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**What Was Saddam's Status When He Was In United States Custody At The Request Of The Iraqi Government? Does The Characterization Of The Conflict Affect Saddam's Status As A Detainee? Can A Prisoner's Status Change Over Time, And If So, How?**

Robert C. Bliss

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**CASE WESTERN RESERVE UNIVERSITY  
SCHOOL OF LAW**

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**MEMORANDUM FOR THE IRAQI HIGH TRIBUNAL**

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**WHAT WAS SADDAM'S STATUS WHEN HE WAS IN UNITED STATES CUSTODY  
AT THE REQUEST OF THE IRAQI GOVERNMENT? DOES THE  
CHARACTERIZATION OF THE CONFLICT AFFECT SADDAM'S STATUS AS A  
DETAINEE? CAN A PRISONER'S STATUS CHANGE OVER TIME, AND IF SO,  
HOW? TO WHAT RIGHTS WAS SADDAM ENTITLED BASED ON HIS STATUS?**

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Spring Semester, 2007**

## INDEX OF AUTHORITIES

### Treaties, Reports & Legislation:

1. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, Art. 8, Art. 9 114 UNTS 123 (entered into force July 18, 1978).
2. AMERICAN CIVIL LIBERTIES UNION, FACT SHEET: EXTRAORDINARY RENDITION, (DEC. 6, 2005).
3. AMNESTY INTERNATIONAL REPORT, BEYOND ABU GHRAIB: DETENTION AND TORTURE IN IRAQ, (MARCH 6, 2006).
4. BRITISH RED CROSS, FOREIGN & COMMONWEALTH OFFICE, MINISTRY OF DEFENSE, PROTECTION OF PRISONERS OF WAR AND CIVILIAN SECURITY INTERNEES AGAINST INSULTS AND PUBLIC CURIOSITY, FIFTH DRAFT RESOLUTION, (SEPT. 1, 2005).
5. C.P.A. ORD. NO. 7, AT 3, JUNE 18, 2003.
6. Charter of The United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.
7. Convention on the Prevention and Punishment of Genocide, G.A. res. 260 (III) A, (Dec. 9, 1948).
8. CPA Memorandum No.3 (revised): Criminal Procedures, 27 June 2004 [hereafter: CPA Memorandum No.3].
9. DEP'T OF DEF., DOC., SADDAM'S STATUS WON'T AFFECT IRAQ'S ABILITY TO TRY HIM, REPORT ON WAR CRIMES TRIBUNALS, (Jan. 13, 2004).
10. European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, Art. 6(3), 213 UNTS 222 (entered into force Sept. 3, 1953), *as amended by* Protocol No. 11, May 11, 1994, ETS No. 155, 33 ILM 943 (1994)
11. Foreign Affairs Reform and Restructuring Act of 1998, ("FARRA"), Pub. L. No. 105-277, § 2242, 112 Stat. 2681 (Oct. 21, 1998), reprinted in 8 U.S.C. § 1231, Historical and Statutory Notes (1999).

- 12 Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, *entry into force* 21 October 1950.
- 13 GLOBAL POLICY FORUM AND PARTNERS REPORT, WAR AND OCCUPATIONS, CHAPTER 6: DETENTION AND PRISONS, (JAN. 2007).
- 14 Hague Convention (II) With Respect to the Laws and Customs of War on Land, Jul. 29, 1899, *entered into force* Sept. 4, 1900.
- 15 Hague Convention (IV) Respecting The Laws And Customs Of War On Land, Oct. 18, 1907, *entered into force* Jan. 26, 1910.
- 16 Hague Convention (V), Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907.
- 17 HUMAN RIGHTS WATCH REPORT, SADDAM HUSSEIN AS A POW: Q & A ON THE PRISONER OF WAR STATUS OF SADDAM HUSSEIN, (JAN. 22, 2004).
- 18 HUMAN RIGHTS WATCH REPORT, TASK FORCE 20/121/6-26/145 CAMP NAMA, BAGHDAD, (JULY 2006).
- 19 Int'l Criminal Trib. for the Former Yugoslavia's Rules of Procedure and Evidence (2005). Rule 80
- 20 International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52, UN Doc. A/6316 (1996), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976)
- 21 Iraqi High Criminal Court Law, *Official Gazette of the Republic of Iraq*, Oct. 18, 2005.
- 22 Iraqi Penal Code, (111) 1969, Al-Waqai-Al-'Iraqiyya No. 2796, Sept. 9, 1980.
- 23 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65, *entered into force* Feb. 8, 1928.
- 24 Rome Statute of the International Criminal Court, July 17, 1998, Art. 67, UN Doc. A/CONF.183/9\*(1998), 37 ILM 999 (1998)
- 25 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49

(1989), *entered into force* July 11, 1991. Both the US and Iraq have failed to become parties to this protocol.

- 26 Statute of the Int'l Criminal Trib. for the Former Yugoslavia, SC Res, 827 (May 25, 1993) (amended 1998)
- 27 Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, annex, Art. 20(4)(d) (Nov. 8, 1994)
- 28 Statute of the Iraqi Special Tribunal, Dec. 10 2003, 43 I.L.M. 231
- 29 The Charter of the United Nations, 26 June 1945, Art. 55-56, *entered into force* Oct. 24, 1945.
- 30 The Charter of the United Nations, 26 June 1945, Art. 55-56, *entered into force* Oct. 24, 1945.
- 31 UN Doc. S/2000/904; *Letter dated* Sept. 26, 2000, *annexed to Letter dated* Sept. 28, 2000, Un Doc. S/2000/925.
- 32 United Nations War Crimes Commission. Law Reports of Trials of War Criminals. Volume VIII, 1949, CASE No. 47, *THE HOSTAGES TRIAL, TRIAL OF WILHELM LIST AND OTHERS, UNITED STATES MILITARY TRIBUNAL, NUREMBERG* , Part III “It is a fundamental principle of criminal jurisprudence that one may not be charged with crime for the doing of an act which was not a crime at the time of its commission.”
- 33 UNITED STATES INSTITUTE FOR PEACE, BUILDING THE IRAQI SPECIAL TRIBUNAL: LESSONS FROM EXPERIENCES IN INTERNATIONAL CRIMINAL JUSTICE: SPECIAL REPORT 122, (JUNE 2004).
- 34 Vienna Convention on the Law of Treaties, *T.S., 1155, P. 331*. May 23, 1969. *entry into force* Jan. 27, 1980.

#### **Law Review Articles:**

- 35 George H. Aldrich, *New Life For the Laws of War*, 75 A.J.I.L. 764 (1981)
- 36 Joseph Blocher, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 Yale L.J. 667 (2006)

- 37 Christopher Burris, *Time For Congressional Action: The Necessity of Delineating the Jurisdictional Responsibilities of Federal District Courts, Courts-Martial, and Military Commissions to Try Violations of the Laws of War*, 2005 Fed. Cts. L. Rev. 4 (2005)
- 38 L. Elizabeth Chamblee, *Post-War Iraq: Prosecuting Saddam Hussein*, 7 Cal. Crim. Law Rev. 1 (2004)
- 39 Bathsheba Crocker, *Closing Remarks*, 20 Ohio St. J. on Disp. Resol. 279 (2005)
- 40 Alison Croessmann, *Congress' Preliminary Response to the Abu Ghraib Prison Abuses, room for reform?*, 71 Brook. L. Rev. 945 (2005)
- 41 David M. Gersh, *Poor Judgment: Why the Iraqi Special Tribunal Is the Wrong Mechanism for Trying Saddam Hussein on Charges of Genocide, Human Rights Abuses, and Other Violations of International Law*, 33 Ga. J. Int'l & Comp. L. 273 (2004)
- 42 Adam Isaac Hasson, *Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet, and Milosevic—Trends in Political Accountability and Transnational Criminal Law*, 25 B.C. Int'l & Comp. L. Rev. 125 (2002)
- 43 Sara Ibrahim, Paricia Staible, Meghan Stewart, *International Legal Updates*, 11 Hum. Rts. Br. 31 (2004)
- 44 Eric Talbot Jensen, *The Laws of War: Past, Present, and Future: Article: Combatant Status: It Is Time for Intermediate Levels of Recognition and Partial Compliance*, 46 Va. J. Int'l L. 209 (2005)
- 45 Ryan J. Liebl, *Rule of Law in Postwar Iraq: From Saddam Hussein to the American Soldiers Involved in The Abu Ghraib Prison Scandal, What Law Governs Whose Actions?*, 28 Hamline L. Rev. 91 (2005)
- 46 Russell A. Miller, *Before the Law: Military Investigations and Evidence at the Iraqi Special Tribunal*, 13 Mich. St. J. Int'l L. 107 (2005)
- 47 Manooher Mofidi, Amy E. Eckert, *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 Cornell Int'l L.J. 59 (2003)
- 48 Major Mynda G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F. L. Rev. 1 (2005)

- 49 Jared Olanoff, *Holding a Head of State Liable for War Crimes: Command Responsibility and the Milosevic Trial*, 27 Suffolk Transnat'l L. Rev. 327 (2004)
- 50 Tom Parker, *Milosevic & Hussein on Trial: Panel 3: The Trial Process: Prosecution, Defense and Investigation: Prosecuting Saddam: Coalitional Provisional Authority and the Evolution of the Iraqi Special Tribunal*, 38 Cornell Int'l L.J. 899 (2005)
- 51 Jordon J. Paust, *The United States as Occupying Power Over Portions of Iraq and Special Responsibilities Under the Laws of War*, 27 Suffolk Transnat'l L. Rev. 1 (2003)
- 52 Robert A. Peal, *Combatant Status Review Tribunals and the Unique Nature of The War on Terror*, 58 Vand. L. Rev. 1629 (2005)
- 53 Srividhya Ragavan, Michael S. Mireles, Jr., *The Status of Detainees from the Iraq and Afghanistan Conflicts*, 2005 Utah L. Rev. 619 (2005)
- 54 Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 Am. J. Int'l L. 580 (2006)
- 55 Geoffrey Robertson, *Milosevic & Hussein on Trial: Ending Impunity: How International Criminal Law Can Put Criminals on Trial*, 38 Cornell Int'l L. J. 649 (2005)
- 56 Michael P. Scharf & Ahran Kang, *Milosevic & Hussein on Trial: Panel 3: The Trial Process: Prosecution, Defense and Investigation: Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL*, 38 CORNELL INT'L L.J. 911 (2005)
- 57 Gilbert Sison, *A King No More: The Impact of the Pinochet Decision on the Doctrine of Head of State Immunity*, 78 WASH. U. L. Q. 1583, N. 115 (2000)
- 58 Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?*, 2003 Army Law. 18 (2003)
- 59 Jamison G. White, *Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, The ICC, and a Wake-Up Call for Former Heads of State*, 50 Case W. Res. 127, 134 (1999).
- 60 Mikhail Wladimiroff, *Milosevic & Hussein on Trial: Panel 3: The Trial Process: Prosecution, Defense, and Investigation: Former Heads of State on Trial*, 38 CORNELL INT'L L.J. 949 (2005)

- 61 Tung Yin, *Procedural Due Process to Determine “Enemy Combatant” Status in the War on Terrorism*, 73 Tenn. L. Rev. 351 (2006)

**Other Sources:**

- 62 Paul L. Bremer, Opening Remarks at the CPA Conference Center, Baghdad, (December 14<sup>th</sup>, 2003).
- 63 *Convictions and sentences in the trial of Saddam Hussein, 7 co-defendants*, International Herald Tribune, Mar. 20, 2007.
- 64 *Decision of Trial of Saddam Hussein Up to Iraqis, Powell Says*, CBS Radio Interview with Dan Raviv and Charles Wolfson, (Washington D.C.) Jan. 4, 2007.]
- 65 Glenn Frankel, *British Anti-Terror Law Reined In*, the Washington Post, Dec. 16, 2004.
- 66 Frank Gaglioti, *Solomon Islands dragooned into the “coalition of the willing,”* World Socialist News, April 2, 2003, at 2.
- 67 Geneva Conventions, Encyclopedia Britannica. 2007. Encyclopedia Britannica Online. April 16, 2007. <http://www.britanica.com/eb/article-9036404>
- 68 Hague Convention, Encyclopedia Britannica. 2007. Encyclopedia Britannica Online. April 16, 2007.
- 69 *Humanitarian Rights and Indefinite Detention: Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law*, INT’L REV. OF THE RED CROSS, March 2005, Vol. 87, at 857.]
- 70 *Iraqi Detainees Deserve Justice*, China Daily (Beijing), *Iraqi Detainees Deserve Justice*, June 20, 2004.
- 71 Daniel Kanstoom, “*Unlawful Combatants*,” in *the United States: Drawing the Fine Line Between Law and War*, AMERICAN BAR ASSOCIATION, HUMAN RIGHTS MAGAZINE, Winter 2003.
- 72 Linda Malone, GROTIAN MOMENT BLOG, *Experts debate the Issues: The Dujail Trial*. Issue # 7, *Does Saddam Hussein have head of state immunity?* Sept. 22, 2005, [http://law.case.edu/saddamtrial/entry.asp?entry\\_id=2](http://law.case.edu/saddamtrial/entry.asp?entry_id=2).

- 73 Paul Martin, *Iraqi foe urges life sentence for Saddam*, The Washington Times, Dec.18, 2006.
- 74 VIRGINIA MORRIS AND MICHAEL SCHARF, *INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL OF THE FORMER YUGOSLAVIA*, (1995)
- 75 Michael Moss, *Former US Detainee in Iraq Recalls Torment*, New York Times, Dec. 18, 2006.
- 76 Bassem Mroue, *Saddam's Iraqi Lawyers to Attend Trial*, The Boston Globe, Feb. 27, 2006.
77. *National Public Radio: Timeline: Saddam's Violent Road to Execution*, (NPR radio broadcast, Dec. 29, 2006) (Transcript available at <http://www.npr.org/templates/story/story.php?storyId=4961744>).
- 78 Perspectives on World History and Current Events, *Coalition of The Willing Map And Troop Numbers*, March 20, 2004.
- 79 Betsy Pisik, *Saddam to be turned over to Iraq*, The Washington Times, June 30, 2004. When Saddam is transferred to Iraqi custody, he will lose his POW status and be tried as an Iraqi criminal defendant.
- 80 Press Conference of the President, The East Room, Office of the Press Secretary, (April 28, 2005).
- 81 Charles Recknagel, *POW Saddam Awaits His Day in Court*, Asia Times, Feb. 21, 2004.
- 82 *Red Cross Clarifies Saddam Detention*, USA Today, June 14, 2004, at 14.
- 83 Leila Nadya Sadat, *International Legal Issues Surrounding the Mistreatment of Iraqi Detainees by American Forces*, ASIL Insights, May 20, 2004.
- 84 Leila Nadya Sadat, *The Trial of Slobodan Milosevic*, ASIL Insights, October 2002.
- 85 *Saddam Hussein Sentenced to Death*, BBC World News, Nov. 5, 2006.

86. *Saddam One Step Closer To Execution: Appeals Court Upholds Death Sentence; Judge Says Former Iraqi Leader Will Be Hanged Within 30 Days*. CBS News, December 26, 2006.
87. *Saddam Ordering Deaths*, The Washington Post, April 6, 2006.
88. *Saddam's French lawyer criticizes Bush for pronouncing former dictator's guilt*, WorldNow, WTNH, and Associated Press, Mar. 28, 2004. "Verges also believes the US has violated the Geneva Conventions on several counts in its detention of Saddam. He cites T-V footage of Saddam's medical exam after his capture, saying it's against the Geneva Conventions to "exhibit him like an animal at a fair."
89. Professor Philippe Sands QC, Guest Lecture Series of the Office of the Prosecutor, Transcript, Immunities before the International Courts, The Hague, (November 18, 2003).
90. Michael P Scharf, *Is It International Enough? A Critique of the Iraqi Special Tribunal in Light of The Goals of International Justice*, Frederick K. Cox International Law Center: War Crimes Research Portal, Feb. 09, 2004, available at [http://law.case.edu/war-crimes-research-portal/instant\\_analysis.asp?id=6](http://law.case.edu/war-crimes-research-portal/instant_analysis.asp?id=6)
91. MICHAEL SCHARF AND GREGORY MCNEAL, *SADDAM ON TRIAL* (2006)
92. *Timeline of Saddam Hussein's Capture*, NPR News Transcript, Dec. 16, 2003.
93. *Transfer of Custody*, PBS News Hour with Jim Lehrer, June 30, 2004.
94. *US Rejects UN Critique of its Iraq Prisoner Policy*, Reuters, July 4, 2005, at 6.
95. Ruth Wedgwood, *Former Yugoslav President Slobodan Milosevic To Be Tried in The Hague for Crimes Against Humanity and War Crimes Allegedly Committed in Kosovo*, American Society for International Law, July, 2001.
96. Edward Wong, *Iraq Prison Raid Finds a New Case of Mistreatment*, The NY Times, Dec. 12, 2005.

**Court Cases:**

97. Prosecutor v. Milosevic, Case No. IT-02-54-T, (“Decision on Assigned Counsel’s Motion for Withdrawal”) (Dec. 7, 2004)
98. Al-Bandar v. Bush, et al., 06-5425 2006 U.S. App. LEXIS 32239 (D.C. Cir. Dec. 29, 2006)
99. Flick v. Johnson, 85 U.S. App. D.C. 70, 174 F.2d 983, 984 (D.C. Cir. 1949).
100. Hill v. McDonough, 548 U.S. , 126 S. Ct. 2096, 2101, 165 L. Ed. 2d 44, 51 (2006)
101. Hirota, et al. v. General of the Army Douglas MacArthur, et al., 338 U.S. 197, 198, 69 S. Ct. 197, 93 L. Ed. 1902 (1948); Flick v. Johnson, 85 U.S. App. D.C. 70, 174 F.2d 983, 984 (D.C. Cir. 1949).
102. In Re Saddam Hussein, 468 F. Supp. 2d 126; 2006 U.S. Dist. LEXIS 93856
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3.	If Saddam were captured as part of the “war on terror,” he might be considered a “securities internee” or an “unlawful combatant” and held indefinitely, though he would still be entitled to certain protections under international law and the laws of war.	17
a.	A securities internee is an individual detained by the Multinational Forces in Iraq for security purposes who has not yet been given another legal status, and who is entitled to certain enumerated rights.	17
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## **I. ISSUE AND SUMMARY OF CONCLUSIONS:**

### **A. Issue\***

The war in Iraq may be classified as a war on terror, an occupation, and armed conflict, or a civil war, and these classifications could alter the way Saddam is labeled as a detainee. But regardless of whether Saddam is labeled a POW, an Iraqi criminal defendant, a securities internee, a lawful or unlawful combatant, a civilian or a former head of state, the laws of war, the Geneva Conventions and the ICCPR require that he be afforded certain procedural rights. This means that no matter how egregious the acts he committed are, he cannot be tortured, humiliated, or denied a fair trial by an objective tribunal, and until proven guilty, he must be presumed innocent.<sup>1</sup> In addition to these fundamental rights, Saddam also cannot be detained indefinitely without trial, and is even entitled to compensation for his unlawful or procedurally flawed detention<sup>2</sup> under the ICCPR.

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\* What was Saddam's status when he was in United States Custody at the request of the Iraqi Government? Does the characterization of the conflict affect Saddam's status as a detainee? Can a prisoner's status change over time, and if so, how? To what rights was Saddam entitled based on his status?

<sup>1</sup> Daniel Kanstoom, "Unlawful Combatants," in *the United States: Drawing the Fine Line Between Law and War*, AMERICAN BAR ASSOCIATION, HUMAN RIGHTS MAGAZINE, Winter 2003. [reproduced in accompanying notebook at Tab 56]

<sup>2</sup> Paul Martin, *Iraqi foe urges life sentence for Saddam*, The Washington Times, Dec.18, 2006. [reproduced in accompanying notebook at Tab 74]

## **B. SUMMARY OF CONCLUSIONS:**

1. In January 2004, the US formally classified Saddam as a POW, a status to which Saddam was entitled to under the Geneva Conventions and the laws of war, which define how nations and individuals at war must treat each other.
2. Saddam's status as a detainee may be changed if a competent tribunal determines that another status is more appropriate, but international humanitarian law still requires that his rights remain intact at all times.
3. When the legal status of the conflict changed from an occupation to an internal domestic conflict, Iraqi law and the ICCPR applied to the detention of Saddam as an Iraqi criminal defendant instead of a POW.
4. While detained under the authority of an Iraqi government, the source of Saddam's rights was derived from the Iraqi criminal code of 1969, the IHT statute, and the ICCPR.

## **II. FACTUAL BACKGROUND**

**Following the invasion of Iraq by multi-national forces ("MNF"), the former Iraqi dictator Saddam Hussein ("Saddam"), was captured, detained, and tried by a US created court,<sup>3</sup> the Iraqi High Tribunal ("IHT"), for war crimes, crimes against humanity and genocide committed during his thirty-year rule.<sup>4</sup> Saddam was found guilty of war crimes and crimes against humanity for ordering the deaths of 148 Shiite**

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<sup>3</sup> *National Public Radio: Timeline: Saddam's Violent Road to Execution*, (NPR radio broadcast, Dec. 29, 2006) (Transcript available at <http://www.npr.org/templates/story/story.php?storyId=4961744>). [hereinafter "Timeline"], [Reproduced in Accompanying Notebook at Tab 72]

<sup>4</sup> Michael P Scharf, *Is It International Enough? A Critique of the Iraqi Special Tribunal in Light of The Goals of International Justice*, Frederick K. Cox International Law Center: War Crimes Research Portal, Feb. 09, 2004, available at [http://law.case.edu/war-crimes-research-portal/instant\\_analysis.asp?id=6](http://law.case.edu/war-crimes-research-portal/instant_analysis.asp?id=6) [reproduced in accompanying notebook at Tab 70]

Muslims and was hanged.<sup>5</sup> The following developments in the Saddam trial illustrate some of the difficulties the IHT faced in trying this former dictator.

US forces captured Saddam 10 miles south of Tikrit on December 13, 2003, in a cellar in the town of ad-Duar.<sup>6</sup> He was taken to an undisclosed location to be interrogated by the CIA, and was later assigned the status of a Prisoner of War (“POW”) by US forces. In December, the US appointed Iraqi Governing Council established the Iraqi Special Tribunal (“IHT”) to try Saddam for war crimes committed during his rule.<sup>7</sup>

June 30, 2004, Saddam was “symbolically” handed over to the IHT as a criminal defendant,<sup>8</sup> though he would stay in the custody of the MNF until he was hanged.<sup>9</sup> This legal “transfer” stripped Saddam of his POW status and protections under the Geneva Conventions,<sup>10</sup> and allowed the MNF to detain him under Iraqi law and the “authority” of the Iraqi government. The change in status entitled Saddam to legal representation.<sup>11</sup>

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<sup>5</sup> Timeline, *supra* [reproduced in accompanying notebook at Tab 72]

<sup>6</sup> Paul L. Bremer, Opening Remarks at the CPA Conference Center, Baghdad, (December 14<sup>th</sup>, 2003). [reproduced in accompanying notebook at Tab 73]

<sup>7</sup> Timeline, *supra* [reproduced in accompanying notebook at Tab 72]

<sup>8</sup> MICHAEL SCHARF AND GREGORY MCNEAL, *SADDAM ON TRIAL* (2006) [hereinafter “SADDAM ON TRIAL”], [reproduced in accompanying notebook at Tab 71]

<sup>9</sup> In *Re Saddam Hussein*, 468 F. Supp. 2d 126, [reproduced in accompanying notebook at Tab 101], *Al-Bandar v. Bush, et al.*, 06-5425 2006 [reproduced in accompanying notebook at Tab 98] Both cases state affirm that following the U.S handover of power to Iraq, and the transfer of Saddam from US to Iraqi custody, Saddam was detained by the multinational forces at the request of Iraq.

<sup>10</sup> Betsy Pisik, *Saddam to be turned over to Iraq*, *The Washington Times*, June 30, 2004. When Saddam is transferred to Iraqi custody, he will lose his POW status and be tried as an Iraqi criminal defendant. [reproduced in accompanying notebook at Tab 54]

<sup>11</sup> *Decision of Trial of Saddam Hussein Up to Iraqis, Powell Says*, CBS Radio Interview with Dan Raviv and Charles Wolfson, (Washington D.C.) Jan. 4, 2007. [Reproduced in Accompanying Notebook at Tab 57]

On July 17, 2005, under the jurisdiction of the Iraqi Governing Council, The Iraqi tribunal announced it had filed charges against Saddam in the Dujail case. August 8, 2005, Saddam fired his volunteer 1,500-member Arab and Western legal defense team, but retained Iraqi attorney Khalil al-Dulaimi. Three months later on October 19, 2005, Saddam pleaded innocent to charges of murder and torture, while questioning the legitimacy of the court, and alleging he had been tortured while being detained by the US.<sup>12</sup>

By late January 2006, the first chief judge in Saddam's trial had stepped down amid charges of political interference and accusations that he failed to control the proceedings.<sup>13</sup> This occurred after Saddam and other defendants had repeatedly acted out in court, and even arrived for their proceedings in pajamas.<sup>14</sup> Then in protest of the newly appointed judge that Saddam alleged was biased against him, Saddam and his lawyer boycotted the trial on February 1, 2006, which continued without them.<sup>15</sup> Later that month, the prosecution presented a document that Saddam admitted signing, which approved death sentences for 148 Dujail residents.<sup>16</sup> A few months later on June 21, 2006, Saddam's principal defense lawyer, Khamis Al-Obeidi was kidnapped and

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<sup>12</sup> Timeline, *supra* [reproduced in accompanying notebook at Tab 72]

<sup>13</sup> *Id.*

<sup>14</sup> Bassem Mroue, *Saddam's Iraqi Lawyers to Attend Trial*, The Boston Globe, Feb. 27, 2006. [hereinafter "Mroue"], [reproduced in accompanying notebook at Tab 53]

<sup>15</sup> *Id.* at. Para. 3.

<sup>16</sup> *Saddam Admits Ordering Deaths*, The Washington Post, April 6, 2006. [reproduced in accompanying notebook at Tab 81]

assassinated by men wearing police uniforms.<sup>17</sup> He was the third member of the defense team to lose his life during the trial.<sup>18</sup>

In a second trial beginning in August, Saddam was charged with genocide, stemming from a gas attack on a Kurdish village during the Anfal campaign of the late 1980s. Saddam and six co-defendants were accused of orchestrating the killings of tens of thousands of Iraqi Kurds.<sup>19</sup> A month later on Sept. 20, 2006, the Iraqi cabinet removed the chief judge of Saddam's second trial after he declared in court that Saddam was "no dictator."<sup>20</sup>

Nov. 5, 2006, the judge in Saddam's first trial found him guilty of war crimes and crimes against humanity, including murder, for ordering the deaths of 148 Shiite Muslims in the town of Dujail.<sup>21</sup> Saddam and two co-defendants were sentenced to death.<sup>22</sup> Four days after Iraq's highest appeals court upheld Saddam's death sentence, on December 30, 2006, Saddam was taken to the gallows and hanged.<sup>23</sup>

### **III. LEGAL ANALYSIS:**

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<sup>17</sup> SADDAM ON TRIAL, *supra* [reproduced in accompanying notebook at Tab 71]

<sup>18</sup> Mroue, *supra* [reproduced in accompanying notebook at Tab 53]

<sup>19</sup> Timeline, *supra* [reproduced in accompanying notebook at Tab 72]

<sup>20</sup> Timeline, *supra* [reproduced in accompanying notebook at Tab 72]

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at para. 12.

**A. In January 2004, the US formally classified Saddam as a POW, a status to which Saddam was entitled to under the Geneva Conventions and the laws of war, which define how nations and individuals at war must treat each other.**

Following the invasion of Iraq by Multi National Forces (“MNF”) in March 2003, the Iraqi conflict was classified as an international armed conflict. Because of this classification, anyone denied freedom by the MNF was protected by the laws of war, and the Third<sup>24</sup> and Fourth<sup>25</sup> Geneva Conventions of 1949, which apply to the treatment of prisoners of war (“POW”) and civilians during times of war respectively. In this situation, the Forth Geneva Convention allows a party to the conflict to deprive individuals of their liberty, but only if “the security of the Detaining Power makes it absolutely necessary,”<sup>26</sup> and only if certain procedures outlined in the Geneva Conventions are followed.<sup>27</sup> The rules for the treatment of prisoners under the laws of war have been developed over a century and must be carefully obeyed during times of armed conflict.<sup>28</sup>

The customary laws of war provide the legal framework under which individuals and state actors may detain, classify, and punish prisoners as civilians,

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<sup>24</sup> Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, *entry into force* 21 October 1950. [reproduced in accompanying notebook at Tab 12]

<sup>25</sup> Geneva Conventions, Encyclopedia Britanica. 2007. Encyclopedia Britanica Online. April 16, 2007. <http://www.britanica.com/eb/article-9036404> [reproduced in accompanying notebook at Tab 64]

<sup>26</sup> AMNESTY INTERNATIONAL REPORT, BEYOND ABU GHRAIB: DETENTION AND TORTURE IN IRAQ, (MARCH 6, 2006). [hereinafter “AMNESTY”], [reproduced in accompanying notebook at Tab 2]

<sup>27</sup> Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, *entry into force* 21 October 1950. [hereinafter “Prisoner of War”], [reproduced in accompanying notebook at Tab 9]

<sup>28</sup> AMNESTY, *supra*, [reproduced in Accompanying Notebook at Tab 3]

POWs or combatants.<sup>29</sup> They require that (1) persons who are not currently taking part in hostilities be respected, treated humanely, protected, that they not be discriminated against, and be given appropriate medical treatment;<sup>30</sup> (2) prisoners, captured combatants and any others who have their liberties restricted must be treated humanely, protected from violence and torture,<sup>31</sup> and if brought to trial, they must receive fair judicial proceedings; (3) methods of warfare must be restricted to avoid unnecessary injury and suffering; and (4) to protect civilian populations, armed forces must distinguish military targets and objects from civilian populations and non-military objects, and avoid targeting non-military targets.<sup>32</sup> These principles are derived from several sources, which have become binding international law and are enumerated below.

The Hague Conventions of 1899<sup>33</sup> and 1907<sup>34</sup> were a series of international agreements that prohibited certain wartime acts such as chemical warfare, hollow point bullets, and enumerated the conditions under which captured prisoners were to be treated. Article 7, Chapter 2 of the 1907 convention states “prisoners of war shall be treated as regards board, lodging, and clothing on the same footing as the troops

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Alison Croessmann, *Congress’ Preliminary Response to the Abu Ghraib Prison Abuses, room for reform?*, 71 Brook. L. Rev. 945 (2005) [reproduced in accompanying notebook at Tab 27] “The United States is a party to the Geneva Conventions which, among other things, regulate the treatment of prisoners of war (“POWs”) by banning the practice of torture.”

<sup>32</sup> Prisoner of War, *supra* [reproduced in accompanying notebook at Tab 9]

<sup>33</sup> Hague Convention (II) With Respect to the Laws and Customs of War on Land, Jul. 29, 1899, *entered into force* Sept. 4, 1900. [reproduced in accompanying notebook at Tab 10]

<sup>34</sup> Hague Convention (IV) Respecting The Laws And Customs Of War On Land, Oct. 18, 1907, *entered into force* Jan. 26, 1910. [reproduced in accompanying notebook at Tab 11]

of the Government who captured them.”<sup>35</sup> After the Hague Convention of 1907, an agreement to reconvene every eight years cemented the idea that international conferences could help curb unnecessary destruction and suffering during international armed conflict.<sup>36</sup> This development has led to further international advancements in the protection of human rights.<sup>37</sup>

In 1928, The Geneva Protocol to the Hague Conventions<sup>38</sup> was enacted in response to public outcry over the use of mustard gas and other similar chemical agents during world war I, and permanently banned the use of all forms of chemical and biological warfare.<sup>39</sup> Even though Saddam Hussein violated this principle of the Hague Conventions, he is still entitled to The Hague Conventions protections for prisoners.<sup>40</sup>

The Geneva Conventions were a series of four international agreements which took the principles of the Hague Conventions, clarified them, and extended the protections of POWs, civilians and other combatants during times of armed conflict.<sup>41</sup> Of particular significance is the third Geneva Convention which

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<sup>35</sup> *Id.* at Article 7, Chapter 2.

<sup>36</sup> Hague Convention (V), Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907. [reproduced in accompanying notebook at Tab 12]

<sup>37</sup> *Id.*

<sup>38</sup> Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65, *entered into force* Feb. 8, 1928. [Hereinafter “Poison Gas”], [reproduced in accompanying notebook at Tab 17]

<sup>39</sup> Eric Talbot Jensen, *The Laws of War: Past, Present, and Future: Article: Combatant Status: It Is Time for Intermediate Levels of Recognition and Partial Compliance*, 46 Va. J. Int’l L. 209, 216 (2005) [reproduced in accompanying notebook at Tab 31]

<sup>40</sup> Poison Gas, *supra* [reproduced in accompanying notebook at Tab 17]

<sup>41</sup> Geneva Conventions, Encyclopedia Britannica. 2007. Encyclopedia Britannica Online. April 16, 2007. <http://www.britanica.com/eb/article-9036404> [reproduced in accompanying notebook at Tab 61]

enumerated that “prisoners of war should be treated humanely and that prison camps should be open to inspection by neutral countries,” while Article IV of the fourth convention of 1949 enumerated protections for civilians falling into the hands of belligerents, and Article III set up requirements for the treatment of prisoners of war.<sup>42</sup>

The establishment of the UN Charter Following World War II on June 26, 1945,<sup>43</sup> reflected a realization by the world community that effective protection of human rights was necessary to promote international peace.<sup>44</sup> Article 55 of the UN Charter states that the UN shall promote "Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,<sup>45</sup> "and Article 56 requires that all members “pledge themselves to take joint and separate action” to achieve this goal.<sup>46</sup> Because the US and MNF overthrew the government of Iraq, and detained its former leader Saddam, the principles and protections of the UN Charter apply to his detention. Additionally, because Saddam qualified as a prisoner during an armed conflict, he was entitled to the fundamental rights enumerated in the Geneva Conventions.

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<sup>42</sup> *Id.* at “laws of war.”

<sup>43</sup> Charter of The United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945. [reproduced in accompanying notebook at Tab 4]

<sup>44</sup> *Laws of War: Charter of the United Nations*, The Avalon Project, Yale Law School, June 26, 1945. available at <http://www.yale.edu/lawweb/avalon/un/unchart.htm>. [reproduced in accompanying notebook at Tab 16]

<sup>45</sup> Manooher Mofidi, Amy E. Eckert, “*Unlawful Combatants*” or “*Prisoners of War*”: *The Law and Politics of Labels*, 36 Cornell Int’l L.J. 59 (2003) [reproduced in accompanying notebook at Tab 42]

<sup>46</sup> The Charter of the United Nations, 26 June 1945, Art. 55-56, *entered into force* Oct. 24, 1945. [reproduced in accompanying notebook at Tab 16]

**B. Saddam’s status may be changed if a competent tribunal determines that another status is more appropriate, but international humanitarian law still requires that his rights remain intact at all times.**<sup>47</sup> This is because the Geneva Conventions requires that all detainees captured during armed combat must be treated like POW’s until they can stand before a competent tribunal for determination of their appropriate status.<sup>48</sup> Once the status of a detainee is determined, it may change if new information becomes available which makes another classification more relevant. In this case, another combatant status review by a competent tribunal would be necessary,<sup>49</sup> though regardless of classification change, the laws of war still require that detainees be afforded certain basic rights.<sup>50</sup>

As commander in chief of Iraq, Saddam meets the requirements to be classified as a POW under the Geneva Conventions. The language in the Geneva Conventions indicates that POW status applies to members of “regularly organized armed forces... [including] ...guerrillas, civilians who take up arms against an enemy openly, or noncombatants associated with a military force.”<sup>51</sup> According to

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<sup>47</sup> American Convention on Human Rights, *opened for signature* Nov. 22, 1969, Art. 8, Art. 9 114 UNTS 123 (entered into force July 18, 1978). [reproduced in accompanying notebook at Tab 1] In addition to the Geneva Conventions, the ICCPR and the European Convention, the American Convention also requires that all detainees are entitled to a fair and impartial tribunal, making the principle customary international law.

<sup>48</sup>*Id.* At 635-637.

<sup>49</sup> Christopher Burris, *Time For Congressional Action: The Necessity of Delineating the Jurisdictional Responsibilities of Federal District Courts, Courts-Martial, and Military Commissions to Try Violations of the Laws of War*, 2005 Fed. Cts. L. Rev. 4 (2005) [reproduced in accompanying notebook at Tab 29]

<sup>50</sup> Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, *entry into force* 21 October 1950. [reproduced in accompanying notebook at Tab 12]

<sup>51</sup> BRITISH RED CROSS, FOREIGN & COMMONWEALTH OFFICE, MINISTRY OF DEFENSE, PROTECTION OF PRISONERS OF WAR AND CIVILIAN SECURITY INTERNEES AGAINST INSULTS AND PUBLIC CURIOSITY, FIFTH DRAFT RESOLUTION, (SEPT. 1, 2005). [hereinafter “RED CROSS”], [reproduced in accompanying notebook at Tab 3]

Article IV of the Geneva Conventions, a soldier is entitled to POW status if they meet the following requirements; (1) being commanded by a person responsible for his subordinates, (2) having a fixed distinctive sign recognizable at a distance, (3) carrying arms openly, and (4) conducting their operations in accordance with the laws and customs of war. When US forces captured Saddam, he qualified for POW status not only as a commander in chief, but also as a noncombatant associated with military force. This was because Saddam was recognizable as the former president of Iraq, his capture represented a major US military objective, and he was hiding for his life below the floor in a cottage.<sup>52</sup> As a commander in chief whose “threat” was used as justification for the US lead invasion,<sup>53</sup> who had been in power for 30 years, and whose picture had been broadly circulated, Saddam was entitled to POW status.<sup>54</sup>

- a. **It is a violation of the Geneva Conventions and the laws of war to deny a prisoner a legal status.** According to the International Committee of the Red Cross (“ICRC”), no person held by an enemy can be denied an official status under international law. “[H]e is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth

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<sup>52</sup> Tung Yin, *Procedural Due Process to Determine “Enemy Combatant” Status in the War on Terrorism*, 73 Tenn. L. Rev. 351 at 389, (2006) [reproduced in accompanying notebook at Tab 51] “Even absent a uniform, there are situations where a detainee’s combatant status should be apparent by his or her own actions. Article 4 of the Geneva Convention recognizes that some combatants will not be wearing uniforms because such a requirement would exclude “organized resistance movements” and locals “who on the approach of the enemy spontaneously take up arms to resist the invading forces.”

<sup>53</sup> Robert A. Peal, *Combatant Status Review Tribunals and the Unique Nature of The War on Terror*, 58 Vand. L. Rev. 1629 (2005) [reproduced in accompanying notebook at Tab 48]

<sup>54</sup> Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, *entry into force* 21 October 1950. [reproduced in accompanying notebook at Tab 12]

Convention, [or] a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no* intermediate status; nobody in enemy hands can fall outside the law."<sup>55</sup> The ICTR explicitly affirmed this principle in a 1998 judgment, stating, "there is no gap between the Third and Fourth Geneva Conventions. If an individual is not entitled to the protection of the Third Convention as a prisoner of war ... he or she necessarily falls within the ambit of [the Fourth Convention]."<sup>56</sup> So as long as the MNFs are needed in Iraq, Saddam and other detainees should be afforded the rights of prisoners enumerated in the Geneva Conventions.

Pending a status classification, a detainee is entitled to the same protections afforded to POWs.<sup>57</sup> According to Article 5 of the third Geneva Convention, "should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy," are entitled to POW status, "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."<sup>58</sup>

**b. Captors are forbidden from subjecting detainees of any kind to torture or other cruel, inhuman or degrading treatment. While unlawful**

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<sup>55</sup> *Humanitarian Rights and Indefinite Detention: Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law*, INT'L REV. OF THE RED CROSS, March 2005, Vol. 87, at 857. [reproduced in accompanying notebook at Tab 64]

<sup>56</sup> Celebici Judgment, para. 271 (1998).

<sup>57</sup> HUMAN RIGHTS WATCH REPORT, TASK FORCE 20/121/6-26/145 CAMP NAMA, BAGHDAD, (JULY 2006). [reproduced in accompanying notebook at Tab 13]

<sup>58</sup> Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 5, *entry into force* 21 October 1950. [reproduced in accompanying notebook at Tab 9]

combatants or non-privileged detainees cannot claim the same protections as POWs during interrogation, all detainees regardless of status are still entitled to protection from “torture and other cruel, inhuman or degrading treatment as set out under international human rights law and customary international law.”<sup>59</sup> So even if Saddam were not entitled to POW status under the Geneva Conventions, which he is, it would be a violation of the Geneva Conventions and international law to subject him to torture or other cruel, unusual, or degrading forms of interrogation or punishment.<sup>60</sup>

**2. If Saddam were captured as part of the “war on terror,” he might be considered a “securities internee” or an “unlawful combatant” and held indefinitely, though he would still be entitled to protections under international law, and the laws of war.**<sup>61</sup>

**a. A securities internee is an individual detained by the MNF in Iraq for security purposes who has not yet been given another legal status, and who is entitled to certain CPA enumerated rights.**<sup>62</sup> Under the Fourth Geneva Convention, “an occupying power can jail civilians who pose an “imperative” security threat, but it must establish a regular procedure for insuring that only civilians who pose a genuine security threat are

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<sup>59</sup> European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, Art. 6(3), 213 UNTS 222 (entered into force Sept. 3, 1953), *as amended by* Protocol No. 11, May 11, 1994, ETS No. 155, 33 ILM 943 (1994) [reproduced in accompanying notebook at Tab 7]

<sup>60</sup> International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52, UN Doc. A/6316 (1996), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter “ICCPR”], [reproduced in accompanying notebook at Tab 15]

<sup>61</sup> *US Rejects UN Critique of its Iraq Prisoner Policy*, Reuters, July 4, 2005, at 6. [reproduced in accompanying notebook at Tab 84]

<sup>62</sup> C.P.A. ORD. NO. 7, AT 3, JUNE 18, 2003. [reproduced in accompanying notebook at Tab 5]

imprisoned.”<sup>63</sup> Before an occupying power is able to determine which detainees pose a genuine threat, it may temporarily detain civilians as security internees,<sup>64</sup> as long as clear rules are established to ensure those who do not pose a threat are released in a timely manner.<sup>65</sup>

Under rules established by the MNF as occupiers of Iraq, the following rules apply to the detention of security internees: a security internee is entitled to (a) appeal the decision which lead to their internment if they are interned for more than 72 hours; (b) which shall initially be reviewed within 7 days, and then again within 9 months form the date of “induction into an internment facility”;<sup>66</sup> (c) standards and operation of such facilities must be in accordance with the requirements of section IV of the Fourth Geneva Convention; and (d) the ICRC shall be granted access to the internees, except in the event of “imperative military necessity as an exceptional and temporary measure”; (e) if the internee is later classified as a criminal internee, the time the internee remained in custody up to this point will not count toward the due process timeline,<sup>67</sup> which mandates that an internee stand before a competent tribunal within six months of

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<sup>63</sup> *Iraqi Detainees Deserve Justice*, China Daily (Beijing), *Iraqi Detainees Deserve Justice*, June 20, 2004. [reproduced in accompanying notebook at Tab 65]

<sup>64</sup> Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, *entry into force* 21 October 1950. [reproduced in accompanying notebook at Tab 20]

<sup>65</sup> Robert A. Peal, *Combatant Status Review Tribunals and the Unique Nature of The War on Terror*, 58 Vand. L. Rev. 1629 at 1647-1649, (2005) [reproduced in accompanying notebook at Tab 43]

<sup>66</sup> AMNESTY, *supra* [reproduced in accompanying Notebook at Tab 3]

<sup>67</sup> *Id.*

internment; and (f) if the security internee held by coalition forces is later transferred to an Iraqi court, “a failure to comply with these procedures shall not constitute grounds for any legal remedy, but may be considered in mitigation of sentence.”<sup>68</sup>

Under the CPA securities internee detention procedures, any Iraqi the MNF determines could possibly pose a security threat can be labeled a securities internee and detained for up to nine months.<sup>69</sup> In this case, only an initial is required. After nine months however, the MNF must classify the internee in a more meaningful way. At this point, if a competent tribunal determines that the securities internee committed a criminal act under Iraqi law, the tribunal will change the securities internee’s status to that of Iraqi criminal defendant.<sup>70</sup> The MNF provision provides no redress for security internees other than possible sentence mitigation.<sup>71</sup> Additionally, as long as prisoners are detained as security internees, they maybe

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<sup>68</sup> CPA Memorandum No.3 (revised), order #7, Section 7: Criminal Procedures, 27 June 2004 [hereafter: CPA Memorandum No.3]. [reproduced in accompanying notebook at Tab 6]

<sup>69</sup> CPA Memorandum No.3 (revised): Criminal Procedures, 27 June 2004 [reproduced in accompanying notebook at Tab 8]

<sup>70</sup> CPA Memorandum No.3 *supra* [reproduced in Accompanying Notebook at Tab 6]

<sup>71</sup> *Id.* At 7.

completely denied due process of law,<sup>72</sup> which is a violation of international law and Iraqi criminal law.<sup>73</sup>

- b. Under the Geneva Conventions, an unlawful combatant is a person who is denied the privileges normally afforded to a POW, or to other protected classes, and may be tried by military tribunals.**<sup>74</sup> An unlawful combatant is denied both the rights normally granted to soldiers under the laws of war,<sup>75</sup> and the civil rights usually guaranteed to criminal defendants<sup>76</sup> under the laws of the applicable detaining state.<sup>77</sup> However, an unlawful combatant is still entitled to the rights protected by Common Article Three of the Geneva Conventions, and the ICCPR.<sup>78</sup> The laws of

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<sup>72</sup> *Humanitarian Rights and Indefinite Detention: Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law*, INT'L REV. OF THE RED CROSS, March 2005, Vol. 87, at 857. [reproduced in accompanying notebook at Tab 71], Leila Nadya Sadat, *International Legal Issues Surrounding the Mistreatment of Iraqi Detainees by American Forces*, ASIL Insights, May 20, 2004. [reproduced in accompanying notebook at Tab 73]

<sup>73</sup> Ryan J. Liebl, *Rule of Law in Postwar Iraq: From Saddam Hussein to the American Soldiers Involved in The Abu Ghraib Prison Scandal, What Law Governs Whose Actions?*, 28 Hamline L. Rev. 91 at 132-133 (2005) [reproduced in accompanying notebook at Tab 45]

<sup>74</sup> Eric Talbot Jensen, *The Laws of War: Past, Present, and Future: Article: Combatant Status: It Is Time for Intermediate Levels of Recognition and Partial Compliance*, 46 Va. J. Int'l L. 209 (2005) [reproduced in accompanying notebook at Tab 39]

<sup>75</sup> *Id.*

<sup>76</sup> Jordon J. Paust, *The United States as Occupying Power Over Portions of Iraq and Special Responsibilities Under the Laws of War*, 27 Suffolk Transnat'l L. Rev. 1 (2003) [reproduced in accompanying notebook at Tab 46]

<sup>77</sup> Joseph Blocher, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 Yale L.J. 667 at 1 (2006) [reproduced in accompanying notebook at Tab 47] POWs "enjoy special rights under the Geneva Conventions that "enemy combatants" detained in Guantanamo do not have, including the right to be tried in the same courts and according to the same procedures as members of the detaining power's armed forces.

<sup>78</sup> ICCPR, *supra* [reproduced in accompanying notebook at Tab 15]

war distinguish unlawful from lawful combatants.<sup>79</sup> Lawful combatants may be captured and detained as POWs by enemy military forces. Though unlawful combatants are also subject to capture and detention, they also may be tried and punished by military tribunals for the acts that make their belligerency unlawful.<sup>80</sup> Because Saddam could not be classified as an unlawful combatant, and was entitled to POW status under the Geneva Conventions, a military tribunal would be an inappropriate forum for his trial.<sup>81</sup> However this situation was remedied with the creation of the IHT and the handover of power to Iraq.<sup>82</sup>

**C. When the legal status of the conflict changed from an occupation to an internal domestic conflict, Iraqi law and the ICCPR applied to the detention of Saddam as an Iraqi criminal defendant instead of a POW.<sup>83</sup>**

When the Iraqi government officially regained power over Iraq in June of 2005, the legal status of the conflict changed from an international armed conflict

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<sup>79</sup> George H. Aldrich, *New Life For the Laws of War*, 75 A.J.I.L. 764 at 769-770 (1981) [reproduced in accompanying notebook at Tab 34]

<sup>80</sup> Daniel Kanstoom, “*Unlawful Combatants*,” in *the United States: Drawing the Fine Line Between Law and War*, AMERICAN BAR ASSOCIATION, HUMAN RIGHTS MAGAZINE, Winter 2003. [reproduced in accompanying notebook at Tab 56]

<sup>81</sup> Prisoners of War, *supra* [reproduced in accompanying notebook at Tab 12]

<sup>82</sup> L. Elizabeth Chamblee, *Post-War Iraq: Prosecuting Saddam Hussein*, 7 Cal. Crim. Law Rev. 1 (2004) [reproduced in accompanying notebook at Tab 48]

<sup>83</sup> Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 Am. J. Int’l L. 580 at 586 (2006) [reproduced in accompanying notebook at Tab 26] “Of course the Occupying Power usually tried to give some colour of legality and independence to the new organizations, which were formed in the majority of cases with the co-operation of certain elements among the population of the occupied country, but it was obvious that they were in fact always subservient to the will of the Occupying Power.”

between states to a domestic Iraqi conflict.<sup>84</sup> At this point, the US became mere agents of Iraq in promoting security,<sup>85</sup> and combating domestic insurgents, which meant that the Geneva Conventions and the laws of war no longer applied to individuals detained in the ongoing civil armed conflict.<sup>86</sup> This eliminated the application of the laws of war and changed Saddam's status from a POW to an Iraqi criminal defendant.<sup>87</sup> This change in status entitled Saddam Hussein to legal representation.<sup>88</sup> The US retained custody of Saddam under the authority of the Iraqi government<sup>89</sup> and the source for Saddam's rights became the Iraqi criminal code of 1969 and the ICCPR.

UN Resolution 1546<sup>90</sup> is the legal basis US troops use to conduct detentions in Iraq following the June 28, 2004 handover of power to the Iraqi government.<sup>91</sup>

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<sup>84</sup> UN Doc. S/2005/373, UN Security Council, Report of the Secretary-General pursuant to paragraph 30 of resolution 1546 (2004), 7 June 2005, para. 72. [reproduced in accompanying notebook at Tab 27]

<sup>85</sup> *Decision of Trial of Saddam Hussein Up to Iraqis, Powell Says*, CBS Radio Interview with Dan Raviv and Charles Wolfson, (Washington D.C.) Jan. 4, 2007. [reproduced in accompanying notebook at Tab 57] Powell reaffirms the notion that Iraq is in control of the trials and is an independent institution.

<sup>86</sup> *US Rejects UN Critique of its Iraq Prisoner Policy*, Reuters, July 4, 2005, at 6. [hereinafter "Critique"], [reproduced in accompanying notebook at Tab 84]

<sup>87</sup> Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 Am. J. Int'l L. 580 at 586 (2006) [reproduced in accompanying notebook at Tab 26] "Of course the Occupying Power usually tried to give some colour of legality and independence to the new organizations, which were formed in the majority of cases with the co-operation of certain elements among the population of the occupied country, but it was obvious that they were in fact always subservient to the will of the Occupying Power."

<sup>88</sup> HUMAN RIGHTS WATCH REPORT, SADDAM HUSSEIN AS A POW: Q & A ON THE PRISONER OF WAR STATUS OF SADDAM HUSSEIN, (JAN. 22, 2004). [reproduced in accompanying notebook at Tab 17]

<sup>89</sup> *Red Cross Clarifies Saddam Detention*, USA Today, June 14, 2004, at 14. [reproduced in accompanying notebook at Tab 79]

<sup>90</sup> UN Doc. S/2005/373, UN Security Council, Report of the Secretary-General pursuant to paragraph 30 of resolution 1546 (2004), 7 June 2005, para. 72. [reproduced in accompanying notebook at Tab 23]

<sup>91</sup> C.P.A. ORD. NO. 7, AT 3, JUNE 18, 2003. [reproduced in accompanying notebook at Tab 55]

Resolution 1546 and associated correspondences between Secretary of State Colin Powell and Iraqi Prime Minister Ayad Allawi, enabled the US to resort to "internment where this is necessary for imperative reasons of security."<sup>92</sup> However, Resolution 1546 does not reference the legal safeguards, which should apply to arrests, detention and internment,<sup>93</sup> so the MNF reference CPA Memorandum No. 3 (revised) of June 2004, as defining arrest procedures for criminal suspects and security internees detained by troops on behalf of Iraq after June 28, 2004.<sup>94</sup>

Though CPA Memorandum No. 3, and Resolution 1546<sup>95</sup> provides authority and procedures for internment, they lack specific procedures for the protection of the detainee's rights to due process.<sup>96</sup> Amnesty International argues that these procedures are inappropriate because they "fail to meet international human rights standards guaranteeing the rights of detainees –including, notably, the right to have access to legal counsel and the right to challenge the lawfulness of the detention before a court."<sup>97</sup>

- 1. While detained under the authority of an Iraqi government, and** as an Iraqi criminal defendant, Saddam was entitled to the procedural safeguards

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<sup>92</sup> CPA Memorandum No.3 *supra* [Reproduced in Accompanying Notebook at Tab 6]

<sup>93</sup> AMNESTY, [reproduced in accompanying notebook at Tab 2]

<sup>94</sup> *Id.* At. "Legal Background".

<sup>95</sup> UN Doc. S/2005/373, UN Security Council, Report of the Secretary-General pursuant to paragraph 30 of resolution 1546 (2004), 7 June 2005, para. 72. [reproduced in accompanying notebook at Tab 23]

<sup>96</sup> HUMAN RIGHTS WATCH REPORT, TASK FORCE 20/121/6-26/145 CAMP NAMA, BAGHDAD, (JULY 2006). [reproduced in accompanying notebook at Tab 18]

<sup>97</sup> *Id.* At. "Legal Background".

enumerated in the Iraqi criminal code of 1969.<sup>98</sup> Under Iraqi Criminal Law, Saddam would have either been entitled to release on bail prior to trial, or an expedited trial, beginning within fifteen days of his capture. In Iraq, a court must first issue a warrant before an arrest can be made.<sup>99</sup> Once an accused individual is arrested and brought into custody, the accused can only be detained without trial for a total of fifteen days for each charge, otherwise the accused must be released on bail.<sup>100</sup> So unless proceedings against Saddam began within fifteen days of his capture, the proceedings of the Iraqi criminal code were violated, requiring that Saddam be released.<sup>101</sup>

Because Iraqi criminal procedure was violated in the detention of Saddam pending prosecution, Saddam should have had his sentence reduced to life in prison, or Saddam should have received compensation for his unlawful detention. This was required under Article 6 of the ICCPR, which mandates that any defendant who is to be executed must stand before an impartial tribunal.<sup>102</sup> Violations of Iraqi criminal procedure, without compensation or sentence reduction, as required by international law, could make the IHT appear other

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<sup>98</sup> Iraqi Criminal Code of 1969, Article 92-108.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* At 109.

<sup>101</sup> Tom Parker, *Milosevic & Hussein on Trial: Panel 3: The Trial Process: Prosecution, Defense and Investigation: Prosecuting Saddam: Coalitional Provisional Authority and the Evolution of the Iraqi Special Tribunal*, 38 Cornell Int'l L.J. 899 at 907-908, See "Victors Justice" section (2005) [hereinafter "Parker"], [Reproduced in Accompanying Notebook at Tab 50]

<sup>102</sup> Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?*, 2003 Army Law. 18 at 23 (2003) [Reproduced in Accompanying Notebook at Tab 32]

than impartial.<sup>103</sup> This unfortunate situation could have been avoided<sup>104</sup> if the IHT had been willing to lighten Saddam's sentence to life in prison.<sup>105</sup> Because the future of stability in Iraq and the future of international and domestic hybrid tribunals will be influenced by the acts of the IHT,<sup>106</sup> the IHT should strive to win public support and a perception of impartiality.<sup>107</sup>

An alternative to a sentence reduction for procedural irregularities in the detention of Saddam could have been monetary compensation. Article 85 of the Rome Statute of the International Criminal Court specifies that victims of unlawful arrest and detention have a right to compensation,<sup>108</sup> as does Article 14 (6) of the ICCPR.<sup>109</sup> Compensating criminals instead of granting them sentence reductions would be a change from the policy of the International

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<sup>103</sup> Parker at 907-908. [Reproduced in Accompanying Notebook at Tab 50]

<sup>104</sup> *Saddam One Step Closer To Execution: Appeals Court Upholds Death Sentence; Judge Says Former Iraqi Leader Will Be Hanged Within 30 Days*. CBS News, December 26, 2006. [Reproduced in Accompanying Notebook at Tab 82] "As an example of Iraqi government interference, Dicker noted Mouwafak al-Rubaie, Iraq's national security adviser, announced the decision of the appeals court before the court itself. Al-Rubaie told AP of the decision about an hour before the chief judge announced it."

<sup>105</sup> Paul Martin, *Iraqi foe urges life sentence for Saddam*, The Washington Times, Dec. 18, 2006. [Reproduced in Accompanying Notebook at Tab 74] "A senior Iraqi Governing Council member, Jalal Talabani, yesterday urged fellow Iraqis to reject President Bush's suggestion that Saddam Hussein should face the death penalty for his crimes."

<sup>106</sup> Russell A. Miller, *Before the Law: Military Investigations and Evidence at the Iraqi Special Tribunal*, 13 Mich. St. J. Int'l L. 107 at 189, (2005) [reproduced in accompanying notebook at Tab 44]

<sup>107</sup> CPA Memorandum No.3 *supra* [reproduced in accompanying notebook at Tab 8]

<sup>108</sup> Rome Statute of the International Criminal Court, July 17, 1998, Art. 85, UN Doc. A/CONF.183/9\*(1998), 37 ILM 999 (1998) [reproduced in accompanying notebook at Tab 18]

<sup>109</sup> International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52, UN Doc. A/6316 (1996), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) Article 14 (6) [reproduced in accompanying notebook at Tab 19]

Criminal Tribunal for the former Yugoslavia (“ICTY”),<sup>110</sup> and the International Criminal Tribunal for Rwanda (“ICTR”),<sup>111</sup> but the purpose of doing this would be to avoid releasing war criminals early on technicalities. In the case of Saddam, it would have been a way to avoid reducing his death sentence to one of life in prison.<sup>112</sup> The ad-hoc tribunals elected to grant sentence reductions partly because they lacked the power to grant compensation.<sup>113</sup> The ad-hoc tribunals needed to do something to compensate victims of unlawful detention, and because they were unable to provide financial compensation to their many defendants, they were forced to grant sentence reductions instead. But this was a flawed system with too many defendants and too little funding to realistically grant financial compensation for procedural irregularities.<sup>114</sup> The IHT on the other hand may find that compensation would be an appropriate and feasible alternative to sentence reductions.<sup>115</sup>

- a. If CPA amendments to Iraqi criminal law<sup>116</sup> could be applied to Saddam’s detention, he could have been detained without formal charges indefinitely, but this would violate ex post facto customary international**

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<sup>110</sup> Statute of the Int’l Criminal Trib. for the Former Yugoslavia, SC Res, 827 (May 25, 1993) (amended 1998) [reproduced in accompanying notebook at Tab 23]

<sup>111</sup> Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, annex, Art. 20(4)(d) (Nov. 8, 1994) [reproduced in accompanying notebook at Tab 21]

<sup>112</sup> Rome Statute of the International Criminal Court, July 17, 1998, Art. 85, UN Doc. A/CONF.183/9\*(1998), 37 ILM 999 (1998) [reproduced in accompanying notebook at Tab 18]

<sup>113</sup> UN Doc. S/2000/904; Letter dated Sept. 26, 2000. [reproduced in accompanying notebook at Tab 81].

<sup>114</sup> Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 *Hastings Int’l & Comp. L. Rev.* 157 at 168 (2004) [reproduced in accompanying notebook at Tab 34].

<sup>115</sup> *Id.*

<sup>116</sup> CPA Memorandum No.3 *supra* [reproduced in accompanying notebook at Tab 6]

**law.**<sup>117</sup> CPA Provision 31, section 6 amends Iraqi domestic law to allow a judge to order a person suspected of an offense punishable by life in prison to be detained indefinitely without bail or trial.<sup>118</sup> Because Saddam was accused of crimes that were punishable by life in prison, under the amended CPA provision, the Iraqi government could have detained Saddam indefinitely.<sup>119</sup> This would have erased the procedural irregularities<sup>120</sup> that occurred as a result of the acts of the CPA<sup>121</sup> in detention of Saddam on behalf of the Iraqi government,<sup>122</sup> but it would also be a step backwards for human rights.<sup>123</sup>

CPA provisions amending Iraqi procedural law should not apply to crimes *ex post facto*,<sup>124</sup> and should not be applied to Saddam. Because CPA provision 31, section 6 substantially alters the consequences of committing a

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<sup>117</sup> United Nations War Crimes Commission. Law Reports of Trials of War Criminals. Volume VIII, 1949, CASE No. 47, *THE HOSTAGES TRIAL, TRIAL OF WILHELM LIST AND OTHERS, UNITED STATES MILITARY TRIBUNAL, NUREMBERG*, Part III “It is a fundamental principle of criminal jurisprudence that one may not be charged with crime for the doing of an act which was not a crime at the time of its commission.”

<sup>118</sup> CPA Provision 31, section 6

<sup>119</sup> CPA Memorandum No.3 *supra* [reproduced in Accompanying Notebook at Tab 6]

<sup>120</sup> *Saddam's French lawyer criticizes Bush for pronouncing former dictator's guilt*, WorldNow, WTNH, and Associated Press, Mar. 28, 2004. “Verges also believes the US has violated the Geneva Conventions on several counts in its detention of Saddam. He cites T-V footage of Saddam's medical exam after his capture, saying it's against the Geneva Conventions to “exhibit him like an animal at a fair.” [reproduced in Accompanying Notebook at Tab 83]

<sup>121</sup> Edward Wong, *Iraq Prison Raid Finds a New Case of Mistreatment*, The NY Times, Dec. 12, 2005. [reproduced in Accompanying Notebook at Tab 59]

<sup>122</sup> Glenn Frankel, *British Anti-Terror Law Reined In*, the Washington Post, Dec. 16, 2004. [reproduced in Accompanying Notebook at Tab 62]

<sup>123</sup> *Humanitarian Rights and Indefinite Detention: Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law*, INT’L REV. OF THE RED CROSS, March 2005, Vol. 87, at 857. [reproduced in Accompanying Notebook at Tab 64]

<sup>124</sup> American Convention on Human Rights, *opened for signature* Nov. 22, 1969, Art. 8, Art. 9 114 UNTS 123 (entered into force July 18, 1978). [reproduced in Accompanying Notebook at Tab 1]

crime punishable by life in prison,<sup>125</sup> use of the amended law in the  
detainment of Saddam would constitute a violation of well established  
customary international legal principles regarding ex post facto punishment.<sup>126</sup>  
Use of CPA amendments to prosecute Saddam, or other former regime  
officials would appear unfair.<sup>127</sup>

Saddam and other former senior Iraqi officials should only be  
subjected to Iraqi domestic law that was enacted prior to the US lead invasion.  
So under Iraqi procedural safeguards, prior to trial, Saddam should only have  
been detained for no more than a quarter of his expected sentence, or six  
months or less.<sup>128</sup> Because Saddam was captured December 13, 2003 and not  
taken to trial until October 19, 2005, this principle of Iraqi criminal procedure  
was violated.<sup>129</sup> Even if the time frame for Saddam's detention excluded all  
the time he was in US custody as a POW (December 13, 2003 until June 30,  
2004), so that it began at the official US-Iraq hand-over on June 30, 2004 as  
CPA order 7, Section 7 specifies, Iraqi Criminal Procedure would still be  
violated.<sup>130</sup> The consequences of this violation would be difficult to remedy

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<sup>125</sup> Iraqi Criminal Code, 1969 at 76-80. [reproduced in Accompanying Notebook at Tab 21]

<sup>126</sup> European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, Art. 6(3), 213  
UNTS 222 (entered into force Sept. 3, 1953), *as amended by* Protocol No. 11, May 11, 1994, ETS No. 155,  
33 ILM 943 (1994) [reproduced in Accompanying Notebook at Tab 7]

<sup>127</sup> ICCPR, [Reproduced in Accompanying Notebook at Tab 15]

<sup>128</sup> 1969 Iraqi Criminal Code, Security 109, 114 [reproduced in accompanying notebook at Tab 7]

<sup>129</sup> *Timeline of Saddam Hussein's Capture*, NPR News Transcript, Dec. 16, 2003. [reproduced in  
accompanying notebook at Tab 80]

<sup>130</sup> *Transfer of Custody*, PBS News Hour with Jim Lehrer, June 30, 2004. [reproduced in accompanying  
notebook at Tab 93]

in the case of Saddam since he has already been executed, however violations of the procedural safeguards of many other detainees can still be remedied.<sup>131</sup>

- b. Because Iraq became a party to the ICCPR on March 23, 1976,<sup>132</sup> Saddam was entitled to all the rights it describes, including the right to be treated with humanity and respect, an impartial trial, and a presumption of innocence before being proven guilty.**

Under Article 10 of the ICCPR, Saddam had a right to be treated with dignity and respect. Article 10 of the ICCPR requires that all detainees be treated with dignity, humanity and that the accused be separated from convicted persons. “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person,” and that except for in exceptional circumstances, the accused shall be “segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.”<sup>133</sup> So prior to Saddam’s conviction, he was entitled to separate detention from those already convicted and serving time for their crimes.<sup>134</sup>

Under Article 14 of the ICCPR, Saddam was entitled to a fair, competent and independent public hearing. Article 14 (1) states “All persons

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<sup>131</sup> Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 Am. J. Int’l L. 580 (2006) [reproduced in Accompanying Notebook at Tab 34]

<sup>132</sup> Office of the United Nations High Commissioner for Human Rights, Status of the Ratification of the principle human rights treaties as of June 09, 2004. <http://www.unhcr.ch/pdf/report.pdf>

<sup>133</sup> International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52, UN Doc. A/6316 (1996), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [reproduced in Accompanying Notebook at Tab 19]

<sup>134</sup> *Id.*

shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. When Iraq's national security adviser, Mouwafak al-Rubaie “announced the decision of the appeals court before the court itself,”<sup>135</sup> the question was raised about whether or not the IHT was free from government interference.<sup>136</sup> If Iraq’s national security advisor was simply given notice of the decision before it was announced to the public, Article 14 of the ICCPR was not violated. If however, the Iraqi government did indeed influence the decision of the IHT, the Article 14 of the ICCPR was violated, which would entitle Saddam to a new trial under international law.<sup>137</sup> Because no evidence has been presented that shows definitively that the Iraqi government influenced the IHT, and because Saddam cannot demand a retrial because he has been executed, we must assume that unless proven otherwise, the IHT is independent from Iraqi government interference.<sup>138</sup>

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<sup>135</sup> *Saddam One Step Closer To Execution: Appeals Court Upholds Death Sentence; Judge Says Former Iraqi Leader Will Be Hanged Within 30 Days*. CBS News, December 26, 2006. [hereinafter “One Step Closer”], [reproduced in accompanying notebook at Tab 82] “As an example of Iraqi government interference, Dicker noted Mouwafak al-Rubaie, Iraq's national security adviser, announced the decision of the appeals court before the court itself. Al-Rubaie told AP of the decision about an hour before the chief judge announced it.”

<sup>136</sup> *Id.*

<sup>137</sup> International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52, UN Doc. A/6316 (1996), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [reproduced in accompanying notebook at Tab 19]

<sup>138</sup> *Saddam One Step Closer To Execution: Appeals Court Upholds Death Sentence; Judge Says Former Iraqi Leader Will Be Hanged Within 30 Days*. CBS News, December 26, 2006. [reproduced in

Saddam was entitled to be presumed innocent before being proven guilty. Article 14 (2) states “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. (3) In the determination of any criminal charge... the following minimum guarantees [apply]: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing; (c) to be tried without undue delay; (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him... (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt. Though it may seem counterintuitive to extend such protections to a war criminal like Saddam, doing so helps ensure that everyone’s due process rights are protected.

Saddam was entitled to appeal his convictions. Article 14(5) of the ICCPR entitles criminal defendants to have their convictions reviewed by a higher court. “Everyone convicted of a crime shall have the right to have his

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accompanying notebook at Tab 82] Though concerns were raised about the independence of the court, no conclusive evidence reveals governmental interference.

conviction and sentence... reviewed by a higher tribunal according to law.”

Article 14 (6) entitles a convicted defendant to compensation if his sentence is overturned. However, if the defendant was responsible for the missing evidence which caused the conviction, he is not entitled to compensation.

Article 14 (7) prohibits an individual from being tried for the same crime twice in the event of an acquittal, and Article 16 of the ICCPR entitles everyone to recognition as a “person before the law.” These rights are extensive, and must be extended to every defendant who stands before the IHT.

**D. Saddam was entitled to extensive rights under the Statute of the Iraqi Special Tribunal (“IHT Statute”), even though these rights are only briefly described.**

Like major international humanitarian legal instruments, the IHT Statute guarantees the accused the right to an impartial trial, presumption of innocence, to be viewed equally to all others before the court, trial with undue delay, and the right to counsel. Saddam and all other defendants who stand before the IHT are entitled to these rights.

Even though the IHT Statute does go as deeply into the rights of the accused,<sup>139</sup> the essence of international humanitarian law is captured in the IHT Statute, which reaffirms their principles, and makes them binding on the IHT. Article 19 of the IHT Statute provides that “[a]ll persons shall be equal before the court...the accused [shall be] presumed innocent before being proven guilty...[and]... shall be entitled to a public hearing. The language of the ICCPR, the European Convention

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<sup>139</sup> Statute of the Iraqi Special Tribunal, Dec. 10 2003, 43 I.L.M. 231 [reproduced in accompanying notebook at Tab 27]

of Human Rights, the African Convention of People and Humans Rights, the American Convention of Human Rights, and the Statute of the ICTY, ICTR, ICC, and now the Statute of the IHT reinforces these principles.<sup>140</sup>

Because the rights mentioned in the IHT Statute are so universally accepted, they carry the force of international law, and must always be followed. This is because they have been reaffirmed over and over again by important treaties and reflect the will of the international community and the aspirations of free societies.<sup>141</sup> So even if these principles were later to be amended out of domestic law, the international community could step in and require that any derogation from their principles be stopped.<sup>142</sup>

- E.** Because Iraq became a ratifying member of the ICCPR, but not the optional second protocol eliminating the death penalty,<sup>143</sup> Iraq is bound by all of the rights and obligations described in the main body of the ICCPR only, but was not barred from

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<sup>140</sup> International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52, UN Doc. A/6316 (1996), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [reproduced in accompanying notebook at Tab 20]

<sup>141</sup> Manooher Mofidi, Amy E. Eckert, “*Unlawful Combatants*” or “*Prisoners of War*”: *The Law and Politics of Labels*, 36 Cornell Int’l L.J. 59 (2003) [reproduced in accompanying notebook at Tab 43] *Humanitarian Rights and Indefinite Detention: Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law*, INT’L REV. OF THE RED CROSS, March 2005, Vol. 87, at 857. [reproduced in accompanying notebook at Tab 72]

<sup>142</sup> Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9\*(1998), 37 ILM 999 (1998) [reproduced in accompanying notebook at Tab 20]

<sup>143</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), *entered into force* July 11, 1991. Both the US and Iraq have failed to become parties to this protocol. [reproduced in accompanying notebook at Tab 15]

sentencing Saddam to death, because this was a legitimate punishment under the Iraqi criminal code of 1969.<sup>144</sup>

Article 6 of the ICCPR enumerates the requirements that must be met before a party can execute a criminal defendant. In relevant part, Article 6 of the ICCPR states: (1) “Every human being has the inherent right to life... (2) In countries, which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime... [t]his penalty can only be carried out pursuant to a final judgment rendered by a competent court... (4) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.”<sup>145</sup> Because the death penalty was a legitimate sentence for the most serious crimes under the 1969 Iraqi criminal code, as long as Saddam was given the opportunity to seek a pardon, amnesty or commutation of his sentence from death to life in prison, and as long as he was tried by a competent tribunal, the ICCPR does not prohibit his execution.<sup>146</sup>

Saddam was convicted of ordering the murders of 148 villagers, forced deportation and torture.<sup>147</sup> All three crimes fall under the broad category of crimes against humanity under international law.<sup>148</sup> So even though the Iraqi criminal Code

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<sup>144</sup> Iraqi Penal Code, (111) 1969, Al-Waqai-Al-Iraqiyya No. 2796, Sept. 9, 1980. [reproduced in accompanying notebook at Tab 17]

<sup>145</sup> ICCPR, Art. 6. [reproduced in accompanying notebook at Tab 15]

<sup>146</sup> *Id.*

<sup>147</sup> *Convictions and sentences in the trial of Saddam Hussein, 7 co-defendants*, International Herald Tribune, Mar. 20, 2007. reproduced in accompanying notebook at Tab 90]

<sup>148</sup> Iraqi High Tribunal, Dujail Chamber opinion, Baghdad, Iraq, Dec. 26, 2006. reproduced in accompanying notebook at Tab 101]

of 1969 provides no punishment for deportation, Saddam may be tried and convicted for this crime under international law.<sup>149</sup> In Iraq, murder is punishable by death in certain circumstances, and may be applied to the case of Saddam under Iraqi criminal law and international law.

In relevant parts, paragraph 406 (1) of the 1969 Iraqi Criminal Code states the following: (1) any person who willfully kills another is punishable by death in the following circumstances... (a) if such killing is premeditated...(c)... if the offender uses brutal methods in the commission of the offense...(f) if the offender kills two or more people and does so as the result of a single act...<sup>150</sup> Because the killing of 148 people after receiving a death threat<sup>151</sup> meets the requirement for multiple victims, is certainly brutal, and likely required some planning to carry out the massacre, the ICCPR would not interfere with the execution of Saddam by the IHT under the Iraqi criminal code of 1969.

**c. CONCLUSION:**

The war in Iraq may be classified as a war on terror, an occupation, and armed conflict, or a civil war, and these classifications could alter the way Saddam is labeled as a detainee. But regardless of whether Saddam is labeled a POW, an Iraqi criminal defendant, a securities internee, a lawful or unlawful combatant, a civilian or a former head of state, the laws of war, the Geneva Conventions and the ICCPR require that he be

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<sup>149</sup> Jordon J. Paust, *The United States as Occupying Power Over Portions of Iraq and Special Responsibilities Under the Laws of War*, 27 Suffolk Transnat'l L. Rev. 1 at 6 (2003) [Reproduced in Accompanying Notebook at Tab 38] Deportation was among the crimes listed in the Nuremberg trials as constituting crimes against humanity.

<sup>150</sup> 406(1) of the 1969 Iraqi Criminal Code

<sup>151</sup> Saddam Hussein Sentenced to Death, BBC World News, Nov. 5, 2006.

treated as a human being, with dignity and respect.<sup>152</sup> This means that no matter how egregious the acts he committed are, he cannot be tortured, humiliated, or denied a fair trial by an objective tribunal, and until proven guilty, he must be presumed innocent.<sup>153</sup> In addition to these fundamental rights, Saddam also cannot be detained indefinitely without trial, and is even entitled to compensation for his unlawful or procedurally flawed detention under the ICCPR. Though Saddam is entitled to all these protections under international humanitarian law, the international community also has a right under these same laws to strip Saddam of his head of state immunity, and exercise universal jurisdiction over him in order to try him for crimes against humanity.

Problems with this system arise when it appears that Saddam's rights are being violated, or that the tribunal which tried him was more concerned with revenge than with administering justice. These issues can discredit a competent and just tribunal, can encourage ethnic clashes, and can undermine the system of international humanitarian law which has been so carefully crafted to enable the rights of war criminals to be protected, while ensuring that they are punished for the atrocities they committed. The IHT should proceed carefully with their remaining trials to ensure that the international community perceives them as a legitimate and just institution. This will help secure further international support and cooperation, and maybe even a little good will from wealthier nations of the world.

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<sup>152</sup> Leila Nadya Sadat, *International Legal Issues Surrounding the Mistreatment of Iraqi Detainees by American Forces*, ASIL Insights, May 20, 2004. [Reproduced in Accompanying Notebook at Tab 66]

<sup>153</sup> Major Mynda G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F. L. Rev. 1 at 82, (2005) [Reproduced in Accompanying Notebook at Tab 41]

