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A Near Term Retrospective on the Al-Dujail Trial & the Death of Saddam Hussein

Michael A. Newton

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> *The hour of liberation is at hand, God willing. But remember that your near-term goal is confined to freeing your country from the forces of occupation and their followers, and not to be preoccupied in settling scores . . . . You must show genuine forgiveness and put aside revenge over the spilled blood of your sons and brothers, including the sons of Saddam Hussein.*
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> -Purported letter written by Saddam Hussein, signed as "President and commander in chief of the holy warrior armed forces."[1]
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> *And now the former dictator of Iraq will face the justice he denied to millions. The capture of this man was crucial to the rise of a free Iraq. It marks the end of the road for him, and for all who bullied and killed in his name . . . . There will be no return to the corrupt power and privilege they once held. For the vast majority of Iraqi citizens who wish to live as free men and women, this event brings further assurance that the torture chambers and the secret police are gone forever. And this afternoon, I have a message for the Iraqi people: You will not have to fear the rule of Saddam Hussein ever again. All Iraqis who take the side of freedom have taken the winning side. The goals of our coalition are the same as your goals—*

*Professor of the Practice of Law, Vanderbilt University Law School.

[1] Saddam Letter Says Iraq's 'Liberation' at Hand; New Slaying Linked to Trial, USA TODAY, Oct. 15, 2006, *available at* http://www.usatoday.com/news/world/iraq/2006-10-16-saddam-letter_x.htm.

> *sovereignty for your country, dignity for your great culture, and for every Iraqi citizen, the opportunity for a better life.*
>
> -President George W. Bush, Address to the Nation, Dec. 14, 2003[2]

I. INTRODUCTION

Saddam Hussein al-Tikriti died at the hands of Iraqi officials at dawn on December 30, 2006, following a tumultuous fourteen month trial[3] for crimes committed against the citizens of a relatively obscure Iraqi village known as al-Dujail.[4] Maintaining his façade of disdain when the verdict and sentence were announced on November 5, 2006, Saddam entered the courtroom with an arrogant strut and refused to stand until the guards made him do so to hear the judge's opinion.[5] When Saddam interrupted the reading of the verdict, Judge Ra'ouf Rasheed Abdel Rahman turned down the volume of his microphone and spoke over him. Speaking on behalf of the five judge panel, Judge Ra'ouf sentenced Saddam to "death by hanging" for the crime of willfully murdering Iraqi citizens from the town of al-Dujail. Saddam railed, "God curse the enemies of the occupation." He demanded that the Arab people "stand up" and proclaimed "death to the enemies of the nation."[6] An automatic appeal of the verdict was initiated and heard by the nine-judge Cassation Panel, which issued its opinion on December 26, 2006.[7] Saddam's

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[2] The full text of the statement is available at http://www.whitehouse.gov/news/releases/2003/12/20031214-3.html.

[3] The al-Dujail trial began on October 19, 2005, and the proceedings were completed on July 27, 2006. The verdict was announced on November 5, 2006, although the full trial opinion was not released until November 22, 2006. The defense submissions for the Cassation Court were received on December 3, 2006, and were denied on December 26, 2006. *Timeline: Saddam Hussein Dujail Trial*, BBC NEWS, Dec. 4, 2006, http://news.bbc.co.uk/2/hi/middle_east/4507568.stm.

[4] The official summary of Judge Ra'id Juhi's investigative file, signed by the investigative judge responsible for developing the Dujail referral file summarizes the incident at Dujail and the subsequent criminal acts committed against the civilian population of the village. While the acts of the regime were criminal and excessive, the incident pales alongside other more widespread regime crimes such as the Anfal campaign. *See* Judge Ra'id Juhi, Investigative Judge of Iraqi High Tribunal, Investigative Summary of Dujail Case, *available at* http://www.iraq-iht.org/en/doc/articleofaldujail.pdf. For other descriptions of the process and analysis of its flaws, both real and perceived, see MARIEKE WIERDA & MIRANDA SISSONS, Int'l Center for Transitional Just., Dujail: Trail and Error?, (2006), *available at* http://www.ictj.org/images/content/5/9/597.pdf; HUMAN RIGHTS WATCH, JUDGING DUJAIL: THE FIRST TRIAL BEFORE THE IRAQI HIGH TRIBUNAL (2006), *available at* http://hrw.org/reports/2006/iraq1106/.

[5] *See* John F. Burns & Kirk Semple, *Hussein is Sentenced to Death by Hanging*, N.Y. TIMES, Nov. 6, 2006, at A1.

[6] Author's personal notes of the televised session.

[7] Cassation Panel, Iraqi High Criminal Court, Al-Dujail Final Opinion, *available at* http://www.iraq-iht.org/ar/doc/ihtco.pdf. For the unofficial English translation, broken down into six segments, see http://www.law.case.edu/saddamtrial/documents/20070103_dujail_appellate_chamber_opinion.pdf. The brevity and timing of the appeals decision has been the subject of

execution was carried out on the first day of the Sunni religious holiday 'Eid al-Adha'[8] despite a provision of Iraqi law that a death sentence "cannot be carried out on official holidays and special festivals connected with the religion of the condemned person."[9] The executioner's rope tightened around his neck and interrupted him as he prayed the most sacred Islamic prayer: "[t]here is no god but Allah . . . ." The sectarian overtones of the poorly implemented execution were preserved on a grainy video apparently taken from an illicit cell phone.[10] Despite the plea for dignity from a voice on the video that is heard to say "[p]lease no . . . this man is about to die," some of those attending the execution taunted Hussein and gleefully celebrated his demise.[11] The jarring images flashed around the world, lending an eerie air of dignity to the end of one of the cruelest tyrants of the twentieth century.

Following the trial, Saddam died as a convicted criminal whose crimes were documented in a 283 page judgment.[12] The opinion is a thorough and organized catalogue of the factual record of evidence from the trial and the investigative file. The Trial Judgment carefully assesses the elements of each charged offense, along with the relevant *mens rea* demonstrated by the available evidence, and it applies the relevant domestic and international law to each and every charge against each of the eight defendants in detail. Although Saddam's execution does undercut the "expressive value" of the

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heavy criticism. HUMAN RIGHTS WATCH, THE POISONED CHALICE: A HUMAN RIGHTS WATCH BRIEFING PAPER ON THE DECISION OF THE IRAQI HIGH TRIBUNAL IN THE DUJAIL CASE 32 (2007), *available at* http://hrw.org/backgrounder/ij/iraq0607/iraq0607web.pdf ("The speed of the decision, the brevity of the opinion (17 pages) and the cursory nature of the reasoning make it difficult to conclude that the Appeals Chamber conducted a genuine review as required by international fair trial principles.").

[8] *See* Sabrina Tavernise, *For Sunnis, Dictator's Degrading End Signals Ominous Dawn for the New Iraq*, N.Y. TIMES, Jan. 1, 2007, at A7; Hassan M. Fattah, *For Arab Critics, Hussein's Execution Symbolizes the Victory of Vengeance over Justice*, N.Y. TIMES, Dec. 31, 2006, at 13.

[9] Law on Criminal Proceedings with Amendments, Number 23 of 1971, Decree No. 230 Issued by the Revolutionary Command Council, Feb. 14, 1971, para. 290 (Iraq), *reprinted in* UNITED STATES INSTITUTE OF PEACE, IRAQI LAWS REFERENCED IN THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL (2004), *available at* http://law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf [hereinafter Iraqi Law No. 23 on Criminal Proceedings].

[10] John F. Burns & Marc Santora, *U.S. Questioned Iraq on the Rush to Hang Saddam*, N.Y. TIMES, Jan. 1, 2007, at A1 (reporting that American authorities predicated transfer of Saddam into Iraqi custody with the demand that "we need everything to be in accordance with the law . . . We do not want to break the law." The Iraqi political officials telephoned officials of the supreme religious body of Iraqi Shiism, composed of *ayatollahs* from the holy city of Najaf, who dutifully approved and sent a signed letter to the Shiite Prime Minister authorizing him "to carry out the hanging until death").

[11] *Id.*

[12] The unofficial English translation of the Trial Chamber opinion is available at http://law.case.edu/saddamtrial/dujail/opinion.asp [hereinafter al-Dujail Trial Judgment], (References hereinafter are to specific pages of the unofficial English language translation made publicly available). *See also* Judgment of Al-Dujail Law *in* 39 CASE W. RES. J. INT'L . J. Nos. 1 & 2, App. A (2006–2007).

subsequent and important trials that remain,[13] its legal foundations, factual findings, and judicial inferences are preserved in the extensive opinion for the world, and particularly Iraqis, to read and analyze. The grossly sectarian overtones of the botched execution do not negate the entirety of the publicly accessible trial sessions, in which the defense presented more than sixty witnesses and the prosecution introduced more than twenty witnesses (termed complainants in Iraqi law). The flawed execution is an incomplete snapshot of the legal process that brought down Saddam. Saddam's execution rekindles memories of the confrontational cross-examination of Herman Goering, whose theatrical performance appeared to make him overshadow the Chief Prosecutor, Robert H. Jackson, who served as U.S. Solicitor General and Supreme Court Justice. Just as Goering's short term triumph is not today remembered as a metaphor for the entire International Military Tribunal at Nuremberg the botched execution of Saddam does not encapsulate all that is memorable or important about the first complete trial held by the Iraqi High Criminal Court.[14]

The larger legacy of the al-Dujail Trial will develop against the backdrop of the referral file that is referenced repeatedly in the opinion of Trial Chamber I. The al-Dujail referral file prepared by the Investigative Judge is more than eleven hundred pages long but has never been publicly released in whole, although it was provided in its entirety to the defense team more than forty-five days prior to trial as required by Iraqi law.[15] The al-Dujail trial represents a significant window into the current practice of states' implementation of humanitarian norms, and its lessons have larger reverberations within the corpus of humanitarian law. Because the Iraqi domestic system is built on a civil law model, the Tribunal also represents the most modern effort to meld common and civil law principles into a consolidated domestic system. This melding, in turn, has yielded a number of important lessons for future trial processes. By extension, the al-Dujail trial contains important lessons for the broader field of international humanitarian law. The balance of this piece will consider some of the most significant implications of the al-Dujail trial. In particular, this piece will assess the Tribunal's actions in light of the normative implications after the establishment of the Tribunal during the post-war occupation of Iraq, the arguments related to the immunity of Saddam and other leading members of the *Ba'athist* party, and the implications for the doctrine of command responsibility as a basis for individual criminal responsibility.

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[13] MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 179 (2007).

[14] TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 335–36 (1992).

[15] Rules of Procedure and Evidence of the Iraqi Special Tribunal, The Official Gazette of the Republic of Iraq. No. 4006, Rules 2, 40, and 41 (Oct. 18, 2005), *available at* http://www.law.case.edu/saddamtrial/documents/IST_rules_procedure_evidence.pdf [hereinafter Tribunal Rules of Procedure].

II. CONTROVERSIAL DIMENSIONS OF THE HIGH CRIMINAL COURT

The precise legacy of the al-Dujail trial remains unknown at the time of this writing, partly because few outside the region followed the daily Arabic broadcasts, and partly because its larger aspirations remain unattainable due to the turmoil inside Iraq and in the larger region. What is clear is that the public perception of the judicial process as an extension of the politics outside the courtroom was reinforced dramatically.[16] In the short term, this has meant that the al-Dujail trial has divided Iraqis instead of providing a rallying point for national reconciliation. The record of the al-Dujail trial is one of missteps, mistakes, and misstatements. Its processes and political dimensions were filled with controversy both within and outside of Iraq. There was very little predictability in this first trial of the Iraqi High Criminal Court, yet its very audacity was inspiring. Iraqi lawyers and politicians succeeded in integrating modern substantive norms into the domestic criminal code of Iraq.[17] They privately took pride in emulating those states that have ratified the Rome Statute of the International Criminal Court by expanding the crimes punishable in domestic courts.[18] To demonstrate tangible progress toward a modern Iraqi state standing alongside the community of nations, the Statute of the Iraqi High Criminal Court (commonly termed the Iraqi High Tribunal across the rest of the world)[19] embodied a synergy between domestic procedural law and the modern tenets of war crimes, crimes against humanity, and genocide that

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[16] *See, e.g.*, Riverblog.blogspot.com, Baghdad Burning, A Lynching, Dec. 31, 2006, http://riverbend blog.blogspot.com (last visited Nov. 1, 2007).

> It's official. Maliki and his people are psychopaths. This really is a new low. It's outrageous—an execution during Eid. Muslims all over the world (with the exception of Iran) are outraged. Eid is a time of peace, of putting aside quarrels and anger—at least for the duration of Eid. This does not bode well for the coming year. No one imagined the madmen would actually do it during a religious holiday. It is religiously unacceptable and before, it was constitutionally illegal. We thought we'd at least get a few days of peace and some time to enjoy the Eid holiday, which coincides with the New Year this year. We've spent the first two days of a holy holiday watching bits and pieces of a sordid lynching. America the savior. . . . After nearly four years and Bush's biggest achievement in Iraq has been a lynching. Bravo Americans.

Id.

See also Robert Fisk, *A Dictator Created Then Destroyed by America*, RINF.COM, Dec. 29, 2006, http://www.rinf.com/columnists/news/a-dictator-created-then-destroyed-by-america.

[17] *Compare* Al-Waqa'i Al-Ivaqiya [The Official Gazette of the Republic of Iraq], Law of the The Iraqi Higher Criminal Court, Oct. 18, 2005, 4006 No. 10, arts. 11–13 *available at* www.law.case.edu/saddamtrial/documents/IST_statute_official-english.pdf [hereinafter Statute of the Iraqi High Criminal Court], *and* Rome Statute of Int'l Crim. Ct., arts. 6, 7, 8 July 1, 2002, 2187 U.N.T.S. 90.

[18] This observation is based on the author's extensive discussions with many Iraqi judges, lawyers, and prosecutors over a period of several years.

[19] *See* Statute of the Iraqi High Criminal Court, *supra* note 17.

were to be implemented insofar as possible using the underlying foundation of the Iraqi procedural code. The judges also studied the best practices from the ad hoc tribunals and strove to follow those examples (such as having a Defense Office internal to the Tribunal with counsel available on stand-by if needed).[20] The Tribunal Elements of Crimes[21] were closely modeled on the International Criminal Court Elements, and the judges repeatedly used the Arabic version of the official International Criminal Court Elements[22] as the basis for their probing questions to international advisors regarding the fit between Iraqi domestic crimes and those recognized under international law. The statute expressly permitted the Iraqi judges to "resort to the decisions of international criminal tribunals" when needed to interpret and apply the provisions punishing genocide, war crimes, and crimes against humanity as incorporated into Iraqi law.[23] However, the precise linkage between the international character of the crimes and their domestic counterparts was not fully explored in the Dujail opinions and remains for development in subsequent cases.

Iraqi jurists conducted a trial that had moments of chaos interspersed amongst days of testimony, documentary evidence, and often arcane legal arguments. They used a transparent process to implement those norms to hold Ba'athist party officials accountable for crimes committed against their own citizens. Moreover, the al-Dujail trial was held in the midst of a burgeoning insurgency that had already claimed the lives of more than 2,200 American military personnel as the trial began.[24] The insurgency also made the logistical coordination required to gather evidence, protect trial participants, and procure the attendance of witnesses more difficult than for any other major war crimes trial in history. For each witness who testified to his or her personal suffering, who looked into the faces of those who had traumatized Iraqi society, there were a thousand others who could have told the same stories. The Iraqi people watched, commented, and critiqued every nuance of the trial process. The free Iraqi press had a field day of

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[20] Tribunal Rules of Procedure, *supra* note 15, Rule 30.

[21] Iraqi Special Tribunal, Elements of Crimes, *available at* http://law.case.edu/saddamtrial/documents/IST_Elements.pdf.

[22] *See* Preparatory Comm'n for the Int'l Crim. Ct., *Finalized Draft Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) (establishing the "Elements of Crimes" for the International Criminal Court). Article 9 of the Rome Statute states that the Elements shall "assist the Court in the interpretation and application" of the provisions related to war crimes, genocide and crimes against humanity. Rome Statute of Int'l Crim. Ct. *supra* note 17, at art. 9.

[23] Statute of the Iraqi High Criminal Court, *supra* note 17, at art. 17.

[24] Iraqi Coalition Casualty Count, Cumulative Coalition Fatalities, *available at* http://icasualties.org/oif/Cumulative.aspx. Hundreds of thousands of Iraqis have been killed and wounded by the conflict itself as well as the deliberate targeting by insurgent forces. At the time of this writing, nearly 300 members of the coalition have lost their lives in Iraq along with an estimated 70,000 Iraqi civilian, police, and security forces as a result of the ongoing armed conflict. American military killed and wounded have topped 26,000 in addition to a number of casualties suffered by civilian contractors. *Id.*

commentary and conspiratorial analysis. The legal process formed the canvas against which an explosive mix of personalities, politics, power, and ego combined to produce the most important trial in the history of the region. Saddam's trial was one of the pivotal events in the modern history of the Middle East, yet its history is muddled in misconception and shrouded with miscommunication.

Perceptions of the trial and its processes rapidly hardened around fragments of media reporting and the few moments of video that repeatedly replayed worldwide. For example, Saddam and ten other potential defendants appeared one by one before the investigative judge, Judge Ra'id Juhi, for the first time on July 1, 2004, and many Iraqis watched breathlessly, hoping for a reassuring sense that an orderly administration of justice was in place to address the vast range of crimes committed under Ba'athist rule. Iraqis lived in a climate of pervasive fear during Saddam's regime, and to see him alive and humbled before the power of the bench was an incredibly powerful image. Saddam's capture in December 2003 had an electrifying effect among the population. Under the regime, Iraqis thought of Saddam with a mixture of dread and paralyzing fear, intermingled with pockets of latent nationalist pride. His personal image was one of grandiose narcissism that led him to insert himself into almost every facet of Iraqi life.[25] Describing the dim hopes for a future of freedom, one Marsh Arab on the outskirts of Nassiriyah said that "when Saddam was in office, we used to be afraid of the walls."[26] While the insurgency could have been fed by images of a defiant and dignified Saddam being treated with cruelty by so called "imperialist occupiers" as he was captured, the ex-dictator's meekness and powerless confusion inspired no nationalist fervor across Iraq or in the broader Arab world. Psychologists observed that the images of a broken man emerging from a "spider hole" in the ground beneath a mud hut in abject submission reinforced Saddam's submissive role.[27] No one will ever know with certainty, but it is likely that the strategy of disrupting the trial and denying its legitimacy originated at the time that Saddam was humiliated before the cameras of the world and was subsequently fed by his delusional narcissism.

The initial confrontation between Judge Ra'id in the service of the law and Saddam clinging to the vestiges of absolute authority was one of high drama. Many commentators incorrectly characterized the session as an "arraignment" akin to those common in American courtrooms, although such

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[25] Jerrold M. Post & Lara K. Panis, *Tyranny on Trial: Personality and the Courtroom Conduct of Defendants Slobodan Milosevic and Saddam Hussein*, 38 CORNELL INT'L L. J. 823, 834 (2005).

[26] INT'L CTR. FOR TRANSITIONAL JUSTICE AND THE HUM. RTS. CTR. OF THE U. OF CAL., BERKELEY, IRAQI VOICES: ATTITUDES TOWARD TRANSITIONAL JUSTICE AND SOCIAL RECONSTRUCTION (2004) (capturing the results of interviews taken from a broad cross section of the Iraqi population by a team of researchers conducted in July and August 2003).

[27] Jerrold M. Post, *Rathole under the Palace: Grandiosity and Defiance Cloaked the Pain and Fear Bred in Hussein*, L.A. TIMES, Dec. 21, 2003, at M1.

a process would have been a foreign practice grafted onto Iraqi practice.[28] Neither Saddam nor any other defendant formally had been charged with anything, and the construction of the courthouse was ongoing.[29] In fact, the sole purpose of that first hearing before Judge Ra'id was to provide the legal justification for detaining Saddam and the other potential defendants as investigations proceeded following the return of full Iraqi sovereignty.[30] Saddam immediately challenged the sense of orderly process and set the tone that would permeate the entire trial until the moment of his execution nearly thirty months later. He demanded to know "how can you charge me with anything without protecting my rights under the constitution?"[31]

The High Criminal Court Rules of Procedure stipulate that the investigating judge must notify all suspects of their rights during their first appearance for questioning.[32] In accordance with Iraqi procedural law, any

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[28] *Saddam's Arraignment*, NAT'L REV. ONLINE, July 1, 2004, http://frum.nationalreview.com/post/?q=MjQyOThiOWU5ZGY0MTg4ZGIyYmI3NGI3YWIwZDMzZmI.

[29] For an edited text of the first session before Judge Ra'id Juhi, the chief Investigative Judge of the Tribunal, see http://www.counterpunch.org/saddam07022004.html.

[30] Aside from questions regarding the incident in al-Dujail and its bloody aftermath, the focus of the early investigative hearing was on a range of other alleged crimes, such as the invasion of Kuwait, the brutal suppression of the 1991 uprising, and the gassing of the village of Halabja. For a description of the proceedings, see John F. Burns, *The Reach of War: The Defendant; Defiant Hussein Rebukes Iraqi Court for Trying Him*, N.Y. TIMES, July 2, 2004, at A1. The initial hearing before an investigative judge is required by Iraqi law as a predicate for holding the potential defendant in custody. Iraqi Law No. 23 on Criminal Proceedings, *supra* note 9, at para. 123.

> [T]he examining magistrate or investigator must question the accused within 24 hours of his attendance, after proving his identity and informing him of the offence of which he is accused. His statements on this should be recorded, with a statement of evidence in his favour. The accused should be questioned again if necessary to establish the truth.

Id.

[31] Rupert Cornwell, *Saddam in the Dock: Listen to His Victims, Not Saddam, Says White House*, THE INDEP., July 2, 2004 (reporting that Hussein stated, "this is all theatre," at his first pre-trial hearing), *available at* http://news.independent.co.uk/world/americas/story.jsp?story=537296. For those who have observed the Milosevic trial, Saddam's statements were eerily familiar. During his initial appearance before the ICTY on July 3, 2001, Milosevic challenged the legality of the establishment of the ICTY. In a pre-trial motion, Milosevic stated, "I challenge the very legality of this court because it is not established in the basis of law." *Milosevic Challenges the Legality of the U.N. Tribunal*, ONLINE NEWSHOUR, Feb. 13, 2002, *available at* http://www.pbs.org/newshour/updates/february02/milosevic _2-13.html.

[32] Tribunal Rules of Procedure, *supra* note 15, at Rule 27. Rule 27 reads as follows:

> Rights of the Suspect during Questioning by an Investigative Judge
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> First: A suspect who is questioned by an Investigative Judge shall have the following rights of which he must be informed by the Investigative Judge prior to questioning in a language he speaks and understands:
>
> A. The right to legal assistance of his own choosing, including the right to have legal assistance provided by the Defence Office if he does not have sufficient means to pay for it;

statement made by the accused to the investigating judge is recorded in the written record and "signed by the accused and the magistrate or investigator."[33] Thus, every suspect (including Saddam) who has appeared before the investigative judges to date has been notified of their rights to counsel and has acknowledged their comprehension of those rights in writing.[34] Subsequent appearances before the investigative judge are undertaken only in the presence of the defense counsel.[35] Numerous facts from the investigative record emerged as important evidence in the Dujail trial; for example the fact that the "assassination" attempt had been nothing more than ten to twelve shots fired from some distance away as Saddam's convoy traveled through al-Dujail.[36] Outside the judicial process, lawyers

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> B. The right to free interpreting assistance of if he cannot understand or speak the language used in questioning;
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> C. The right to remain silent. In this regard, the suspect or accused must be cautioned that any statement he makes may be used against him in court.
>
> Second: An accused may voluntarily waive his right to legal assistance during questioning if the Investigative Judge determines that the waiver is voluntarily and knowingly made.
>
> Third: If an accused has exercised his right to legal assistance, questioning by an Investigative Judge may not be performed without the presence of counsel if the accused did not . . . his right, willingly and knowingly for the presence of his counsel. In a case of the waiver, if the accused later expressed his will to have legal assistance, accordingly the questioning must stop accordingly and must not resume except with the presence of counsel.

Id.

[33] Iraqi Law No. 23 on Criminal Proceedings, *supra* note 9, at para. 128.

[34] Copies of the statements from that July 2004 hearing are on file with the author.

[35] *Id.* For example, in that first session, this was one of the exchanges that took place:

> SADDAM: I speak for myself.
>
> JUDGE: Yes, as a citizen you have the right. But the guarantees you have to sign because these were read to you, recited to you.
>
> SADDAM: Anyway, why are you worried? I will come again before you with the presence of the lawyers, and you will be giving me all of these documents again. So why should we rush any action now and make mistakes because of rushed and hasty decisions or actions?
>
> JUDGE: No, this is not a hasty decision-making now. I'm just investigating. And we need to conclude and seal the minutes.
>
> SADDAM: No, I will sign when the lawyers are present.
>
> JUDGE: Then you can leave.

CounterPunch Wire, *What Law Formed This Court?: Transcript of Saddam's Arraignment*, COUNTERPUNCH, Jul. 2, 2002, http://www.counterpunch.org/saddam07022004.html.

[36] *See* Al Dujail Lawsuit, Case No. 1/9 First/2005, English Translation of Dujail Trial Chamber Opinion, Part I, 9 (2006), *available at* http://www.law.case.edu/saddamtrial/documents/dujail_opinion_pt1.pdf [hereinafter Part I, Unofficial Translation of Dujail Trial Chamber Opinion].

hired by Hussein's wife sought to undermine the orderliness of the proceedings and to create a perception of lawless irregularity by publicly claiming that the Tribunal could not lawfully impose any punishments because it lacked legitimacy or lawful creation.[37]

From those first dramatic moments in July 2004, the tension between law and power and between truth and tyranny was a constant undercurrent in the al-Dujail trial; it was almost palpable to trial observers inside the courtroom as the days passed.[38] In its Judgment, the Trial Chamber describes the conduct of the defendants and their lawyers as "anarchist" and an "organized offensive course" intended to provoke the court.[39] Iraqi law provides that the Trial Chamber "is not permitted, in its ruling, to rely upon a piece of evidence which has not been brought up for discussion or referred to during the hearing, nor is it permitted to rely on a piece of paper given to it by a litigant without the rest of the litigants seeing it."[40] Despite the frequency of outbursts and disruptive conduct, the Trial Chamber expressly noted that it strove to demonstrate "magnanimity" and "tolerance . . . for the purpose of serving . . . justice," and hence "disregarded all these fabrications and violations" by basing its decision on the evidentiary record.[41] Quite apart from the process inside the courtroom, the revitalized free press in the country had a field day throughout the trial. The barrage of media criticism amidst the chorus of commentary from all across the political spectrum led to the resignation of the original Presiding Judge, Rizgar Amin.[42] Moreover, eight persons associated with the process were murdered during the course of the trial, further creating the perception of disorder and unfairness. Rather than succumbing to the manipulation of the murderers, the judges expressed their sympathy, granted defense requests for delays, ensured that procedures were in place to preserve the defendants' rights to the assistance of counsel, scrutinized security precautions for trial participants, and forged ahead.[43] Despite the interruptions, there was no stage of the al-Dujail trial in which

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[37] Rory McCarthy & Jonathan Steele, *Saddam on Trial: Legitimacy and Neutrality of Court Will Be Challenged*, THE GUARDIAN, July 2, 2004, *available at* http://www.guardian.co.uk/Iraq/Story/0,2763,1252096,00.html.

[38] Interview with RCLO official (Dec. 13, 2006).

[39] Part I, Unofficial Translation of Dujail Trial Chamber Opinion, *supra* note 36, at 24.

[40] Iraqi Law No. 23 on Criminal Proceedings, *supra* note 9, at para. 212.

[41] Part I, Unofficial Translation of Dujail Trial Chamber Opinion, *supra* note 36, at 24.

[42] *See* Robert F. Worth, *Fed Up, Judge in Hussein Trial Offers to Quit*, N.Y. TIMES, Jan. 15, 2006, at A6 (reporting Judge Rizgar's frustration that the Tribunal officials took no public action to defend his actions or judicial integrity).

[43] The Trial Chamber opinion describes many of the specific measures taken to preserve the defendants' rights to a fair trial and those measures taken to safeguard members of the defense team to include secure transportation and living arrangements upon request. Part I, Unofficial Translation of Dujail Trial Chamber Opinion, *supra* note 36, at 24–27.

any defendant was unrepresented by either his attorneys or those provided by the Court when the retained counsel boycotted proceedings.[44]

The judges intended many of their decisions to increase the perceptions of fairness and demonstrate the rebirth of an effective Iraqi judiciary committed to finding the truth while adhering to the defendants' rights.[45] Instead, this seemed to catalyze the cynicism of the population and feed popular misconceptions that the trial was a form of American power. The Coalition Provisional Authority Order that delegated authority to the Iraqi leaders to promulgate the Statute required that the Tribunal meet "international standards of justice."[46] Under the terms of the Statute, the Trial Chambers must "ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with this Statute and the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."[47] Articles 19 and 20 of the Tribunal Statute set out a range of fundamental rights, styled as "Guaranties" for the defendants that the judges must ensure are implemented.[48] For example, based on these mandates and the requirements of Iraqi law, after a witness has testified and answered any questions from the bench necessary to clarify the facts, the "prosecutor, complainant, civilian plaintiff, a civil official, and the defendant may discuss the testimony via the court and ask questions and request clarifications to establish the facts."[49] In accordance with the procedural law, the judges permitted Saddam and other defendants to question witnesses and to participate in exploring the defense perspectives on the testimony. Despite the fact that the judges anticipated such outbursts and handled them in a similar manner to the ad hoc international tribunals, the Dujail defendants' lawful right to raise issues in their own defense became the sword that Saddam and other defendants used to conduct the rants and outbursts that became fixed in the public perception as the norm during court sessions.[50] The press widely reported these outbursts. There were times when the insurgency raging outside the courtroom seemed directly linked and fed by the events inside the courtroom. Saddam and other

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[44] *Id.* at 2; CounterPunch Wire, *supra* note 35.

[45] MICHAEL P. SCHARF & GREGORY S. MCNEAL, SADDAM OF TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL 119 (2006).

[46] *See* Coalition Provisional Authority Order Number 48: Delegation of Authority Regarding an Iraqi Special Tribunal (Dec. 10, 2003), *available at* http://www.cpa-iraq.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf.

[47] Statute of the Iraqi High Criminal Court, *supra* note 17, at art. 20, § 2. The phrase "rules of procedure" includes those contained in the underlying Iraqi Law No. 23 of 1971. *Id.* at art. 16.

[48] The Arabic word literally means "guarantees," but the intended meaning is "rights." The official translation uses the phrase "Guaranties of the Accused" as the heading for Article 19 of the Statute of the Iraqi High Criminal Court. *See id.* at art 19.

[49] Iraqi Law No. 23 on Criminal Proceedings, *supra* note 9, at para. 168.

[50] See Michael P. Scharf, *Chaos in the Courtroom: Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials*, 39 CASE W. RES. J. INT'L L 145 (2006).

defendants managed to fan the flames of conflict from within the walls of the trial on a number of occasions. During one such occasion, Saddam shouted, "Down with the Americans! Down with the traitors,"[51] which in turn prompted the defense attorneys to start yelling, resulting in what the Judgment describes as "him being taken away from the hall in accordance with the provision of article [158] of the penal regulations law."[52]

Saddam retained an animal magnetism that competed with the judicial power from the first moments of trial down to its dramatic conclusion as the dominating force in the courtroom. The shouted exhortations, extraneous arguments, and demonstrations of defiance to the judges (such as Barzan al-Tikriti wearing pajamas to court or defendants repeatedly turning their backs to the judges) became flashpoints of controversy. The hours of orderly testimony and the trauma endured by the civilians of al-Dujail went largely ignored. No western media outlet ever showed Saddam or any other defendant apologizing to the bench, despite the fact that they did so more than a dozen times during the course of the trial.[53] However, the problems faced by the Iraqi judges were identical to those presented by other defendants in international ad hoc tribunals whose conduct has been far more disruptive and defiant. Like the Iraqi bench, international judges repeatedly have been forced to remove disruptive defendants from the courtroom in the interests of decorum and the judicial process, and have appointed standby counsel to preserve the rights of defendants who have chosen to undermine the truth-seeking processes inherent in a fair trial.[54] During the Dujail trial, standby counsel served to protect the rights of the defendant in "interests of justice" and helped preserve the Tribunal's "legitimate interest in ensuring that the trial proceeds in a timely manner without interruptions, adjournments or disruptions."[55] Like their colleagues

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[51] Part I, Unofficial Translation of Dujail Trial Chamber Opinion, *supra* note 36, at 25.

[52] Iraqi Law No. 23 on Criminal Proceedings, *supra* note 9, at para. 158 ("The defendant may not be removed from the court room during consideration of the case unless he violates the rules of the court, in which case procedures continue as if he were present. The court must keep him informed of the procedures which took place in his absence." According to the Trial Chamber, the defense team also spread the names of court appointed attorneys to internet web sites in defiance of the orders from the bench.).

[53] Based on the author's notes during the al-Dujail trial, as well as numerous print reports from the region during the trial.

[54] *See, e.g.*, Prosecutor v. Seselj, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defense (Mar. 1, 2005); Prosecutor v. Seselj, Case No. IT-03-67-PT (Aug. 21, 2006); Order Concerning Appointment of Standby Counsel and Delayed Commencement of Trial, Decision on Assignment of Counsel; Prosecutor v. Seselj, Case No. IT-03-67-PT (Oct. 25, 2006); David Hooper, *Serbian War Crimes Suspect Seselj Removed From Hague Hearing*, BBC MONITORING NEWSFILE, Nov. 1, 2006, at 1.

[55] Prosecutor v. Seselj, Case No. IT-03-63-PT, Decision on the Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defense (May 9, 2003) (holding that Article 21 of the ICTY Statute does not on its face exclude the possibility of offering an accused the assistance of assigned counsel where "the interests of justice so require. The need may arise for unforeseeable reasons to protect an accused's interests and to ensure a fair and expeditious

in international processes, the Iraqi judges would respond to repeated demonstrations of defiance and rambling diatribes by occasionally blocking the audio and video broadcasts. They also handled the repetitive hunger strikes precisely in accordance with international standards.[56] Lastly, while the Tribunal Statute permits the presiding judge to close proceedings under extremely limited circumstances, that power was used quite sparingly.[57] When defendants were removed from court, they had full access to their attorneys and watched a closed circuit broadcast of the proceedings from their cells, and they were able to consult with their counsel during trial sessions. No defendant or defense attorney was ever denied admission to the courtroom when they acceded to the authority of the presiding judge.

Despite the range of protections afforded defendants and the judges' efforts to maintain the focus on the presentation and evaluation of the actual evidence during the trial, the "speechifying" and political diatribe ultimately caused many Iraqis to conclude that a "far more suitable outcome would have been to . . . hold the trials outside Iraq even if a capital sentence could not have been passed."[58] Moreover, the taint of political interference continues to linger over the proceedings, which implicates the very essence of an independent and impartial system of justice at the very foundation of fairness. At this early date, it appears that the Iraqi High Criminal Court has fallen short of its aspiration to serve as a rallying point of unity and pride for the Iraqi people as it addresses the crimes of its past. The al-Dujail opinion nevertheless serves as an important benchmark for the future development of international humanitarian law. Its formation during a period of occupation and the clear findings of the court *vis-a-vis* the balance between domestic law and the orders of the occupying powers demonstrate its importance. The treatment of the sovereign immunity defenses raised is also notable. This paper concludes by assessing the Judgment and Cassation Panel decision (the Appeals verdict rendered on December 26, 2006) in light of the theories of personal responsibility articulated by the judges.

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trial"). The need for a strong Defense Office and the availability of standby counsel familiar with the entire trial is one of the most enduring lessons of the al-Dujail Trial. *See* Michael Scharf, *Lessons from the Saddam Trial*, 39 CASE W. RES. J. INT'L L., NOS. 1 & 2, 1 (2006–07) (generated from the Oct. 7, 2006 Cleveland Experts Meeting). Because the Iraqi domestic system is built on a civil law model, the Tribunal represents the most modern effort to meld common and civil law principles into a consolidated system and has accordingly yielded a number of important lessons for future trial processes).

[56] *See* Nevmerzhehitsky v. Ukraine, App. No. 54825/00, Eur. Comm'n H.R. Decid. Rep. (2005), para. 94; Mara Silver, *Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation,* 58-2 STAN. L. REV. 631, 633–34 (2005) (Giving into a prisoner's demands never, in any legal system across the globe, has been put forth openly as a legitimate judicial solution to ending that prisoner's hunger strike.); Joel K. Greenberg, *Hunger Striking Prisoners: The Constitutionality of Force-Feeding,* 51 FORDHAM L. REV. 747 (1983).

[57] Statute of the Iraqi High Criminal Court, *supra* note 17, at art. 20.

[58] DR. ALI ALLAWI, THE OCCUPATION OF IRAQ: WINNING THE WAR AND LOSING THE PEACE 434–35 (2007).

III. TRANSITIONAL JUSTICE UNDER THE LAW OF OCCUPATION

The procedural and substantive components of the Iraqi High Criminal Court functioned in the shadow cast by its inception during the Coalition occupation. The very antithesis of a judicial process based on legal arguments and evidence is one in which the courtroom simply serves as the stage upon which judges serve as proxies for the political desires of their masters. The relationship of a subjugated civilian population to a foreign power temporarily exercising *de facto* sovereignty is regulated by the extensive development of the law of occupation.[59] In terms of legal rights and duties, Iraq was considered an occupied territory when it was "actually placed under the authority of the hostile army."[60] This legal criterion is fulfilled when the following circumstances prevail on the ground: first, that the existing government structures have been rendered incapable of exercising their normal authority; and second, that the occupying power is in a position to carry out the normal functions of government over the affected area.[61] For the purposes of U. S. policy, occupation is the legal state occasioned by "invasion plus taking firm possession of enemy territory for the purpose of holding it."[62] Although a state of occupation does not "affect the legal status of the territory in question,"[63] the assumption of authority over the occupied territory implicitly means that the existing institutions of society have been swept aside. In the context of the post-war occupation in Iraq, the emotionalism attached to any implication that the victorious coalition would simply mandate punishment of its political enemies was heightened as a result of the political controversy around the world regarding the legality of the coalition military operations. Indeed, some scholars argued that the perceptions of hegemonic external power could negate the conceptual benefits of holding trials in Iraq, such as the availability of victims and evidence.[64]

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[59] *See* Annex to the 1907 Hague Convention IV, Regulations Respective the Laws and Customs of War on Land, Jan. 26, 1910, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 73 (A. Roberts & R. Guetff eds., Oxford University Press 3d ed. 2000) [hereinafter 1907 Hague Regulations]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 47–48, Oct. 21, 1950, 6 U.S.T.3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

[60] 1907 Hague Regulations, *supra* note 59, at art. 42; DEP'T OF THE ARMY, THE LAW OF LAND WARFARE, DEPARTMENT OF THE ARMY FIELD MANUAL 27-10, ¶ 351 (1955) [hereinafter U.S. ARMY FIELD MANUAL]. The entire Chapter 6 of the U.S. ARMY FIELD MANUAL relating to the law of armed conflict is devoted to explaining the test of the law on occupation and U.S. occupation policy. *Id.*

[61] U.K. MINISTRY OF DEF., THE MANUAL OF THE LAW OF ARMED CONFLICT 275, ¶ 11.3 (2004).

[62] U.S. ARMY FIELD MANUAL*, supra* note 60, ¶ 352.

[63] Protocol Addition to the Geneva Convention of August 12, 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 4, U.N. DOC. A 32/144 (Dec. 7, 1978) [hereinafter Protocol I].

[64] Jose Alvarez, *Trying Hussein: Between Hubris and Hegemony*, 2 J. INT'L CRIM. JUST. 319, 326 (2004).

The baseline principle of occupation law is that the civilian population should continue to live their lives as normally as possible. This concept may be termed the "minimalist principle," though some observers have termed it the "principle of normality."[65] In accordance with the baseline principle of normality, Article 43 of the 1907 Hague Regulations stipulates that the occupying power must respect, "unless absolutely prevented, the laws in force in the country."[66] In its temporary exercise of functional sovereignty over the occupied territory, and as a pragmatic necessity, the occupation authority must ensure the proper functioning of domestic criminal processes and cannot abdicate that responsibility to domestic officials of the civilian population who may or may not be willing or able to carry out their normal functions in pursuit of public order.[67] As a policy priority, domestic officials should enforce domestic law insofar as possible. In addition, crimes not of a military nature that do not affect the occupant's security should be delegated to the jurisdiction of local courts.[68] Pursuant to its temporary assumption of domestic authority, the occupier may detain civilians when there are "serious and legitimate reasons" to believe that the detained persons threaten the safety and security of the occupying power.[69] The coercive authority of the occupying power is limited by a specific prohibition against making any changes to the governmental structure or institutions that would undermine the benefits guaranteed to civilians under the Geneva Conventions.[70]

Because the foreign power has displaced the normal domestic offices, the cornerstone of the law of occupation is the broad obligation that the foreign power must "take *all* the measures in his power to restore, and ensure, as far as possible, public order and safety."[71] In the authoritative French, the occupier must preserve "l'ordre et la vie publics" (i.e., public order and life).[72]

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[65] J.S. Pictet, *The Principles of International Humanitarian Law,* ICRC, Geneva, 1967, at 50.

[66] 1907 Hague Regulations, *supra* note 59, at art. 43.

[67] Fourth Geneva Convention, *supra* note 59, at art. 54 ("The Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.").

[68] U.S. ARMY FIELD MANUAL*, supra* note 60, ¶ 370.

[69] Prosecutor v. Delalic, Mucic, Delic, and Landzo (Celibici), Case No. IT-96-21-T, Judgment, (Feb. 20, 2001).

[70] Fourth Geneva Convention, *supra* note 59, at art. 47.

[71] 1907 Hague Regulations, *supra* note 59, at art. 43 (emphasis added).

[72] *Id*. The conceptual limitations of foreign occupation also warranted a temporal limitation built into the 1949 Geneva Conventions that the general application of the law of occupation "shall cease one year after the general close of military operations." Fourth Geneva Convention, *supra* note 59, at art. 6. Based on pure pragmatism, Article 6 of the Fourth Geneva Convention does permit the application of a broader range of specific treaty provisions "for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory." *Id.* The 1977 Protocols eliminated the patchwork approach to treaty protections with the simple declaration that "the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the

On that legal reasoning alone, the establishment of the Iraqi Tribunal might have been warranted as a matter of legal logic under the inherent occupation authority of the Coalition if it had been an integral aspect of a larger strategic plan for restoring public calm and peaceful stability to the civilian population.

The circumstances surrounding the formulation of the High Criminal Court are at once the most potent legal and political hurdle to its long-term reputation. In fact, arguments over the legality of the Tribunal's formation caused the first of what would be many defense protests during the long trial. During the third trial session on December 5, 2005, ex-Qatari Justice Minister Najib al-Nu'aymi asked to speak regarding the legitimacy of the tribunal and its formation.[73] When Judge Rizgar resisted hearing such an oral motion in lieu of written submissions, the defense lawyers threatened to stage an en masse walkout. Judge Rizgar responded that he would appoint standby counsel to represent the rights of the defendants if the retained counsel walked out of the courtroom. Although international practice clearly warrants the appointment of counsel when necessary to preserve the dignity of the courtroom and protect the rights of the defendants,[74] Saddam and his brother-in-law Barzan al-Tikriti began to shout, "This is a law made by America and does not reflect Iraqi sovereignty." After the defense lawyers left, Saddam, shaking his right hand, told the judge, "You are imposing lawyers on us. They are imposed lawyers. The court is imposed by itself. We reject that."[75] Following a ninety-minute defense walk out, al-Nu'aymi read aloud from the Geneva Conventions and argued that the case could not proceed because it had been established during a period of occupation that resulted from an illegal invasion and was not the product of a "legitimate" Iraqi government.[76] The defense team representing Awad Hamad al Bandar then followed up the courtroom theatrics with a written motion submitted on December 21, 2005, challenging the legality of the tribunal based on its creation during a period of coalition occupation rather than at the hands of a sovereign Iraqi government.

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case of occupied territories, on the termination of the occupation." Protocol I, *supra* note 63, at art. 3(b).

[73] Unless otherwise noted, factual details in this paragraph are recorded in the author's personal notes.

[74] Graham Zellick, *The Criminal Trial and the Disruptive Defendant: Part Two,* 43 MOD. L. REV. 3, 284, 295 (1980); Michael Scharf, *Self Representation Versus Assignment of Defense Counsel Before International Criminal Tribunals*, 4 J. INT'L CRIM. JUST. 1, 31, 35 (2006). *See also* Faretta v. California, 422 U.S. 806, 835 (1975) (holding that "the right of self-representation is not a license to abuse the dignity of the courtroom" and "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct").

[75] *Saddam Says He's Not Afraid of Execution*, JERUSALEM POST, Dec. 5, 2005, *available at* http://www.jpost.com/servlet/Satellite?cid=1132475686374&pagename=JPost%2FJPArticle%2FShowFull.

[76] Author's personal notes of trial testimony.

Essential to the promulgation of the original Tribunal Statute in December 2003, the entity named the "Coalition Provisional Authority" (CPA) had affirmative authority as the "temporary governing body designated by the United Nations as the lawful government of Iraq until such a time as Iraq is politically and socially stable enough to assume its sovereignty."[77] The United Nations Security Council unanimously affirmed "the specific authorities, responsibilities, and obligations under applicable international law of these States of the Coalition as occupying powers under unified command (the Authority)."[78] The CPA posited its power as the occupation authority in Iraq in declarative terms: "The CPA is vested with all executive, legislative, and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483, and the laws and usages of war."[79] The "Coalition Provisional Authority" literally was titled: 1) it represented the two States legally occupying Iraq (the United States and the United Kingdom) as well as the coalition of more than twenty other States referred to in Resolution 1483 as working "under the Authority"; 2) it was intended to be a temporary power to bridge the gap to a full restoration of Iraqi sovereign authority;[80] and, perhaps most importantly, 3) it exercised the obligations incumbent on those States occupying Iraq in the legal sense, and conversely enjoyed the legal authority flowing from the laws and customs of war. This understanding of CPA status comports with the diplomatic representations made at the time of its formation.[81]

The allegations of so-called "victor's justice" have haunted virtually every accountability process since Nuremberg,[82] and thus have a visceral power

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[77] The Coalition Provisional Authority: Overview, http://www.iraqcoalition.org/bremerbio.html.

[78] S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003) (referring to the members of the coalition).

[79] Coalition Provisional Authority Regulation 1, CPA/REG/01 (May 16, 2003), *available at* http://www.cpa-iraq.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf.

[80] S.C. Res. 1546, U.N. Doc. 5/Res/1546 (June 8, 2004). Security Council Resolution 1546 was unanimously passed on June 8, 2004, and welcomed the restoration of full Iraqi sovereignty effective June 30, 2004. *Id.*

[81] *See* Letter from the Permanent Representatives of the United Kingdom and the United States to the United Nations, addressed to the President of the Security Council, U.N. Doc S/2003/538, (May 8, 2003), *available at* http://www.globalpolicy.org/security/issues/iraq/document/2003/0608usukletter.htm (last visited Apr. 15, 2005).

[82] Richard May & Marieka Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT'L L. 725, 764 (1999). The perception of victor's justice was also a strong motivating factor in the movement to establish a permanent international criminal court. *See, e.g.*, M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP L. REV. 1, 34 (1991).

> We cannot rely on the sporadic episodes of the victorious prosecuting the defeated and then dismantle these ad hoc structures as we did with the Nuremberg and Tokyo tribunals. The permanency of an international

that could corrode every facet of the trial. If the truth-seeking process of trials is overcome by externally imposed limits on judicial independence or politically motivated revenge, the entire process would suffer from a crisis of legitimacy. On the other hand, the mere fact that formation of a new judicial process was predicated on political power does not inherently constitute fatal bias. Summarizing the International Military Tribunal at Nuremberg, one preeminent international jurist opined that "despite certain shortcomings of due process rules at Nuremberg . . . . Nuremberg was neither arbitrary nor unjust . . . . [V]ictors sat in judgment and did not corrupt the essential fairness of the proceedings."[83] The Iraqi High Criminal Court and the International Criminal Tribunal for the former Yugoslavia (ICTY) share the same jurisprudential underpinnings because the U.N. Security Council established the ICTY with a ground-breaking 1993 resolution[84] premised on the legal authority of the Security Council to "maintain or restore international peace and security."[85] Both Tribunals were, therefore, implicitly founded on the assessment by the officials charged with preserving stability and the rule of law that prosecution of selected persons responsible for serious violations of international humanitarian law would facilitate the restoration of peace and stability. After the first defendant, a Serb named Dusko Tadic, challenged the legality of the ICTY, the Trial Chamber ruled that the authority of the Security Council to create the tribunal was dispositive.[86] Just as the Security Council has the "primary responsibility" for maintaining international peace and security,[87] the CPA had a concrete legal duty to facilitate the return of stability and order to Iraq after the fall of the regime.

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

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> criminal tribunal acting impartially and fairly irrespective of whom the accused may be is the best policy for the advancement of the international rule of law and for the prevention and control of international and transnational criminality.

Id.

[83] THEODOR MERON, WAR CRIMES LAW COMES OF AGE—ESSAYS 198 (1998).

[84] S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

[85] U.N. Charter art. 39 (giving the Security Council the power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and it "shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security").

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

[87] U.N. Charter art. 24, at para. 1.

obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907."[88] Resolution 1483 is particularly noteworthy because the Dujail Judgment cites it as conveying the imprimatur of unanimous Security Council authority to the Iraqi High Criminal Court by highlighting the need for an accountability mechanism "for crimes and atrocities committed by the previous Iraqi regime."[89] The Security Council further required the CPA to exercise its temporary power over Iraq in a manner "consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory."[90] Though strikingly similar to the declaration of Allied power in occupied Germany after World War II,[91] CPA Regulation 1 was founded on bedrock legal authority flowing from the Chapter VII power of the Security Council as supplemented by the preexisting power granted to the CPA under the law of occupation.[92]

Responding to the defense motion challenging the legitimacy of the High Criminal Court, the Dujail Judgment strikes something of an indignant tone. The judges were apparently offended by the defense's constant insinuation that they were "propelled by others" as a result of the occupation and wrote that the defense allegations constituted "degrading statements" that amounted to an "indecent attack" on their character.[93] The Iraqi Judicial Law specifies that the judge shall be bound to "preserve the dignity of the judicature and to avoid anything that arouses suspicion on his honesty."[94]

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[88] S.C. Res. 1483, ¶ 5, S/RES/1483 (May 22, 2003).

[89] *Id.*

[90] *Id.* ¶ 4.

[91] General Eisenhower's Proclamation said: "Supreme legislative, judicial, and executive authority and powers within the occupied territory are vested in me as Supreme Commander of the Allied Forces and as Military Governor, and the Military Government is established to exercise these powers." *Reprinted in* Military Government Gazette, Germany, United States Zone, Office of Military Government for Germany, 1 Issue A (June 1, 1946) (copy on file with author).

[92] The Fourth Geneva Convention recognizes the importance of individual rights enjoyed by the civilian population and the correlative duties of the occupier to that population. The structure of the Fourth Convention focused on the duties that an occupying power has towards the individual civilians and the overall societal structure rather than on the relations between the victorious sovereign and the defeated government. Under the rejected concept termed "*debellatio*," the enemy was defeated utterly and, accordingly, the defeated State forfeited its legal personality and was absorbed into the sovereignty of the occupier. MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 600–01 (1959). The successful negotiation of the Geneva Conventions in the aftermath of World War II marked the definitive rejection of the concept of *debellatio*, under which the occupier assumed full sovereignty over the civilians in the occupied territory. EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 92 (1993). *Debellatio* "refers to a situation in which a party to a conflict has been totally defeated in war, its national institutions have disintegrated, and none of its allies continue militarily to challenge the enemy on its behalf." *Id.*

[93] Part I, Unofficial Translation of Dujail Trial Chamber Opinion, *supra* note 36, at 24.

[94] Law of Judicial Organization, Number 160 of 1979, Resolution No. 1724, issued by the Revolutionary Command Council, Oct. 12, 1979, art. 7, published by the Ministry of Justice,

Careful trial observers noted that the Dujail judges were very conscious of the gravity of their task in seeking the truth about the events surrounding al-Dujail.[95] On the very first day of trial, Judge Rizgar Amin reminded all of the defendants of their fair trial rights as embedded in the Statute and in Iraqi law, and pointedly reminded them of the presumption of innocence.[96] Judge Ra'ouf frequently reminded the defendants of the constitutional principle (also found in the Statute of the Tribunal[97] and in the International Covenant on Civil and Political Rights[98]) that an accused is "innocent until he is proven guilty in a legal trial."[99] Citing the series of Security Council Resolutions that began with Resolution 1483, the Trial Chamber flatly rejected the defense motion based on the "self evident" truth that the Iraqi government retained the right to prosecute Ba'athist officials for "the crimes determined and adopted in international criminal law."[100] Resolution 1483 operated in conjunction with the residual laws and customs of war to establish positive legal authority for the formation of the Iraqi High Criminal Court under CPA authority as delegated to the Interim Governing Council.

The Trial Chamber also supported its conclusion by citing the text of Security Council Resolution 1511, which also was a unanimous Resolution based on its Chapter VII authority, reaffirming "the sovereignty and territorial integrity of Iraq."[101] In the operative paragraph, the Security Council determined

> that the Governing Council and its ministers are the principal bodies of the Iraqi interim administration, which, without prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period until an

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Official Gazette of the Republic of Iraq, Vol. 23, No. 27 at 2 (July 2, 1980), *reprinted in* UNITED STATES INSTITUTE OF PEACE, IRAQI LAWS REFERENCED IN THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL (2004) (copy on file with author).

[95] Author's observations in the courthouse and from discussions with trial participants.

[96] Christiane Amanpour, *Saddam Hussein Defiant In Court*, CNN.COM, Oct. 20, 2005, http://www.cnn.com/2005/WORLD/meast/10/19/saddam.trial/index.html.

[97] Statute of the Iraqi High Criminal Court, *supra* note 17, at art. 17.

[98] International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 (describing analogous provisions derived from international human rights law) [hereinafter ICCPR].

[99] INTERIM CONSTITUTION IRAQ (1970) art. 20, *reprinted in* UNITED STATES INSTITUTE OF PEACE, IRAQI LAWS REFERENCED IN THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL (2004). This principle is also embodied in Article 19 of the 2005 Iraqi Constitution. *See* IRAQI CONSTITUTION art. 19, *available at* http://www.law.case.edu/saddamtrial/documents/UN_USG_UK_NDI_Agreed_English_Text_25.01.06-CURRENT.pdf. The Iraqi Law on Criminal Proceedings makes clear that the judge must release an accused if "there is insufficient evidence for conviction." Iraqi Law No. 23 on Criminal Proceedings, *supra* note 9, at para. 203.

[100] Part I, Unofficial Translation of Dujail Trial Chamber Opinion, *supra* note 36, at 31.

[101] S.C. Res. 1511, ¶ 1, U.N. Doc. S/RES/1511 (Oct. 16, 2003), *available at* http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2003&m=October&x=20031016151238yesmikk0.6846125.

> internationally recognized representative government is established and assumes the responsibilities of the Authority.[102]

Buttressed by the Chapter VII power of the Security Council at the time of its creation,[103] the Iraqi High Criminal Court rested not only on the authority of the occupation officials, but also directly on the legal power of the Interim Governing Council responsible for drafting and adopting the original Statute. Apart from the authority of occupation law that had been conveyed to the succession of interim Iraqi governments, the opinion notes that 78 percent of the Iraqi people had elected the sovereign Iraqi government that amended and re-promulgated the original Tribunal Statute in October 2005.[104] The opinion also cites the principle embedded in the International Criminal Court that sovereign states have primacy for enforcing international norms.[105] The rejection of the defense motion and approval of its formation under the authority granted to the Iraqi Governing Council creates an almost perfect parallel to the post-World War II occupations. During these occupations, the British and Americans created guidelines to direct Germany towards democracy but ultimately gave the Germans great latitude in rebuilding their country.[106]

The legality portion of the Dujail Judgment is an important example of modern state practice that will guide future post-conflict occupations. It reinforces the premise that the Fourth Geneva Convention does not operate to doggedly elevate the provisions of domestic law and the structure of domestic institutions above the pursuit of justice. The duty found in Article

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[102] *Id.* ¶ 4.

[103] The ICTY and Iraqi High Criminal Court are thus intellectual twins as they rest on the authority of the Security Council's Chapter VII power. The former U.S. Attorney General Ramsey Clark has attacked the legal authority for forming the ad hoc tribunals in a number of public comments and letters which raise the almost identical arguments to those raised in the Dujail Trial strategy. *See, e.g.*, Letter from Ramsey Clark to U.N., http://www.medialens.org/forum/viewtopic.php?p=1168.

> The former President of Yugoslavia is on trial for defending Yugoslavia in a court the Security Council had no power to create. . . . The ICTY and other ad hoc criminal tribunals created by the Security Council are illegal because the Charter of the United Nations does not empower the Security Council to create any criminal court. The language of the Charter is clear. Had such power been placed in the Charter in 1945 there would be no U.N. None of the five powers made permanent members of the Security Council in the Charter would have agreed to submit to a U.N. criminal report.

Id.

[104] Part I, Unofficial Translation of Dujail Trial Chamber Opinion, *supra* note 36, at 31.

[105] Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 24–25 (2001).

[106] Walter M. Hudson, *The US Military Government and the Establishment of Democratic Reform, Federalism, and Constitutionalism During the Occupation of Bavaria*, 1945–47, 180 MIL. L. REV. 115, 123 (2004).

43 of the Hague Regulations to respect local laws unless "absolutely prevented" (in French "*empêchement absolu*") imposes a seemingly categorical imperative.[107] However, rather than being understood literally, "*empêchement absolu"* has been interpreted as the equivalent of "*necessité*."[108] The Dujail verdict reinforces this functional meaning. Under the obligations of modern human rights law, an occupier may amend local law to "remove from the penal code any punishments that are 'unreasonable, cruel or inhumane' together with any discriminatory racial legislation."[109] For example, the Israeli decision to confer the vote in mayoral elections on women who had not formerly enjoyed this right would probably comport with the Article 43 obligation of an occupier.[110] Despite the minimalist principle, international law allows reasonable latitude for an occupying power to modify, suspend, or replace the existing penal structure in the interests of ensuring justice and the restoration of the rule of law. The Dujail Judgment builds on the state practice in the post-World War II context that permitted the Allies to set the feet of the defeated Axis powers "on a more wholesome path"[111] rather than blindly enforcing the institutional and legal constraints that had been the main bulwarks of tyranny.[112]

Though Trial Chamber I merely mentions Article 64 of the Fourth Geneva Convention in passing, its opinion is consistent with the modern interpretation of the law of occupation. The subtle linkage between Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention gave the CPA broad discretion to delegate the authority for promulgation of the Tribunal to the Governing Council as a matter of necessity. Article 64 of the Fourth Geneva Convention clarified the old Hague Article 43 by explaining the exception to the minimalist principle in more concrete terms. In ascertaining the implications of Article 64 with regard to the occupation in Iraq, it is important to realize that its drafters did not extend the "traditional

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[107] Yoram Dinstein, *Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding*, PROGRAM ON HUMANITARIAN POL. & CONFLICT RES., HARV. U., OCCASIONAL PAPER SERIES 8 (2004).

[108] *Id. See also* Edmund.H. Schwenk, *Legislative Power of the Military Occupant Under Article 43, Hague Regulations,* YALE L. J. 393, 399–402 (1945).

[109] LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 259 (2d ed. 2000).

[110] *Id*.

[111] MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 225 (1959).

[112] For example, the oath of the Nazi party was: "I owe inviolable fidelity to Adolf Hitler; I vow absolute obedience to him and to the leaders he designates for me." *See* DREXEL A. SPRECHER, INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT 1037–38 (1999). Accordingly, power resided in Hitler, from whom subordinates derived absolute authority in hierarchical order. This absolute and unconditional obedience to the superior in all areas of public and private life led in Justice Jackson's famous words to "a National Socialist despotism equaled only by the dynasties of the ancient East." TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 99–100 (1947).

scope of occupation legislation."[113] The Geneva Convention added detail to the concept of necessity enshrined in the 1907 Article 43 obligation, but it did so with the intent of protecting the legal rights of the civilian population.[114]

The plain language of Article 64 must be interpreted in good faith in light of the object and purpose of the Fourth Convention, which seeks to alleviate the suffering of the civilian population and ameliorate the potentially adverse consequences of occupation subsequent to military defeat.[115] The first paragraph strikes a balance between the minimalist intent of the framers and the overriding purpose of making due allowance both for the rights of the civilian population and the concurrent right of the occupier to maintain the security of its forces and property. The second paragraph of Article 64 morphed the implicit meaning of "necessary" drawn from the old Hague Article 43 into an explicit authority to amend the domestic laws in order to achieve the core purposes of the Convention. Article 64 has thus been accepted in light of the common-sense reading and the underlying legal duties of the occupier to permit modification of domestic law under limited circumstances.[116]

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[113] GEORGE SCHWARZENBERGER, THE LAW OF ARMED CONFLICT 194 (1968).

[114] Fourth Geneva Convention, *supra* note 59, at art. 64. Article 64 reads as follows:

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

Id.

[115] Vienna Convention on the Law of Treaties art. 31(1), Jan. 27, 1980, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969).

[116] UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 293 (2004). United States doctrine states that the

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

U.S. ARMY FIELD MANUAL, *supra* note 60, ¶ 371.

At its core, Article 64 protects the rights of citizens in the occupied territory to a fair and effective system of justice. As a first step, and citing its obligation to ensure the "effective administration of justice," the CPA issued an order suspending the imposition of capital punishment in the criminal courts of Iraq and prohibiting torture as well as cruel, inhumane, and degrading treatment in occupied Iraq.[117] Exercising his power as the temporary occupation authority, Ambassador Bremer signed CPA Order No. 7, which amended the Iraqi Criminal Code in other important ways seeking to suspend or modify laws that "the former regime used . . . as a tool of repression in violation of internationally recognized human rights."[118] The subsequent promulgation of CPA Policy Memorandum No. 3 on June 18, 2003, which amended key provisions of the Iraqi Criminal Code in order to protect the rights of the civilians in Iraq,[119] was based on the treaty obligation to eliminate obstacles to the application of the Geneva Conventions. Though the CPA Policy aligned Iraqi domestic procedure and law with the requirements of international law, it was at best a stop gap measure that was neither designed nor intended to bear the full weight of prosecuting the range of crimes committed by the regime. Section 1 of the original June 18, 2003 Policy Memorandum No. 3 expressly focused on the "need to transition" to an effective administration of domestic justice that had been weaned from a "dependency on military support."[120]

The authority to "subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligation under the present Convention," in turn permitted the delegation of authority to the Interim Governing Council needed to draft and adopt the Statute of the Tribunal. Article 47 of the Fourth Convention makes clear that such "provisions" may include sweeping changes to the domestic legal and government structures. Article 47 implicitly concedes power to the occupying force to "change . . . the institutions or government" of the occupied territory, so long as those changes do not deprive the population of the benefits of that Convention.[121] Thus, the CPA lawfully could not have hidden behind the fig

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[117] Coalition Provisional Authority Order Number No. 7, Doc. No CPA/ORD/7 at sec. 2–3 (June 9, 2003), *available at* http://www.cpa-iraq.org/regulations/index.html#Orders.

[118] *Id*.

[119] Coalition Provisional Authority Memorandum Number 3, *revised* on June 27, 2004, *available at* http://www.cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures__Rev_.pdf.

[120] Copy on file with author.

[121] Fourth Geneva Convention, *supra* note 59, at art. 47. Article 47 also prevented the CPA from effecting changes that would undermine the rights enjoyed by the civilian population "by any agreement concluded between the authorities of the occupied territories and the Occupying Power." *Id. See also* U.S. ARMY FIELD MANUAL, *supra* note 60, ¶ 365. United States Army doctrine reflects this understanding of the normative relationship with the reminder that "restrictions placed upon the authority of a belligerent government cannot be avoided by a system of using a puppet government, central or local, to carry out acts which would have been unlawful if performed directly by the occupant." *Id.* ¶ 366 (further specifying that "Acts induced

leaf of domestic decision making. The CPA could not have allowed domestic authorities in occupied Iraq to create a process that would have undermined the human rights of those Iraqi citizens accused of the most severe human rights abuses during the period of the "entombed regime." The Commentary to the Fourth Geneva Convention on the protection of civilians also makes clear that the occupying power may modify domestic institutions (which would include the judicial system and the laws applicable thereto) when the existing institutions or government of the occupied territory operate to deprive human beings of "the rights and safeguards provided for them" under the Fourth Convention.[122] These provisions of occupation law are consistent with the Allied experience during the post-World War II occupations. They were intended to permit future occupation forces to achieve the salutary effects inherent in rebuilding or restructuring domestic legal systems when the demands of justice require such reconstruction. Against that legal backdrop, direct CPA promulgation of the Statute and the accompanying reforms to the existing Iraqi court system could have been justified on the basis of any of the three permissible purposes specified in Article 64 of the Fourth Convention fulfilling its treaty obligation to protect civilians, maintaining orderly government over a restless population demanding accountability for the crimes suffered under Saddam, or enhancing the security of Coalition forces.

IV. THE LEX MITIOR PRINCIPLE

The Trial Chamber's findings with regard to legality formed a necessary predicate to resolving a critical issue raised *sua sponte* by Trial Chamber I judges. The death penalty has been both permitted and utilized within Iraqi criminal courts throughout the modern era and dates back to the Code of Hammurabi in practice.[123] The Iraqi Penal Code of 1969 listed the death penalty among the range of permitted penalties for criminal offenses.[124] However, as noted above, Ambassador Bremer promulgated Coalition Provisional Order No. 7 in June 2003 seeking to align Iraqi practice with international human rights norms during the period of occupation.[125] Regardless of the procedural forms adopted, international law is clear that no

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or compelled by the occupant are nonetheless its acts").

[122] Int'l Comm. of the Red Cross, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, *in* THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY VOL. IV 274 (Pictet ed., 1958).

[123] Author's observation based on numerous comments by Iraqi jurists and prosecutors.

[124] Iraqi Penal Code of 1969, Chapter V, § 1, para. 85, *available at* http://www.law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf. "The primary penalties are: 1) death penalty, 2) life imprisonment, 3) imprisonment for a term of years, 4) penal servitude, 5) detention, 6) a fine, 7) confinement in a school for young offenders, 8) confinement in a reform school." *Id.* The subsequent sections specify a range of procedural obligations and limitations on the actual imposition of capital sentences. *Id.*

[125] L. Paul Bremer, Coalitional Provisional Authority Order Number 7, Penal Code (June 18, 2003), *available at* http://www.aina.org/books/cpapenalcode.htm.

accused should face punishment unless convicted pursuant to a fair trial affording all of the essential guarantees embodied in widespread state practice.[126] The affirmative obligations of Article 47 of the Fourth Geneva Convention[127] required a CPA role to ensure that the judicial structure that emerged as a function of Iraqi domestic politics and was promulgated as a domestic statute fully complied with relevant human rights obligations.[128] Section 3, Paragraph 1 of CPA Order No. 7 was the most controversial provision, because it provided that "capital punishment is suspended. In each case where the death penalty is the only available penalty prescribed for an offense, the court may substitute the lesser penalty of life imprisonment, or

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

[127] Fourth Geneva Convention, *supra* note 59, at art. 47. Article 47 also prevented the CPA from effecting changes that would undermine the rights enjoyed by the civilian population "by any agreement concluded between the authorities of the occupied territories and the Occupying Power." *Id.*

[128] A full discussion of the extent to which human rights law applies in an occupation environment is beyond the scope of this paper. There is a growing awareness that some aspects of human rights may apply extraterritorially alongside the conventional obligations found in occupation law. The precise interrelationship between occupation law and human rights norms is debatable and ill-defined at present. *See, e.g.,* Bankovic et. al. v. Belgium and 16 Other Contracting States, App. No. 52207/99, Eur. Ct. H.R., para 71 (2001) (rejected on jurisdictional grounds) (declaring in dicta on the one hand that the European Convention may impose obligations on States anywhere they exercise "effective control" while in another paragraph, para. 80, limiting that gratuitous language to territory that "for the specific circumstances, would normally be covered by the Convention" which means those state parties signatory). Contra, Issa et al. v. Turkey, App. No. 31821/96, Eur. Ct. H.R., 30 (2000). Both bodies of law serve to protect fundamental human values, albeit in differing manners and from differing jurisprudential frameworks. Obliquely referring to the connection between the two distinct bodies of law, the Inter-American Commission on Human Rights noted that:

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

Inter-American Commission, Coard et al. v. United States, Case 10.951, Inter-Am C.H.R., Report No. 109/99, OEA/Ser.L./V, ¶ 37 (1999).

such other lesser penalty as provided for in the Penal Code."[129] Despite the promulgation of CPA Order No. 7 and its temporary abolition of capital sentences, the original Tribunal Statute adopted by the Interim Governing Council in December 2003 permitted the range of punishments "prescribed by the Penal Code of 1969," and this language was retained in each of the subsequent legislative enactments following the restoration of full sovereignty.[130]

During the Dujail trial, the defense never raised the apparent conflict between the sentencing provisions of the Statute and the enactment of its original version during the occupation period under which the use of capital punishment was not permitted. Enshrined in Article 15 of the ICCPR, the principle of *lex mitior* requires that if the applicable law is changed so as to allow for a lighter penalty subsequent to the commission of a crime, the offender shall benefit from the change.[131] The Iraqi Penal Code of 1969 expressly adopts the principle of *lex mitior* in Section 2(2). This section reads as follows:

> (1) The occurrence and consequences of an offence are determined in accordance with the law in force at the time of its commission and the time of commission is determined by reference to the time at which the criminal act occurs and not by reference to the time when the consequence of the offence is realised.
>
> (2) However, if one or more laws are enacted after an offence has been committed and before final judgment is given, then the law that is most favourable to the convicted person is applied.[132]

Hence, the Dujail Trial Chamber faced a potential legal barrier to even considering any capital sentence. The Trial Judgment addressed the *lex mitior* issue as its first substantive issue. One of the central pillars of the law of occupation is that the occupying power does not acquire sovereignty over

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[129] Coalition Provisional Authority Order Number No. 7, Doc No CPA/ORD/7, Sec. 3(1) (June 9, 2003), *available at* http://www.cpa-iraq.org/regulations/index.html#Orders.

[130] Statute of the Iraqi High Criminal Court, *supra* note 17, at art. 24.

[131] ICCPR, *supra* note 98, art. 15. Article 15 reads:

> (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

Id.

[132] Iraqi Penal Code of 1969, *supra* note 124, Sec. 2(2).

the territory. Because an occupying power is merely a temporary custodian of the status quo in the territory it controls,[133] an assertion of de jure authority through annexation is fundamentally at odds with the temporary nature of occupation.[134] During the fourteen months of occupation, the CPA effected a displacement, rather than a replacement, of Iraqi sovereignty. Trial Chamber I specifically highlighted its unanimous opinion that "the Temporary Coalition Government is considered a transitional authority in Iraq until achieving full sovereignty according to Article 43 of The Hague Laws of 1907 the orientation of the occupier is to respect the language, norms and traditions of the occupied country."[135]

Lex mitior is meant to give the accused the benefits of a change in the value judgments of society at large. Laws imposing new and lighter penalties are often the concrete expression of some change in the attitude of the community towards the offense in question.[136] As a result, the principle of *lex mitior* "applies only to cases in which the commission of the criminal offence and the subsequent imposition of a penalty took place within one and the same jurisdiction."[137] In the context of the Iraqi Penal Code of 1969, the phrase "one or more laws" clearly indicates that a law must be enacted within the formal process of the domestic law for *lex mitior* to attach. The concept of "one or more laws" found in Section 2(2) of the Penal Code parallels the phrase "provision made by law" found in Article 15 of the ICCPR.[138] The Trial

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[133] CHRISTOPHER GREENWOOD, ESSAYS ON WAR IN INTERNATIONAL LAW 357 (2006); UK WAR OFFICE, MANUAL OF MILITARY LAW, III: THE LAW OF WAR ON LAND ¶ 510 (1958); *see also* GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY OF THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 27–37 (1957); U.S. ARMY FIELD MANUAL*, supra* note 60, ¶ 358:

> Being an incident of war, military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty. The exercise of these rights results from the established power of the occupant and from the necessity of maintaining law and order.

Id.

[134] Int'l Comm. of the Red Cross, *supra* note 122 ("[T]he occupation of territory in wartime is essentially a temporary, de facto situation, which deprives the occupied Power of neither its statehood nor its sovereignty; it merely interferes with its power to exercise its rights."); Frederic L. Kirgis, *Security Council Resolution 1483 on the Rebuilding of Iraq,* ASIL INSIGHTS (2003), *available at* http://www.asil.org/insights/insigh107.htm ("Internationally, though, the fact that a country is occupied and is under the effective, but temporary, control of the occupying powers does not affect its continuing status as a sovereign state. Iraq remains a state as a matter of international law, with rights and obligations toward other sovereign states.").

[135] Part I, Unofficial Translation of Dujail Trial Chamber Opinion, *supra* note 36, at 3.

[136] Commission on Human Rights, 5th Session (1949), 6th Session (1950), 8th Session (1952) [E/CN.4/SR.112, p.8 (F)].

[137] Momir Nikolic, Case No. IT-02-60/1-S, Judicial Supplement No. 46, ¶ 163, Sentencing Judgment, (Dec. 2, 2003).

[138] ICCPR, *supra* note 98, at art. 15(1).

Chamber implicitly concluded that a "procedure made by law" is one that has been enacted in accordance with Iraqi legislative procedure. The CPA's purpose was to protect the people of Iraq, not to speak for them.[139] Coalition Provisional Authority Order Section 7, paragraph 3, contained no measure of public opinion but only represented the operational necessity under which the Coalition was acting in light of its powers under occupation law. Based on the findings of the Trial Chamber and the status of the CPA under Article 43, the CPA was not, and did not consider itself to be, the voice of the people, since it was not the legislative organ of the Iraqi people.[140]

The Cassation Panel Opinion addressed this issue squarely and upheld the assessment of the Trial Chamber that *lex mitior* was inapplicable due to the ephemeral nature of CPA authority by holding that CPA Order No. 7 did not stem from the Legislative Authority in Iraq, nor did it include any standards of the public opinion, but rather it merely reflected the necessity that the Coalition was supposed to act according to and in light of the authority entrusted in it in accordance with the occupation law being the interim sponsor during that present period in Iraq. Because that Authority had no legal sovereignty over the occupied region, and consequently, the Coalition Authority was kind of a separate legal jurisdiction, according to well-established international laws, the Iraqi High Tribunal was not obliged to implement its rulings or its laws. The order of the Interim Coalition Authority, which suspended execution of capital punishment, was merely a temporary procedure imposed by an interim authority, and therefore, this law could not have been considered a law issued before the sentencing and consequently would have the power to make the law of capital punishment null and void and a law that would be an applicable legal choice of the legal judgment.[141]

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[139] Paul Bowers, *Iraq: Law of Occupation*, Research Paper 03/51, House of Commons Library 19 (June 2, 2003).

[140] United Kingdom Foreign Secretary Jack Straw commented on trials for members of the Saddam Hussein regime in response to a question by Douglas Hogg: "We want the Iraqi people, in the main, to take responsibility for ensuring justice in respect of former members of the regime." HOUSE OF PARLIAMENT COUNCILS DEBATE, cc 32-3 at 29 (Apr. 28, 2003), *available at* http://www.parliament.uk/commons/lib/research/rp2003/rp03-051.pdf. Pierre-Richard Prosper, the U.S. Ambassador for War Crimes, was interviewed by the *Daily Telegraph* in April 2003. The report gave the following account of his arguments:

> As for Saddam's crimes, he believes that the Iraqis themselves should take the lead, and that their former president and his henchmen should be tried in Iraq itself. We really need to allow the Iraqis the opportunity to do this. They are the victims. It is their country that was oppressed and abused. We want them to have a leadership role, and we're there to be supportive.

Toby Harnden, *Man with a mission to put Saddam in the dock: Pierre-Richard Prosper, the US Ambassador for War Crimes, tells Toby Harnden in Washington why he would love to look the fallen dictator in the eye,* DAILY TELEGRAPH, April 21, 2003, at 12.

[141] Cassation Panel, Iraqi High Criminal Court, al-Dujail Final Opinion, *supra* note 7, at 13.

V. THE DUJAIL VERDICTS: FINDINGS AND SENTENCES

The International Military Tribunal at Nuremberg set the precedent for simplifying evidentiary requirements in favor of a full airing of available facts before a panel of judges. Justice Robert H. Jackson noted that "peculiar and technical rules of evidence developed under the common law system of jury trials to prevent the jury from being influenced by improper evidence constitute a complex and artificial science," and accordingly accepted that rules of evidence at Nuremberg should put the premium on the probative value of the evidence.[142] Although dispensing with rigid rules of evidence gave the International Military Tribunal "a large and somewhat unpredictable discretion," it also permitted both the prosecution and defense to select evidence on the basis of "what it was worth as proof rather than whether it complied with some technical requirement."[143] Since 1945, rather than operating under restrictive rules of evidence, all of the tribunals applying international humanitarian law have permitted evidence so long as it is "relevant and necessary for the determination of the truth."[144] This standard drawn from the International Criminal Court Statute compares favorably to the Iraqi High Criminal Court Rule of Procedure that permits the Trial Chamber to admit "any relevant evidence which it deems to have probative value."[145]

The procedures for the introduction of evidence and the consideration of verdicts are perhaps the most notable aspects of the co-mingling of common and civil law traditions. Many commentators from outside Iraq do not understand the nature of trial evidence in relation to the broader referral file. As one Iraqi judge put it, "[I]n our system, only the evidence speaks."[146] Rather than developing a straitjacket set of rules related to the introduction of evidence, the Dujail Trial Chamber had the broader mandate to "apply rules of evidence which will best favour [sic] a fair determination of the matter before it and are consonant with the spirit of the Statute and general

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[142] REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIBUNALS 11, DEPARTMENT OF STATE PUBLICATION 3080, WASHINGTON D.C., xi (1949). Interestingly, as a matter of historical record, the teams of international prosecutors at Nuremberg did not develop detailed "elements of crimes" that have become an accepted feature of every subsequent international process.

[143] *Id.*

[144] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), art. 69(3), *reprinted in* 37 I.L.M. 999 (1998).

[145] Tribunal Rules of Procedure, *supra* note15, Rule 79. This provision is adjacent to the common sense caveat that the Trial Chamber may "exclude evidence if its probative value is substantially outweighed by the potential for unfair prejudice, considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*, Rule 59.

[146] Interview with Judge Ra'id Juhi, Chief Investigative Judge, Iraqi High Criminal Court, in Baghdad (Aug. 2, 2006).

principles of law."[147] The lengthy Trial Judgment contains a wealth of detail regarding facts, inferences, trial motions, allegations, and outright false testimony in the Dujail case.[148] The Judgment is an exhaustive catalogue of the questions raised by the legal elements of each offense alleged and a recitation of the exculpatory and inculpatory evidence raised against each defendant for each charge. There is a great deal of discussion regarding the inferences to be drawn by the judges regarding the modes of individual participation in the offenses.

Prior to assessing any verdicts, the Trial Chamber analyzed the propriety of assessing guilt on the basis of crimes against humanity. Crimes against humanity have never been reduced to a globally-applicable general convention, though the corpus is expanded and captured in the Rome Statute of the International Criminal Court.[149] Similar to the European Court of Human Rights analysis in *Kolk and Kislyiy v. Estonia*,[150] the Trial Chamber engaged in an extensive analysis to determine whether the Iraqi High Criminal Court lawfully could impose punishment for crimes against humanity committed in 1982, even though they were not specifically

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[147] Tribunal Rules of Procedure, *supra* note15, Rule 79.

[148] While the Trial Chamber I findings can be simply stated, they rest upon an array of detailed factual underpinnings and analytical comparisons to the elements that are well beyond the scope of this paper. For example, no defendant was convicted of the crime against humanity of enforced disappearances because the judges concluded that the elements of the crime were not satisfied based on the available evidence. For a discussion of this crime with regard to Saddam Hussein, see Case No. 1/9 First/2005 Al Dujail Lawsuit (Case), English Translation of Dujail Trial Chamber Opinion, Part 3, 41–43 (2006) [hereinafter Part III, Unofficial Translation of Dujail Trial Chamber Opinion], *available at* http://law.case.edu/saddamtrial/documents/dujail_opinion_pt3.pdf.

> After examining and debating the available evidence in this case, it has become clear to the court that some of the bases that were required for establishing this crime are unavailable. Thus, it is not possible to hold any of the defendants in this case, including the accused Saddam Hussein, accountable for acts that do not form a crime in accordance with international law, where nothing has been proven to this court that anyone of the relatives of the victims has submitted a request to any government agency asking for the fate, or the whereabouts, of the victims . . . This will lead to the unavailability of another element, which is that the refusal to acknowledge the deprivation of members from the Dujail residents of their freedom, or providing information about their fate, or whereabouts, had been upheld by the State, or by a political organization; or by its permission, support, or approval, and because it has not been proven to this court that there was refusal by one of the government agencies, or the Ba'ath party, to acknowledge that because no one from the relatives of the Dujail residents has submitted an inquiry regarding this issue.

Id.

[149] Rome Statute of Int'l Crim. Ct. art. 7, July 1, 2002, 2187 U.N.T.S. 90.

[150] *See* Kolk & Kislyiy v. Estonia, ECHR Judgment, Application No. 24018/04, Jan. 26, 2006. According to the European Court of Human Rights, crimes against humanity were proscribed and defined sufficiently by 1949 to permit the conviction of Estonian nationals in 1994 based on a domestic statute enacted in 1992 that created jurisdiction over crimes against humanity. *Id*.

criminalized in Iraqi domestic law until the December 2003 original IST Statute, which was later revalidated in Article 130 of the 2005 Iraqi constitution[151] and amended in the legislative revisions promulgated in October 2005. The Trial Chamber discussion is a sophisticated discourse on the interface between international and domestic law as well as between treaties and international custom as authoritative sources of law.[152] Like every international tribunal going back to Nuremberg,[153] Trial Chamber I concluded that "the actions attributed to the accused in al-Dujail case, if verified are considered international and internal crimes simultaneously, and the committing of such crimes is considered a violation of the international criminal law and international human law, at the same time considered a violation of the Iraqi law."[154] By logical extension, the international character of the crimes against humanity alleged in connection with al-Dujail required "additional elements other than those stipulated in the Iraqi penal code."[155] Holding that crimes against humanity, when committed during a time of peace, had become international crimes prior to 1982, the Statute of the Iraqi High Criminal Court comported with human rights norms.[156] In the words of the Trial Judgment, the procedural and due process principle of non-retroactivity cannot be perverted to result in impunity for those who committed crimes against humanity during the Ba'athist era:

> Therefore, it can be said that the tribunal law did not stipulate the criminal nature of these acts and it is not their originator, rather it merely transferred these crimes from the international domain where they already existed and still exist, to the national domain. In another sense, the tribunal law took over what was included in international penal law which incriminates the acts that form international crimes and transferred them to domestic law, based on the theory of reception, which is well known in the field of international law.

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[151] CONST. REPUBLIC OF IRAQ, art. 134. ("The Iraqi High Tribunal shall continue its duties as an independent judicial body, in examining the crimes of the defunct dictatorial regime and its symbols. The Council of Representatives shall have the right to dissolve it by law after the completion of its work.") Unofficial English translation *available at* http://www.law.case.edu/saddamtrial/documents/UN_USG_UK_NDI_Agreed_English_Text_25.01.06-CURRENT.pdf.

[152] Part I, Unofficial Translation of Dujail Trial Chamber Opinion, *supra* note 36, at 35–44.

[153] Guenael Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L.J. 237 (2002).

[154] Part I, Unofficial Translation of Dujail Trial Chamber Opinion, *supra* note 36, at 41.

[155] *Id.*

[156] Art. 15 of the ICCPR, reads "[n]o one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national *or international law*, at the time when it was committed." ICCPR, *supra* note 98, at art. 15(1) (emphasis added).

> The principle of non-retroactivity of criminal law is respected for the purposes of preventing injustice and protecting the innocent. However, objecting or taking exception to it without a sound legal basis for the purpose of absolving individuals accused of committing international crimes from criminal responsibility means that justice is denied and injustice is dedicated.[157]

Because a number of defendants raised the retroactivity defense on appeal, the Cassation Chamber also addressed its applicability to crimes against humanity committed before the enactment of the domestic statutes. Though it has gaps in a number of other areas, the language of the Appeals Opinion is clear and correct in rejecting the defense allegation:

> [I]f a provision is stated in an international treaty or agreement for a specific incriminating act, the application of this provision on acts perpetrated before its issuance does not mean that the provision was applied retroactively. This provision was preceded by international norms which entail non-legitimacy of the act. The provisions did no more than record and clarify the substance of previous norms and traditions for the perpetrator of the act and his presence. Therefore, the principle of legitimizing crimes and criminal penalties is consistent with justice principles since it is a fundamental principle in all laws, including international criminal law.[158]

Having established the legality of the tribunal's formation, and its subject matter competence to adjudicate crimes against humanity, the Trial Chamber sentenced seven defendants and fully acquitted Muhammad 'Azzawi 'Ali, a former Ba'ath party official from the region of al-Dujail, due to a lack of evidence. The Trial Judgment contains a great deal of detail, broken down by crime and defendant, establishing the widespread and systematic nature of the crimes, as well as detailing the mens rea of each accused. The convictions break down as follows:[159] Saddam Hussein and Barzan al-Tikriti, the former intelligence chief and the half-brother of Hussein, were found guilty of "deliberate" killing, forcible deportation, and torture and were sentenced to two ten-year prison terms and death by hanging; Awad Hamed

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[157] Case No. 1/9 First/2005 Al-Dujail Lawsuit (Case), English Translation of Dujail Trial Chamber Opinion, Part II, 4 (2006), *available at* http://law.case.edu/saddamtrial/documents/dujail_opinion_pt2.pdf [hereinafter Part II, Unofficial Translation of Dujail Trial Chamber Opinion].

[158] Cassation Panel, Iraqi High Criminal Court, al-Dujail Final Opinion, *supra* note 7, at 12.

[159] *See* Case No. 1/9 First/2005 Al Dujail Lawsuit (Case), English Translation of Dujail Trial Chamber Opinion, Part VI, 51–54 (2006), *available at* http://law.case.edu/saddamtrial/documents/dujail_opinion_pt6.pdf [hereinafter Part VI, Unofficial Translation of Dujail Trial Chamber Opinion].

al-Bandar, the head of the Revolutionary Court, was found guilty of willful killing and was sentenced to death by hanging; Taha Yassin Ramadan, the former vice president, was found guilty of willful killing, deportation, torture, and other inhumane acts and was sentenced to life imprisonment[160] and to three other prison terms; former Ba'ath party officials from the al-Dujail region, 'Abdallah al-Ruwaid and 'Ali Dayih 'Ali, were found guilty of willful killing and sentenced to fifteen years in prison; former Ba'ath party official from the al-Dujail region, Mizher al-Ruwaid, was found guilty of willful killing and torture and was sentenced to fifteen years and seven years imprisonment. The Trial Chamber also "decided to confiscate the movable and immovable money belonging to the convicted under Article 24/Sixth of the Iraqi Supreme Criminal Court law No.10 – 2005" in order to preserve assets on behalf of any victims resorting to civil courts "in order to claim compensation for damages incurred as a result of crimes committed against them."[161]

The conviction of Judge Awad Hamad al-Bandar for the crime against humanity of willful murder was one of the most significant aspects of the Dujail Trial. This marked the first time since World War II that a jurist had been convicted of crimes against humanity for perverting the power of the law into the tool of political power. A U.S. military commission convicted ten Nazi-era judges in the famous case *United States of America v. Alstötter et al.*, known worldwide as the Justice Case and later fictionalized in the famous film *Judgment at Nuremberg*.[162] Bandar, whose lead attorney in the Dujail Trial was his son, served as the President of the Revolutionary Command Council Court ("RCCC"). The Ba'athist regime never could destroy the Iraqi judiciary completely, and Saddam therefore created the Revolutionary Command Council Court as a convenient mechanism for imposing his personal will in the guise of justice. The Revolutionary Command Council Courts had jurisdiction over any cases directed by Saddam, in particular national security matters.[163] Defendants could expect little or no due process

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[160] The Cassation Panel upheld the convictions against Taha Yassin Ramadan but ordered "the repeal of the sentencing paragraph related to the punishment of life imprisonment" and ordered that his case be sent back to Trial Chamber I "for the purpose of strengthening the penalty against him and raising it to the appropriate legal limit." Cassation Panel, Iraqi High Criminal Court, al-Dujail Final Opinion, *supra* note 7, at 20. This aspect of the Cassation Decision was one of the most troubling components of the entire Dujail trial. It is not explained in the written opinion, and there is no delineation of the matters in aggravation that warranted a more severe punishment. The decision carried overtones of political manipulation of the judicial process, prompting the U.N. High Commissioner for Human Rights to submit a specific brief requesting that the capital sentence be reversed. Brief for U.N. High Commissioner for Human Rights as Amicus Curiae, in the Matter of Sentencing of Taha Yassin Ramadan (2007), *available at* http://law.case.edu/saddamtrial/documents/arbour_amicus_curiae_brief_en.pdf. Ramadan was hanged until death.

[161] Part VI, Unofficial Translation of Dujail Trial Chamber Opinion, *supra* note 159, at 52.

[162] *See* U.S. v. Alstottler et. al., 3 T.W.C.1 (1948), 6 L.R.T.W.C.1 (1948), 14 Ann. Dig. 278 (1948), *available at* http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/Alstoetter.htm.

[163] INTERNATIONAL COMMISSION OF JURISTS, IRAQ AND THE RULE OF LAW 109–13 (1994).

and their verdicts could not be appealed, however, President Hussein personally had to approve death sentences.[164] On May 27, 1984, Saddam referred 148 men and boys to the RCCC for "trial" whereupon Bandar dutifully sentenced them to death.[165] During Bandar's closing argument, which was delivered by a stand-by counsel from the Defense Office of the Tribunal, Judge Ra'ouf scornfully looked down and asked Bandar, "[W]hat kind of judge were you?"[166] Bandar scowled back in reply and, in a face dripping with contempt, said "I was the best."[167] The Trial Chamber noted that Judge Bandar characterized the civilians as "ravaging traitors" in the papers for the case,[168] and supported its findings regarding the criminal use of an ostensibly legal process by observing that the systematic "attack directed against the civilian population" required to constitute a crime against humanity need not be a purely military attack.[169]

The Trial Judgment describes a great weight of evidence leading it to "form a solid conviction without any reasonable doubt" that the civilians were sentenced to death without any trial at all.[170] In fact, the Trial Judgment language describing Bandar's death decree could not be more pointed or more poignant to the ears of a professional attorney:

> The decision issued by the defendant A-Bandar and with the members of the so-called Revolutionary Court on June 14, 1984 is in fact an order of murder and not a judgment issued by virtue of the law and in conformity with it. This order was indeed fulfilled and more than 90 citizens of Al Dujail were

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[164] The signed death warrants were available at trial and entered into evidence, Trial Exhibit 8, *available at* http://law.case.edu/saddamtrial/exhibits/.

[165] *Id.*, Exhibit 4.

[166] The author observed this exchange firsthand, and quotes are taken from personal notes.

[167] *Id.*

[168] Part I, Unofficial Translation of Dujail Trial Chamber Opinion, *supra* note 36, at 14.

[169] *Id.*

[170] Part II, Unofficial Translation of Dujail Trial Chamber Opinion, *supra* note 157, at 13. Some of the facts leading to this conclusion were that "after carrying out the death penalty in 1985, at least between 4 and 14 individuals who were sentenced to death were still alive." *Id.* at 20.

> [I]n any case, the tribunal spent enormous efforts in this regard and secured all the papers of case No. 944/C/1984 comprised, of 361 pages and gave all the lawyers of the defence, including the lawyer of the defendant Awad al-Bandar copies of all of those papers, as demonstrated by receipt attached to the case papers dated June 19, 2006. The tribunal notes that all of these 361 pages did not contain any of the procedures of the alleged trial, including the absence of any of the victims (defendants') testimonies before the (disbanded) Revolutionary Court in this case.

Id. at 22.

> killed on the pretext of the death penalty against them which was issued by the court and carried out by hanging.[171]

The decision to convict Bandar of willful killing was predicated on the conclusion that he had actual knowledge of the attack directed against the citizens of al-Dujail, and that he used his office to participate in that attack.

> This widespread and organized (systematic) attack by these forces and organizations against the civilian population of al-Dujail, and later on other governmental bodies participated in the attack . . . . Amongst those governmental organizations was the (disbanded) Revolutionary Tribunal, which was presided over by the defendant Awad Al-Bandar, and which took part in the attacks against the civilian population of Al Dujail in pursuance of the policy of the state and Ba'ath party which called for conducting that attack or furthered such a policy. This tribunal is also convinced that this widespread attack included organized detention and imprisonment of civilians from Al Dujail, as well as torturing, abusing and murdering them.[172]

In approving the death sentence against Awwad Hamad Al-Bandar, the Cassation Panel concluded that he committed, as a principal actor, a joint criminal act that represented a premeditated murder as a crime against humanity. The conclusion that he "issued verdicts to execute a large number of citizens of Dujail through a mock trial" stands in sharp contrast to the range of due process available to the Dujail defendants on trial before Trial Chamber I. One of the great ironies for the future of Iraq is that the graphic juxtaposition between law and power that the founders of the Iraqi High Criminal Court intended was largely lost in the controversy and condemnation of the lengthy trial in the public discourse.

For specialists in international humanitarian law, the convictions for the crime against humanity of inhumane acts are also noteworthy. The crime of "other inhumane acts" is a residual category of crimes against humanity that originated in Article 6(c) of the Nuremberg Charter and was also included in the Tokyo Charter as well as Allied Control Council Law No. 10 applicable in occupied Germany.[173] The crime of inhumane acts was "designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition."[174] Some courts have

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[171] *Id.* at 32–33.

[172] Part II, Unofficial Translation of Dujail Trial Chamber Opinion, *supra* note 12, at 29.

[173] *See* Prosecutor v. Milomir Stakic, Case No. IT-97-24-A, Appeals Judgment, ¶ 315 (Mar. 22, 2006), *available at* http://www.un.org/icty/stakic/appeal/judgement/sta-ajo60322e.htm.

[174] Prosecutor v. Kupreskic, et. al., Case No. IT-95-16-T, Trial Judgment, ¶ 563 (Jan. 14, 2000) Prosecutor v. Kupreskic cautioned that there

found that convictions of the same accused for both the crime of inhumane acts and the crime of torture are cumulative.[175]

Prior to the sporadic small arms fire on July 8, 1982, the Trial Judgment describes al-Dujail as a "safe town . . . rich in fruit gardens irrigated from the Tigris River through canals and water pumps."[176] The people of al-Dujail enjoyed a good standard of living and the local party membership "was mixed between Shiites and Sunnites."[177] Based on the destruction of the forests around Basra, Taha Yassin Ramadan proposed that the regime destroy the orchards and fields around Dujail. An eyewitness testified that three months after the incident, the tractors, bulldozers, international-type cars, and six-wheel drive vehicles came and loaded the trees and disposed of them outside the city.[178] The fields and orchards of Dujail were razed and all of the fruit trees carted off and destroyed. The lifestyle and affluence of the families of Dujail died as the orchards were pulled from the ground. In open court, Taha Ramadan indignantly defended his actions in conceiving and implementing the destruction of the orchards. On March 14, 2006, he argued that regarding "the fields of al-Dujail, due to what has happened, it is natural and it is the government's right as long as there is a public interest at stake or a need for taking over of farms, buildings, or estates in exchange of an appropriate compensation."[179] The government interest to which he referred was to punish all of the inhabitants of Dujail following what Saddam perceived as an attempt to kill him. As international humanitarian law is applied more frequently, the Trial Chamber's decision to convict Taha Yassin Ramadan for the crime of inhumane acts may become the very embodiment of that catch-all crime. Destroying the sustenance and prosperity of an entire village is the epitome of acts "intentionally causing great suffering, or serious injury to the body or to the mental or physical health."[180]

VI. CONCLUSION

As the era of international enforcement of humanitarian law dawned in response to what President Roosevelt later described as the "blackest crimes

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> is a concern that this category lacks precision and is too general to provide a safe yardstick for the work of the Tribunal and hence, that it is contrary to the principle of the 'specificity' of criminal law. It is thus imperative to establish what is included within this category.

Id.

[175] Prosecutor v. Milan Martic, Case No. IT-95-11-T, Trial Judgment, ¶ 477 (Jan. 12, 2007).

[176] Part I, Unofficial Translation of Dujail Trial Chamber Opinion, *supra* note 36, at 3.

[177] *Id.*

[178] Part VI, Unofficial Translation of Dujail Trial Chamber Opinion, *supra* note 159, at 9.

[179] *Id.* at 2.

[180] Statute of the Iraqi High Criminal Court, *supra* note 17, at art. 12(f).

in all history,"[181] the Allied Powers issued the Moscow Declaration on October 30, 1943.[182] In the context of the current debate over internationalizing justice, it is important to note that the Moscow Declaration favored punishment through the national courts in the countries where the crimes were committed.[183] The Declaration specifically stated that German criminals were to be "sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be erected therein."[184] As the International Military Tribunal (IMT) at Nuremberg opened, Justice Robert Jackson's magnificent opening statement[185] reiterated the truth that the IMT was merely an alternative to domestic courts for prosecuting the "symbols of fierce nationalism and of militarism."[186]

The Iraqi decision to create a Tribunal and prosecute the leading Ba'athists who terrorized the Iraqi people and dominated Iraqi society for more than three decades was a bold gambit. The Iraqi High Criminal Court was conceived and created at precisely the time when Iraqi politicians were discovering the reality of running a nation and reestablishing order that could contain sectarian and tribal rivalries. In many areas, the fissures of tribal loyalty, family bonds, and religious perspective became the poles that attracted political support. Against this backdrop, all the tribes, regions, religions, and economic classes within Iraq were united by a deep need to expose the crimes of the regime and hold the regime accountable for their suffering.

As Saddam Hussein entered the court on the first day of the al-Dujail trial, the dream of justice seemed unattainable as he rebuked the judge. "I didn't say 'former president,' I said 'president' and I have rights according to

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[181] Statement by the President, Mar. 24, 1944, *reprinted in* REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIBUNALS 12, DEPARTMENT OF STATE PUBLICATION 3080, WASHINGTON D.C. (1945) [hereinafter JACKSON REPORT].

[182] MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 146–47 (2007).

[183] IX Department of State Bulletin, No. 228, 310, *reprinted in* JACKSON REPORT, *supra* note 179 at 11. The Moscow Declaration was actually issued to the Press on November 1, 1943. For an account of the political and legal maneuvering behind the effort to bring this stated war aim into actuality, see PETER MAGUIRE, LAW AND WAR: AN AMERICAN STORY 85–110 (2000).

[184] *Id*.

[185] In the words of one aging Nuremberg prosecutor, "There would have been no Nuremberg without Robert Jackson. He was courageous beyond limit and stuck to his vision of a trial in which justice would prevail. Jackson accomplished his goal . . . and he seemed perilously alone in his quest for justice." Henry T. King, Jr., *Robert H. Jackson and the Quest for Justice at Nuremberg,* 35 CASE W. RES. J. INT'L L., No. 2, 263, 271 (2003).

[186] Robert Jackson, Chief of Counsel for the United States, Opening Statement to the International Military Tribunal at Nuremberg, 11 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 99 (1947).

the constitution, among them immunity from prosecution."[187] Later that day, Saddam spoke with a powerful and aggressive tone. He turned to the cameras as if he was trying to convince the Iraqi people. His voice rang across the courtroom and rose as his passion became evident: "Those who fought in God's cause will be victorious . . . . I am at the mercy of God, the most powerful."[188] When the judge persisted, Saddam demanded, "Who are you? What does this court want?"[189] Saddam Hussein al-Tikriti, deposed President of Iraq, added: "I don't answer to this so-called court, with all due respect, and I reserve my constitutional rights as the president of the country of Iraq. I don't acknowledge either the entity that authorizes you, nor [sic] the aggression, because everything based on a falsehood is a falsehood."[190]

Over time, the power of the people's will trumped the dictator's power. Saddam and the other leading Ba'athists were subjected to criminal prosecutions because the democratically-elected representatives of the people enacted legislation to remove that immunity.[191] This revocation of immunity stands for the principle that personal immunity flowing from the official position of an accused is property of the state and cannot be perverted into an irrevocable license to commit the most serious crimes known to mankind. Not only does a sovereign state have the right to revoke immunity flowing from constitution or statute, the Dujail Cassation Decision even postulates that:

> [I]t is the duty of the state to exercise its criminal jurisdiction against those responsible for committing international crimes since the crimes of which the defendants are accused of in the Dujail case form both international and domestic crimes and committing them constitutes a violation of the International Penal Code and the Law of Human Rights while at the same time violating Iraqi laws.[192]

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[187] *See Judge Delays Saddam Trial Until November*, PBS ONLINE NEWSHOUR, Oct. 19, 2005, http:www.pbs.org/newshour/updates/saddam_10-19-05.html.

[188] *See* Martin Asser, *Opening Salvoes of Saddam Trial*, BBC NEWS, Oct. 19, 2005, http://news.bbc.co.uk/2/hi/middle_east/4356754.stm.

[189] *Id.*

[190] *Id*.

[191] Echoing the tenets of modern international criminal law embodied in Article 27 of the Rome Statute of the International Criminal Court, the Iraqis revoked the immunity of former Ba'athist officials. Statute of the Iraqi High Criminal Court, *supra* note 17, at art. 15. The Rome Statute provides:

> The official position of any accused person, whether as president, chairman or a member of the Revolution Command Council, prime minister, member of the counsel of ministers, a member of the Ba'ath Party Command, shall not relieve such person of criminal penal, nor mitigate punishment. No person is entitled to any immunity with respect to any of the crimes stipulated in Articles 11, 12, 13, and 14 of this law.

Id.

[192] Cassation Panel, Iraqi High Criminal Court, al-Dujail Final Opinion, *supra* note 7, at 18.

Furthermore, in perhaps the clearest jurisprudential statement regarding the specific liability attaching to a head of state found guilty of serious breaches of international humanitarian law, the Cassation Panel wrote that crimes committed while subject to a grant of immunity should be subject to more severe punishment. This principle is worthy of emulation in other tribunals as other nations strive to apply the substantive content of international law, and may over time represent the single most important legal concept to come out of the al-Dujail verdicts. The cloak of official immunity is a factor for aggravating the sentence because in the words of the Iraqi jurists:

> [A] person who enjoys it usually exercises power which enables him to affect a large number of people, which intensifies the damages and losses resulting from commitment of crimes. The president of the state has international responsibility for the crimes he commits against the international community since it is not logical and just to punish subordinates who execute illegal orders issued by the president and his aides, and to excuse the president who ordered and schemed for commitment of those crimes. Therefore, he is considered the leader of a gang and not the president of a state which respects the law, and therefore, the head chief is responsible for crimes committed by his subordinates, not only because he is aware of those crimes, but also for his failure to gain that awareness.[193]

Paraphrasing Justice Jackson's assessment of the International Military Tribunal at Nuremberg, "no history" of the era of Iraq under Ba'athist rule will be "entitled to authority" [194] if it ignores the factual and legal conclusions engendered by the work of the Iraqi High Criminal Court. The people who suffered at the hands of the regime are empowered to watch as justice is done in accordance with law and procedure. The importance of the process is captured in the reality of what happens inside the courtroom and what is captured in the written legacy of the judges rather than what is transmitted for seconds that day in the broadcast media. One eminent scholar noted that the failures of the al-Dujail trial "actually had very little to do with what occurred inside the courtroom. The most fundamental component of a fair, independent, and impartial trial is the absence of government

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[193] *Id.* at 9–10.

[194] REPORT TO THE PRESIDENT BY MR. JUSTICE JACKSON, Oct. 7, 1946, *quoted in* 49 AM. J. INT'L L. 44, 49 (1955), *reprinted in* REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIBUNALS 11, DEPARTMENT OF STATE PUBLICATION 3080, WASHINGTON D.C. 432, 438 (1949) Justice Jackson also wrote that, "We have documented from German sources the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people." *Id.*

interference."[195] To date, the work of the court has been tainted by the insidious effects of external politics. So long as it functions as a neutral, independent, and apolitical servant of the people's interests in upholding legal precepts, the work of the High Criminal Court remains emblematic as a modern chapter in the age old struggle to implement law as a constraining and constructive force in society. While its operation has been pockmarked with tragedy and occasional mistakes, it is one of the bulwarks that even today guards against the tide of lawlessness and power sweeping across Iraq.

The struggle against impunity and unconstrained evil is a common bond that crosses cultural and religious boundaries to unite humans. Societies and nations have endured almost unspeakable suffering over the past century. In the words of the Iraqi judges, humanity shares a common heritage that cannot be torn apart because

> millions of women, men and children have fallen victims during the last century to unimaginable horrors which have strongly shaken the human conscience; and whereas these serious crimes threaten the peace, security and prosperity of the world and arouse the concern of the entire international community and must not be allowed to pass without punishment and prosecuting their perpetrators in an effective way through measures taken at the national level that aim to put an end to letting the perpetrators get away with these crimes.[196]

That is the legacy of al-Dujail.

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[195] Mark S. Ellis, *The Saddam Trial: Challenges to Meeting International Standards of Fairness with Regard to the Defense*, 39 CASE W RES. J. INT'L L., 171, 192 (2006).

[196] Cassation Panel, Iraqi High Criminal Court, al-Dujail Final Opinion, *supra* note 7, at 18.