARE ROMANO ET AL., INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA (2004). *But see* James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L.J. 616, 680 (2005) (evaluating the Special Court for Sierra Leone along five criteria – including, *inter alia*, expeditiousness of justice, financial management and international cooperation - and concluding that “[u]nless we lower our expectations of hybrid tribunals or increase the resources, time and support we are prepared to give them, we must prepare for disappointment.”).

65 Since its independence as of May 2002 the name has been changed to Timor Leste. This article will continue to use the name East Timor, as this was what the territory was called when the hybrid panel for the state was established.

apex among transitional justice mechanisms.⁶⁶ This paper lacks the space to thoroughly consider the claim; in fact, the academic community has only just begun to identify the quiddity of hybrid mechanisms.⁶⁷ The commonly identified ‘typical’ aspects of hybrid courts include (a) chronological components; hybrid establishment has so far resulted from situations in which foreign intervention was invited⁶⁸ and the subsequent granting of the UN’s imprimatur,⁶⁹ (b) structural components; the domestic judicial system of the state where hybrid courts had been established were over-taxed to the point of paralysis or persistent crisis’ had left it more notional than extant,⁷⁰ (c) financial components; hybrid courts have relied on voluntary contributions for funding,⁷¹ (d) and geo-political components; hybrid courts are located in the areas where the events that they were intended to adjudicate occurred,⁷² have been run independent of local governments,⁷³ and have made a deliberate effort to build domestic capacity by partially utilizing domestic judges and law.⁷⁴

66 See e.g., Laura Dickinson, *The Relationship between Hybrid Courts and International Courts: The Case of Kosovo*, NEW ENG. L. REV. 1059, 1060 (2003). The ‘special’ court in Cambodia is also likely to employ the hybrid model, but structural and funding problems have prevented the court from becoming operational. Daniel K. Donovan, *Recent Development, Joint U.N.-Cambodia Efforts to Establish A Khmer Rouge Tribunal*, 44 HARV. INT’L L.J. 551, 557 (2003). But see Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23(2) ARIZ. J. INT’L. & COMP. L. 347, 354-356 (2006) (asserting that “David Scheffer, former U.S. Ambassador-at-Large for War Crimes Issues, and Hansjörg Strohmeyer, Director of the Office of Humanitarian Affairs at the United Nations, both rejected the notion that hybrid courts might be touted as a model for the future despite the fact that Scheffer had helped establish the special court for Sierra Leone and was deeply involved in the efforts to create a hybrid court in Cambodia, and Strohmeyer had worked to establish hybrid courts in Kosovo and East Timor as an assistant legal advisor to the UN transitional administrators there.”).

67 For an excellent piece of scholarship attempting to analyze “to what extent the courts that are currently referred to as hybrid courts actually form one category, which features they have in common and in which respects they are fundamentally different” read Sarah M.H. Nouwen, *‘Hybrid courts’ - The hybrid category of a new type of international crimes courts*, 2 UTRECHT L.R. 190 (2006).

68 See generally Laura Dickenson, *The Promise of Hybrid Tribunals*, 97 AM. J. INT’L. L. 295, 297-299 (2003); Beth K. Dougherty, *Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone* 80(2) INT’L. AFF. 311, 316 (2004); Suzanne Katzenstein, Note, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245, 248 (2003).

69 Nouwen, *supra* note 68, at 210.

70 See generally Dickenson, *supra* note 69, 296-300.

71 Dougherty, *supra* note 69, at 319; Nouwen, *supra* note 68, at 212.

72 Nouwen, *supra* note 68, at 209.

73 The hybrid court of Sierra Leone is an exception. See Higonnet, *supra* note 67, at 355.

74 *Id.* at 359; Dickinson, *supra* note 69, at 307 citing Joel C. Beauvais, Note, *Benevolent Despotism: A Critique of U.N. State-Building in East Timor*, 33 N.Y.U. J. INT’L L. & POL. 1101, 1157-59 (2001); Nouwen, *supra*

It is unfortunate that a hybrid court was never a realistic possibility for transitional justice, the political and financial barriers to its formation simply too much to overcome.

Even the limited role assigned to international judges and law in hybrid courts would have been too much for the US to tolerate. Recall that concurrent to the discussion of the transitional options for Iraq, the Hague trial of Milosevic was proceeding. Milosevic's histrionics during the trial were acknowledged even then as "brilliantly cunning, designed to play on Serbia's psychological vulnerabilities and continued Serb resentment of the 1999 NATO bombing."⁷⁵ Considering the Milosevic paradigm and facing global criticism for its violation of international law, the last thing the US would have been willing to do was endorse a forum affording international procedural protections that afforded Saddam the opportunity to indict the US and energize devotee's in Iraq.⁷⁶

Remember also that the Iraq war was undertaken near-unilaterally, and a "unilateral intervener [has] far more leeway to choose personnel with greater appeal to the local population."⁷⁷ In the context of an Iraq that regarded the international community with "mistrust...anger and resentment" and unlike East Timor, Sierra Leone or Kosovo there existed in Iraq "a clear and emphatic preference for any court to be established in Iraq and to operate

note 68, at 204-206.

⁷⁵ Michael P. Scharf, *The Legacy of the Milosevic Trial*, 37 NEW ENG. L. REV. 915, 930 n.84 (2003) citing Dusko Doder, Book Review of Slobodan Milosevic and the Destruction of Yugoslavia by Louis Sell, THE NATION, May 27, 2002, at 25.

⁷⁶ The Hague proceedings against Milosevic, for example, were broadcast throughout Serbia, and Milosevic's approval rating in Serbia doubled as he turned the trial into a political referendum on NATO bombings. Scharf, *supra* note 67, at 930.

⁷⁷ Dermody, *supra* note 17, at 87. The idea that hybrid tribunals work best (if at all) when multilateral intervention is the international response to the precipitating injustice is an interesting notion best left for dissection in another paper. For now, it will have to suffice to point out that several authors have averred the inappropriateness of a hybrid court in cases of unilateral intervention. See e.g., John Dermody, *Beyond Good Intentions: Can Hybrid Tribunals Work After Unilateral Intervention?*, 30 HASTINGS INT'L & COMP. L. REV. 77, 83, 102 (2006); Jamie O'Connell, *Here Interest Meets Humanity: How to End the War and Support Reconstruction in Liberia, and the Case for Modest American Leadership*, 17 HARV. HUM. RTS. J. 207, 219 (2004).

under Iraqi control” and a capacity for fair trials,⁷⁸ it makes sense that the US would only turn Saddam over to Iraq and the non-internationalized forum it endorsed.⁷⁹

In addition to the political needs of the US and Iraq, the reality that “for Iraqis, justice for Saddam Hussein *is* the death penalty upon conviction”⁸⁰ would have necessitated the inclusion of capital punishment as within the remit of a hybrid court but also guaranteed an internationally tepid response to the idea of a mixed Tribunal.⁸¹ The United Kingdom, Russia and France all vociferously opposed the death penalty for Saddam, and would not have sanctioned a hybrid court competent capable of meting out capital punishment.⁸² Given the passion with which Iraqi and international parties each argued their point and the lack of middle-ground between the two positions, it would appear that the international compromise necessary to achieve ‘hybridity’ would not have manifested during the period when all transitional options were being considered.

Had firm limitations on the potential for Saddam to manipulate the court been established and compromise on the issue of capital punishment been achieved, there is still reason to suspect that many of the problems for which the IHC is currently criticized would have dogged an Iraq hybrid while adding an additional burden of financial hardship for the court. It is frequently complained, for example, that the IHC does not permit a large enough role for an international community interested in seeing international criminals put to justice. Even if a hybrid model

78 Iraqi Voices, *supra* note 35, at ii, 31.

79 Additionally, Dermody posits that the unilateral intervention factor is important since “[c]ountries and organizations whose experiences would be vital to the successful use of the hybrid model could withhold their support out of fear of post hoc legitimatization [sic] of the unilateral intervention.” Dermody, *supra* note 17, at 85.

80 Moghalu, *supra* note 24, at 522.

81 Richard Goldstone, *The Trial of Saddam Hussein: What Kind of Court Should Prosecute Saddam Hussein and Others for Human Rights Abuses?*, 27 FORDHAM INT’L L.J. 1490, 1507 (2004).

82 Blair Opposes Death Penalty for Saddam, Associated Press, 2006, http://abclocal.go.com/kabc/story?section=nation_world&id=4732975; Russia: opposes execution of Saddam Hussien, extends own ban on the death penalty, Nov 15, 2006, <http://deathpenaltyinformation.blogspot.com/2006/11/russia-opposes-execution-of-saddam.html>; France and Germany oppose death penalty for Saddam, July 4, 2004, http://web.france.com/forum/france_and_us/2004/07/france_and_germany_oppose_death_.

were used in Iraq though, domestic resistance to large-scale international judicial participation would have precluded the establishment of a hybrid court with the same permissive grant that has come to be regarded as the 'norm' of mixed tribunals.⁸³ Transnational frustration and a loss of legitimacy in both international *and* domestic minds would have been the result.

Additionally, it is no secret that the current Tribunal suffers an international legitimacy deficit based in part on the poor quality and Tribunal's treatment of the defense. Unfortunately, reliance on a hybrid model would probably have done little to improve global perceptions of the proceedings. The struggle to obtain funding is a considerable problem faced by the three hybrid courts currently operational,⁸⁴ and in other mixed Tribunals has resulted in a "lack [of] even the most basic equipment necessary for [the courts] to do their jobs; translators and other administrative personnel are in short supply" and a dearth of interested "qualified international personnel to fill posts as judges, prosecutors, and defense counsel."⁸⁵ The difficulties involved in funding hybrid courts, and the inefficiency that results from the inexperience of personnel participating in them is a serious setback to achieving domestic and international legitimacy and arbitrarily reduces the number of offenders who will be brought to justice before hybrid bodies.⁸⁶

Had the US taken it upon itself to meet the financial needs of a hybrid tribunal in an effort to boost legitimacy of a hybrid, the mixed court would have faced the same accusations regarding a lack of independence that the IHC currently faces. If, however, the US had not

83 The (now former) Minister of Justice publicly asserted that "[t]he presence of foreign judges [in a trial of Saddam] will undermine [Iraqi] sovereignty and would undercut the value of the Iraqi judiciary." Quoted in Sonya Sceats, *The Trial of Saddam Hussein*, 05/02 Briefing Paper 8 (2005), at 5, available at <http://www.chathamhouse.org.uk/pdf/research/il/BPtrialhussein.pdf>

84 David Cohen, *Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?*, 61 ASIA PAC. ISS. 1, 5 (2002) available at <http://www.eastwestcenter.org/stored/pdfs/api061.pdf>; Dickinson, *supra* note 69, at 307.

85 Dickinson, *supra* note 69, at 297. See generally Cohen, *supra* note 85.

86 Higonnet, *supra* note 72, at 363; Katzenstein, *supra* note 71, at 264; East Timor: Special Crimes Deputy Prosecutor Admits Trials Flawed (Radio Australia broadcast, June 28, 2002), available at <http://www.etan.org/et2002b/june/23-30/28specal.htm>.

significantly funded a hybrid court, it is doubtful that an international community smarting from US disregard of international norms would have taken up the financial slack, and the resulting underfunded hybrid court would have faced the international legitimacy burdens currently associated with other ‘anorexic’⁸⁷ and ‘shoestring’⁸⁸ hybrid transitional mechanisms.

III. The Iraqi High Court

To assert that an Iraqi-run domestic Tribunal was the most desirable and politically feasible forum for the trials of Saddam and his cronies is *not* to claim that the IHC has been a paragon of transitional justice. Since 2003 little has been done to address the litany of concerns expressed by an international community agitated at the perceived substantive and procedural defects plaguing the IHC.⁸⁹ As a result, domestic and international perceptions of trial legitimacy have become increasingly precarious and the need to address the catalog of shortcomings, real and perceived, has become more urgent. As a prelude to suggestions as to implementing select reforms, in this section I provide an overview of Tribunal shortcomings from the inception of the IST to the conclusion of the al-Dujail trial.

A. Transnational Justice is born; Initial Distaste for the IST

Two years after the creation of the IST and weeks before the al-Dujail trial was scheduled

87 Dougherty, *supra* note 71, at 326 citing Interview with SCSL Registrar Robin Vincent, Freetown, Nov. 19, 2003. See Amnesty International, *Sierra Leone; The UN Security Council must make the Special Court Effective and Viable*, Press Release, (Feb. 13, 2001) available at <http://web.amnesty.org/library/Index/ENGAFR510012001?open&of=ENG-393>.

88 Avril McDonald, *Sierra Leone's Shoestring Special Court*, 84 INT'L REV. OF THE RED CROSS 121 (2002).

89 A few important alterations in the Tribunal were made during the 2005 re-promulgation period and ought to be acknowledged. The revised law;

- incorporated the Criminal Procedure Law of 1971 and the Rules of Procedures and Evidence.
- gave the right to the relatives of the Iraqi victims and the wronged to raise a civil lawsuit in the IHT to sue the defendants.
- removed the ability of any authority to grant a pardon or reduce the penalties issued by the Tribunal.

A Comprehensive View of the IHT, at 4, available at <http://www.iraqiht.org/en/doc/acomprehensiveview.pdf>.

to begin the statute establishing the IST was revoked and replaced by the IHC Law, creating the Tribunal that exists today.⁹⁰ As presently incarnated, the IHC operates as a domestic court and consists of five units: tribunal investigative judges, ten trial chambers (each with a five-judge panel), one appeals chamber (a nine-judge panel), a prosecutions department and an administrative department.⁹¹ The Tribunal possesses jurisdiction over Iraqi nationals and residents⁹² accused of crimes of genocide, crimes against humanity and war crimes (as enumerated in the IHC Law), as well as violations of certain Iraqi laws - such as “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”⁹³ - that occurred between July 17, 1968, and May 1, 2003.⁹⁴

From the outset the IST seemed destined to be considered a transitional failure.⁹⁵ Within months of its 2003 founding national and international opponents were chastising its lack of impartiality, sensitivity to the vagaries of politics and imperfect legal foundation,⁹⁶ while

90 For a more complete record of the Tribunal’s establishment, read ICTJ, *Creation and First Trials of the Supreme Iraqi Criminal Tribunal*, October 2005 available at <http://www.ictj.org/images/content/1/2/123.pdf>.

91 IHC Law, *supra* note 4, at art. 3. See also Bâli, *supra* note 3, at 462.

92 IHC Law, *supra* note 4, at art. 1(b).

93 *Id.*, at art. 11-14. See also Bâli, *supra* note 3, at 463. Some have criticized IHC statute for its elevation of ‘domestic’ Iraqi crimes to the same stratum as genocide, war crimes and crimes against humanity. Newton, however, sees this as a positive development, and responds that “. . . Article 14 is a window into the soul of the Iraqi bar because it reveals the offenses deemed most egregious by peace-loving Iraqis seeking to rebuild an Iraq based on freedom. From the Iraqi perspective, the crimes listed in Article 14 are of comparable severity to the grave violations of international norms found in Articles 11–13. Therefore the Iraqis felt that prosecution of the domestic crimes described in Article 14 would be a necessary component of the broader IST objective of helping to heal the wounds inflicted on Iraqi society by the Ba’athists.” Newton, *supra* note 20, at 408.

94 IHC Law, *supra* note 3, at art. 1(b).

95 Miranda Sissons, *And Now from the Green Zone . . . Reflections on the Iraq Tribunal’s Dujail Trial*. 20 ETHICS & INT’L AFF. 3 (2006) available at <http://www.ictj.org/images/content/5/8/588.pdf>.

96 See Human Rights Watch, *Memorandum to the Iraqi Governing Council on ‘The Statute of the Iraqi Special Tribunal’*, <http://hrw.org/backgroundunder/mena/iraq121703.htm>; Amnesty International, *Iraq: Tribunal established without consultation*, December 10, 2003, <http://www.amnestyusa.org/countries/iraq/document.do?id=80256DD400782B8480256DF80064341B>; Bassiouni, *Post-Conflict*, *supra* note 13, at 636.

Arguments regarding the legality of the court have been largely rendered otiose subsequent to the Iraqi Transitional Assembly’s approval of the court and the special mention of the IHC in the Iraqi Constitution. There might, of course, be scholars willing to argue that the Iraqi people had no choice, and could not abandon the IHC as its proceedings were already underway, thereby rendering the IHC still illegal. This author has yet to run across this

questioning the Tribunal's independence and (by extension) its legitimacy. The general consensus was that the IST was “[incapable] of rendering fair and effective justice for violations of international humanitarian law and other serious criminal offenses involving the prior regime.”⁹⁷

The role of the US in the design of the IST seemed especially to gall critics.⁹⁸ In the context of an unpopular near-unilateral intervention, however, these condemnations seem particularly inevitable.⁹⁹ Concurrently, its doubtful that the US creation of the Iraq Governing Council, a body chastised for its partiality and responsible for the appointment of the original sitting and investigating judges and prosecutors of the IST, did little to inure critics to the US-backed Tribunal.¹⁰⁰

Ill-timed changes in control of the IST highlighted the politicized makeup of the Tribunal

line of reasoning in the literature however, and the argument appears to have been supplanted with other criticisms.
97 Ravi Chandrasekaran, *Rights Court Run by Iraqis Is Approved by Council*, WASH. POST, Dec. 10, 2003, at A01 available at <http://www.ictj.org/en/news/coverage/article/411.html> (citing the conclusion reached by a team of U.N. specialists on the Iraqi justice system in August 2003).

98 Bassiouni, *Post-Conflict*, *supra* note 13, at 358 note 164; Danilo Zolo, *The Iraqi Special Tribunal; Back to the Nuremberg Paradigm?*, 2 J. INT'L CRIM. JUST. 313, 315-16 (2004). See Marlise Simons, *The Conflict in Iraq: The Legal System; Iraqis Not Ready for Trials; U.N. to Withhold Training*, N.Y. TIMES, Oct. 22, 2004;

Anna Light, *Assessing The Iraqi Special Tribunal: With Saddam on the Stand, Is Justice Being Done?*, 6 BARD J. GLOBAL AFF., 47, 49 (2005) available at http://www.bard.edu/institutes/bgja/journal/vol6/11iraqi_tribunal.pdf.

99 Without getting into the substance of the debate regarding the legality of the invasion of Iraq, suffice to say that the war was undertaken under dubious pretenses and, at the time of the IST's creation, faced increasing domestic and international opposition. Almost certainly, this increased the readiness with which critics would fault the US for “shirk[ing], even denounc[ing], its responsibilities to uphold international law across a range of global problems and concerns,” and nearly any action the US undertook that even hinted at a unilateralist mindset would have been unpalatable. David Krieger, *The Bush Administration's Assault on International Law*, WORLD EDITORIAL & INTERNATIONAL LAW, Sept. 29, 2002, http://www.wagingpeace.org/articles/2002/09/29_krieger_bush-assault.htm.

100 The partiality of the IGC was well documented. The IGC was responsible for the appointment of Judge Wael Abdulatif (who had been “disbarred and imprisoned by Saddam”) and Judge Dara Nor al Din (who served eight months of a two-year sentence in prison after he, in his capacity as a Court of Appeals judge, “held one of Saddam’s edicts unconstitutional) to the IST. Their appointments were widely objected to. See Prosecuting Iraqi War Crimes, 108th Cong. 50-55 (2003) (statement by Tom Malinowski, Washington Advocacy Director, Human Rights Watch) reprinted in Swift *supra* note 4, at 113. Judge Raouf Abdul Rahman, a replacement Chief Judge during the al-Dujail trial, is a Kurd from the city of Halabja (the city that was targeted by Saddam during the Anfal campaign). See also Peter Slevin, *Iraqi Governing Council Says It Wants to Try Hussein*, WASH. POST, Dec. 15, 2003, at A9, 2003 WL 67893793. Additionally, further undermining public perceptions of impartiality, US and Iraqi politicians publicly discussed Saddam’s execution as *fait accompli*. Rajiv Chandrasekaran, *Iraqi Planners Hope to Start Trial by Spring*, WASH. POST, Dec. 16, 2003, at A1; Peter Landesman, *Who v. Saddam?*, N.Y. TIMES, July 11, 2004, at 34.

and exacerbated legitimacy problems. Salem Chalabi, the original executive director (appointed by the Iraqi National Congress in April 2004) of the IST and a contributing drafter of the original IST Statute was removed from his position after charges of murder were filed against him in an Iraqi court.¹⁰¹ Though the charges were dropped, Mr. Chalabi publicly maintained that his “insistence on the independence of the Tribunal was. . . proving inconvenient to the secret policy of the interim government to grant amnesty to or otherwise work out deals with senior Ba’athists inside and outside Iraq,”¹⁰² and that as a result of his refusal to bow to pressures to engage in “show trials followed by speedy executions”¹⁰³ he was replaced by Amer Bakri. The assertion by a public figure that ‘show trials’ were the ostensible purpose of the IST, in conjunction with the much-criticized biased judicial selection process,¹⁰⁴ was a nail in the coffin of initial public faith in the integrity, independence and legitimacy of the IST.

B. Jurisdictional defects

The IHC Statute has been criticized since its inception for its incorporation of international crimes “without establishing a foundation for their application under Iraqi law [and violating the principle of *nullum crimen sine lege*].”¹⁰⁵ However, in its opinion concluding the al-Dujail trial, the IHC determined that;

The concept of these principles by virtue of the proclamation is not limited to what is adopted by the internal laws of the different countries as a necessity that the action should be stipulated as a punishable crime when committed in

101 Light, *supra* note 110, at 5.

102 John F. Burns & Dexter Filkins, *Iraqis Battle Over Control of Panel to Try Hussein*, N.Y. TIMES, Sept. 24, 2004, <http://www.globalpolicy.org/intljustice/tribunals/iraq/2004/0924control.htm>.

103 *Iraq PM ‘Seeks Saddam Show Trial’*, BBC NEWS, Sept. 23, 2004, http://news.bbc.co.uk/1/hi/world/middle_east/3684052.stm.

104 See e.g. Newton, *supra* note 20, at 404; Bassiouni, *Post-Conflict*, *supra* note 13, at 367.

105 Bassiouni, *supra* note at 13, 373-74 (“The Statute defines the three core crimes [genocide, war crimes and crimes against humanity] identically to the definitions contained in the ICC statute, though without establishing a foundation for their application under Iraqi law.”). See *id.* at 374-375. The *nullum crimen* principle is embodied in international law at International Covenant on Civil and Political Rights, art. 15, Dec. 19, 1966, 6 I.L.M. 368 (1967) (entered into force March 23, 1976) [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 7, Nov. 4, 1950, 312 U.N.T.S. 221 [hereinafter ECHR]; American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) at Art. 9 [hereinafter ACHR].

the national laws of their countries, but instead the concept of this principle in the international criminal law extends to comprise the international crimes.

So the action or prevention should form an international crime punishable by virtue of the international law, also this action or refraining from action shall be considered (an international crime) when committed, and the same if the origin of this crime and penalty exists in international customs or in international conventions and treaties.

Our court believes that what is stated in this international proclamation is at least obligatory for the member countries of the U.N. and Iraq is a constituent member in this international organization and therefore it is obligatory according to the principles stated in this proclamation without the need to stipulate it in the interior law.¹⁰⁶

106 Case n° 1/9 First/2005, Al-Dujail Lawsuit, Part I at 37, *available at* http://law.case.edu/saddamtrial/documents/dujail_opinion_pt1.pdf [hereinafter al-Dujail Judgment].

The Tribunal also wrote;

Our court, and despite the fact that it is national, and not international, has the right to consider the international crimes, not because the court of law, which is an internal law, stipulated so, but also either because Iraq ratified on international treaties included international crimes, as the condition in respect to war crimes stipulated in Geneva convention of 1949 and additional protocols annexed thereto, and the ethnic extermination stipulated in the convention of preventing genocides of 1948, or because the rules of the international criminal law are applied not only in Iraq but in all countries of the world directly, without the need to be stipulated in the national laws of those countries, as it is with respect to crimes against humanity, even with respect to war crimes and ethnic extermination which are already forbidden by virtue of international rules before being convicted by international treaties.

Id. at 42.

This would seem to satisfy Bassiouni's recommendation that;

The violation of the principles of legality in the Statute with respect to the crime of genocide and war crimes can be resolved by interpreting the principles of legality in a manner that distinguishes between the formal aspect of these "principles" (promulgation in national Iraqi legislation and publication in the Official Gazette) and the substantive aspects of the principles of legality, which require ensuring that public notice of such crimes has been provided prior to the commission of the criminalized acts. Such an interpretation would be based on the proposition that the crimes of genocide and war crimes are contained in the conventions that have been ratified by Iraq, even though they have not been the subject of national Iraqi legislation published in the Official Gazette of Iraq. Moreover, these crimes have been publicly known in Iraq, and the prospective defendants and others in the upper echelons of the regime leadership can be assumed to have had knowledge of these crimes.

Bassiouni, *supra* note, at 374-375.

This author speculates that the IHC could be faulted for its 'incorporating together' those crimes - e.g. war crimes - codified in specific treaties to which Iraq was a party, versus those - e.g. crimes against humanity - codified in a variety of instruments to which Iraq was not a party (e.g., the Convention Against Torture, the Rome Statute) but that taken together comprise *jus cogens* norms) that arguably require a nexus to the crimes stipulated in the 1969 Criminal Code (a nexus that was not considered by the IHC in the al-Dujail opinion). See Bassiouni, *supra* note 13,

The temporal jurisdiction of the IHC also suffers from two shortcomings, one of which is beyond the capacity of the Tribunal to address. While the Tribunal may hear evidence on charges pertaining to nearly 35 years of Ba'ath Party rule, the reach of the Tribunal does *not* extend to crimes committed subsequent to the 2003 invasion. This aspect of the Tribunal is widely perceived to be the most blatant kind of protectionism, in that it prevents the prosecution of documented crimes committed by soldiers from the US and Coalition states.¹⁰⁷ Additionally, the law establishing the IHC is accused of violating the *nullum crimen sine lege* principle of international law, since it is uncertain whether crimes against humanity and war crimes had, as customary law, the scope attributed to them by Article 12 and 13 of the IHC law.¹⁰⁸

C. Procedural Defects

The IST Statute was generally regarded by the international community as having failed to confirm the minimum procedural safeguards that would protect the rights of the accused;¹⁰⁹ it

at 376. See also al-Dujail Judgment, Part III at 20, available at, http://law.case.edu/saddamtrial/documents/dujail_opinion_pt3.pdf. The Tribunal could also be faulted for finding Saddam guilty of “squandering the national resources,” a crime within the remit of the IHC that does not appear in the Iraqi 1969 Criminal Code, also implicating the *nullum crimen* doctrine. See al-Dujail Judgment, Part III at 46. See Bassiouni, *supra* note 13, at 377. See generally Qanun al-Uqubat [Criminal Code], Law No. 111 (1969).

¹⁰⁷ See e.g., Dr. Saby Ghoshray, *Enforcing International Criminal Law in the Iraqi Special Tribunal: An Analysis of the Scope, Jurisdiction and Legitimacy of the Proposed Legal Framework*, paper submitted at the 20th International Conference of the International Society for the Reform of Criminal Law (2004) at 4 available at <http://www.isrcl.org/Papers/2004/Ghoshray.pdf>; Bali, *supra* note 3, at 467.

Saddam took advantage of this perception and attempted to galvanize supporters by arguing over the limited jurisdiction of the IHC during his July 4, 2004 arraignment. *Transcript: Saddam's Arraignment*, FOX NEWS, July 1, 2004, http://www.foxnews.com/printer_friendly_story/0,3566,124433,00.html [hereinafter *Transcript*]. See also Balakrishnan Rajagopal, *Trying Saddam*, NATION, Apr. 5, 2004, at 6.

¹⁰⁸ Alvarez, *supra* note 62, at footnote 2 (asserting that “it is not plausible to suggest that some of the crimes now included [in our concept of ‘crimes against humanity’] such as deportation[. . .], which was only defined for the first time in the Statute of the International Criminal Court, was regarded as such a crime in 1968.”); Ilias Bantekas, *The Iraqi Special Tribunal for Crimes Against Humanity*, 54 INT’L & COMP. L.Q. 237, 242 (2005). A similar retroactivity problem has been acknowledged in regard to the Statutes establishing the ICTY and ICTR. See Christian Tomuschat, *International Criminal Prosecution: The Precedent of Nuremberg Confirmed*, in 5 CRIMINAL LAW FORUM, Vols. 2-3, 242 (1994).

¹⁰⁹ Marlise Simons, *Iraqis Not Ready for Trials; UN To Withhold Training*, N.Y. TIMES, Oct. 22, 2004, at A11; Bâli, *supra* note 3, at 463; Moghalu, *supra* note 21, at 520. But see Newton, *supra* note 101, at 832-33.

did not, for example, require proof ‘beyond a reasonable doubt,’ the standard relied upon by the ICTY, ICTR and ICC, to establish the guilt of a defendant,¹¹⁰ and it allowed trials *in absentia*, thus breaking with international precedent and “ [. . .] compromis[ing] the ability of an accused to exercise his or her rights to a fair trial.”¹¹¹ The IHC Law altered the procedural landscape and mostly incorporated ICCPR protections¹¹² (though it did not alter burden of proof or *in absentia* requirements),¹¹³ resulting in the melting away of several formerly serious criticisms. After the Tribunal's first trial, however, it became apparent that some procedural components of IHC proceedings would need further refinement, and observers were fast to note that, during the al-Dujail trial the Tribunal failed to;

- ensure that proper notice to defendants of the charges against them and the material facts that related to each defendants role in the alleged crimes was provided.
- afford defendants adequate time and facilities to prepare their defense. This included disclosing prosecutorial evidence earlier and not allowing “trial by ambush.”
- respect international norms regarding the right to cross-examine witnesses.
- make public, in written and reasoned form, its decisions on procedural issues.¹¹⁴

D. The death penalty

Including capital punishment as a sentencing option within the remit of the IHC was an anathema to an international - or at least European - community long opposed to perceived “cruel, inhuman and degrading” punishments,¹¹⁵ and has proved to be a decisive impediment to

110 Human Rights Watch, *Rules of Procedure and Evidence Missing Key Protections*, April 22, 2005, available at <http://www.globalpolicy.org/intljustice/tribunals/iraq/2005/0422hrwbriefing.htm>. See also ICTY Rules of Procedure and Evidence, Rule 87(a), ICTR Rules of Procedure and Evidence, Rule 87(a), Rome Statute, *supra* note 29, at art.66(3).

111 Human Rights Watch, Memorandum to the Iraqi Governing Council on The Statute of the Iraqi Special Tribunal, December 2003, available at www.hrw.org/backgrounder/mena/iraq121703.htm. For example, the principle *non bis in idem* is now a part of the IHC's mandate, whereas in the IST Statute it did not appear.

112 Compare e.g., ICCPR, *supra* note 119, at arts. 14, 15 with IHC Law, *supra* note 4, at arts. 19, 30. See also Bâli, *supra* note 3, at 464.

113 Moghalu, *supra* note 21, at 523-24. Conviction “beyond a moral certainty.” is the current standard of proof relied upon by the IHC.

114 Judging Dujail, *supra* note 109, at 44-64. See also Sceats, *supra* note 84.

115 Amnesty International, Iraqi Special Tribunal-Fair trials not guaranteed (May 13, 2005), at 17, available at

international participation in the IHC.¹¹⁶ In addition, Saddam's grossly mismanaged execution had the injurious effect of attracting unwelcome media attention to an already embattled Tribunal. Far from the somber occasion it was intended to be,¹¹⁷ the visual record of the execution paints a picture that can only be described as jarring and grotesque; for those who have seen it, the footage of Saddam being led to the gallows to chants of "go to hell!" and "Moqtada!"¹¹⁸ will not soon be forgotten. The circulation of the audio/visual recording of Saddam's execution, released on the heels of an 'edited' version that pointedly omitted the audio, provoked sectarian divisions, led to the widespread perception of the implementation and method of execution as 'deplorable'¹¹⁹ and turned the "important milestone on Iraq's course to becoming a democracy that can govern, sustain, and defend itself"¹²⁰ into a public relations disaster for the IHC.¹²¹ Moreover, although Iraqis generally reacted positively to the news of

<http://www.globalpolicy.org/intljustice/tribunals/iraq/2005/0513AIraq.pdf> ("The most recent statistics indicate that 84 countries across the world have abolished the death penalty for all Crimes.").

Many authors have concluded that the inclusion of capital punishment as a sentencing option violates international law. See e.g., Michael Bohlander, *Can the Iraqi Special Tribunal Sentence Saddam Hussein to Death?*, 3 J. INT'L. CRIM JUSTICE 463 (2005); Bâli, *supra* note 3, at 464. *But see*, Bantekas, *supra* note 124, at 250.

116 See Zagaris, *supra* note 4, at 76. The British government, for example, cited moral and practical concerns (potential breach of ECHR obligations) when it cut short efforts to assist in the tribunal's development. Parker, *supra* note 3, at 908. Additionally, the United Nations has ordered its personnel serving in other Tribunals to refrain from assisting the IHC because capital punishment was permitted. Colum Lynch, *U.N. Refuses to Assist Iraqis With War Crimes Trials*, WASH. POST., Oct. 23, 2004, at A18.

117 President George W. Bush said that he wished the execution of Saddam Hussein "had gone in a more dignified way." *Saddam's execution could have been more 'dignified': Bush*, CBC News, Jan. 5, 2007, <http://www.cbc.ca/world/story/2007/01/04/bush-saddam.html>.

118 A reference to one of Saddam's opponent, Shi'ite cleric Moqtada al-Sadr. John F. Burns, *Saddam buried; videos grip Iraq*, INT'L HERALD TRIB., Dec. 31, 2006, <http://www.iht.com/articles/2006/12/31/news/saddam.php?page=2>.

119 Patrick Wintour, Kim Willsher & Brian Whitaker, *Prescott attacks 'deplorable' Saddam execution scene*, THE GUARDIAN, Jan. 3, 2007, <http://politics.guardian.co.uk/foreignaffairs/story/0,,1981607,00.html>. See generally *Comments on the Death Penalty of Saddam*, Dec. 30, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/12/30/AR2006123000407_2.html.

120 President George W. Bush, Statement on Execution of Saddam Hussein, Dec. 29, 2006, available at <http://www.whitehouse.gov/news/releases/2006/12/20061229-15.html>.

121 While not responsible for the execution of Saddam (that dubious honor belonging to the Iraqi government), the Tribunal's mandate to engage in capital punishment, the rapidity with which Saddam was charged and hanged, and the politicization of the verdict associated the maligned IHC with the adverse circumstances surrounding the execution itself. Statement by John Burns, Baghdad Bureau Chief, NEW YORK TIMES, *transcript available at Iraqi Official Arrested for Recording Saddam's Execution*, PBS, Jan. 3, 2007, http://www.pbs.org/newshour/bb/middle_east/jan-june07/saddam_01-03.html.

Saddam's death, invective quickly followed as others pointed out that thousands of victims would now be deprived of the satisfaction of facing a defendant¹²² and that "once the culprit is gone, the tendency to...document those atrocities that were committed is very unlikely."¹²³

E. Administrative flaws

Protecting Tribunal jurists and prosecutors has been a challenge since the IHC's inception.¹²⁴ In one well-publicized incident an Iraqi judge and lawyer participating in the trial of Saddam were killed outside their home in Baghdad,¹²⁵ and as the security situation in Iraq continues to decline the capacity of the Tribunal to protect trial participants has not improved.¹²⁶ The chilling effect of the lack of security on potential witnesses and lawyers has been significant.¹²⁷

122 Statement by David Scheffer, *Saddam Executed*, Aired December 30, 2006 on CNN, *transcript available at* <http://transcripts.cnn.com/TRANSCRIPTS/0612/30/cnr.01.html> ("Many Kurds say they are upset about the prospect of Saddam Hussein being executed before being tried for atrocities against the Kurds."). For an overview of international reactions to Saddam's death, see *Nations welcome, condemn Saddam execution*, MSNBC, Dec. 30, 2006, <http://www.msnbc.msn.com/id/11497279/>.

123 Statement made by Dr. Karim, President of the Washington Kurdish Institute, on National Public Radio. *Kurds Feel Cheated by Saddam's Execution*, National Public Radio Broadcast, Dec. 29, 2006 *available at* <http://www.npr.org/templates/story/story.php?storyId=6697341>.

124 Amnesty International, *Iraq: Flaws in the first trial before the Supreme Iraqi Criminal Tribunal should not be repeated*, *Public Statement*, (Aug. 18, 2006) <http://web.amnesty.org/library/index/ENGMDE140312006>. ("Defence [sic] lawyer Sa'dun al-Janabi was killed in October 2005, during the first week of the trial, while two other defence [sic] lawyers. 'Adil al-Zubeidi and Khamis al-Ubeidi were killed in November 2005 and June 2006 respectively. A number of lawyers reportedly received anonymous threats."). See also Goldstone, *supra* note 85, at 1505-06; Miranda Sissons, *And Now from the Green Zone . . . Reflections on the Iraq Tribunal's Dujail Trial*, 20(4) ETHICS IN INT'L AFF. 505, 508 (2006).

The US Embassy's Regime Crimes Liaison Office (RCLO), established in March 2004 by the US Department of Justice and funded by the US Congress, plays the primary role in devising security arrangements for court personnel, securing the court building in the initial phase of the court, building judicial and prosecutorial capacity and reviewing and cataloging documents obtained by investigators. Human Rights Watch, *Judging Dujail: the First Trial Before the Iraqi High Tribunal*, Vol. 18 (2006) at 29, 43, 53, *available at* <http://hrw.org/reports/2006/iraq1106/iraq1106webwcover.pdf> [hereinafter *Judging Dujail*].

125 Robert F. Worth, *Two from Tribunal for Hussein Case Are Assassinated*, N.Y. TIMES, Mar. 1, 2005, at A1, *available at* <http://select.nytimes.com/gst/abstract.html?res=F60F16FD38590C718CDDAA0894DD404482&n=Top%2fReference%2fTimes%20Topics%2fPeople%2fH%2fHussein%2c%20Saddam>. At least five persons working for the court, including an investigative judge and the chief of security, were killed before the opening of the Dujail trial. *Judging Dujail*, *supra* note 109, at 20.

126 See *Judging Dujail*, *supra* note 109, at 21.

127 *Judging Dujail*, *supra* note 109, at 14, 24 ("Human Rights Watch has been informed that several lawyers who had accepted clients accused in the on-going Anfal trial withdrew from the case, on the grounds of personal security."). See Tarin, *supra* note 66, at 481 ("If hostilities on the ground have not ceased, then the gathering of

The Tribunal has been derided as a body prone to corruption¹²⁸ and lacking the institutional robustness – the questionable bias, competence and professionalism of the novitiate judges is frequently remarked upon¹²⁹ - to judge and prosecute major violations of international law.¹³⁰ Formed from the stuff of an Iraqi judicial system that had been abused by decades of Ba'ath governance (the result being internal corruption, a lacunae where 'due process' rights should have been and a record of court-sanctioned human rights abuses)¹³¹ it is no wonder that observers questioned the Tribunals *bona fides*. Though those who established the IST and the successor IHC were aware of the potential for these shortcomings to undermine perceptions of the Tribunal's capacity and, if one is inclined to believe self-promoting press-releases, tried admirably to compensate for them at the formation stage,¹³² it is clear that these concerns have been insufficiently addressed in the years subsequent to the IHC's creation.¹³³

F. A dearth of international participation

The IHC has institutionalized a marginal role for the international community by breaking with transitional precedent and limiting the appointment of judges with international

evidence likely will be hampered, as it was for the International Criminal Tribunal for the former Yugoslavia (ICTY).”).

128 Michael Scharf, *Is It International Enough?*, 2 J. INT'L CRIM. JUST. 330, 333 (2004) *citing Iraq to Create War Crimes Tribunal in Coming Days*, available at <http://www.usatoday.com/news/world/iraq/2003-12-15>.

129 On the professionalism of participants, Human Rights Watch noted that judges would occasionally be baited by or engage in insulting exchanges with defendants. For example, “[o]n June 12, 2006, the judge entered into an exchange of insults with defendant Barzan al-Tikriti before ordering the latter’s removal from the chamber.

“Al-Tikriti had complained that witnesses for him were scared to come forward to testify:

Judge: Afraid of Whom? Ghosts?

Al-Tikriti: Afraid of the terrifying court.

Judge: You’re terrifying!

Al-Tikriti: No, you’re terrifying!

Judge: Why do you always have to be the hero? Get him out of here.”

Judging Dujail, *supra* note 109, at 68.

130 Scharf, *supra* note 146; Marlise Simons, *Iraqis Not Ready for Trials; UN To Withhold Training*, N.Y. TIMES, Oct. 22, 2004, at A21.

131 Williamson, *supra* note 35, at 231, 237; Tarin, *supra* note, at 491; Judging Dujail, *supra* note 109, at 24.

132 See generally, Williamson, *supra* note 35.

133 See e.g., Debate between Dr. Curtis F. J. Doebbler and Professor Michael P. Scharf, *Will Saddam Hussein Get A Fair Trial?*, 37 CASE W. RES. J. INT'L L. 21 (2005); Bassiouni, *supra* note 13, at 386; Wald, *supra* note 142, at 545-46; Judging Dujail, *supra* note 20, at 31.

experience to cases where a state is a party.¹³⁴ Three distinct critiques are usually leveled against the IHC as a consequence; that reform in the form of internationalization would (1) resolve the institutional shortcomings - including security problems - of the IHC,¹³⁵ (2) better achieve the goals of transitional justice, since international participation would acknowledge the crimes of the Ba'ath regime not only against Iraqis but against the conscience of the world¹³⁶ and (3) increase perceptions of legitimacy, since the those with experience in the international judicial system are better able to deal with complex litigation involving international crimes and protect the rights of defendants.¹³⁷

Neither the IHC nor its creators have been receptive to these voices, and one negative consequence of the 'balance' that *has* been struck became apparent in the final stages of the al-Dujail trial as the Tribunal relied on but imperfectly applied international law.¹³⁸ In light of an IHC that teeters on an increasingly thin line between legitimacy and contempt, results such as these continue to frustrate and disenfranchise (current and former) Coalition members and the international community at large.

Part IV. What can and ought be done

134 IHC Law, *supra* note 4, at art. 3(5). As of late 2006, no non-Iraqi judges have been appointed to any chamber of the IHT. "Non-Iraqi lawyers with experience in international criminal law may be appointed, at the discretion of the court's president, as "advisors" to judges and prosecutors in order to provide "assistance in the field of international law" (the exact role of advisors, to whom they are accountable, and how they exercise an "assistance" function are unspecified, however). Non-Iraqi defense lawyers are permitted to assist the principal lawyer, but non-Iraqis cannot register as representing the accused unless they present proof of accreditation with the legal professional association in their country, and are then approved by the Iraqi Ministry of Justice." Only two non-RCLO international advisors have been appointed, one to the first trial chamber shortly before the opening of the Dujail trial, and the second to the Defense Office in late April 2006, six months after the commencement of the jail trial. Judging Dujail, *supra* note 109, at 109, 53.

135 Tarin, *supra* note 66, at 508.

136 Elizabeth Chamblee, *Post-War Iraq: Prosecuting Saddam Hussein*, 7 CAL. CRIM. L. REV. 1, 23 (2004); Scharf, *supra* note 146, at 332.

137 Bassiouni, *supra* note 11, at 13; David M. Gersh, Note, *Poor Judgment: Why The Iraqi Special Tribunal is the Wrong Mechanism for Trying Saddam Hussein on Charges of Genocide, Human Rights Abuses, and Other Violations of International Law*, 33 GA. J. INT'L & COMP. L. 273, 274 (2004); Farhad Malekian, *Emasculating the Philosophy of International Criminal Justice in the Iraqi Special Tribunal*, 38 CORNELL INT'L L.J. 673, 677 (2005).

138 See ICTJ, *Dujail: Trial and Error?*, Briefing Paper, Nov. 2006, at 15, available at <http://www.ictj.org/images/content/5/9/597.pdf>.

It seems particularly inevitable that the IHC, acknowledging the degree of criticism already leveled at it, will emerge from the transitional period free from allegations that its proceedings amount merely to sound and fury. Even at this 'late' date in the Tribunal's work though, the IHC and international community should not be deterred from striving to provide the best justice possible for Iraq. With an eye towards that goal, in this section I have outlined some measures that I believe would benefit the Tribunal, the Iraqi people, and the international community in the effort to meet the many demands of transitional justice.

A. De-Ba'athification; a flawed policy in the context of the IHC

The law establishing the IHC states at art. 33 that “no person belonging to the Ba’ath party may be appointed as a Judge, Investigative Judge, Prosecutor, employee or any of the Tribunal staff.”¹³⁹ The a blanket prohibition against the involvement of former Ba’ath party members exists is not surprising; the corruption and institutionalized bias of judicial officials under Saddam was well known,¹⁴⁰ and the potential for collusion between defendants and the Tribunal was a paramount concern to those initially responsible for setting the transitional agenda.¹⁴¹ Unfortunately it is likely that, as in the domain of security and politics, vetting has been applied too broadly. I recommend that art. 33 be removed and in its place a series of guidelines, developed by the Council of Ministers in conjunction with the President of the Tribunal to be consistent with the IHC Law,¹⁴² be inserted. These revised rules would distinguish between nominal former Ba’ath party members and those whose contributions to the IHC would be seriously compromised by their party involvement.¹⁴³

This reform would be consistent with the general trend of Iraqi political behavior. In

139 IHC Law, *supra* note 4, at art. 33.

140 Williamson, *supra* note 35, at 231.

141 *Id.* at 237.

142 IHC Law, *supra* note 4, at art. 39.

143 For a scathing review of de-ba'athification and its detrimental effects on the IHC, see Zachary D. Kaufman, *The Future of Transitional Justice*, 1 STAIR 58, 68 (2005).

May 2003 the US-led coalition instituted a policy of lustration that banned Ba'athists (most of whom are minority Sunnis) from holding positions of authority - political, judicial, or administrative - in Iraq. Approximately ten percent of the Iraqi population belonged to the Ba'ath Party, and the decree removed approximately 120,000 people from their jobs and disbanded Iraq's 350,000-member military. However, less than a year later and in response to criticisms that the process was "applied unfairly and unevenly," the US announced that some of these individuals could be re-hired to administrative positions.¹⁴⁴ The changes did not stop there though; the revised de-Ba'athification policy gained momentum and in December 2006 Iraqi Prime Minister Nouri Maliki announced that former Ba'ath party members would be entitled to claim government pensions and assume leadership roles in the armed forces of Iraq,¹⁴⁵ a rhetorical shift that is generally viewed as "a step toward success"¹⁴⁶ and a tacit acknowledgment that it is important to distinguish between former regime loyalists who pose a continued threat and those who were affiliated with a repressive government for more practical reasons.¹⁴⁷

Moreover, continued exclusion of former Ba'ath party members from the IHC runs the risk of disenfranchising a cadre of qualified and interested lawyers and judges with potentially significant contributions to the transitional justice process.¹⁴⁸ These individuals could be participating directly, as judges or prosecutors of the IHC, or indirectly, by observing the role

144 A process that came to be termed 'reverse Ba'athification,' 're-Ba'athification,' or 'de-de-Ba'athification.' Statement by Mr. Bremer, *quoted in* Jim Krane, *Bremer Softens Ba'ath Party Ban in Iraq*, USA TODAY, April 23, 2004, *available at* http://www.usatoday.com/news/world/iraq/2004-04-24-baathists-us_x.htm.

145 Molly Hennessy-Fiske, *Iraq opens its army to Hussein loyalists*, LA TIMES, Dec. 17, 2006, <http://www.latimes.com/news/nationworld/world/la-fg-iraq17dec17,0,39370.story?coll=la-home-headlines>.

146 *Id.* (quoting Nasir Ani, a Sunni parliament member.).

147 has asserted that the only crimes many Ba'ath party members were guilty of was "a desire to feed their families." Dr. Ayad Allawi *quoted in* *Leading Iraqi says de-Baathification hampering US reconstruction*, AGENCE FRANCE PRESSE, Dec. 28, 2003, *available at* <http://www.arabmediawatch.com/amw/Articles/News/tabid/76/newsid393/2207/Leading-Iraqi-says-de-Baathification-hampering-US-reconstruction/Default.aspx>

148 A community that almost certainly exists, based on the impressions of John C. Williamson, first senior advisor to the Iraqi Ministry of Justice. Williamson, *supra* note 35, at 231.

their former Ba'ath cohorts adopt in the IHC and approving from the sidelines. Additionally, re-Ba'athification of the IHC would help insulate the tribunal from the risk of “overly zealous prosecution for past crimes” as the Tribunal carries on with its work under pressure of a Shi'a-dominated political body.¹⁴⁹

Judges and lawyers, like all personnel associated with transitional efforts throughout the world, *must* have their backgrounds systematically, transparently and in a manner free of political taint, examined so as to prevent anyone with a history of corruption or complicity in human rights abuses from participating in transitional justice.¹⁵⁰ Mistakes in the re-Ba'athification process have already been made and the Iraqi government must be especially careful to avoid egregious errors like those associated with Jaadan Muhammad Alwan, whose reappointment as chief of police in Anbar Province scandalized former Prime Minister Alawi when continued “associations with known insurgents” were discovered.¹⁵¹ That said, of the thousands of individuals nominally associated with the Ba'ath party there are certainly legally experienced individuals with a demonstrated history of integrity, professionalism and competence who deserve to contribute to transitional justice in Iraq.

B. Outreach

The Tribunal convenes in Baghdad on the premise that transitional justice is more

149 Laura Dickinson, *Transitional Justice in Afghanistan; the promise of mixed Tribunals*, 31 DENVER J. INT'L L. & POL'Y 23, 34 (2002) (noting the tendency for overcorrection to take hold in post-conflict situations where an imbalanced judiciary is part of the transitional justice project, and considering the case of Kosovo, where an imbalance between Serbian and Albanian judges led to partiality and legitimacy deficits.). The potential for overly zealous prosecution within the IHC has been remarked upon by several authors, who point out that “victims of Saddam's repression were among those considered for appointments to the bench.” Sceats, *supra* note 87, at 5, available at <http://www.chathamhouse.org.uk/pdf/research/il/BPtrialhussein.pdf>.

150 Williamson, *supra* note 35, at 237. If a mistake were made in, for example, a judicial appointment to the Tribunal it is unlikely that the IHC in current fragile state could withstand the fallout. The ICTR, a transitional body with a much more robust international reputation, had a difficult time withstanding similar criticisms seven years after its creation when Joseph Nzabirinda, a Defense Investigator on the ICTR payroll, was found guilty of murder as a crime against humanity. See Victor Peskin, *Rwandan Ghosts*, 2002 LEGAL AFF. 21, 22 (2002) available at http://www.legalaffairs.org/issues/September-October-2002/feature_peskin_sepoct2002.msp.

151 Edward Wong & Erik Eckholm, *Alawi Presses Effort To Bring Back Ba'athists*, N.Y. TIMES, Oct. 13, 2004, available at <http://neocrack.info/voices/2004/October/10.13.4.htm>.

relevant for Iraqis if the mechanism by which justice is achieved is proximate to the area where the crimes to be adjudicated occurred. The IHC has, in fact, severely compromised the security of its participants in order to achieve this laudable goal. But for all the sacrifices this choice required, the IHC has been surprisingly lethargic when it comes to engaging with and empowering the Iraqi public in the transitional justice process. This is a mistake, as time and again deliberate and considered outreach has been a prerequisite for social healing and credibility establishment for transitional institutions whose formalistic proceedings may obscure the larger picture.¹⁵²

The IHC website, the most obvious mechanism for global outreach, is almost useless, and has a tendency to provide information in a rather acontextual and disjointed manner, declaring that, for example;

“In previous statements, the IHT has circulated that the IHT is irresponsible about any statement does not release by official or source from inside or outside of IHT except the IHT president or its spokesman. The IHT would like to emphasize that the Iraqi jurisdiction is independence, stems from the Arabic jurisdiction and not affected by any statement but keep a rule of law and no one impact in its provisions and decisions only on presented raised legal evidences of the case.”¹⁵³

Though the IHC does have an official responsible for communicating with local and international media¹⁵⁴ and the IHC trials have been televised¹⁵⁵ there has been no concentrated or comprehensive effort directed at promoting a view of the Tribunal as a transparent and publicly accountable organ intended to serve the Iraqi need for justice and historical documentation, or

152 Judge MacDonald, who assumed the position of President of the ICTY in 1999, has noted that “. . . It is much more difficult to dismantle already established misperceptions and propaganda than it would have been to start from the outset with updated and accurate information about the Tribunal . . . We can only hope that other international justice institutions, like the ICC, will learn from our mistakes and conduct extensive public information and outreach activities from the outset.” *Interview with Olga Kavran, Deputy Outreach Coordinator, International Criminal Tribunal for the Former Yugoslavia*, Victims’ Rights Working Group Bulletin, No. 4, October 2005, at 3.

153 Statement of the IHC, *available at* <http://www.iraq-ihc.org/en/17-12-2006.html>

154 Sissions, *supra* note 142, at 50.

155 George Packer, *Saddam on Trial*, THE NEW YORKER, Oct. 31, 2005, http://www.newyorker.com/archive/2005/10/31/051031ta_talk_packer

even educating the public as to the operational principles and organization of the IHC. A well designed outreach program would meet these goals, while informing the Iraqi people of the continuing relevance of the Tribunals work and a time frame in which that work may be expected to be completed.

C. Judicial Outbursts

Its reasonable to request of the Tribunal that lapses in judicial demeanor¹⁵⁶ cease. While certainly an understandable response to supercilious behavior, emotional outbursts reflect poorly on the court and more generally send a message that jurists do not trust the balance between protections for the accused and prosecutorial gusto enshrined in the IHC Law. The situation is exacerbated by the tendency on the part of Tribunal judges to vacillate on the rules for proper courtroom conduct (usually to the detriment of the defense) without explanation¹⁵⁷ - observers are left with the impression that transitional justice has been ‘personalized’ by those individuals selected to carry out the transitional justice mandate.

D. The death penalty

Perhaps no issue has proven more divisive in the Iraqi transitional justice process than that of capital punishment. Derided by cynics as “not. . . a contribution to the pacification of Iraq, but a cause for further hatred and terror”¹⁵⁸ but accepted by many as an execution of Iraq's

156 See e.g., Judging Dujail, *supra* note 109, at 68 (“On June 13, 2006, the judge derided a member of Saddam Hussein’s defense team from the United States, Curtis Doebbler. . . . On July 24, during the closing statement for Barzan al-Tikriti, the judge exclaimed to al-Tikriti, “Since you were a child, you were drowned in blood.”).

157 See e.g., *id.*, at 67 (“On May 15, 2006, the judge refused to allow defendants all to be present when defense witnesses gave evidence. For example, when a witness for defendant Ali Dayeh Ali gave evidence, the judge did not allow the other defendants to be present. This did not appear to be based on any misconduct by the other defendants, and no reasons were given. This continued for another trial day before the judge changed his mind, without explanation. Similarly, also on May 15, in a seemingly erratic manner, the judge refused to allow a defense lawyer to question his own witness, but later in the day permitted it without explanation. On May 24 the judge refused to allow defense lawyers to direct any questions to defense witness Tariq Aziz, exclaiming that “the defense team’s aim is to insult the court,” although defense lawyers had not yet had a chance to pose any questions to Aziz before the judge reached this view. After the lunch recess, the judge reversed himself and permitted Aziz to be recalled for questioning, but with no explanation as to why he had disallowed questioning in the first place.”).

158 See e.g., Zolo, *supra* note 110, at 318.

right to “decide for themselves whether to adhere to treaties which ban this practice,”¹⁵⁹ capital punishment has so far stood in the way of widespread endorsement of the IHC. The pro-sovereign-choice camp, however, seems to be slowly eroding the violation-of-international-law position; Ban Ki-moon recently acknowledged that “the issue of capital punishment is for each and every member state to decide”¹⁶⁰ and there is evidence that there is dialog between Tribunal jurists and their counterparts at the ICC, ICTR and ICTY despite the UN prohibition.¹⁶¹

The need for an international presence working with the IHC is undeniable, and the time has come for the EU countries to embrace their own rhetoric and confront the reality that “in countries which maintain the death penalty” a goal of EU engagement is “the progressive restriction of [capital punishment's scope. . .],”¹⁶² not its immediate abolition. It is too much to expect a victimized country with a history of reliance on capital punishment to lead by example and forgo what is considered by most Iraqis to be the most appropriate punishment.¹⁶³ EU countries should be working hard to have their experienced nationals fill the many non-Iraqi “advisory” roles available at the IHC.¹⁶⁴

159 See e.g., Alvarez, *supra* note 62, at 325.

160 Julia Preston, *The Struggle for Iraq; New UN chief Invites Controversy by Declining to Oppose Hussein Execution*, N.Y. TIMES, at A6.

161 See Jenia Turner, *Transnational Networks and International Criminal Justice*, U of M Law School Working Paper Series, (2007) at 32, available at <http://ssrn.com/abstract=940480> citing Indonesian Judges Seminar on International Humanitarian Law: Conclusions and recommendations 3 (2003), http://www.hrcberkeley.org/download/seminar_indonesia.pdf; Allison Danner, *When Courts Make Law: How International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 58-59 (2006). See also Robert Collier, *Human Rights Shortcomings” in Hussein Tribunal: Concern Grows that Trial Will Be Seen as a Kangaroo Court*, S. FR. CHRON., Apr. 22, 2004, at A13 (quoting a December 2003 statement by Amnesty International that it is “a great disappointment to see representatives of the Occupying Powers now supporting or professing neutrality on the issue of the death penalty in Iraq rather than encouraging the permanent end of this obsolete and inhuman punishment.”).

162 Declaration by the Presidency on Behalf of the European Union to Mark the Entry into Force of Protocol No. 13 to the ECHR, Concerning the Abolition of the Death Penalty in all Circumstances, The Council P 83/03, July 14, 2003.

163 Bassiouni, *supra* note 13, at 244; See also Moghalu, *supra* note 21, at 522.

164 IHC Law, *supra* note 4, at art. 7(2). EU countries would also do well to remember that under universal jurisdiction, many Ba'ath criminal's may be prosecuted in other forums, providing an alternate mechanism by which the international community can be 'involved'. Iran and Kuwait, for example, have both expressed an interest in bringing charges against Hussein posthumously.

Those Iraqi actors involved in setting the transitional agenda must also adjust their thinking as to capital punishment. The Iraqi people, as desirous as they are of retributive justice, also want and need a complete historical record of the crimes committed by the Ba'ath regime under Saddam.¹⁶⁵ Capital punishment may be an accepted end-point to Tribunal proceedings, but the IHC should hesitate before rushing to sentence if the consequences are unanswered questions and alienation of those harmed by Ba'athist actions. The error epitomized by the hanging of Saddam should not be made twice; no more criminals should be executed until all crimes for which the defendant has been accused have been heard. Art. 27(2) of the IHC Law,¹⁶⁶ which has been interpreted to require execution within 30 days of a Tribunal decision to that effect should be revised or reconstrued so as to permit defendants guilty of more than one capital-punishment worthy offense to be tried for *all* the crimes for which they are accused.¹⁶⁷

Compromise on the issue and more robust international participation in the IHC has two potential benefits; (a) it does *not* itself ascribe legitimacy to the IHC, but does give the Tribunal the opportunity to earn legitimacy by working with an accepting and supportive environment and (b) it increases the IHC's domestic and international relevance as foreign practitioners can

165 Iraqi Voices, *supra* note 35, at 38.

Even if the IHC does *not* wish to acknowledge this aspect of its mandate, capital punishment prevents third states from trying human rights violators for crimes for which they escaped culpability in Iraq (e.g. Saddam and genocide). Surely IHC jurists, as members of a judicial community, can sympathize with the desires of interested legal professionals representing other relevant constituencies. While acknowledging this interest and remitting the accused to the jurisdiction of other states decreases the likelihood that the defendants will be executed, as Alvarez points out “[p]erhaps, in time, Iraqis could be persuaded that there are some penalties worse than death; including being the perpetual defendant. . .”). Alvarez, *supra* note 62, at 325. For some excellent pieces on the rise of universal jurisdiction, read Xavier Phillipe, *The Principles of Universal Jurisdiction and Complementarity how do the two principles intermesh?*, 88 INT’L REV. OF THE RED CROSS 375 (2006); Cedric Ryngaert, *Universal Jurisdiction in an ICC Era*, 14 EUR. J. CRIME, CRIMINAL L. & AND CRIMINAL JUST. 46 (2006); Naomi Roht-Arriaza, *The Pinochet Principle and Universal Jurisdiction*, 35 NEW ENG. L. REV. 312 (2001).

166 IHC Law, *supra* note 4, at art. 27(2).

167 A revision of the Article would have been done by the President of the Tribunal and the Council of Ministers under their art. 39 authority. *Id. supra* note 4, at art. 39. A re-interpretation, however, has already been made and proposed. Two days before Saddam was executed, Bosh Ibrahim, Iraq's deputy justice minister, went on record as saying that the Cassation Panel's decision to uphold Saddam's death sentence within 30 days violated Iraqi law, since the IHC “does not say within 30 days, it says after the lapse of 30 days.” Quoted at Kevin John Heller, Grotian Moment Blog, *available at* http://law.case.edu/saddamtrial/entry.asp?entry_id218.

contribute their expertise and guide the IHC down a path that can meet as many goals of transitional justice as possible.

V. Conclusion

It is unfortunate that the transitional experience in Iraq has been tarnished with legal uncertainty, procedural flaws and administrative shortcomings. Nonetheless, it is important to realize that reliance on an imperfect domestic Tribunal represented a superior transitional mechanism as compared to its alternatives. While it is tempting to think that the ICC, an ad-hoc or hybrid court would have more effectively executed a transitional justice mandate, when considered in light of the mainstream approach to transitional justice that emphasizes legitimacy, sovereignty, political needs and complementarity it is clear that the IHC was the best 'fit' for transitional justice in Iraq.

Iraqis and the international community have much to gain from an IHC process that is revised to be just, fair, transparent, and expeditious. Meeting the needs of Iraqis and the greater world will be difficult, but would be possible through concentrated efforts on the part of Tribunal authorities willing to push for de-Ba'athification and constructive engagement with an international community willing to compromise on the issue of capital punishment and lend its expertise to outreach and judicial training efforts of the Tribunal.