Enforcing International Criminal Law in the Iraqi Special Tribunal: An Analysis of the Scope, Jurisdiction and Legitimacy of the Proposed Legal Framework

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1. Introduction

In recent years, we have seen a number of *judicial proceedings* trying to bring to justice political leaders accused of masterminding or perpetrating grievous crimes ranging from genocide, to crime against humanity, to war crimes. This resulted in a systematic development and codification in *International Jurisprudence*. From the International Criminal Court[1], to the U.N. Security Council backed war crimes tribunals, and to hybrid tribunals[2], we have seen both

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[1] On July 17, 1998, 120 countries meeting at a United Nations Diplomatic Conference in Rome adopted a treaty for the establishment of an International Criminal Court. Rome statute of the International Criminal Court, *adopted* July 17, 1998, at the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court; available: <http://www.un.org/icc>. The treaty was adopted by a vote of 120 in favor and 7 against, with 21 abstaining. See "U.N. Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court," U.N. Press Release L/ROM/22 (July 17, 1998); available: http://www.un.org/icc; accessed May 10, 2004.

[2] For a comprehensive overview and the statute of the International Criminal Tribunal for former Yugoslavia, *See* Richard May et al., *Essays on ICTY Procedure and Evidence in Honor of Gabrielle Kirk McDonald*, International Humanitarian Law, vol. 3, (Kluwer, 2000). *See also* "Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia Since 1991", *in Report of the Secretary-General pursuant to Paragraph 2 of the Security Council Resolution 808*, Annex, Art. 9(2), at 39, U.N. Doc. 5/25704 (1993). For the Rwanda Tribunal, *See* Statute of the International Criminal Tribunal for Rwanda, U.N. Security Council Res. 955, U.N. SCOR 49th Sess., 3453rd mtg., Annex, Art. 8(2), U.N. Doc. S/RES/955 (1994), reprinted in International Legal Materials 33 (1994): 1598, 1605. For the Sierra Leone Tribunal, *See* Nsongurua J. Udombana, *Globalization of Justice and the Special Court for Sierra Leone*, 17 Emory Int'l. Rev. 55(Spring, 2003). In this context, the special court for Sierra Leone is "mixed", or "hybrid", in the sense that the judges are from both Sierra Leone and elsewhere, and that the court will try violations of Sierra Leone law as well as international law. This is in sharp contrast to the new Iraqi Special Tribunal, established without U.N. participation and to be constituted of only Iraqi judges.

the variations and evolution of International Criminal Justice. Against this backdrop, the recently proposed Iraqi Special Tribunal (IST) has sparked huge interest for various reasons. First and foremost, the formation of this special tribunal is linked with the occupation of Iraq whose very legitimacy has been questioned by the international legal community[3]. Therefore, the proposed IST faces both credibility and independence issues, as the prospect of imparting "victor's justice"[4] looming large on evolving infrastructure of the tribunal. Secondly, as the statute for the IST is unveiled only recently while Iraq was still under occupation, questions of its legitimacy are being circulated among the international legal community and human rights groups. This therefore, sets the stage for us to examine the IST for its judicial scope and constraints, for its adherences to and departures from the customary International Law, and for its neutrality and independence or the lack thereof. Additionally, the IST has been a long-waited event that came as a harbinger of retribution and hope to scores of oppressed people. Therefore, we must examine whether the legal framework governing this Special Tribunal has structural imperfection owing to its perceived need for retribution and vengeance, or whether its guidelines are truly embedded in the spirit of customary International Law.

According to the US occupation authority, the surrogate author of The Iraqi Special Tribunal, this justice mechanism is intended to render justice for Iraq and to be carried out by the Iraqis. We will examine the validity of this argument, as there are questions galore as to the neutrality of this proposed justice system. Because, if these Iraqis are carefully handpicked by the Occupation Authority, how can neutrality prevail over vengeance or retribution? Can this "Iraqi justice" be reconcilable with the concept of "International justice" within the context of

[3] The invasion of Iraq by the U.S. Coalition forces has brought a fundamental challenge to International law, as it begs the question: can the U.S. and U.K *lawfully* attack Iraq, either with Security Council approval or, in the absence of such approval, on the basis of previous Council resolutions or under the principle of self-defense? In the aftermath of scandalous revelations of incorrect or faulty intelligence report, the legal argumentation in this context is clear, as international law cuts to the heart of the claimed legitimacy of this war. The overwhelming public opposition to a war against Iraq in almost every country in the world, except the U.S., highlights the need to derive legitimacy from somewhere other than the will of the people. For discussions on the illegality of the invasion of Iraq see R. Singh, A. Macdonald, Matrix Chambers, Public Interest Lawyers on behalf of Peace rights, "Opinion on the legality of the use of force against Iraq," para. 17, p. 8 (10 September, 2002); S*ee also* Letter from US Secretary of State Daniel Webster to Lord Ashburton, August 6, 1842, quoted in Moore, *A Digest of International Law,* Vol. II (1906), at 412, and A publication from the Center for Economic and Social Rights Emergency Campaign for Iraq, "Tearing Up The Rules: The Illegality of Invading Iraq"; available: <http://www.cesr.org/iraq>; accessed May 20, 2004.

[4] In Richard H. Minear, *Victor's Justice*: *The Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971), p.3. In September 1945, Tojo had made much the same point more emphatically, "I should like not to be judged by a conqueror's court," after which statement he shot himself, but survived". Arnold C. Brackman, The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials (New York: William Morrow, 1987, p.44.

International Law? Apart from Saddam Hussein and his associates, whom else might the Iraqi Special Tribunal eventually prosecute? Lastly, we will examine the asymmetric nature of this tribunal, as the tribunal has jurisdiction only over Iraqi nationals as this Tribunal cannot try any American or British soldiers or their commanders, even though instances of war crimes culpability is beginning to surface in Iraq.

Statute of the Iraqi Criminal Tribunal

The Iraqi Governing Council (IGC) on December 10, 2003 adopted the Statute of the Iraqi Special Tribunal (SIST)[5]. The statute acts as the legal foundation for the IST, and provides a guideline for the organization, jurisdiction and basic procedure of the proposed tribunal. According to the SIST, the tribunal will be independent of any Iraqi government bodies, and will have jurisdiction over specified crimes committed by any Iraqi nationals or residents between July 17, 1968 and May 1, 2003, coincidentally the period of the Baath Party Rule. The IST will consist of nine appellate judges, at least five of which are trial judges, and up to twenty investigative judges, which can include up to ten "reserve" investigative judges. The prosecution team will consist of up to twenty prosecutors all of whom will be appointed by the IGC. *The Appeals Chamber* will select the *President of the IST* from among its members, and a *Director* appointed by the IGC will head an *Administration Department.* In a stark contrast to the other war tribunals, the statute does not require the IGC to appoint non-Iraqis as judges, rather, stipulates that non-Iraqis be appointed to serve as "observers" or in "advisory capacities" to the *Trial and Appeals Chambers* in the proposed tribunal.

With the above background in mind, let us delve into an analysis of the tribunal's legal framework. We will present: (i) an analysis of the temporal jurisdiction and its inadequacies, (ii) an examination of the scope of the substantive crimes committed and their asymmetric nature in relation to the Statute, and (iii) a review of the three principles of independence, impartiality and competence of the judiciary. This will help us determine whether the proceedings of the Iraqi Tribunal can be viewed as a welcome sign in the firmament of International Law. Because, this single development in global jurisprudence can catapult the advancement of customary

[5] Statute of the Iraqi Special Tribunal, December 10, 2003. available: <http://www.cpa-iraq.org/human_rights/statute.htm>.

international law to loftier heights never attained before since the Nuremberg Trials, by erasing apparent imperfections so often labeled against other previous War crime Tribunals.

2. Temporal Jurisdiction: A Time Stretched Too Far?

> Article 1(b) of the statues of the Iraqi Special Tribunal states:
> "The Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11 to 14 as committed since July 17, 1968 and up until May 1, 2003, in the territory of the Republic of Iraq or elsewhere, including crimes committed in connection with Iraq's wars against the Islamic Republic of Iran and the State of Kuwait. This includes jurisdiction over crimes listed in Articles 12 and 13 committed against the people of Iraq (including its Arabs, Kurds, Turcomans, Assyrians and other ethnic groups, and its Shi'ites and Sunnis) whether or not committed in armed conflict"[6].

The exceptionally extended period considered here for the possible prosecution of some of the very serious criminal acts poses legitimacy problems and could present various legal challenges in future. Because, the time frame envisioned in the IST is significantly wider in stark contrast to the other criminal tribunals, namely the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) as a reference base. Interestingly, the temporal scope of both the ICTR and ICTY spans only over a year, whereas the crimes that could be brought under the jurisdiction of IST spans almost 35 years. Again, this falls just short to incorporate all the criminal atrocities perpetuated by the US and British forces as occupying powers[7]. Furthermore, by establishing a close-ended time frame between 17th July 1968 and 1st May 2003, the IST ensures Saddam Hussein can be charged for alleged criminal atrocities for the entire period of his power in Iraq. However, this temporal jurisdiction blatantly fails to incorporate possible charges for soldiers belonging to the US and the other Coalition member states, in spite of established proof of systemic and illegal criminal activities by the said

[6] *See id.* at 5.
[7] Reports of systematic violation of human rights through actions, such as, inhuman torture during interrogations, using deadly and overwhelming force on unarmed civilians, all by the U.S. coalition forces have been well documented in various reports. *See* Amnesty *International, Iraq: Responsibilities of the Occupying Powers*, AI Index: MDE14/ 089/2003 (April 2003). *See also*, "U.S. Coalition Forces above the Law, According to the CPA", in a news report provided by Dahr Jamail, an independent American journalist reporting for Iraq; available: http://www.informationclearinghouse.info/articles5475.htm; accessed July 20, 2004.

troops[8]. In this context, the approach taken by the IST differs significantly from those of the ICTY and ICTR. Because, our examination of both the ICTY Statue and the ICTR Statute reveals that the special tribunal allows for a much-broadened time frame during which charges can be brought against an offending party[9].

Secondly, IST Statute opens the door to prosecute Saddam and his fellow Baath Party Officials and members of his government for waging war against both Iran and Kuwait. In this context, the intent of the Article 14(c) of the IST statute must be carefully analyzed. It says,

> "The abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended"[10].

Delving into the archives of history, we will find that the Iraq-Iran War took place between 1980 and 1988[11]. This was followed by Iraq's invasion into Kuwait between 1990 and 1991[12]. If the seeds for the Iraq-Iran War were sewn by Saddam's personal ambition to be the leader of the Arab world, surely, it was nurtured and allowed to grow unabated by the blanketed assistance given to Saddam's regime by the Western powers. As it has been factually established that, the US and its Western Allies were increasingly apprehensive about Tehran's growing statue as Shi'ite fundamentalist regime after the Western-friendly Shah's fall from power[13]. Saddam Hussein's personal ambitions and Iraq's evolving military prowess was a perfect fit to thwart the expanding fundamental religious movements emanating from Iran. So, the United States, Great Britain, and other countries supported Iraq with money, weapons, and diplomatic support and

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[8] Treatment of Abu Ghraib Prisoners in Iraq, Article 15-6 Investigation of the 800th Military Police Brigade; available: http://news.findlaw.com/cnn/docs/iraq/tagubarpt.html>; accessed July 5, 2004.

[9] The Article 8 of the ICTY calls for a temporal jurisdiction for the tribunal extending to a period beginning on 1 January 1991; available: <http://www.un.org/icty/basic/statute/stattue.htm#8>. The Article 7 of the ICTR stipulates the temporal jurisdiction for the tribunal to be between 1 January 1994 and 31 December 1994; available http://www.ictr.org/english/basicdocs/statute.html. *See also* Symon, L., "The Inherent Powers of the ICTY and ICTR", International Criminal Law Review, 1 November 2003, vol. 3, no.4, pp. 369-404(36).

10 *See id*. at 5.

11 *See generally*, Khadduri Majid, "*The Gulf War: The Origins and Implications of the Iraq-Iran Conflict*"(American Philogical Publication, 1988).

[12] *See* Khadduri, Majid and Ghareb, Edmund, "*War in the Gulf, 1990-1991: The Iraq-Kuwait Conflict and Its Implications*", Paper, 0195149793, Oxford University Press, 2001.

[13] *See also* Dekker, Ige and Post, H.G., "*The Gulf War of 1980-1988: The Iran-Iraq War in International Legal Perspective*". (Brill Academic Publication 1992). *See also* generally, Maul, Hanns, W. and Pick, Otto, "*The Gulf War: Regional and International Dimensions*". (Palgrave Macmilian 1990). *See also* Tarock, Adam, "*The Superpower's Involvement in the Iran-Iraq War*". (Nova Science Publisher 1998). *See also* "*Saddam: Made in the USA, How the Reagan/Bush administrations backed Saddam*". Available: <http://www.bnfp.org/neighborhood/mjoore.htm>; accessed July 15, 2004.

according to some reports, even with covert spy operations in its territories. Therefore, the pertinent question comes to the mind is, when Saddam and his associates are charged in crimes committed in relation to the War with Iran, can the defense call the relevant Western officials to testify and corroborate their role in these crimes?[14]

The historical context of the Iraq-Iran War easily establishes the evolutionary nexus between the Iraq-Iran War and the post-war military atrocities mentioned in the IST statute. Saddam could use all these in his legal defense in response to charges of Genocide, Crimes Against Humanity and War Crimes. Article 11 and 12 of the IST statues allow the tribunal to bring charges on Genocide and Crimes against Humanity respectively, in relations to the persecution of certain sections of Iraqi population. Documented evidence suggests that the weapons that were used in waging war against Iran, were the very same weapons used against the Kurdish population in Halabja[15], and again made available only because of the Western money pumped in to strengthen the Baathist regime to fight Iran. Therefore, by helping this so called atrocious regime sustain, the Western money also helped unleashing atrocities against sections of Iraqi population[16]. And, if the tacit approval of the Western powers were available to

[14] *See* 60 Minutes interview, Jacques Verges, the French Lawyer expressed opinion that members of the Bush administration in particular current Secretary of the U.S. Department of Defense Donald Rumsfeld would be called on to testify and held accountable for giving aid and support to Saddam during the height of Saddam's atrocities. "This mass destructive weapons were sold to Iraqi government by the United States. And Mr. Rumsfeld has been one of the man responsible for this sale, for this bargain, for this market," says Verges, who calls Rumsfeld a "traveling salesman" for toxins and poisons. *See* "The Devil's Advocate," *60 Minutes* transcript of Jacques Vergès interview, April 25, 2004. *Also see* Khalil Mazraawi, "French lawyer says he will defend Saddam Hussein," *USA Today*, AFP, March 27, 2004.

[15] *See generally Middle East Watch, Genocide in Iraq: The Anfal Campaign against the Kurds*. (New York 1993).

[16] According to newly declassified documents mentioned in an article by Michael Dobbs in The Washington Post, a newly declassified document Iraq was already using chemical weapons on an "almost daily basis" when Donald Rumsfeld met with Saddam Hussein in 1983, consolidating the U.S.-Iraq military alliance. *See* "U.S. Had Key Role in Iraq Buildup Trade in Chemical Arms Allowed Despite Their Use on Iranians, Kurds" by Michael Dobbs in Washington Post, Monday, December 30, 2002; Page A01. It has been argued that, the Pentagon supplied logistical and military support; U.S. banks provided billions of dollars in credits; and the C.I.A., using a Chilean conduit, increased Saddam's supply of cluster bombs. U.S. companies also supplied steel tubes and chemical substances, the types of material, which the Security Council was searching for prior to the invasion. According to a report from U.S. representative Dennis Kucinich (Democrat, Ohio), U.S. companies, as late as 1989 and 1990, under permits from the first Bush administration, sent mustard gas materials, live cultures for bacteriological research, to Iraq. U.S. companies helped Iraq build a chemical weapons factory, and then shipped Hussein a West Nile virus, hydrogen cyanide precursors, and parts for a new nuclear plant. Available: <http://www.randycrow.com/articles/022303.htm>, accessed on July 5, 2004. The infamous massacre at Halabja -- the gassing of the Kurds -- took place in March 1988. On September 19, sixth months later, U.S. companies sent eleven strains of germs, four types of anthrax to Iraq, including a microbe strain, called 11966, developed for germ warfare at Fort Detrick in the '50s. (Judith Miller provides a partial account of the sordid traffic in U.S. chemicals and germs in her book, *"Germs: Biological Weapons and America's Secret War"*. It has been found that Dow Chemical (infamous for its napalm in the Vietnam War) sold large amounts of pesticides, toxins that cause death by

Iraq in its fight against Iran, the same holds true for the case of Iraq suppressing its minorities. Therefore, to make the playing field level, how can we *not* bring the accomplices of crime to justice, when we are leaving no stone unturned to bring the perpetrators of these crimes to justice?

Article 14 (c) of the IST statute allows for the prosecution of crimes committed in relations to the War with Kuwait, which took place within 3-years following the end of Iraq-Iran War. At this time we will not indulge into an analysis of the culpability of Saddam and his associates for war against Kuwait, as the IST has been designed to do just that. But, we can argue that the invasion of Kuwait is connected to the Iraq-Iran War in the following manner. The 8-year War with Iran depleted Iraq's financial resources to the extent that oil revenues were not enough to service debts to outside countries. Among the countries purportedly claiming to have extended credit to Iraq during the war was Kuwait. Even though Iraq claimed that the money given by Kuwait during the Iraq-Iran War was a grant, and therefore, no repayment is required. On the contrary, Kuwait staked claim for repayment, an act which set a whole set of actions in motion culminating in the Iraqi invasion of Kuwait[17]. But, whether we accept the Iraqi version of a grant or the Kuwaiti version of a loan, it can now be established that Kuwait actively assisted Iraq in continuing the Iraq-Iran War. Therefore, the issues before us, are as follows: If the US and its like-minded allies, including Kuwait, has helped Iraq in perpetuating the 8-year War with Iran, why weren't the charges brought against Saddam and his associates in an International Tribunal after the conclusion of the War? Also, if the charges of criminal atrocities are being brought against the then Iraqi rulers for actions related to Iraq-Kuwait conflict, we must ask why the culpability of Kuwait in abetting the crime during Iraq-Iran War is not being addressed?

The third issue we want to address is the scope of both Article 12's Crime against Humanity and Article 13's War Crimes provisions for an extended period between 1968 and 2003. We will argue that alleged criminal conducts as far back as 1968 defined under the guidelines developed for both the Crimes against Humanity and War Crimes Sections of the Iraqi Tribunal Statute is in conflict with the legal principle of "ex post facto" charge. In other words,

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asphyxiation. Twenty-four U.S. firms exported arms and materials to Baghdad. France also sent Hussein 200 AMX medium tanks, Mirage bombers, and Gazelle helicopter gunship. As Assistant Secretary of Defense Richard Armitage testified in 1987, "We cannot stand to see Iraq defeated." Available: <http:www.inmotionmagazine.com/time.html>; accessed on July6, 2004. *Also see* Middle East Watch, Genocide in Iraq: The Anfal Campaign against the Kurds (New York 1993).

the defendants will be indicted for something that was not a crime until after they had committed it[18]. Additionally, according to paragraph (a) of Article 12[19], to allow prosecution for Crime against Humanity to go forward, evidence must indicate the existence of "widespread or systematic attack". History of criminal tribunals suggest, it was not until the formation of the ICTY, ICTR, and SCSL during the early 1990s to mid-1990s, the legal rules defining criminal conduct under Crimes against Humanity became embedded in to the realm of International Criminal Law. This therefore, throws into a murky and uncharted territory of legal black hole, any attempt by any tribunal to bring serious charges of Crimes against Humanity for acts purported in the 60s and 70s, at a time when the rules of customary law was still in its infancy at best.[20]

3. Scope over Substantive Offenses: Will Coalition Offenses Go Unpunished?

A look at Article 1(b)[21] will underscore the deficiency of the statues in establishing a level playing field for all concerned, because with respect to the personal jurisdiction, the statue simply mentions "Iraqi National or any resident of Iraq". To be fair and impartial, the phrase "resident of Iraq" needs more clarification, as it does not stipulate whether the US forces and the US prison guards can be prosecuted for crimes during the occupation. This is in stark contrast to the provisions of other contemporary International Tribunals. For example, the statue of the Special Court of Sierra Leon (SCSL) allows the prosecution of peacekeeping forces as incorporated in its Article 1(2) and (3)[22].

In the previous Section, we discussed the possible legal repercussions arising out of apparent inadequacies in the formulation of temporal jurisdiction attempted in Article 1(b) by spanning the time frame some three decades before 1994. In this section, we would like to

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[17] Adams, Patricia, "*Iraq's debts: The Odious Debt Doctrine and Iraq after Saddam*", Probe International (2004).

[18] Under written constitutions the *ex post facto* rule condemns statutes, which define as criminal, acts committed before the law was passed. For example, according to Article 1, Section 10 of the U.S. Constitution, the states are forbidden to pass any *ex post facto* law. Some critics however, have argued that the *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field. However, history must not be allowed to repeat itself by bringing forth the ghost of Nuremberg. See J. Stone, *Social Dimensions of Law and Justice* (1966), p. 205.

[19] *Id.*

[20] See generally Boas Gideon and Schabbas Williams A., *International Criminal Law Developments in the Case Law of the ICTY*, International Humanitarian Law Series, 6, (Martinus Nijhoff Publishers 2004).

[21] *See id*. at 5

explore whether (i) domestic offenses have been categorized under violations of International Humanitarian Law, and (ii) whether a fully developed definition of International Criminal Law has been applied. Article 14 states[23],

> "The Tribunal shall have the power to prosecute persons who have committed the following crimes under Iraqi law:
> a) For those outside the judiciary, the attempt to manipulate the judiciary or involvement in the functions of the judiciary, in violation, *inter alia*, of the Iraqi interim constitution of 1970, as amended;
> b) The wastage of national resources and the squandering of public assets and funds, pursuant to, *inter alia*, Article 2(g) of Law Number 7 of 1958, as amended; and
> c) The abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended".

We will argue that some of the offenses mentioned here, such as "wasted of national resources and squandering of public assets and funds" fall squarely within the category of domestic corrupt practice, a violation in vogue in majority of the countries in Asia and Africa[24]. Therefore, inclusion of such offenses will make it extremely difficult, if not impossible, for a defendant to ever be exonerated. Because, embedded within the guidelines of the Tribunal Statute is ample provision to convict Saddam's associates who cannot be convicted on more serious charges. Consequently, this will create a scenario where the wheels of justice will never stop and the legitimacy of the tribunal will be seriously undermined.

Article 14 (c) stipulates the crime of aggression be dealt with from Iraqi domestic perspective. Even though dealing with Iraqi Law introduces a measure of realism, we cannot but argue the fact that the stipulation of Iraqi Laws clearly serves US interest[25]. If "the pursuit of policies that may lead to the threat of war or the use of armed forces of Iraq against an Arab country", is to be followed in developing criminal indictment against Saddam and his associates, the same must be applied against the US Coalition forces for its illegal invasion of Iraq[26]. In this context, we designate the invasion as illegal because the U.N. resolution 144 falls short of

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[22] *Id.*
[23] *Id.*
[24] *See* Vaknin, S. "*Corruption and Transparency*", United Press International (2002).
[25] *See id.* at 5.
[26] *See id*. at 3.

authorizing military force against Iraq[27]. Therefore, we conclude that the Article 12 (c) restricts the prosecution for the Crime of Aggression to Iraqi domestic laws only, thereby undermining the neutrality of the tribunal statute in this aspect.

4. Will Justice Be Impartial, Independent and Competent?

[27] The U.N. Security Council, in its unanimous adoption of resolution 1441, declares in Article 14 that it "decides to remain seized of the matter," which is the diplomatic language for asserting that the Security Council alone has the authority to determine what, if any, action to take regarding Iraqi violations of their resolutions. Additionally, the U.N. Charter declares unequivocally in Articles 41 and 42 that the U.N. Security Council alone has the power to authorize the use of military force against any nation in noncompliance of its resolutions. It was the insistence by France, Russia and other nations that any alleged Iraqi violations be put before the Security Council to determine the appropriate response that delayed for seven weeks the adaptation of the U.S.-sponsored resolution. However, it was the United States who insisted upon the right of any member state to unilaterally attack Iraq if any single government determined that Saddam Hussein's regime was violating the strict new guidelines. The U.N. Security Council categorically rejected the U.S. demand to grant its members such unprecedented authority to wage war. Instead, the resolution adopted insists that any alleged violations be brought forward by the inspection teams consisting of experts in the field, not by any member state. At such a time, according to the resolution, the Security Council would "convene immediately in order to consider the situation and the need for full compliance." Therefore, there is no legal authority within the context of resolution 1441 to conclude that the U.N. authorized use of force against Iraq.

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

[29] *See* Guidelines on the Role of Prosecutors. *Adopted* by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana; Cuba, 27 August to 7 September 1990; available: <http://www.unhchr.ch/html/menu3/b/h-comp45.htm>; accessed July 5, 2004.

[30] *See id*. at 5

[31] *See id*.

[32] *See id*. at 2.

[33] *See id.*

[34] The terms “international law”, “international humanitarian law”, ‘law of armed conflict”,“ jus in bello and “laws of war” are interchangeable. While there is sometimes disagreement on the relative scope of the terms, they all point to the body of law that governs the *jus in bello* conduct of hostilities and the protection of victims within the meaning of the framework under the Hague and Geneva streams of law.

[35] The Iraqi Governing Council has been short-listing Iraqi judges based on their integrity and having membership in the Baath Party. However, recent reports cast serious doubt on the process. The records of only half of the Iraqi judges have been examined as of the end of 2003, and only 1 in 5 has been disqualified, even though evidence points that nearly all were significantly tainted or biased. *See also Bringing the Old Regime to Trial*, 369. The Economist, December 13, 2003, at 41. *See* Radio Netherlands, *Saddam Trial Will Take Time*, December 16, 2003. Also see Slaughter, Ann-Marie, “Role for U.N. in War Crimes Trials”, a commentary published on May 21, 2003 in The Washington Times.

[36] There have been widespread speculation of U.S. influence in the development and eventual functioning of the Iraqi Tribunal. A particular report indicated that the statute for the Iraqi Special Tribunal that was adopted by the U.S. appointed Governing Council in December, 2003 is nearly identical to the draft provided by the U.S. few months earlier. *See* Associated Press, *Iraq to Create War Crime Tribunal in Coming Days.*

As the preparations for the development of the Iraqi Special Tribunal is underway in Iraq, widespread speculations are rampant as to how impartial and effective this justice mechanism is going to be. It is an historic fact, that the Iraqi Special Tribunal is developed by the US with the help of US appointed Iraqis, majority of whom were far removed from listening into the pulse of the country for a pretty long time. Without the supervision of a World Body, such as the United Nations, the statute of the IST was formulated to ensure the interest of both the US and its Iraqi allies. Therefore, this is the context within which we must examine the effectiveness of this tribunal. Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR)[28] requires that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by Law". In this regard, the U.N. Guidelines on the Role of Prosecutors require that "Prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications …carry out their functions impartially."[29] We recognize that impartiality, independence and competence are central issues in legitimizing the IST to be an effective justice mechanism for the Iraqis within the context of International jurisprudence. In this context, both the judges and prosecutors must be perceived as independent, especially from any branches of government, special interest groups, or the occupying power. Our summation is backed by the following observations.

Firstly, the requirement of independence has to be applied uniformly during the selection of the judges and prosecutors. However, according to the statue of the IST, the independence requirement is stipulated only for the Investigative Judges and Prosecutors, but not so for the Trial and Appeals Chamber Judges. The Investigative Judges and Prosecutors are instructed to act independently and are prohibited from seeking or receiving instructions from any official or other sources, as contained in Articles 7 and 8, both reasonably elaborate on sections of the statute.[30] In a stark contrast, Article 4 governing the Trial and Appeals Chamber Judges do not stipulate any such independence provision.[31] This therefore causes concern as to the intention and effectiveness of the tribunal, especially, where there is a well-developed body of International Law, codified within the Statute of the ICTY, SCSL, and ICTR.[32]

Secondly, competence of judges and prosecutors stands as the fundamental element for trial to be compliant with International Fair Trial standards. When the US oversaw the formulation of a tribunal to be run by an all-Iraqi court without any U.N. involvement, this became an issue of daunting proportions. Even if we set aside the issue of partiality and personal

bias driven by vengeance, we cannot ignore the issue of qualification and expertise required to conduct the complex proceedings. Several reasons can be cited. Criminal trials in Iraq has traditionally been brief proceedings, lasting no more than few days is the longest of cases; with majority lasting only few hours.[33] The Iraqi jurisprudence suffered from decades of Baathist influence during which period they were insulated from the development of International Criminal and Humanitarian Law worldwide.[34] It is not plausible to assume that any of the Iraqi judges have ever participated in trials of such complexity that emerge while prosecuting Heads of States for acts of Genocide, War Crimes, or Crimes against Humanity, as had been the cases in ICTY, ICTR, SCSL. Several studies have been put forth since the announcement of IST that equivocally contends that the Iraqi Justice system, under no circumstances, is equipped to handle the complexity envisioned in the upcoming trials.[35]

Lastly, setting aside the issues of competence and experience, the perception of being partial or beholden to the US occupying powers, is a stigma that will continue to undermine the proposed tribunal. This is bolstered by the facts that the judges are to be handpicked by the Council, and the US will be providing the funding for the Tribunal, at an estimated cost of $75 million dollars.[36]

5. Discussion

The unfolding of the Iraqi Special Tribunal comes upon us at a time when the fractured conscience of the World Humanity is anxiously waiting on the wings to see if true justice will prevail. Because, never before since Nuremberg, did the global jurisprudence face a crisis of confidence in International Law, amidst solidification of concepts such as, pre-emptive self defense, war on terrorism anywhere any time, within the context of an unbalanced New *Global Order* consisting of an only sole superpower. Therefore, like Nuremberg, the Iraqi Special Tribunal has all the ingredients to be the most significant yet profoundly debatable. It is significant because in it resides the opportunity to address the incompetence and incompleteness of the ICTYs. Yet it is debatable as it is laden with the danger of being perceived as retributive or driven by vengeance.

Before, engaging in any criticism of the structural inadequacies of the proposed tribunal, we assert that the ensuing comments should not be construed as suggestions to set the tribunal defendants free. However, the punitive measures must be established upon a sound theory of

International Law that become the guiding principle in the field consonant with a universally accepted idea of justice, keeping in harmony with the cultural norms and social orders of sovereign Nations.

In connection with the War Crimes or Crimes against Humanity charges, the Iraqi Special Tribunal must pass the litmus test of legitimacy only by being able to substantiate those charges upon sound principles of customary International Law. This will entail addressing the questions: did the defendants know at the time of committing the offenses that their actions are defined within the established guidelines codified under law, a law that was in prevalence before, not just developed *ex post facto*? And if the answer is yes, the proceedings of the tribunal must answer this as well: under what theory may that action be constituted a violation and was there enough body of case laws to supplant that theory?

The analysis of the statutes of the tribunal suggests, some of the most serious of charges, such as, crime against humanity, war crimes, or genocide reject the notion of *ex post facto* principle. This will not only regress the codification of customary International Law, but also miss the opportunity on fulfilling the unfinished business of Nuremberg. Additionally, the proposed tribunal falls severely short of establishing fairness and equality in terms of personal jurisdiction for Crimes against Humanity and War Crimes. Because if the rules are laid out to prosecute Saddam and his accomplices for those crimes, why it is designed to insulate U.S. and coalition forces from coming under its purview?

As a divided World reminisces the ghastly sights and sounds of civilian cars being smashed against guard embankments by U.S. *humvees*, military age men from Iraqi villages being abducted to secret detention, only to be found dead or maimed, and, civilian infrastructure far removed from military hostilities being decimated by bombs and missiles, the hopes and aspirations for justice to prevail on all fronts only gets accentuated. Because some of these atrocities are criminal acts defined with languages as clear as, “extermination of life,” “attack directed against civilian population,” and “enforced disappearance of persons,” within the guidelines under Article 12 of the Statute of the Iraqi Special Tribunal. The paragraph (b) of the Article 13 of the same Statute sets the guideline within the sections on War Crimes as follows:

> “Intentionally launching an attack in the knowledge such attack will cause incidental loss of life or injury to civilians or damage to civilian objects which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”

Unfortunately, the very domestic theme of the law and its carefully crafted timeframe precludes U.S. coalition forces from being tried for those crimes in the tribunal. These apparent inadequacies make the articles 12, 13, 14 of the Statutes of the Iraqi Special Tribunal seem founded on one-sided considerations and delimited by carefully selected personal jurisdiction.

This begs the pertinent question: is the cornerstone of justice being compromised on the quicksand of self-interest? Perhaps, this is the reincarnation of "victor's justice" of Nuremberg. Perhaps, this is the very legacy with which the Iraqi Special Tribunal will be remembered. Or, perhaps, the interplay of U.S politics and imperialistic intentions will cease to influence the tribunal's proceedings, thereby restoring confidence in International Law.

At this moment, the World is most interested to uncover the testimony of Baathist regimes' criminal atrocities, yet silently aspires to see the dignity and efficiency of the legal process to unfold. But if the way the war was imposed on sovereign Iraq, the way this statute was crafted to insulate U.S. coalition atrocities, and the way International standards of impartiality, independence and competence was trampled in the selection of tribunal judges bore the promises of unknown tomorrow, the outcome of the trial is a foregone conclusion, only to be remembered as a regressive legal event in the development of International Criminal Law.

6. Conclusion

We have argued in this paper, that the Iraqi Special Tribunal lacks some of the essential elements to ensure legitimate and credible trials for the intended crimes, such as, Genocide, War Crimes and Crimes against Humanity, on all sides of the fence. This conclusion was drawn by analyzing some of the statutes of the proposed tribunals within the context of customary International Law. For this, a comparison is also made with the recent developments in International Criminal law with respect to the reformulation and guiding principles enshrined with the past war crime tribunals. Additionally, we revealed that, the relationship between US interests and Iraqi jurisprudence to be the primary force behind developing the one-sided guidelines to govern the working principles of The Iraqi Special Tribunal.

Finally, the Iraqi Special Tribunal is far from being concluded. It is in this nascent stage of its formation of legal proceedings lies the best hope for International Law. It is therefore, high time that the legal scholars, jurists, and activists should come forward and ensure that justice is

not commingled with self-interest, ingenuity and imperialistic objectives. Because, in the words of the prominent 16th century jurist Lord Digby the 2nd, “we must not piece up want of legality with matter of convenience, nor the defailance of prudential fitness with a pretense of Legal Justice”.