

## The Statute of the Iraqi Special Tribunal for Crimes Against Humanity- Progressive or Regressive?

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### A. Introduction

The global effort to establish an effective system of international justice is at an important phase in its history.<sup>1</sup> After close to 50 years of relative stagnation following the Nuremberg trials at the end of World War II, the field of international criminal law has been revitalised.<sup>2</sup> The establishment of the International Criminal Court,<sup>3</sup> the *ad hoc* tribunals for the former Yugoslavia and for Rwanda,<sup>4</sup> “hybrid” or “inter-

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<sup>1</sup> M.M. DeGuzman, *The Road from Rome: The Developing Law of Crimes against Humanity*, 22.2 HUMAN RIGHTS QUARTERLY 335-403 (2000) at <http://www.soc.umn.edu/~boyle/22.2deguzman.html> (last visited May 2003) (at the dawn of the new millennium, the international community is proclaiming a renewed and invigorated commitment to international criminal justice).

<sup>2</sup> B.B. Ferencz, *Getting Aggressive about Preventing Aggression*, THE BROWN JOURNAL OF WORLD AFFAIRS (1999) at <http://www.iccnw.org/html/ferencz199907.html> (last visited June 2003) (The subject of international criminal jurisdiction had been languishing on the U.N. agenda for almost fifty years while armed violence and human rights outrages continued to disgrace the human landscape. The availability of instantaneous reports of atrocities anywhere in the world sparked renewed demands by human rights activists for action to curb the publicized depravities. Small nations were apprehensive about tribunals created a la carte by the privileged States sitting on the Security Council. The General Assembly called for new committees to expedite the movement toward the creation of a permanent International Criminal Court. Prodded by the Assembly, the International Law Commission (ILC) finally concluded its 60 article draft Statute for an International Criminal Court in 1994).

<sup>3</sup> Rome Statute of the International Criminal Court, *opened for signature* 17 July 1998, U.N. Diplomatic Conf. of Plenipotentiaries on the Establishment of an Int'l Crim. Ct., U.N. Doc. A/CONF.183/9 (1998) *reprinted in* 37 I.L.M. 999 (1998).

<sup>4</sup> For a comprehensive overview of the legislative history and Statute of the Yugoslav Tribunal, see J.C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639 (1993); *see also* SC Res. 827 (May 25, 1993) *reprinted in* 32 I.L.M. 1203 (1993); For Rwanda *see* SC Res. 955 (Nov. 8, 1994) *reprinted in* 33 I.L.M. 1602 (1994).

nationalised" processes such as the Special Court in Sierra Leone,<sup>5</sup> and national criminal justice systems exercising universal jurisdiction,<sup>6</sup> have all lent substance and credibility to the assertion that the most grievous human rights crimes<sup>7</sup> are subject to international scrutiny and legal action.<sup>8</sup>

It is therefore within this context that the Statute of the Iraqi Special Tribunal for Crimes Against Humanity (ISTCH Statute)<sup>9</sup> needs to be evaluated. This is because the ISTCH Statute, unlike previous international criminal law statutes, was adopted unilaterally as part of the obligations of an occupying power,<sup>10</sup> who seemingly violated international law.<sup>11</sup> In contrast, previous international criminal law statutes were adopted multilaterally and in accordance with internationally accepted forms of intervention.<sup>12</sup>

This Article intends to examine the impact of the ISTCH Statute on the norms and credibility of contemporary international criminal law. In other words, despite its legislative history, can the ISTCH Statute nevertheless constitute a step forward for international criminal law, à la Nuremberg? Or is it essentially a step backward?

These questions will be tackled by examining the following aspects of the ISTCH Statute: the organizational structure of the ISTCH, the legislative history of the ISTCH Statute, its territorial, personal, temporal and subject matter jurisdiction, and the penalties it recognizes. The methodology of this article will involve an analytical and comparative assessment of the aforementioned provisions with equiva-

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<sup>5</sup> S.C. Res. 1315 (2000), 14 August 2000.

<sup>6</sup> *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet; Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (On Appeal from a Divisional Court of the Queen's Bench Division) on 24 March 1999.

<sup>7</sup> Harvard Research on International Law (Supp. 1935), *Draft Convention on Jurisdiction with Respect to Crime* 29 AM. J. INT'L L., 445.

<sup>8</sup> K.C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988); M.C. BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 526 (Dordrecht 1992); RATNER & ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW* 143 (Oxford 1997); Restatement Third of the Foreign Relations Law of the United States, 1987, § 404, Reporters' Note 1, 257.

<sup>9</sup> Statute of the Iraqi Special Tribunal for Crimes against Humanity (ISTCH Statute), 10 December 2003.

<sup>10</sup> Amnesty International, *Iraq: Responsibilities of the Occupying Powers*, AI Index: MDE14/089/2003 (April 2003).

<sup>11</sup> For relevant literature see e.g. M.E. O'Connell, *The Myth of Pre-emptive Self Defence*, AM. SOCIETY OF INT'L L., TASK FORCE ON TERRORISM (2002).

<sup>12</sup> *Supra* note 3; *supra* note 4; *supra* note 5.

lent provisions under the statutes of other international criminal law enforcement agencies. The justification for this approach is that it serves as a credible method for objectively assessing the impact of the ISTCH Statute on contemporary international criminal law. After doing so, the conclusion is that the ISTCH Statute is counterproductive to contemporary international criminal law.

### **B. The Statute of the Iraqi Special Tribunal for Crimes Against Humanity (ISTCH Statute)**

This section is composed of five sub-sections. They are: (1) the legislative history of the ISTCH Statute, (2) its organizational structure, (3) an analysis of the territorial, personal and temporal jurisdiction of the ISTCH Statute, (4) a focus on its subject matter jurisdiction, and (5) an examination of the penalties recognized by the ISTCH Statute.

#### *I. Legislative History of the ISTCH Statute*

In order to adequately assess the provisions of the ISTCH Statute, it is first necessary to examine the major events that led to its formulation and adoption. These events are; (1) the Iraq-Iran war, which lasted from 1980 to 1988,<sup>13</sup> (2) the persecution of sections of the Iraqi population by Saddam Hussein,<sup>14</sup> (3) the Iraq-Kuwait conflict, which occurred during the period between 1990 and 1991,<sup>15</sup> and (4) the terrorist attacks against the United States on September 11, 2001.<sup>16</sup> In addition, whilst events (1) to (3) are inter-related, event (4) is purely a cataclysmic factor in the sequence of events provoking the adoption of the ISTCH Statute.

Furthermore, the above classification can be explained in the following ways. First, the Iraq-Iran war, was a product of a combination of factors such as religion, border disputes, and personal ambition. This point of view is evident in the following joint statement made by *Bucknam* and *Esquivel*:

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<sup>13</sup> Article 14(c) of the ISTCH Statute; *see generally* HIRO DILIP, *THE LONGEST WAR: THE IRAN-IRAQ MILITARY CONFLICT* (New York 1991).

<sup>14</sup> Article 11 and Article 12 of the ISTCH Statute on Genocide and Crimes against Humanity respectively; *See generally* MIDDLE EAST WATCH, *GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS* (New York 1993).

<sup>15</sup> Article 14(c) of the ISTCH Statute; *see generally* ICG, *Iraq Background: What Lies Beneath*, Middle East Report No. 6 (2002).

<sup>16</sup> ISTCH Statute, *supra* note 14 (Presumably Iraq's culpability would fall under "the pursuit of policies that may lead to the threat of war").

The combination of Saddam's interests, along with the threats and opportunities facing Iraq yielded four political objectives- three of them positive objectives, and one negative objective. The positive objectives flowed coherently one from the other, and included: (1) countering the destabilizing influence emanating from the fundamentalist Shia regime in Tehran, (2) regaining the Shatt al-Arab waterway, and (3) establishing Saddam Hussein as leader of the Arab world.<sup>17</sup>

One aspect of this statement, which is of most relevance to what could be termed as the internationalisation of the Iraq-Iran war, is the reference to Saddam's aim of overcoming the "destabilizing influence emanating from the fundamentalist Shia regime in Tehran." This is because of the fact that this objective was what prompted the United States and like minded countries to actively support Saddam, by giving him weapons, money, and moral support in his war against Iran.<sup>18</sup> This played a significant role in the persecution of sections of the Iraqi population and the Iraq-Kuwait conflict.

Second, in relation to the persecutions of sections of the Iraqi population by Saddam, a nexus can be established between these atrocities and the Iraq-Iran war. This owes to the following factors. First, the Iraq-Iran war provided Saddam's regime with weapons from western allies, and these weapons facilitated the persecution of sections of the Iraq population.<sup>19</sup> Second, because Saddam and the west had effectively become allies owing to their mutual dislike of Iran, western countries were prepared to overlook Saddam's atrocities.<sup>20</sup>

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<sup>17</sup> M. Bucknam & F. Esquivel, *Saddam Hussein and the Iran-Iraq War*, Paper submitted to the National Defence University National War College, available at <http://www.ndu.edu/nwc/writing/AY01/5601/SeminarABestPaper5601.pdf> (last visited January 2004).

<sup>18</sup> D. Priest, *Rumsfeld Visited Baghdad in 1984 to Reassure Iraqis*, *Document Show*, WASHINGTON POST December 19, 2003 (Publicly, the United States maintained neutrality during the eight-year Iran-Iraq war, which began in 1980. Privately, however, the administrations of Reagan and George H.W. Bush sold military goods to Iraq, including poisonous chemicals and deadly biological agents, worked to stop the flow of weapons to Iran, and undertook discreet diplomatic initiatives, such as the two Rumsfeld trips to Baghdad, to improve relations with Hussein).

<sup>19</sup> K. Nezan, *When Our "Friend" Saddam Was Gassing the Kurds*, LE MONDE DIPLOMATIQUE (trans. Barry Smerin, January -February 1998); however see C. Greenwood, *Trying Saddam*, THE GUARDIAN (December 17, 2003) available at [www.guardian.co.uk/Iraq/Story/0%2C2763%2C1108631%2C00.html](http://www.guardian.co.uk/Iraq/Story/0%2C2763%2C1108631%2C00.html) (last visited June 2004) (Exonerating the U.S. and U.K. from criminal responsibility for Saddam's atrocities against his own people by writing: "The suggestion that America and Britain were responsible for the crimes of which Saddam stands accused is nonsense - it was not America that ran the torture chambers or Britain that gassed Halabja").

<sup>20</sup> K. Nezan, *supra* note 23.

Third, the Iraq-Kuwait conflict can similarly be connected to the Iraq-Iran war. This can be inferred from an amalgamation of the following statements. The first statement, which was made by *Elali*, provides evidence of Kuwait's monetary contributions to Iraq, so as to facilitate the latter's war against Iran. It reads:

In early 1989, the Export-Import Bank of the United States reported that Iraq was facing a severe debt crisis that oil revenues could not rectify. According to that report, in 1989 Iraq owed nearly US\$27 billion to Western creditors and another US\$50 billion to the Gulf states, including US\$10 billion to Kuwait...the Iraqi government continues to insist that the funds it received during the war with Iran (estimated between \$30 and \$50 billion) from the rich Arab states- mainly Kuwait, Saudi Arabia, and the United Arab Emirates- were grants, while these states classify them as debts.<sup>21</sup>

This statement is important for two reasons. First, it proves that Kuwait lent money to Saddam for his war against Iran. Second, it shows that there was dispute as to the status of that money, that is, whether it was a loan or a grant.

Second, a statement by the International Crisis Group links Iraq's ensuing financial problems after the Iraq-Iran war to the invasion of Kuwait. It reads:

The war with Iran marked a decisive turning point in the nature of the Iraqi regime...The war also led to the severe economic crisis that was a critical backdrop to the invasion of Kuwait and the ensuing Gulf war.<sup>22</sup>

The September 11, 2001 Al-Qa'ida attacks were the fourth event that contributed to the formulation of the ISTCH Statute. The 9/11 attacks can be described as the catalyst in this sequence of events. This characterisation is based on the fact that the attacks led to an overnight change in United States policy towards Iraq.<sup>23</sup>

Furthermore, to clarify, in the pre 9/11 environment, the United States viewed Iraq as more of a standard state-to-state threat than as a state sponsor of terrorism.<sup>24</sup> However, the perceived magnitude of the threat of catastrophic terrorist attacks in

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<sup>21</sup> W. Elali, *Dealing with Iraq's Foreign Indebtedness*, 42(1) THUNDERBIRD INT'L BUS. REV. 67 (2000).

<sup>22</sup> Iraq Background, *supra* note 15, at 6.

<sup>23</sup> C. Bury, *A Tortured Relationship U.S.-Iraq Relations*, ABC News, 28 December 2003 (reporting on changes in U.S. policy towards Iraq).

<sup>24</sup> P. PILLAR, *TERRORISM AND U.S. FOREIGN POLICY* 160 (2001).

the post 9/11 environment, together with the possibility of collusion between Iraq's government and terrorists, led policymakers to identify Iraq as an appropriate target in the War on Terror.<sup>25</sup>

In addition, in order to strengthen their case for "regime change" in Iraq after September 11, the U.S. government cited the Iran-Iraq war, Saddam's persecution of the Iraqi people, and the Iraq-Kuwait conflict.<sup>26</sup> It is this connection of 9/11 to the other three events that eventually culminated in the defeat and capture of Saddam and members of his regime, the occupation of Iraq, and the formulation of the ISTCH Statute by the United States.

Having summarized the legislative history of the ISTCH Statute, the following sections will examine other relevant aspects of the Statute in light of this history.

## II. Organizational Structure of the ISTCH

As stated above, the ISTCH Statute was adopted primarily as a result of the defeat and capture of Saddam and members of his regime by the United States. Victory over Saddam and his associates therefore raised the issue of which judicial venue should prosecute them. That is, should be tried by the International Criminal Court (ICC), an ad hoc international court, a hybrid court, a domestic court, the court of a third state, or a U.S. court.<sup>27</sup>

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<sup>25</sup> President George W. Bush, *Remarks by the President on Iraq in Cincinnati Ohio*, Oct. 7, 2002 available at <http://www.whitehouse.gov/news/releases/2002/10/20021007-8.html> (last visited May 2004) (We know that Iraq and al Qaeda have had high-level contacts that go back a decade. Some al Qaeda leaders who fled Afghanistan went to Iraq. These include one very senior al Qaeda leader who received medical treatment in Baghdad this year, and who has been associated with planning for chemical and biological attacks. We've learned that Iraq has trained al Qaeda members in bomb-making and poisons and deadly gases. And we know that after September the 11th, Saddam Hussein's regime gleefully celebrated the terrorist attacks on America); Iraq Liberation Act, Public Law 105-338, 1998; Authorization of the Use of Military Force Against Iraq, Public Law 107-243, 2002; however, see K.M. POLLACK, *THE THREATENING STORM: THE CASE FOR INVADING IRAQ* xxi-xxii (2002); see also Lord Alexander of Weedon Qc., *Iraq: The Pax Americana and the Law*, September 2003 available at <http://www.justice.org.uk/images/pdfs/iraqpaxam.pdf> (last visited January 2004). (criticizing the alleged link between Al-Qa'ida and Saddam by reference to the Report of the Intelligence and Security Committee, "Iraqi Weapons of Mass Destruction").

<sup>26</sup> S.E. Miller, *Iraqi Weapons of Mass Destruction*, Report of the Intelligence and Security Committee, September 2003; American Academy of Arts and Sciences, *Gambling on War: Force, Order and the Implications of Attacking Iraq*, in *WAR WITH IRAQ COSTS, CONSEQUENCES, AND ALTERNATIVES 2002* (listing the justifications for U.S. war against Iraq).

<sup>27</sup> D.F. Orentlicher, *Venues for Prosecuting Saddam Hussein: The Legal Framework*, available at <http://www.asil.org/insights/insigh124.htm> (last visited June 2004).

The difficulties of selecting an appropriate judicial structure, at least from the point of view of the U.S., can be pointed out by looking at the ICC. First of all, because the U.S. is a non-signatory to the Rome Statute of the ICC, it would be unlikely for the U.S. to support any use of the ICC against Saddam and members of his regime for policy reasons.<sup>28</sup> Additionally, policy reasons aside, allowing Saddam and members of his regime to be tried by the ICC could extend the reach of the ICC vis-à-vis the activities of U.S. soldiers in Iraq. This is because under the terms of the Rome Treaty, state parties are *inter alia* obligated to extradite indicted persons to the ICC.<sup>29</sup> Therefore, it follows that were Iraq to become a party to the Rome Treaty, this would also indirectly facilitate the ICC's jurisdiction over U.S. nationals who are alleged to have committed war crimes in Iraq.

Based on these considerations, it was logical for the U.S. to have opted for a domestic special tribunal set up by the Iraqi Governing Council, which is essentially a group of pro-Western Iraqi exiles and local representatives of the country's various ethnic communities, appointed by U.S. occupation authorities.<sup>30</sup> In addition, the regulations for the five-person tribunal were drafted largely by U.S. government lawyers who pointedly ruled out any direct role for the United Nations in the process.<sup>31</sup> Thus, Article 28 of the ISTCH Statute states that "[t]he judges, investigative judges, prosecutors and the Director of the Administration Department shall be Iraqi nationals."<sup>32</sup> This provision clearly suggests that the court will be primarily managed by Iraqis. However, Article 7 of the ISTCH Statute balances the above requirement by stipulating the following:

The Chief Tribunal Investigative Judge shall be required to appoint non-Iraqi nationals to act in advisory capacities or as observers to the Tribunal Investigative Judges. The role of the non-Iraqi nationals and observers shall be to provide assistance to the Tribunal Investigative Judges with respect to the investigations and prosecution of cases covered by the this Statute (whether in an international context or otherwise), and to monitor the protection by the Tribunal Investigative Judges of general due process of law standards. In appointing such advisors, the Chief Tribunal Investiga-

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<sup>28</sup> A. Dworkin, *Trying Saddam: The Options*, available at <http://www.crimesofwar.org/onnews/news-saddam.html> - 32k (last visited June 2004).

<sup>29</sup> See generally M.P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 L. & CONTEMP. PROBS. 67 (Winter 2001).

<sup>30</sup> S. Zunes, *Saddam's Arrest Raises Troubling Questions*, FOREIGN POLICY IN FOCUS (December, 2003)..

<sup>31</sup> *Id.*

<sup>32</sup> Article 28 ISTCH Statute.

tive Judge shall be entitled to request assistance from the international community, including the United Nations.<sup>33</sup>

This provision carves out a role, albeit a small one, for members of the international community, that is, they will act as observers and advisors to the ISTCH.<sup>34</sup>

Finally, one of the main criticisms of the domestic court approach vis-à-vis Iraq is that it could undermine the credibility of contemporary international criminal law since a war crimes trial of Saddam Hussein and other Iraqis by U.S. appointed Iraqi surrogates rather than by neutral parties would in effect constitute a form of victor's justice. This would therefore be counter productive to contemporary international criminal law. In this respect, it is important to bear in mind that standards of international criminal justice have changed significantly in the last sixty years. In other words, what seemed permissible after the Second World War, i.e. a military tribunal made up of representatives of the victorious powers, would be perceived differently today, particularly in view of the establishment of genuinely independent courts for the former Yugoslavia and Rwanda and the launch of a permanent independent International Criminal Court.<sup>35</sup>

### *III. Territorial, Personal and Temporal Jurisdiction of the ISTCH Statute*

#### *1. Territorial and Temporal Jurisdiction*

Both the territorial and temporal jurisdiction of the ISTCH Statute, are stipulated in Article 1(b) which states: [t]he Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes committed since 17 July 1968 and up until and including 1 May 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.<sup>36</sup>

The following pertinent comments can be made in relation to the above stipulation. First, in terms of the temporal scope of the ISTCH Statute, Article 1(b) provides for

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<sup>33</sup> Article 7(n) ISTCH Statute.

<sup>34</sup> A. Muktar, *Wrangle Over Saddam Tribunal Begins*, IRAQ TODAY, 22 December 2003 (In contrast to the special tribunal established in the former Yugoslavia and Rwanda, which were under UN auspices, the Iraqi tribunal would be "administered by Iraqi judiciary and no international experts would take part except as advisors).

<sup>35</sup> Dworkin, *supra* note 28.

<sup>36</sup> Article 1(b) ISTCH Statute.



a 35 years time frame, which extends from 1968 to 2003. Such a time frame, although seemingly wider than that of the ICTY which is only 1 year<sup>37</sup> or of the ICTR which is also 1 year,<sup>38</sup> is perhaps not wide enough.

Furthermore, although the criminalisation of atrocities committed between 17 July 1968 and 1 May 2003 will allow the tribunal to consider the full extent of atrocities committed by Saddam, that is, from the moment he secured a position on the Iraq Ba'ath Revolutionary Command Council (RCC) in 1969<sup>39</sup> to the moment his government was overthrown by the United States in 2003, this approach nevertheless suggests that post 1 May 2003 crimes, that is, those committed by U.S. troops, would not be punishable under the ISTCH Statute. Thus, atrocities committed by U.S. Coalition Forces in Abu Ghraib prison such as the incidents of "sadistic, blatant, and wanton criminal abuses . . . inflicted on several detainees . . . [which were] systemic and illegal,"<sup>40</sup> can only be partially prosecuted by ISTCH, since they were perpetrated between March-November 2003.<sup>41</sup>

This method is therefore in stark contrast to the approaches of other international criminal law enforcement agencies. For example, the ICTY allows for an open-ended temporal jurisdiction. This point of view is evidenced by Article 1 of the ICTY Statute which states: [t]he International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia *since 1991* in accordance with the provisions of the present Statute.<sup>42</sup> (emphasis added)

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<sup>37</sup> D. Shraga & R. Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, available at <http://www.ejil.org/journal/Vol5/No3/art4.html> (last visited January 2004).

<sup>38</sup> Article 1 of the ICTR Statute.

<sup>39</sup> Bucknam & Esquivel, *supra* note 17, at 3.

<sup>40</sup> Taguba Report, Part One, Findings of Fact, extracted from Sadat, N.L. (May 2004), *International Legal Issues Surrounding the Mistreatment of Iraqi Detainees by American Forces*, AM. SOCIETY OF INT'L L. INSIGHTS available at <http://www.asil.org/insights/insigh134.htm#author> (last visited June 2004).

<sup>41</sup> Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation, 1 (Feb. 2004), at <http://www.cbsnews.com/htdocs/pdf/redcrossabuse.pdf> [hereinafter ICRC Report] (last visited June 2004). The ICRC Report was based on allegations collected by the ICRC during its visits to places of internment of the Coalition Forces between March and November, 2003.

<sup>42</sup> Article 1 ICTY Statute; However, the Rwanda Statute adopts an approach similar to that of the ISTCH Statute. This is because Article 7 of the ICTY Statute limits the temporal jurisdiction of the Tribunal. Its commencement date was fixed at 1 January 1994, its closing date at 31 December of that year. *See* D. Shraga & R. Zacklin, *supra* note 37.

Equally, the Statute of the Special Court for Sierra Leone, also adopts a similar approach, as evidenced by Article 1 which stipulates the following: [t]he Special Court shall have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone *since 30 November 1996*, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.<sup>43</sup> (emphasis added)

A second aspect of the temporal scope of the ISTCH Statute is that it clashes with the principle *nullum crimen sine lege*. This is because it is uncertain that international crimes such as crimes against humanity and war crimes, as recognized under Articles 12 and 13 of the ISTCH Statute respectively, had between 1968 to the mid 90s, acquired the status of customary law with as large a scope as is attributed to them by those provisions. A similar opinion was made by *Tomuschat* in relation to the customary law status of crimes against humanity under the ICTY and ICTR Statutes, as evidenced by the following words:

One has to admit, however, that a formulation in writing of rules that supposedly pre-exist as customary norms may cross the line between codification and creation of new law. This difficulty may affect in particular Article 5 of the Statute of the International Tribunal for the Former Yugoslavia and article 3 of the Statute of the International Tribunal for Rwanda. It is by no means certain that before 1993 crimes against humanity had acquired the status of customary law with as large a scope as is attributed to them by those articles...It should also be noted, in this connection, that the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind offers a widely divergent categorization of crimes against humanity, labelling them systematic or mass violations of human rights. Given this substantial difference in treatment, it might be argued that in some borderline cases the international and customary law character of the relevant offence has not been sufficiently established.<sup>44</sup>

This statement basically confirms what has already been said above, that is, that crimes against humanity had a relatively small scope even up until the mid 90s.

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<sup>43</sup> Article 1 Statute of the Special Court for Sierra Leone.

<sup>44</sup> C. Tomuschat, *International Criminal Prosecution: The Precedent of Nuremberg Confirmed*, 5 CLF Vols. 2-3, 242(1994).

In addition, in relation to other violations of the laws or customs of war, which are a category of war crimes recognized by the ISTCH Statute, the following statement by *Shraga* and *Zacklin*, made in relation to their customary law status, albeit in the context of Article 4 of the ICTR Statute, suggest that this category of war crimes had not crystallized into customary international law by 1994, which marked the establishment of the ICTR:

In empowering the Rwanda Tribunal to prosecute persons responsible for violations of Article 3 common to the Geneva Conventions and Article 4 of Additional Protocol II, the Council has elected to follow less strict criteria for the choice of the applicable law than that which it adopted in the Statute of the Yugoslav Tribunal. Unlike the Yugoslav Tribunal which was empowered to apply provisions of a customary international law nature entailing the criminal responsibility of the perpetrator of the crime, *the Rwanda Tribunal is empowered to apply provisions of Additional Protocol II which as a whole has not yet been recognized as part of customary international law, and of common Article 3 which for the first time has been read as founding criminal responsibility.*<sup>45</sup> (emphasis added)

This statement corroborates the opinion that other violations of the laws or customs of war did not constitute customary international law at the time of the establishment of the ICTR.

Finally, in terms of its territorial scope, the ISTCH Statute allows the Tribunal to prosecute Saddam and members of his government for initiating a war against Iran and Kuwait. It therefore has a similar scope to the Nuremberg Charter<sup>46</sup> and the ICTR Statute,<sup>47</sup> which apply to neighbouring states.

## 2. Personal Jurisdiction

The personal jurisdiction of the ISTCH Statute is stipulated in Article 1(b), which permits the Tribunal to exercise jurisdiction over any "Iraqi national or resident of Iraq."<sup>48</sup> The interesting aspect of this stipulation is the inclusion of the requirement "resident of Iraq." This opens the way for the prosecution of non-Iraqis who, whilst residing in Iraq, committed atrocities in its territory between 1968 and 2003. This

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<sup>45</sup> D. Shraga & R. Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, *supra* note 37.

<sup>46</sup> Article 6(a) IMT Charter on Crimes Against Peace.

<sup>47</sup> Article 1 ICTR Statute.

<sup>48</sup> Article 1(b) ISTCH Statute.

interpretation could lead to the prosecution of members of the U.S. Coalition Forces who committed atrocities in Abu Ghraib prison.

Were this the case, this approach would be in line with the approach adopted by the Statute of the Sierra Leone Special Court (SCSL). This is because Article 1(2) and (3) of the SCSL Statute stipulates that:

2. Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State.
3. In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.<sup>49</sup>

Finally, the above provision ensures that a level playing field is instituted for all parties involved in the conflict, regardless of their motives. It follows that were a similar approach be applied in the context of U.S. soldiers in Iraq this would constitute a progressive step for contemporary international criminal law.

#### *IV. Subject Matter Jurisdiction of the ISTCH Statute*

The ISTCH Statute is made up of a mixture of international crimes and domestic offences. This opinion is evident in Article 10 which stipulates the following:

- The Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11 - 14, committed since 17 July 1968 and up and until 1 May 2003, in the territory of Iraq or elsewhere, namely:
- a) The crime of genocide;
  - b) Crimes against humanity;
  - c) War crimes; or
  - d) Violations of certain Iraqi laws ....<sup>50</sup>

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<sup>49</sup> See Articles 1(2) and (3) of the Statute of the Sierra Leone Special Court.

<sup>50</sup> Article 10 ISTCH Statute.

### 1. Genocide

Article 11 of the ISTCH Statute on genocide is identical to Article 2 of the ICTR Statute.<sup>51</sup> It follows that because of the similarities between both provisions, the criticisms of the latter provision will equally affect the former. For instance, one such criticism is the fact that Article 11(b) of the ISTCH Statute overlaps with Article 15 of the same statute.<sup>52</sup> A comparison of both provisions for instance reveals the extent of overlaps between Article 11(b) (incitement, attempt, and complicity in genocide) and Article 15 (incitement, ordering, inducing, planning, committing, or attempting).

The potential difficulties of this type of overlap was explained by *Harhoff* in connection with the interplay between Article 2 of the ICTR Statute and Article 6(1) of the ICTR Statute, which fulfil the same type of function as Articles 11 and 15 of the ISTCH Statute. His statement was as follows:

Some interesting choices are to be made between the application of Article 2, para. 2 (conspiracy, incitement, attempt, and complicity in genocide), on the one hand, and Article 6, para. 1 (planning, instigation, ordering, committing, aiding, or abetting), on the other. Unless the prosecutor decides to charge persons accused of genocide under Article 2 only and thus to abstain from also referring to Article 6, para.1, for the same acts of genocide..., the Trial Chambers will be forced either to explain the difference between, say, incitement and instigation, or to assume that Article 2, para. 3, stands out as the *lex specialis* and then consequently dismiss simultaneous genocide charges raised under Article 6, para. 1.<sup>53</sup>

To the extent that this statement points out the possibility of double jeopardy arising from the overlap between Article 2(2) and Article 6(1), it could equally affect the rights of defendants under the ISTCH.

Finally, apart from the issue of clarity, Article 11 of the ISTCH Statute also faces application difficulties. It is expected that Article 11 will be applied to the persecution of Kurds and Shi'ites.<sup>54</sup> However, the 1948 Genocide Convention protects vic-

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<sup>51</sup> Article 3 ICTR Statute.

<sup>52</sup> Article 15 ISTCH Statute.

<sup>53</sup> F. Harhoff, *The Rwanda Tribunal a presentation of Some Legal Aspects*, available at <http://www.icrc.org/icceng.nsf/cl...501ab412565ad00548ab2?OpenDocument> (last visited December 2003).

<sup>54</sup> *Supra* note 14; *supra* note 19.

tims belonging to a national, ethnical, racial, or religious group and excludes members of political groups.<sup>55</sup> It follows that Article 11 of the ISTCH Statute can only apply to atrocities against Kurds who are of a different race than Saddam and his allies, who were essentially Sunnis.<sup>56</sup> It cannot however apply to the Shi'ites, owing to the fact that they, like the Sunnis, are Arabs and Muslims.<sup>57</sup> Nevertheless emic distinctions, as has been the case in Rwanda, could be applied for the purpose of applying Article 11 so as to distinguish between Sunnis and Shi'ites. This would mean that the distinction between both groups would be based on the subjective perceptions of the perpetrators. In other words, the status of Shi'ite victims will be evaluated from the point of view of Sunnis who wished to single them out from the rest of the community.<sup>58</sup>

## 2. Crimes against Humanity

Article 12 of the ISTCH Statute<sup>59</sup> reproduces Article 7 of the Rome Statute.<sup>60</sup> This reproduction also means that the former provision will suffer from the defects of the latter. One of such defects can be found in the following statement made by the ICTY in the case of *Prosecutor v. Kupreskic et al.*,<sup>61</sup> vis-à-vis Article 7:

“Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity; Article 7(2) thus provides a broad definition of perse-

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<sup>55</sup> Not retained at the draft stage when submitted to the United Nations General Assembly (E/447) because of their lack of permanence, political groups were included under protected groups in the ad hoc committee's draft document by a narrow majority (4 votes to 3; UN Off. Doc. E/794 of 24 May 1948 pp. 13-14). The reference to political groups was however again rejected in the final draft of the Assembly General's Sixth Committee (see in particular the commentaries of the Brazilian and Venezuelan representatives expressing their concern about the fact that only "permanent" groups were specified, A/C.6/SR 69, p. 5).

<sup>56</sup> CIA. The World Fact Book-Iraq, available at <http://www.cia.gov/cia/publications/factbook/geos/iz.html#People> (last visited June 2004).

<sup>57</sup> *Id.*

<sup>58</sup> The International Criminal Tribunal for Rwanda stated that “an ethnic group is one whose members share a common language and culture; or a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including the perpetrators of the crimes (identification by others)” in the Kayishema case (Judgement, para. 98).

<sup>59</sup> Article 12 ISTCH Statute.

<sup>60</sup> Article 7 of the Rome Statute.

<sup>61</sup> *Prosecutor v. Kupreskic et al.* Case No. IT-95-16, Decision of 14 January 2000.

cution and, at the same time, restricts it to acts perpetrated “in connection” with any of the acts enumerated in the same provision as constituting crimes against humanity (murder, extermination, enslavement, etc.) or with crimes found in other provisions such as war crimes, genocide, or aggression. To the extent that it is required that persecution be connected with war crimes or the crime of aggression, this requirement is especially striking in the light of the fact that the ICC Statute reflects customary international law in abolishing the nexus between crimes against humanity and armed conflict.<sup>62</sup>

This statement points to the fact that the Rome Statute’s definition of crimes against humanity, under Article 7, has a restrictive effect on the application of this category of international crimes.

Furthermore, in the case of Iraq, this has been actuated by the requirement that the ISTCH can only exercise jurisdiction over crimes against humanity when they are committed in connection with war crimes, genocide, violations of stipulated Iraqi laws, or any of the other offences listed under crimes against humanity. This restriction has three implications. First, there will be substantial overlap between the four categories of crimes. For example, killing of a civilian in armed conflict could violate Article 11, Article 12, Article 13, and Article 14(c) of the ISTCH Statute; four separate provisions in the same statute. This could in turn jeopardize the rights of the accused.

Second, employing a restrictive approach to crimes against humanity under the ISTCH Statute will severely undermine the substantive law on this category of international crimes. In other words, linking crimes against humanity with other categories of crimes within the jurisdiction of the tribunal, will undo over 50 years of effort by the Control Council Law No. 10, the ICTR, and the ICTY, in breaking the link between crimes against humanity and other categories of international crimes.<sup>63</sup>

Finally, the third main effect of restricting the applicability of crimes against humanity to other international crimes is that it will create legal loopholes. This is because requiring crimes against humanity to have been committed in armed conflict would mean that offences committed in times of so-called “peace” would not be covered by the definition. Thus full accountability for atrocities committed by Saddam and members of his regime cannot be achieved.

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<sup>62</sup> *Id.* at 579-580.

<sup>63</sup> Article II (c) of CCL. No. 10; Article 3 of the ICTR Statute and Article 5 of the ICTY Statute.

### 3. War Crimes

Article 13 of the ISTCH Statute<sup>64</sup> is identical to Article 8 of the Rome Statute<sup>65</sup> and Article 20 of the 1996 ILC Draft Code Against the Peace and Security of Mankind.<sup>66</sup> The similarity between these provisions is based on the fact that Article 13 includes a similar list of war crimes. However, as explored in the above sections, this similarity also means that Article 13 is open to the criticisms of the latter provisions.

These criticisms are evident in the following statement made by *Allain* and *Jones* in connection with Article 20 of the 1996 ILC Draft Code:

In sum, Article 20 is a towering Babel of international humanitarian law norms. There is, moreover, substantial overlap among its seven categories of war crimes. For example, torturing to death a person *hors de combat* could violate (a)(i), (b)(iv), (d) and (f)(i) - four separate provisions in the same article.<sup>67</sup>

This statement draws attention to the degree of overlaps between the categories of war crimes recognized under Article 20 of the 1996 ILC Draft Code. It follows that because Article 13 of the ISTCH Statute contains an identical list of war crimes to Article 20, albeit with organizational modifications, that is, 4 instead of 7 categories of war crimes, a similar degree of overlap will also affect Article 13. This could in turn jeopardize the rights of the accused.

Finally, another criticism of Article 13, which has already been stated above, is that it in part violates the principle *nullum crimen sine lege*. This is because of the fact that other violations of the laws or customs of war, which are a category of war crimes *inter alia* recognized under that provision, did not acquire the status of customary law until after the mid 90s.<sup>68</sup>

### 4. Violations of Stipulated Iraqi Laws

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<sup>64</sup> Article 13 ISTCH Statute.

<sup>65</sup> Article 8 of the Rome Statute of the International Criminal Court.

<sup>66</sup> Article 20 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind.

<sup>67</sup> J. Allain, & J.R.W.D. Jones, *A Patchwork of Norms: A Commentary on 1996 Draft Code of Crimes against the Peace and Security of Mankind*, available at <http://www.ejil.org/Journal/vol8/No1/art6.pdf> (last visited December 2003).

<sup>68</sup> Sub-Section 2.3.1.



Article 14 of the ISTCH Statute on violations of stipulated Iraqi Laws, stipulates the following:

(a) The Tribunal shall have the power to prosecute persons who have committed the following crimes *under Iraqi law* (emphasis added). 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* (emphasis added), 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* (emphasis added), as amended; 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* (emphasis added), as amended.<sup>69</sup>

While Articles 14(a) and (b) appear to be specific to Iraq the most important provision is Article 14(c). This is because Article 14(c) recognizes the crime of aggression albeit from a domestic perspective. This approach therefore begs the following questions. Why has the crime of aggression been listed under violations of stipulated Iraqi Laws? Why was it not addressed as a separate and independent provision?

Finally, the answer to the above questions lie in U.S. interest. An international definition of aggression on the lines of Article 14(c), that is, "pursuit of policies that may lead to the threat of war or the use of the armed forces ... against an Arab country," would equally affect U.S. actions in invading Iraq. In this respect it should be recalled that none of the UN resolutions on Iraq authorized the forcible removal of Saddam from power. For instance, resolution 1441, which invoked Chapter VII of the UN Charter and *inter alia* recognized that Iraq's non-compliance with its inspection obligations under previous resolutions, constituted a threat to international peace and security, is notable for what it does not include, namely, an authorization for Member States to use "all necessary means" to ensure compliance.<sup>70</sup> It follows that aggression was included under Article 14 of the ISTCH Statute, so as to keep the spot light solely on Saddam.

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<sup>69</sup> Article 14 ISTCH Statute.

<sup>70</sup> See generally P. McClain, *Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the use of force against Iraq*, 13 DUKE J. OF COMP & INT'L L. 233 (June 2003).

5. *Penalties envisaged by the ISTCH Statute*

Article 24 of the ISTCH statute<sup>71</sup> is principally concerned with penalties. This provision reads as follows:

- (a) The penalties that shall be imposed by the Tribunal shall be those prescribed by Iraqi law (especially Law Number 111 of 1969 (the Iraqi Criminal Code)), save that for the purposes of this Tribunal, sentences of life imprisonment shall mean the remaining natural life of the person.
- (b) Subject to paragraph a) above, the penalties for crimes under Article 14 shall be those prescribed under the relevant provisions of Iraqi law
- (c) The penalty for crimes under Articles 11 to 13 shall be determined by the Trial Chambers, taking into account the factors contained in paragraph d) below.
- (d) A person convicted of:
  - 1. An offence involving murder or rape as defined under Iraqi law;or
  - 2. An offence ancillary to such offence of murder or rape, shall be dealt with as for an offence of, as the case may be, murder or rape or the corresponding ancillary offences in relation to murder or rape.
- (e) The penalty for any crimes under Articles 11 to 13 which do not have a counterpart under Iraqi law shall be determined by the Trial Chambers taking into account such factors as the gravity of the crime, the individual circumstances of the convicted person and relevant international precedents.
- (f) The Trial Chambers may order the forfeiture of proceeds, property or assets derived directly or indirectly from that crime, without prejudice to the rights of the bona fide third parties.
- (g) In accordance with Article 307 of the Iraqi Criminal Procedure Code, the Tribunal has authority to confiscate any goods prohibited by law regardless of whether the case has been discharged for any lawful reason.<sup>72</sup>

As is evident from the above, Article 24 ties the penalties for all of the crimes recognized by the ISTCH Statute to Iraq's penalty scheme. This approach therefore bears some similarities and differences with the penalty approaches of the ICTY and ICTR.

It follows that the similarity between the ISTCH and the ICTY and ICTR lies in the fact that the ICTY and ICTR equally refer to the penal practices of their respective

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<sup>71</sup> Article 24 of the ISTCH Statute.

<sup>72</sup> *Id.*

countries, that is, the former Yugoslavia and Rwanda. This method has been justified on the basis that because international law has not developed a sentencing pattern of its own, imposing a sentence on defendants that did not accord with the sentencing practices of the country in which they committed the offence would violate the principle of legality.<sup>73</sup>

In addition, like Iraq, the former Yugoslavia and Rwanda similarly recognize the death penalty. For instance, in the case of the former Yugoslavia, the SFRY Penal Code allowed the imposition of a sentence of death in certain cases.<sup>74</sup>

On the other hand, the difference between the ISTCH and the ICTY and ICTR lies essentially in organizational structure. In other words, the fact that the ICTY and ICTR have an international stature means that their penalties must reflect international human rights law principles as evident in the Second Optional Protocol to the ICCPR<sup>75</sup> and the *opinio juris* of states.<sup>76</sup> What these sources have in common is that they are against the imposition of the death penalty. Their effect has therefore been to exclude the death penalty as a form of punishment under the ICTY and ICTR.<sup>77</sup> By contrast, the ISTCH, owing to its primarily domestic character, applies a dualist approach to sentencing. In other words, except in cases where “the penalty for any crimes under Articles 11 to 13 ...do not have a counterpart under Iraqi law,” it has the right to apply Iraqi law, which recognizes the death penalty.

Finally, from the perspective of international criminal law, recognition of the death penalty in the context of Iraq undermines efforts to abolish capital punishment, which have existed since the end of World War II.<sup>78</sup>

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<sup>73</sup> M.C. BASSIOUNI & P. MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 690 (1996).

<sup>74</sup> See generally W.A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*. 7 *DUKE J. OF COMP. & INT'L L.* 461 (December 1997).

<sup>75</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights Aimed at Abolition of the Death Penalty, adopted Dec. 29, 1989, G.A. Res. 44/128, (entered into force July 11, 1991).

<sup>76</sup> See generally Schabas, *supra* note 74.

<sup>77</sup> Article 24 of the ICTY Statute and Article 23 ICTR Statute.

<sup>78</sup> W.A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW*, (2d ed 1997).

### C. Conclusion

The Statute of the Iraqi Special Tribunal for Crimes Against Humanity is essentially a product of negotiation between the U.S., an occupying power seeking to apply a model which would primarily serve its interests, and U.S. appointed Iraqi surrogates, which is a group seeking to adapt such a model for the purpose of retribution against their enemies. Unlike previous tribunals, that is, the Rwanda Tribunal and the Yugoslav Tribunal, the Iraqi Special Tribunal for Crimes Against Humanity was established in line with the obligations United States faced as an occupying power under the Geneva Conventions. This meant that its Statute has been formulated in a way which is favourable to both the U.S. and its local allies in Iraq. This is reflected in its territorial, personal, temporal, and subject matter jurisdiction, as well as in the penalties it recognizes.

It follows, therefore, that the interplay between law and politics is likely to govern the life of the Iraqi Special Tribunal for Crimes Against Humanity as long as the U.S. exercises some form of control over Iraqi sovereignty. Such a situation would have a retroactive effect on international criminal law, since it would cause international criminal law to revert to the Nuremberg era, where justice was dispensed by a military tribunal made up of representatives of the victorious powers. Nevertheless, since the Iraqi Special Tribunal for Crimes Against Humanity is yet to become operational, it remains premature to draw up such general conclusions. Therefore, although the substantive laws of the tribunal clearly demonstrate that it will have a negative impact on the development of international criminal law, such a conclusion will need to be balanced against the actual judicial activities of the Tribunal. Several more years must pass before the international community will be able to fully evaluate the impact of the Iraqi Special Tribunal for Crimes Against Humanity on the development of international criminal law.