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Does International Law Provide Guidance About The Obligations Of The Iraqi Government And/Or Multinational Forces-Iraq To Provide Security For The Defense Attorneys And Their Families?

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CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
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MEMORANDUM FOR THE
IRAQI HIGH TRIBUNAL

ISSUE:

DOES INTERNATIONAL LAW PROVIDE GUIDANCE ABOUT THE OBLIGATIONS OF
THE IRAQI GOVERNMENT AND/OR MULTINATIONAL FORCES-IRAQ TO PROVIDE
SECURITY FOR THE DEFENSE ATTORNEYS AND THEIR FAMILIES?

Prepared by David Willis
Spring 2006

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issue¹

Defense counsel working on cases before the Iraqi High Tribunal [“IHT”] have been the targets of assassination attempts and their families have been targeted in kidnapping attempts.²

Two defense attorneys working on the Saddam Hussein Dujail case have been killed in these attacks. As a result, defense counsel have made repeated demands that the Iraqi Government and Multinational Forces-Iraq protect them and their families from insurgent attack. This memorandum addresses the obligations of the Iraqi Government and Multinational Forces-Iraq to provide security for defense attorneys under international law.

B. Summary of Conclusions

1. The Iraqi Government is obligated to protect defense counsel’s right to freedom of movement under Article 12 of the International Covenant on Civil and Political Rights [“ICCPR”].

Article 12 of the ICCPR requires State parties to guarantee the right of liberty of movement.³ It is insufficient simply to preserve those rights by law or in the State’s

¹ Defense counsel have repeatedly demanded that the Iraqi Government and Multinational Forces-Iraq protect them from insurgent attack. These demands have included requests that defense counsel and their families be transported to neutral countries, and that the Iraqi Government and/or Multinational Forces-Iraq bear all costs associated with any such relocation—including schooling for the defense counsel’s children and a stipend for living. Self-evidently, the Iraqi Government and Multinational Forces-Iraq cannot accede to these requests. At the same time, the security of each participant in the trial is of paramount concern to the Iraqi Government, and Multinational Forces-Iraq. Accordingly, the IHT has offered each defense attorney a security package which is at least as robust as the security which is provided to judges and prosecutors.

Does international law (in particular the ICCPR and other relevant conventions) provide guidance about the obligations of the Iraqi Government and/or Multinational Forces-Iraq to provide security for the defense attorneys and their families? If so, what are the responsibilities of the Iraqi Government and Multinational Forces-Iraq to provide security for the defense attorneys?

² Liz Sly. *Lawyer feels like a dead man talking; Hussein defenders targets of assassins*. Chicago Tribune, November 13, 2005. (Chicago Final Edition). (Article discusses assassinations of two attorneys, attempted kidnapping of the son of Majid al-Saadoun, lawyer for former Vice President Taha Yassin Ramadan, and the differing theories behind the attacks) [reproduced in the accompanying notebook at Tab 33]

³ International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, Article 12 ¶1, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. [reproduced in the accompanying notebook at Tab 7]

Constitution.⁴ The duty to guarantee the right of liberty of movement requires protecting that right from both public and private interference.⁵ Iraq has protected this right in its Constitution, but must take affirmative action to protect defense counsel from insurgent attack.⁶

2. The Iraqi Government is obligated to protect defense counsel's family under Article 17 of the ICCPR.

Article 17 of the ICCPR requires States parties to guarantee that no person shall be subject to arbitrary or unlawful interference with his privacy or family.⁷ This obligation requires the Iraqi Government to provide protection from both public and private interference.⁸

3. The Iraqi Government is obligated to ensure defendants are provided a fair hearing under Article 14 of the ICCPR.

Article 14 of the ICCPR requires States parties to guarantee its citizens a fair and public hearing.⁹ While this right is not infringed as it pertains to defense counsel because they are not on trial, the effect of the threat of insurgent attacks on defense counsel could infringe their clients' right to a fair and public hearing. The requirements for a fair hearing include guarantees

⁴ International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, General Comment No. 03: Implementation at the National Level (Art. 2), para. 1, 13th Sess., (July 29, 1981) (hereafter ICCPR General Comment No. 03) [reproduced in accompanying notebook at Tab 8].

⁵ International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, General Comment No. 27: Freedom of Movement, para. 6, 67th Sess., CCPR/C/21/Rev.1/Add.9, (November 2, 1999) (hereinafter ICCPR General Comment No. 27) [reproduced in accompanying notebook at Tab 11]

⁶ Iraq Const., Art. 24, *translated in* http://law.case.edu/grotian-moment-blog/documents/UN_USG_UK_NDI_Agreed_English_Text_25.01.06.CURRENT.pdf. [reproduced in accompanying notebook at Tab 3]

⁷ ICCPR, *supra* note 3, at Art. 17, ¶1.

⁸ International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, General Comment 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation, para. 1, 32nd Sess., (April 8, 1988) (hereinafter ICCPR General Comment No. 16) [reproduced in accompanying notebook at Tab 10].

⁹ ICCPR, *supra* note 3, Art. 14, para. 1.

of adequate time and facilities for the preparation of a defense, communication with counsel of the defendant's choosing, and the right to be tried without undue delay.¹⁰

4. The Iraqi Government is obligated to provide safe and healthy working conditions under Article 7 of the International Covenant on Economic, Social, and Cultural Rights ["ICESCR"].

Article 7 of the ICESCR establishes "the right of everyone to the enjoyment of just and favourable conditions of work, which ensure.... (b) safe and healthy working conditions."¹¹

Attacks by insurgents on defense attorneys clearly constitute an unsafe working condition.

5. The Iraqi Government is obligated to provide safe and accessible education under Article 13 of the ICESCR.

Article 13 of the ICESCR requires States parties to provide everyone the right to an education.¹² This right has an availability component and an accessibility component.¹³ The availability component requires the state to make educational facilities available to everyone within its jurisdiction.¹⁴ The accessibility component is further divided into three elements, a non-discrimination element, a physical accessibility element, and an economic accessibility element.¹⁵

¹⁰ *Id.* at Art. 14, para. 3.

¹¹ International Covenant on Economic, Social, and Cultural Rights, *opened for signature* December 16, 1966, Art. 7, 993 U.N.T.S. (hereinafter ICESCR) [reproduced in accompanying notebook at Tab 13]

¹² *Id.* at Art. 13.

¹³ International Covenant on Economic, Social, and Cultural Rights, *opened for signature* December 16, 1966, General Comment No. 13, para. 6, 993 U.N.T.S. (hereinafter ICESCR General Comment No. 13) [reproduced in accompanying notebook at Tab 14]

¹⁴ *Id.*

¹⁵ *Id.*

The physical accessibility element requires the State party to provide education that is within safe physical reach at some reasonably convenient geographic location.¹⁶ The economic accessibility obligation requires the State party to ensure that education is affordable to all.¹⁷ Article 13 of the ICESCR also incorporates an obligation to protect that requires the State party to take measures to prevent interference with the right of education by third parties.¹⁸ Article 13 of the ICESCR also incorporates an obligation to fulfill that requires the State to fulfill a specific education right when the individual is unable to realize the right due to circumstances beyond their control.¹⁹

6. United Nations General Assembly resolutions provide guidance on obligations of the Iraqi Government to provide security to defense counsel and members of their families.

While United Nations General Assembly resolutions are not binding on member states, they provide guidance on what member States' obligations are in fulfilling binding requirements under applicable international covenants.²⁰

In a resolution adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990, the U.N. General Assembly created the following guidelines on a State party's obligation to ensure that lawyers are able to provide effective representation. Governments shall ensure that lawyers:

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at para. 47.

¹⁹ *Id.*

²⁰ U.N. Charter, Art. 10 and Art. 14. (While there is some debate on whether U.N. resolutions are binding, most experts consider only internal resolutions concerning budgetary matters to actually be binding on member States). [reproduced in accompanying notebook at Tab 21]

- (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;
- (b) are able to travel and to consult with their clients freely both within their own country and abroad; and
- (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.²¹

Attacks by insurgents in Iraq clearly implicate Iraq's first obligation because they have intimidated, hindered, harassed, and influenced defense counsel. These attacks have also affected defense counsel's ability to travel and communicate with their clients.

In U.N. General Assembly Resolution 2005/35 dated April 13, 2005, the General Assembly provided further guidance. In ensuring respect for international human rights law, State parties have the duty to:

- (a) take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- (c) provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice....irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) provide effective remedies to victims, including reparation....²²

²¹ Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 para. 16 (1990). (hereinafter Basic Principles on the Role of Lawyers) [reproduced in accompanying notebook at Tab 1]

²² Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious violations of International Humanitarian Law, C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11, para. 3 (19 April 2005). (hereinafter Basic Principles and Guidelines on the Right to a Remedy and Reparation) [reproduced in accompanying notebook at Tab 2]

The Resolution defines “victims” as persons suffering direct harm and, when appropriate, their immediate family members.²³

The obligation to provide reparation includes the obligation to provide satisfaction and guarantees of non repetition.²⁴ Satisfaction should include any or all of the following:

- (a) effective measures aimed at the cessation of continuing violations;
- (b) verification of the facts and full and public disclosure of the truth;
- (c) public apology, including acknowledgment of the facts and acceptance of responsibility;
- (d) judicial and administrative sanctions against persons liable for the violations; and
- (e) inclusion of an accurate account of the violations that occurred in international human rights law.²⁵

The obligation to take effective measures aimed at the cessation of continuing violations requires the Iraqi Government to take action to prevent further attacks on defense counsel and their families. The obligation to verify and disclose the facts supports the defense counsel’s request for independent investigations into the attacks.

The resolution provides that guarantees of non repetition should include any or all of the following measures:

- (a) protecting persons in the legal profession; and
- (b) reviewing and reforming laws contributing to or allowing gross violations of international human rights law.²⁶

This obligation to protect persons in the legal profession to ensure non-repetition serves as another source of authority requiring the Iraqi Government to provide security to defense counsel.

²³ *Id.* at para. 8.

²⁴ *Id.* at para. 18.

²⁵ *Id.* at para. 22.

²⁶ *Id.* at para. 23.

7. The Geneva Conventions obligate Multinational Forces-Iraq to provide security for defense counsel and members of their family.

Article 2 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War provides that the Convention shall apply to any armed conflict which may arise between two Parties whether a state of war is recognized or not.²⁷ Article 6 provides the rules governing which Articles of the Convention apply during the occupation and which terminate at the end of military operations.²⁸

Article 4 defines a “protected person” under the Convention as a person who finds himself, “in the hands of a Party to the conflict or Occupying power of which they are not nationals.”²⁹ Article 27 provides that protected persons are entitled to respect for their persons and their family rights.³⁰

Article 47 provides that protected persons may not be deprived of the protections of the Convention by any change in law, the government, or by any agreements between authorities of the occupied territory and the occupying power.³¹ This article means that the obligations of Multinational Forces-Iraq are not nullified by the creation of the new Iraqi Government or any agreements in place between them.

Under Article 49, an Occupying Power may evacuate a given area due to security concerns provided that the removals are effected in safe conditions, healthy conditions, and as

²⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* August 12, 1949, Art 2, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) (hereinafter Geneva Convention) [reproduced in accompanying notebook at Tab 4].

²⁸ *Id.* at Art. 6. (The articles that continue in effect for the duration of an occupation include Articles 1-12, 27, 29-34, 47, 49, 51, 52, 53, 59, 61-77, and 143).

²⁹ *Id.* at Art. 4.

³⁰ *Id.* at Art. 27.

³¹ *Id.* Art. 47.

long as members of the same family are not separated.³² This article provides authority for Multinational Forces-Iraq to move members of defense counsel's family due to security concerns but does not obligate them to do so.

Under Article 72, an Occupying power has an obligation to provide those accused of crimes with the assistance of counsel who may visit them freely and to provide the facilities necessary for preparing their defense.³³ This article obligates Multinational Forces-Iraq to ensure that defense attorneys are secure enough that there is no threat of the insurgent attacks infringing on their ability to protect the rights of defendants to a fair trial before the IHT.

8. Actions taken by other International Tribunals indicate minimal standards of security that the IHT must offer to defense counsel.

The Special Court for Sierra Leone ["SCSL"] is similar to the IHT in that it operates in the country where the incidents under review took place. While the SCSL has not faced a specific threat comparable to the insurgency in Iraq, it has taken several measures regarding security that should be considered minimal standards for the IHT. Actions taken include:

- (a) security plans were developed and modified in collaboration with United Nations Mission in Sierra Leone;
- (b) periodic exercises to test contingency plans for transferring detainees in the event of a security emergency;
- (c) communications among various security forces were integrated;
- (d) a communications and operations center was established at the Court's primary site;
- (e) a program of residential security inspections was established;
- (f) a program of security awareness training was implemented;
- (g) escorts were provided to all staff traveling outside the Tribunal compound.³⁴

³² *Id.* at Art. 49.

³³ *Id.* at Art. 72.

³⁴ First Annual Report of the President of the Special Court for Sierra Leone, <http://www.sc-sl.org/specialcourtannualreport2004-2005.pdf> accessed March 18, 2006. (hereinafter First Annual Report of SCSL) [reproduced in accompanying notebook at Tab 23].

While the International Criminal Tribunal for Rwanda [“ICTR”] is located outside the country where the alleged human rights violations took place, it has taken a variety of actions to protect the members of the Tribunal while they operate outside the Tribunal compound, including:

- (a) a newsletter providing guidance on personal security measures its members should be aware of;³⁵ and
- (b) holding team building workshops for its security units to share techniques and discuss methods of solving particular security issues.³⁶

The SCSL and ICTR provide examples of minimal security programs the IHT should incorporate. The fact that neither of those tribunals has faced security issues approaching that of the insurgency in Iraq means that providing only these safeguards should not be considered adequate in satisfying the Iraqi Government’s and Multinational Forces-Iraq’s obligations to defense counsel.

9. Witness protection cases in international law provide a five-part test to guide decisions on the amount of security the Iraqi Government is obligated to provide to defense counsel.

In crafting any guidelines for determining whether security provided to defense counsel is sufficient to avoid violating a defendant’s rights to a fair trial or effective assistance of counsel, some general considerations must be applied. First, whether the level of security is sufficient will depend upon particular facts in varying circumstances. Second, this test in no way abrogates or changes the obligations of the Iraqi Government contained in the ICCPR and ICESCR, nor would it change the obligations of Multinational Forces-Iraq as an occupying force. This test is

³⁵ International Criminal Tribunal for Rwanda Newsletter, Vol. 1, No. 3, August 2003. <http://65.18.216.88/ENGLISH/newsletter/aug03/aug03.pdf> accessed March 24, 2006. (hereinafter ICTR Newsletter August 2003) [reproduced in accompanying notebook at Tab 25].

³⁶ International Criminal Tribunal for Rwanda Newsletter, November 2005. <http://65.18.216.88/ENGLISH/newsletter/nov05/nov05.pdf> accessed March 24, 2006. (hereinafter ICTR Newsletter November 2005) [reproduced in accompanying notebook at Tab 26]

only a tool to use when deciding whether the IHT should, or is obligated to, provide an increased level of security for defense counsel when they are engaged in any particular activity.

An analysis of the major witness protection cases discussed in international law provides five guidelines that the Iraqi Government should consider in deciding whether a particular security request on behalf of defense counsel should be honored.

1. *The defense counsel must have a real, objective fear for his safety or the safety of his family.*

This objective standard requires that when defense counsel claims a fear of attack, that fear must be legitimate and reasonable. At a minimum, deciding whether defense counsel's fear is legitimate and reasonable will include a geographic element and a temporal element. The geographic element requires the fear be particular to the place where the attorney or his family is located or will be traveling to, rather than some general fear of a threat that could exist at any location. The temporal requirement mandates that the fear must be based on current insurgent activities or future threats.

2. *The activity the defense counsel seeks to engage in must be important to the defendant's case.*

This guideline specifies that the obligation to provide security for a particular activity defense counsel wishes to engage in depends upon the importance of that activity in preparing the defense's case.

3. *There must be no prima facie evidence that the fears expressed by defense counsel are for purposes of propaganda or delay.*

This guideline is to ensure that any security fears raised by defense counsel are not raised purely for the purposes of delaying the trial or influencing public opinion of the judicial process. Given the importance of ensuring security of those involved in the trial, the Iraqi Government

may not ignore such claims unless there is uncontradicted evidence that the claims are false on their face. Any doubt should be resolved in favor of the defense counsel's claims.

4. *The must be a balancing of the difficulty of providing security to defense counsel with the appearance of unfairness to the defendant.*

This is a catch-all requirement that requires the Iraqi Government to consider the appearance of unfairness to the defendant when deciding what security measures it will provide to defense counsel for any particular activity they wish to engage in. This is important because to outsiders judging the fairness and legitimacy of the tribunal, not allowing defense counsel every opportunity to investigate and prepare a defense may create an appearance of unfairness.

5. *Increased security measures are required only when strictly necessary.*

This guideline requires the Iraqi Government to balance a series of factors when deciding whether security measures for a particular activity are necessary at a particular time. Factors for consideration include, but are not limited to, the stage of the proceedings, the trends in insurgent activity at the location, the effect of delaying defense counsel's activity until a later time, available security resources, and the goal defense counsel seeks to achieve by engaging in the activity.

II. FACTUAL BACKGROUND

Defense counsel appearing before the IHT and their family members have been subject to repeated attacks by insurgents operating in Iraq. On October 20, 2005, Saadoun Suhaiyer al-Janabi, attorney for the former head of Saddam's Revolutionary Court, was kidnapped and murdered after assailants burst into his office.³⁷ Earlier that same day, a carload of gunmen attempted to kidnap the 13-year-old son of Majid al-Saadoun, an attorney representing Taha

³⁷ James Rupert, *Slaying Fuels Doubts over Trial of Saddam*. The Seattle Times, Pg. A1, October 22, 2005. [reproduced in accompanying notebook at Tab 28]

Yassin Ramadan.³⁸ On November 8, 2005, a second defense attorney was murdered.³⁹ Attorney Adil Mohammad Abbas Zubeidi was killed and attorney Thamer Hamoud al-Huzaie was severely wounded.⁴⁰ Both attorneys were representing Barzan Tikriti and Taha Yassin Ramadan.⁴¹ On November 28, 2005, Judge Rizgar Mohammed Amin was forced to adjourn the trial because Ramadan was unable to obtain a replacement after one of his attorneys was murdered, another wounded, and a third left the country for fear of his safety.⁴²

These attacks show the importance of providing security to defense attorneys appearing before the IHT. International covenants in human rights law vest defense counsel, as individuals, with certain rights and require the Iraqi Government and Multinational Forces-Iraq to protect those rights.

Protecting defense counsel due to the important role they play in the judicial process is also important because the IHT must be seen as a tribunal that meets international standards for fairness and legitimacy. Protection of the rights of defendants at the tribunal is the primary avenue through which such fairness and legitimacy is guaranteed and the public perception of the fairness of the tribunal is important in achieving the IHT's goals. The rights of defendants can be directly and indirectly infringed if the defendants' attorneys are not adequately protected by the IHT and Multinational Forces-Iraq.

³⁸ Lawyer Feels Like a Dead Man Talking, *supra* note 2.

³⁹ James Rupert, *2nd Saddam lawyer killed; The assassination is the latest incident fueling fears that a fair trial can't occur in Iraq for him, co-defendants*. Newsday, Pg. A8, November 9, 2005. [reproduced in accompanying notebook at Tab 27].

⁴⁰ *Id*

⁴¹ *Id*.

⁴² Steve Negus, *Lawyers voice fears as Saddam trial delayed*. Financial Times, Middle East, pg. 10, November 29, 2005. [reproduced in accompanyin notebook at Tab 34]

The defendants' right to assistance of counsel could be infringed in a variety of manners. If the attorney is killed, then the defendant has lost his assistance, even if it is only a temporary basis until a new attorney is hired/appointed. If the attorney is unable to perform his duties due to fear of attack, including performing factual investigations necessary for a diligent defense, then the defendant's right to effective assistance of counsel may be infringed.

The right to a trial without undue delay may also be infringed if the security of defense attorneys is not ensured. The constant need to replace defense counsel, whether because they have been killed, injured, or resigned out of fear, will create delays in the trial as new attorneys come on the case and require time to prepare. If the attorneys are not provided adequate time to prepare, then the overall fairness of the tribunal comes into question.

These are just some factors which establish the importance of guaranteeing the security of defense counsel appearing before the IHT. Without guaranteeing their security, the fairness and legitimacy of the Tribunal is open to attack because of the effect such lack of security may have on the rights of defendants appearing before the Tribunal.

This memo will analyze the obligations of the Iraqi Government and Multinational Forces-Iraq to provide security for defense attorneys by examining what rights personal to those attorneys are protected in law and infringed by insurgent activity. The memo will then attempt to provide some guidelines on what actions are required of the Iraqi government and Multinational Forces-Iraq by analyzing measures taken in other jurisdictions and trying to create a rule based upon the principles embodied in decisions on the issue of witness protection. While absolute security is unlikely to be achieved until the insurgency is defeated in Iraq, meeting these guidelines should strengthen the arguments that the tribunal is fair and legitimate.

III. OBLIGATIONS OF THE IRAQI GOVERNMENT UNDER THE ICCPR AND THE ICESCR.

The two major international covenants that are binding on Iraq are the International Covenant on Civil and Political Rights [“ICCPR”] and the International Covenant on Economic, Social, and Cultural Rights [“ICESCR”]. Iraq signed both Covenants on February 18, 1969 and ratified both Covenants on January 25, 1971.⁴³

A. The ICCPR guarantees the rights to freedom of movement, protection of family members, and the right to a fair and public hearing.

The ICCPR guarantees to everyone the right to liberty and security of person, the right to freedom of movement, the right to protection of the family, and the right to a fair and public hearing by an independent court established by law.

1. Rules concerning the implementation of the ICCPR.

The Iraqi government is under a general obligation to protect the rights guaranteed in the ICCPR to all individuals in their territory and subject to their jurisdiction.⁴⁴ While the Iraqi government is free to choose the method of implementing these rights, the ICCPR creates an affirmative duty to provide effective protection of those rights.⁴⁵

Article 2 requires state parties to the ICCPR to take the steps necessary “to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present

⁴³ Ratifications of the ICCPR, Office of the High Commission on Human Rights, available at <http://www.ohchr.org/english/countries/ratification/4.htm>. See also Ratifications of the ICESCR, Office of the High Commission on Human Rights, available at <http://157.150.195.4/LibertyIMS::/sidG8KrkoV3J591DSHx/Cmd%3D%24%24E920gZM7XmSfR3j1u%3Bwzj1%3D%23pv> [reproduced in accompanying notebook at Tabs 31 and 32, respectively]

⁴⁴ International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, General Comment No. 31: Nature of the general legal obligation Imposed on States Parties to the Covenant, para. 3, 80th Sess., 2187th mtg., CCPR/C/21/Rev.1/Add.13, (May 26, 2004). [reproduced in accompanying notebook at Tab 12].

⁴⁵ ICCPR General Comment No. 03, *supra* note 4 at para. 1.

Covenant.”⁴⁶ The comment to Article 2 makes clear that simply protecting those rights by law or in the Constitution is insufficient and Iraq is required to take affirmative action to protect defense counsel’s enjoyment of those rights.⁴⁷

Although the Iraqi Government has moved to protect those rights by ratification of its Constitution,⁴⁸ the opening comments to the ICCPR make clear that this is not per se sufficient to meet Iraq’s obligations under the Covenant. It is insufficient for the IHT to rely on the Constitution or statutes to ensure protection of those rights when they are currently being infringed by insurgent activity. Something more is required: affirmative action to stop insurgents from infringing on those rights.

2. The right to freedom of movement under the ICCPR.

Article 12 of the ICCPR requires States parties to ensure that everyone enjoys the right to liberty of movement.⁴⁹ The comment to Article 12 states that the State party must protect the right from both public and private interference.⁵⁰

It would seem clear that the actions of the insurgency have interfered with defense counsel’s right to freedom of movement. If certain areas of Iraq, for example the Sunni Triangle, are too dangerous for defense counsel to enter and travel freely then that right is infringed. The

⁴⁶ ICCPR, *supra* note 3 at Art. 2, para. 2.

⁴⁷ ICCPR General Comment No. 03, *supra* note 4 at para. 1. (“The Committee notes....that the implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient. The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.”)

⁴⁸ See Iraq Const., *supra* note 6. (Article 15: Right to life, security and liberty; Article 16: Right to equality; Article 17: Right to privacy; Article 19: right to fair and public hearing by independent tribunal; Article 24: Freedom of movement; Article 29: Sanctity of the Family; and Article 30: Right to protection of the family).

⁴⁹ ICCPR, *supra* note 3, at Art. 12, para. 1.

⁵⁰ ICCPR General Comment No. 27, *supra* note 5 at para. 6.

Covenant clearly states that the fact that the threat comes from a private group rather than the state itself is irrelevant. The duty of the state extends to protecting defense counsel from interference by the insurgency.

The State party must protect the right to freedom of movement for anyone who is lawfully within the territory of the State. Whether someone is lawfully within the State is governed by domestic law, but once an alien is determined to be lawfully within the State, the State is under an obligation to protect his right to freedom of movement.⁵¹ This indicates that the right and obligation extends not only to defense counsel that are Iraqi nationals but also to defense attorneys from other nations while they are in Iraq to participate in proceedings before the IHT. No specific facts are available, but presumably those appearing before the IHT must be in the country legally (under domestic Iraqi law) and as such, they are entitled to the protection of the Iraqi Government by the terms of the Covenant.

The Covenant does provide for derogation of this right in a situation involving national security but any derogation is governed by the principles of necessity and consistency.⁵² This perhaps provides an excuse for the Iraqi Government if it fails to adequately provide security for defense counsel but there would appear to be two problems with such an excuse.

First, the terms of the Covenant imply that any derogation is allowed by the State party, not third parties. The derogation of defense counsel's right to freedom of movement comes from the insurgency and not from action by the Iraqi Government. The Iraqi Government's failure consists of not providing adequate protection of the right to freedom of movement rather than of any affirmative action in derogation of that right.

⁵¹ *Id.* at para. 4.

⁵² ICCPR, *supra* note 3 at Art. 12, para. 3.

Second, even if the State could raise the defense when the infringement is instituted by a private group, there is a problem with the proportionality of the infringement. In the most severe cases, the defense attorneys have been killed. No national security concern would likely excuse an infringement of the right to freedom of movement to such an extent.

3. Iraq's obligation to protect defense counsel's family under the ICCPR.

Article 17 of the ICCPR provides that no person shall be subject to arbitrary or unlawful interference with his privacy or family.⁵³ This right requires protection from both State action and the actions of individuals.⁵⁴

The prohibition against unlawful interference bars any interference that is not specifically provided for in the law.⁵⁵ Clearly neither Iraqi law nor international law provides legal authority for the insurgent attacks against defense counsel or members of their family.

The Article states that everyone has the right to protection of the law against such interference or attacks.⁵⁶ This restates the general proposition that the Iraqi Government is obligated to go beyond simply protecting such rights in the Constitution or domestic law and must take affirmative action to protect those rights. This also suggests that simply providing financial support for security personnel hired and controlled by defense counsel may be insufficient if it does not stop attacks against members of defense counsel's family. Most importantly, this clearly creates an obligation on the Iraqi government to provide security for defense counsel's family.

⁵³ *Id.* at Art. 17, para. 1.

⁵⁴ ICCPR General Comment No. 16, *supra* note 8 at para. 1.

⁵⁵ *Id.* at para. 3.

⁵⁶ ICCPR, *supra* note 3 at Art. 17, para. 2.

The comments require that individuals must be able to protect themselves against any unlawful attacks that do occur.⁵⁷ This would suggest that the Iraqi Government may not take any action prohibiting defense counsel from acting in their own defense. The fact that the Iraqi Government has made an agreement to provide financing for security personnel of the defense counsel's choice provides support for arguing the Government is protecting this right.

4. Iraq's obligation to provide a fair hearing under the ICCPR.

Article 14 of the ICCPR requires States parties to guarantee that accused individuals are entitled to a fair and public hearing.⁵⁸ Obviously the defense attorneys themselves are not on trial and thus their right to a fair hearing is not being infringed by any action on behalf of the Iraqi Government or the insurgency. But the actions of the insurgency may infringe on the rights of the defendants appearing before the IHT because of the threats to defense counsel.

The requirements for a fair hearing under Article 14 include guarantees of adequate time and facilities for the preparation of a defense, communication with counsel of the defendant's choosing, and the right to be tried without undue delay.⁵⁹ The comments state that these are only minimum guarantees for a fair hearing and that they may be insufficient to ensure a fair hearing given a particular set of circumstances.⁶⁰

⁵⁷ ICCPR General Comment No. 16, *supra* note 8 at para. 11.

⁵⁸ ICCPR, *supra* note 3 at Art. 14, para. 1.

⁵⁹ *Id.* at Art. 14, para. 3.

⁶⁰ International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, General Comment No. 13: Equality before the Courts and the right to a fair and public hearing by an independent court established by law, para. 5, 21st Sess., (April 13, 1984) (hereinafter ICCPR General Comment No.13) [reproduced in accompanying notebook at Tab 9].

What qualifies as adequate time and facilities for the preparation of a defense will depend on the circumstances of each case.⁶¹ This would seem to allow the IHT some flexibility in the time allowed for preparation of the defense. Some factors the IHT should consider include the complexity of the trial, the publicity of the trial, the degree of interference by the insurgency experienced by the defense attorneys participating on that particular case, and the potential for improved security to provide better access to important sites for investigation and gathering evidence.

The requirement of communication requires assurances that the defendant's attorney can counsel and represent the defendant, "in accordance with their established professional standards and judgement without any restrictions, influences, pressures, or undue interference from any quarter."⁶² This means that the IHT must ensure that defense counsel is able to communicate with their clients as necessary in developing the defense case.

If security concerns are preventing such communication, either because it is unsafe for the attorneys to travel to the location of detention or because the location of detention is unsafe for meeting, then this right is being infringed by the insurgency. The obligation to protect from "any quarter," means that the IHT must take proactive measures to protect defense counsel from insurgent attacks so that they may communicate with their clients. If they are not allowed to do so the IHT may not meet the requirement of a fair proceeding under Article 14 of the ICCPR.

⁶¹ *Id.* at para. 9.

⁶² *Id.* ("Judgement" is quoted as misspelled).

The right to be tried without undue delay extends not only to the commencement of the trial but also the time within which it should be completed and a judgment rendered.⁶³ Insurgent attacks could infringe this right in a variety of ways.

For example, if defense attorneys are killed by insurgent action, then the IHT must allow the new attorneys time to prepare for the case. This will cause extensive delays every time a lawyer must be replaced. This in turn keeps the defendant in a detention facility for a significantly longer amount of time. Most of the time spent in detention is pre-trial preparation time rather than actual trial time.⁶⁴ When attorneys are replaced, this pre-trial preparation may have to be repeated in order to ensure the defendant has effective assistance of competent counsel but doing so could cause significant delay. Thus, the lack of security that created the need for the new attorney will infringe on the defendant's right to a trial without undue delay.

A similar analysis would follow if an attorney decided to resign because of the security threats to himself or his family. The same problems might arise if an attorney needed to be removed because a member of his family has been killed or kidnapped by insurgents.

B. The ICESCR guarantees the right to safe and healthy working conditions and the right to education.

The ICESCR provides for the right to safe and healthy working conditions and the right to education.⁶⁵ Those rights create an obligation on the Iraqi Government to provide security while defense attorneys are working on their cases and to ensure that members of the defense counsels' children have access to education.

⁶³ *Id.* at para. 10.

⁶⁴ For example, while Saddam Hussein was captured in late 2003, his first trial did not begin until October 19, 2005 and was expected to take less than 25 actual trial days. *See generally* John F. Burns, *Defiant Hussein, Lashing Out at U.S., Goes on Trial*, New York Times, Section A Pg. 1, October 20, 2005. [reproduced in accompanying notebook at Tab 29]

⁶⁵ ICESCR, *supra* note 11 at Arts. 7 and 13.

1. The right to safe and healthy working conditions.

Article 7 of the ICESCR establishes “the right of everyone to the enjoyment of just and favourable conditions of work, which ensure.... (b) safe and healthy working conditions.”⁶⁶

Attacks by insurgents clearly create unsafe working conditions for defense counsel but it is unclear whether this obligation extends only to providing a specific environment where the principal activities of the worker occur or if it extends to taking a proactive approach to ensuring that defense counsel are safe wherever they perform their work.

2. The right to education.

Article 13 of the ICESCR establishes the right of everyone to an education.⁶⁷ This right has two components, an availability component and an accessibility component.⁶⁸ In addition, this article includes an obligation to protect and an obligation to fulfill.⁶⁹

The availability component requires the state to make educational facilities available to everyone within its jurisdiction.⁷⁰ With regard to defense counsel’s request that the Iraqi Government pay for education expenses of their family members who may be relocated to a neutral country, this would seem to be outside the jurisdiction of the Iraqi government. There is no obligation on the Iraqi Government to provide education outside of Iraq. Clearly though, the Iraqi Government has an obligation to ensure that education is available to defense counsels’ family members wherever they are located in Iraq.

⁶⁶ ICESCR, *supra* note 11 at Art. 7.

⁶⁷ *Id.* at Art. 13.

⁶⁸ ICESCR General Comment No. 13, *supra* note 13 at para. 6.

⁶⁹ *Id.* at para. 47.

⁷⁰ *Id.* at para. 6.

The accessibility component has three requirements: non-discrimination, physical accessibility, and economic accessibility.⁷¹ The physical accessibility obligation requires the state to provide education that is within safe physical reach at some reasonably convenient geographic location.⁷² This requirement is an issue with regard to “safe physical reach.” As reported in newspaper articles, there has been at least one attempt to kidnap the child of a defense attorney.⁷³ It is unclear if this attempt came while the child was traveling to or from school, but presumably the children are exposed to attacks during that time. The Iraqi Government must act to ensure that defense counsels’ children can get to and from school without jeopardizing their physical safety.

The economic accessibility obligation requires the state to ensure that education is affordable to all.⁷⁴ Clearly this applies to education provided in Iraq. But it appears that the obligation to ensure affordability does not extend beyond the borders of Iraq and thus there is no obligation to provide financial support for the education of any of defense counsels’ family members who are moved to a neutral country. The comments to Article 13 state that the extent of the obligations under Article 13 are subject to the text of the Covenant.⁷⁵ The actual obligations under the Covenant include such things as development of a system of schools at all levels, establishment of minimal educational standards, and improvement of the condition of the teaching staff.⁷⁶ These obligations cannot possibly extend beyond the borders of Iraq, thus it

⁷¹ *Id.*

⁷² *Id.*

⁷³ Lawyer Feels Like a Dead Man Talking, *supra* note 2.

⁷⁴ ICESCR General Comment No. 13, *supra* note 13 at para. 6.

⁷⁵ *Id.* at para. 47.

⁷⁶ ICESCR, *supra* note 11 at Art. 13.

makes sense that the economic accessibility obligation also does not extend beyond those borders.

Article 13 also incorporates an obligation to protect and an obligation to fulfill on the part of the state. The obligation to protect requires the state to take measures to prevent interference with the right of education by third parties.⁷⁷ This creates an affirmative obligation, similar to that found in the ICCPR, upon the Iraqi Government to act in protecting the members of defense counsel's family who are attending school in Iraq. If fear, or actual attacks, are keeping defense counsel's children from attending school, then the Iraqi Government has violated its obligation to ensure their safety and to prevent interference with this right by the insurgency. The fact that at least one attempted kidnapping of a defense attorney's child has occurred suggests that the Iraqi Government has fulfilled this requirement because the attempt was foiled. The attack also serves to highlight the need and obligation of the Iraqi Government to continue protecting the children of defense counsel that are in county and ensure their safety when traveling to and from school.

The obligation to fulfill requires the state to fulfill a specific right when the individual is unable to realize the right due to circumstances beyond his/her control.⁷⁸ The obligation to fulfill could create an obligation on the Iraqi Government to meet defense counsel's demands with regard to moving their families out of Iraq and paying education expenses. It is unclear whether the obligation would extend that far, but there does not appear to be a limit. If the Iraqi Government cannot ensure the safety of the children and cannot prevent interference with the education of those children, then presumably, the duty to take affirmative action could include the duty to send them to a neutral country and provide financial support for their education.

⁷⁷ ICESCR General Comment No. 13, *supra* note 13 at para. 47.

⁷⁸ *Id.*

C. United Nations General Assembly Resolutions.

United Nations General Assembly resolutions are not binding on member states but may provide useful guidance on what is expected of a member state in fulfilling its obligations under binding international covenants.⁷⁹

In a document adopted in 1990, the U.N. General Assembly provided the following guidelines for obligations of the States parties in regards to lawyers. Governments shall ensure that lawyers:

- (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;
- (b) are able to travel and to consult with their clients freely both within their own country and abroad; and
- (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.⁸⁰

The preamble to this resolution specifically cites the ICCPR guarantees to a right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal as considerations in creating these guidelines.⁸¹ The resolution also creates a duty upon States to safeguard lawyers when they are under threat as a result of discharging their functions.⁸²

This resolution provides authority for the obligation on Iraq to ensure the security of defense counsel under the ICCPR. The actions of the insurgency clearly intimidate, hinder,

⁷⁹ U.N. Charter, *supra* note 20 at Art. 10, 14.

⁸⁰ Basic Principles on the Role of Lawyers, *supra* note 21 at para. 16.

⁸¹ *Id.*

⁸² *Id.* at para. 17. (A similar obligation exists to protect prosecutors and their families when their safety is threatened as a result of their prosecutorial functions.) See Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990). [reproduced in accompanying notebook at Tab 5].

harass, and influence defense counsel in the performance of their professional duties. Defense counsel may be intimidated from traveling to key areas to investigate evidence necessary to provide competent representation for their clients. The same goes for hindering their investigations and preparations for trial. There can be no doubt that attacks on their personal safety and their family members harass defense counsel.

If a kidnapping attempt were ever successful, it would create undue influence on how that attorney approached his job because his child is held hostage. It is possible that even unsuccessful attempts at kidnapping defense counsel's children could create an undue influence on defense counsel if they become distracted from their job because they are worried about the safety of their children.

The insurgency has also created problems for the Iraqi Government's obligation to ensure that defense counsel can travel and consult with their clients freely. Inadequate security clearly limits the ability of defense counsel to travel the country as necessary for preparing their defense. On at least one occasion insufficient security prevented defense counsel from freely communicating with their clients.⁸³

The Basic Principles on the Role of Lawyers provides additional authority for the obligation of the Iraqi Government to provide security to defense counsel. Under this document, the Iraqi Government must ensure defense counsel can perform their duties without intimidation, hindrance, harassment, or other undue influence. The Iraqi Government must also ensure that the insurgency does not prevent defense counsel from freely communicating with their clients.

⁸³ Debate between Dr. Curtis F. J. Doebbler and Professor Michael P. Shcharf, "Will Saddam Hussein Get a Fair Trial?", 37 Case. W. Res. J. INT'L L. 21, at 35 (2005). [reproduced in accompanying notebook at Tab 22]

Additional guidance is found in U.N. General Assembly Resolution 2005/35 dated April 19, 2005.⁸⁴ This Resolution establishes that, in ensuring respect for international human rights law, States parties have the duty to:

- (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice...irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) Provide effective remedies to victims, including reparation....⁸⁵

The Resolution defines “victims” as persons who individually or collectively suffered harm, including a substantial impairment of their fundamental rights and physical or mental injury, through acts or omissions that constitute gross violations of international human rights law.⁸⁶

When appropriate, “victim” also includes immediate family members and dependents of the direct victim.⁸⁷

This means that the obligations of the Iraqi Government extend not only to the defense attorneys individually, but also to members of their families. The resolution also creates an obligation not only to protect defense counsel, but to investigate any attacks and ensure the investigation is done impartially.

This impartial investigation requirement suggests the Iraqi Government should look to neutral countries for assistance in conducting investigations of the attacks to determine if any of

⁸⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 22. (“the Principles and Guidelines do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law”).

⁸⁵ *Id.* at para. 3.

⁸⁶ *Id.* at para. 8.

⁸⁷ *Id.*

defense counsels' claims of impropriety, bias, and involvement in the attacks can be substantiated. The accusations in and of themselves may make it a good idea to involve a neutral party so as to guarantee that Iraq complies with the requirements of impartiality whether the claims are true or not. Such an investigation would help to increase the perception of the IHT's legitimacy and fairness in the eyes of the Iraqi people.

The State party in which any violation occurs should take measures to protect the victims against unlawful interference with their privacy and ensure their safety from intimidation and retaliation, as well as that of their families, before, during, and after judicial, administrative, or other proceedings.⁸⁸ Presumably any investigation identifying those responsible for the previous attacks would lead to judicial proceedings. Thus, the Iraqi Government has an additional obligation, since attacks have occurred, to provide security for defense counsel and their families.

The obligation to provide reparation includes the obligation to provide satisfaction and guarantees of non repetition.⁸⁹ Satisfaction should include any or all of the following:

- (a) effective measures aimed at the cessation of continuing violations;
- (b) verification of the facts and full and public disclosure of the truth;
- (c) public apology, including acknowledgement of the facts and acceptance of responsibility;
- (d) judicial and administrative sanctions against persons liable for the violations; and
- (e) inclusion of an accurate account of the violations that occurred in international human rights law.⁹⁰

The obligation to provide effective remedies aimed at the cessation of continuing violations is yet another source requiring the Iraqi Government to provide security for defense counsel and their families.

⁸⁸ *Id.* at para. 12.

⁸⁹ *Id.* at para. 18.

⁹⁰ *Id.* at para. 22.

Guarantees of non repetition should include any or all of the following measures which will also contribute to prevention:

- (a) protecting persons in the legal profession; and
- (b) reviewing and reforming laws contributing to or allowing gross violations of international human rights law.⁹¹

This obligation is yet another international law source suggesting that the Iraqi Government has an obligation to protect defense counsel from attacks by insurgents.

IV. OBLIGATIONS OF MULTINATIONAL FORCES-IRAQ UNDER THE LAWS GOVERNING OCCUPYING FORCES.

The United States became a party to the Geneva Conventions by ratification on August 2, 1955.⁹² Iraq became a party to the Geneva Conventions by accession on February 14, 1956.⁹³

The Geneva Convention relative to the Protection of Civilian Persons in Time of War is applicable to Multinational Forces-Iraq, in part, under Articles 2 and 6.⁹⁴ While some articles in the Convention terminate upon the cessation of military operations, several other articles

⁹¹ *Id.* at para. 23.

⁹² International Committee of the Red Cross, States party to the Geneva Conventions and their Additional Protocols, [www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/\\$File/Conventions%20de%20Geneve%20et%20Protocoles%20additionnels%20ENG.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/$File/Conventions%20de%20Geneve%20et%20Protocoles%20additionnels%20ENG.pdf) accessed March 19, 2006. (Other member States of Multinational Forces-Iraq became parties to the Geneva Conventions as follows: Albania, May 27, 1957; Armenia, June 7, 1993; Australia, October 14, 1958; Azerbaijan, June 1, 1993; Bosnia-Herzegovina, December 31, 1992; Czech Republic, February 5, 1993; Denmark, June 27, 1951; El Salvador, June 17, 1953; Estonia, January 18, 1993; Georgia, September 14, 1993; Italy, December 17, 1951; Japan, April 21, 1953; Kazakhstan, May 5, 1992; Latvia, December 24, 1991; Lithuania, October 3, 1996; Macedonia, September 1, 1993; Mongolia, December 20, 1958; Poland, November 26, 1954; Republic of Korea, August 16, 1966; Romania, June 1, 1954; Slovakia, April 2, 1993; United Kingdom, September 23, 1957.) [reproduced in accompanying notebook at Tab 24]

⁹³ *Id.*

⁹⁴ Geneva Convention, *supra* note 27 at Art. 2, 6. (Article 2 states that the convention shall apply to any armed conflict which may arise between two Parties whether a state of war is recognized or not. Article 6 governs the applicability of the Convention to Occupying Powers and provides that certain articles apply for the duration of the occupation while others terminate one year after the close of military operations. The articles that continue in effect for the duration of an occupation include Articles 1-12, 27, 29-34, 47, 49, 51, 52, 53, 59, 61-77, and 143.)

continue in effect for the duration of the occupation and contain specific provisions which are relevant here.⁹⁵

Article 27 of this Convention, which continues in effect for the duration of an occupation, provides that protected persons⁹⁶ are entitled to respect for their persons and their family rights.⁹⁷ The Article requires that protected persons “shall be protected especially against all acts of violence or threats thereof.”⁹⁸ Article 27 thus creates a direct obligation on the Multinational Forces-Iraq to protect individuals and their families from insurgent attacks.

Under Article 47 of this Convention, which continues in effect for the duration of an occupation, protected persons may not be deprived of the protections of the Convention by any change in law, the government, or by any agreements between authorities of the occupied territory and the Occupying Power.⁹⁹ This means that the creation of the interim-Iraqi government and more recently, the elections and process of forming the new democratically elected government do not relieve the Multinational Forces-Iraq from their obligation to protect Iraqi citizens under their territory of control.

Under Article 49 of this Convention, which continues in effect for the duration of an occupation, an Occupying Power may evacuate a given area due to security concerns provided that the removals are effected in safe conditions, healthy conditions, and as long as members of

⁹⁵ *Id.*

⁹⁶ *Id.* at Art. 4. (“Protected persons” are defined as persons who find themselves in the hands of a Party to the conflict or Occupying Power of which they are not nationals.)

⁹⁷ *Id.* at Art. 27.

⁹⁸ *Id.*

⁹⁹ *Id.* at Art. 47.

the same family are not separated.¹⁰⁰ Parties to the conflict may take measures concerning the security of protected persons that may be necessary as a result of the war.¹⁰¹ While this does not create an obligation on Multinational Forces-Iraq to relocate members of defense counsel's family, per their request, it does provide the authority to do so against their will if necessary to ensure their security.

Under Article 72 of this Convention, which continues in effect for the duration of an occupation, an Occupying Power has an obligation to provide those accused of crimes with the assistance of counsel who may visit them freely, and to provide the facilities necessary for preparing their defense.¹⁰² While this is not a direct obligation Multinational Force-Iraq has to defense counsel, it does apply to those appearing as defendants before the IHT. It does provide an indirect obligation to protect defense counsel though, because insurgent attacks could infringe on the ability of defense attorneys to provide effective assistance of counsel to those defendants.

V. LESSONS FROM OTHER INTERNATIONAL TRIBUNALS.

A. The Special Court for Sierra Leone

The Special Court for Sierra Leone ["SCSL"] provides an especially useful model for the IHT. While it is true that the SCSL has not faced any specific security threat, it is similar to the IHT in that it operates in the country where the incidents under review took place.¹⁰³ Despite the lack of a specific threat, the SCSL has taken several measures with regard to security that should be considered by the IHT as a minimal program applicable not only to defense counsel but to staff at the IHT.

¹⁰⁰ *Id.* at Art. 49.

¹⁰¹ *Id.* at Art. 27.

¹⁰² *Id.* at Art. 72.

¹⁰³ First Annual Report of SCSL, *supra* note 34.

The SCSL's security plans were developed and modified in collaboration with United Nations Mission in Sierra Leone ["UNAMSIL"]. Periodic exercises to test contingency plans were implemented including movement of detainees to a secondary site in the event of a security emergency. Communications between the security forces supporting the Court were integrated. A joint communications and operations center was established at the Court's primary site. A program of residential security inspections was established and included night time patrols of residences to ensure staff security. A program of security awareness training was implemented on a recurring basis for all staff. Escorts were provided to all staff traveling to sites out of Freetown and to Liberia.¹⁰⁴

While these guidelines serve only as minimal standards, they should be implemented in Iraq to protect defense counsel. Residential security inspections would protect defense counsel while they are at home and should be extended to include defense counsels' offices given the previous kidnapping at that location.¹⁰⁵ Providing escorts while traveling is also a must and should be conducted pursuant to the guidelines discussed below.

B. International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda ["ICTR"] provides further guidance on minimal standards of security that the Iraqi Government and the IHT should implement to protect defense counsel. The ICTR differs from the IHT and SCSL in that it is not situated in the country in which the alleged crimes took place and is thus not exposed to the easy reach of violence from interested parties. Nevertheless, the ICTR has distributed a newsletter outlining

¹⁰⁴ *Id.*

¹⁰⁵ Lawyer Feels Like a Dead Man Talking, *supra* note 2.

guidelines for persons at the tribunal to improve their security awareness.¹⁰⁶ In addition, the ICTR has held team building workshops for its security units to share techniques and discuss methods of solving particular security issues.¹⁰⁷

The newsletter covers issues from personal security to communications to use of United Nations vehicles. The newsletter offers suggestions such as: avoid carrying large amounts of cash; avoid crowded areas; remain alert; maintain a low profile; minimize publicity of the member and his family; cooperate with local authorities; and maintain communication with the ICTR.¹⁰⁸ The ICTR also offers VHF radios on request so that members may stay in contact while away from the tribunal.¹⁰⁹

The newsletter includes a section regarding residential and family protection. This section suggests having the ICTR's security services conduct a security survey of the member's home.¹¹⁰ The newsletter also suggests hiring a nighttime guard for the member's home and provides methods for reporting all security-related incidents.¹¹¹

The ICTR once again provides guidance in requiring security at defense counsels' residences and that practice should extend to their offices as well. In the case of defense counsel appearing before the IHT, they have insisted upon having security guards of their own choosing. Even with the private security guards, the IHT and the Iraqi Government should still follow the ICTR's practice of conducting security surveys of defense counsels' residences and offices. The

¹⁰⁶ ICTR Newsletter August 2003, *supra* note 35.

¹⁰⁷ ICTR Newsletter November 2005, *supra* note 36.

¹⁰⁸ ICTR Newsletter August 2003, *supra* note 35 at pg. 8.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at pg. 9.

¹¹¹ *Id.*

ICTR's practice of providing VHF radios should also be implemented in Iraq to ensure that defense counsel can request assistance immediately should any attack occur.

VI. LESSONS FROM WITNESS PROTECTION CASES

This section will focus on the rules developed and applied in witness protection cases with the goal of identifying some basic background principles relating to concerns over the fairness of the trial. It will then attempt to apply those principles in the context of what specific security measures are required of the IHT and Multinational Forces-Iraq in protecting defense counsel.¹¹² Any guidelines provided go only to what responsibilities the Iraqi Government or Multinational Forces-Iraq have to provide security in response to any specific requests by defense counsel. The obligations of the Iraqi Government under the ICCPR and ICESCR remain in effect and unchanged by any balancing test. The obligations of Multinational Forces-Iraq under the laws governing occupying forces also remain in effect and unchanged by the guidelines promulgated below.

Each of the significant witness protection cases has involved a balancing of interests, although those interests have been defined in different ways depending upon the case. For instance, one case involved balancing the public interest in the ability of the defendant to elicit or establish facts against the public interest in the anonymity of undercover operatives.¹¹³ Other public interests discussed in such cases have included: "the public interest in the preservation of anonymity and the encouragement of prosecution witnesses to give evidence; the public interest in the safety and security of witnesses; the public interest in evidence being given without fear or

¹¹² For a complete analysis of witness protection, *See* Memorandum for the Office of the Prosecutor of the ICTR, ISSUE: Witness Protection, Sarah Suscinski, November 2002. [reproduced in accompanying notebook at Tab 30].

¹¹³ *Jarvie and Another v. Magistrates Court of Victoria at Brunswick and Other*, 1994 V.R. 84, 89 (S. Ct. Vict.). [reproduced in accompanying notebook at Tab 15].

intimidation; the public interest in the accused receiving a fair trial; the public interest in public criminal proceedings; and the privacy interests of the witness.”¹¹⁴ Thus, any guidelines must identify interests that have to be balanced in connection with providing security for defense counsel and ensuring the legitimacy and fairness of the IHT.

A. The Test in *Prosecutor v. Tadic*¹¹⁵

In 1995, Dusko Tadic became the first accused individual to appear before the ICTY for alleged violations of international humanitarian law that occurred from June 1992 through August 1992.¹¹⁶ During the *Tadic* case, the ICTY had the opportunity to decide when witnesses could be protected by remaining anonymous when giving testimony and came up with a 5-part test to decide when witnesses could remain anonymous without infringing on the rights of the defendant to a fair trial.

The Prosecutor in the *Tadic* case filed a motion for protective measures for the protection of alleged victims and witnesses including the following measures: not disclosing the names, addresses, whereabouts and other identifying data; taking testimony from witnesses via one-way closed circuit television; using voice and image altering devices to avoid transmitting the image to the accused and defense; and closing all hearings involving those witnesses.¹¹⁷ This is perhaps the most cited case on the authority for witness protection in the context of international tribunals. The case is important to the IHT because it took place during a situation of armed

¹¹⁴ Amicus Curiae Brief on Protective Measures for Victims and Witnesses, Submitted by Dean and Professor of Law Christine Chinkin. 7 Crim. L.F. 179. (1996). [reproduced in accompanying notebook at Tab 19]

¹¹⁵ Prosecutor v. Tadic, Case No. IT-94-1-T, Prosecutor’s Motion requesting Protective Measures for Victims and Witnesses (August 10, 1995). [reproduced in accompanying notebook at Tab 16].

¹¹⁶ *Id.* at para. 1, 2.

¹¹⁷ *Id.* at para. 3.

conflict and the Court specifically cited the fact that derogation of the defendant's rights was allowed in cases of national emergency pursuant to Article 4 of the ICCPR.¹¹⁸

According to the ICTY Trial Chambers, a witness could remain anonymous when the following conditions are met:

- (1) there is a real fear for the safety of the witness or his family;
- (2) the testimony of the witness is important to the Prosecutor's case;
- (3) The Trial Chamber is satisfied that there is no prima facie evidence that the witness is untrustworthy;
- (4) a witness protection program is non-existent or ineffective; and
- (5) any measure taken is strictly necessary.¹¹⁹

While this test is not directly applicable to the security of defense attorneys, it can be used to create guidelines when deciding whether particular security measures are sufficient to prevent any danger to defense counsel from constituting a violation of the defendant's right to a fair trial.

B. The Test in *R. v. Taylor and Crabb*.

In *R v. Taylor and Crabb*, the Court considered whether a teenage girl who witnessed a defendant charged with murder leave the scene of the crime could testify anonymously.¹²⁰ The Court found that she could testify anonymously and provided five guidelines to decide when a witness may remain anonymous in derogation of the defendant's right to a fair trial.¹²¹ The guidelines are similar to the test in *Tadic*, which should be expected as *Taylor* is one of the cases the ICTY cited when formulating the standards to be applied at that tribunal.¹²² Under the rule of

¹¹⁸ *Id.* at para. 61.

¹¹⁹ *Id.* at para. 62-66.

¹²⁰ *R. v. Taylor* 1994 Crim. L.R. 253 (August 17, 1994). [reproduced in accompanying notebook at tab 17]

¹²¹ *Id.*

¹²² *Prosecutor v. Tadic*, Prosecutor's Motion requesting Protective Measures for Victims and Witnesses, *supra* note 115 at para. 60.

Taylor, a court should consider whether a witness may remain anonymous using the following guidelines:

- (1) there must be real grounds for fear of the consequences if the evidence were given and the identity of the witness revealed;
- (2) the evidence must be sufficiently relevant and important to make it unfair to make the prosecution proceed without it;
- (3) the prosecution must satisfy the court that the creditworthiness of the witness has been fully investigated and disclosed;
- (4) the court must be satisfied that there would be no undue prejudice to the accused, although some prejudice is inevitable, even if it is only the qualification placed on the right to confront the witness as accuser; and
- (5) the court should balance the need for protection of the witness, including the extent of that protection, against unfairness or the appearance of unfairness.¹²³

This first three parts to these guidelines are similar to those found in the *Tadic* case. The last two are different, but could be considered as a balancing test requirement.

C. Guidelines for the responsibilities of the Iraqi Government and Multinational Forces-Iraq to provide security for defense counsel.

In crafting any guidelines for determining whether security provided to defense counsel is sufficient to avoid violating a defendant's rights to a fair trial or effective assistance of counsel, some general considerations must be applied. First, whether the level of security is sufficient will depend upon particular facts in varying circumstances. For example, the level of security provided to defense counsel while they are at the Tribunal might be sufficient but that same level of security could be insufficient when defense counsel is required to visit sites where the charged crimes allegedly occurred.

Second, this test in no way abrogates or changes the obligations of the Iraqi Government contained in the ICCPR and ICESCR, nor would it change the obligations of Multinational Forces-Iraq as an occupying force. Those general obligations remain. This test would likely be

¹²³ R. v. Taylor, *supra* note 120.

useful as a tool in deciding whether the IHT should or is obligated to provide an increased level of security for defense counsel when they are engaged in any particular activity.

With these general considerations in mind, the following guidelines derived from the *Tadic* and *Taylor* tests are proposed. When considering whether a particular request by defense counsel for security while they engage in a particular activity is necessary for protecting the defendants' rights to a fair trial and effective assistance of counsel: (1) the defense counsel must have a real, objective fear for his safety or the safety of his family; (2) the activity the defense counsel seeks to engage in must be important to the defendant's case; (3) there must be no prima facie evidence that the fears expressed by defense counsel are for purposes of propaganda or delay; (4) there must be a balancing of the difficulty of providing security to defense counsel with the appearance of unfairness to the defendant; and (5) the increased security measures are required only when strictly necessary.

1. The defense counsel must have a real, objective, fear for his safety or the safety of his family.

The *Tadic* Court began with the requirement that there must be real fear for the safety of the witness or his family, and the same requirements should extend to defense counsel. The *Tadic* Court agreed with the defense argument that the standard should be objective.¹²⁴ Thus, before any violation of the defendant's rights to a fair trial or effective assistance of counsel can occur, the attorney requesting added security must have an objective fear for the safety of his self or his family.

¹²⁴ Prosecutor v. Tadic, Prosecutor's Motion requesting Protective Measures for Victims and Witnesses, *supra* note 115 at para. 62.

The objective standard means that the fear must be legitimate and reasonable.¹²⁵ This element is also of primary concern in English cases that have decided whether a witness could remain anonymous to protect his identity.¹²⁶ Deciding whether the stated fear is legitimate and reasonable is a factual inquiry and must be considered on a case-by-case basis.

At a minimum, deciding whether defense counsel's fear is legitimate and reasonable will include a geographic element and a temporal element. If those elements are not met, then there would be no obligation on the part of the Iraqi Government to provide security for defense counsel while they are engaged in a particular activity.

The geographic element requires that the fear be particular to the place where the attorney or his family is located or will be traveling to, rather than some general fear of a threat that could exist at any location. For example, the fact that an attack took place in Baghdad does not in and of itself mean that a defense attorney should fear attack in Basra. Some independent evidence of the threat existing at the claimed location would be required.

The temporal requirement mandates that the fear must be based on current insurgent activity or future threats. For example, the fact that an attack took place in a particular neighborhood in Baghdad three months ago does not mean that it is reasonable to fear attack at that location during a trip scheduled for next week. Some independent evidence that a threat still exists or will exist at that location would be required.

¹²⁵ Mercedeh Momeni. Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia. 41 How. L.J. 155 at 171 (Fall, 1997). [reproduced in accompanying notebook at Tab 20]

¹²⁶ See *R. v. Watford Magistrates Court ex parte Lenman and Others*, 1992 T.L.R. 285, Crim. L. Rev. 388 (1993). (Held that if a court is satisfied that a real risk to the administration of justice exists because a witness fears for his safety on reasonable grounds, then the court could order the identity of the witness be kept from the defendant.) [reproduced in accompanying notebook at Tab 18].

2. The activity the defense counsel seeks to engage in must be important to the defendant's case.

The *Tadic* case required that a particular witness must be important to the Prosecutor's case.¹²⁷ This requirement could be restated in a variety of ways as applied to defense counsel appearing before the IHT, but a general statement would be that the activity the defense counsel seeks to engage in must be important to the defendant's case.

For example, if defense counsel wants to travel to a particular location in Iraq, the obligation to provide security will depend upon the importance of visiting that location in preparing the defense's case. If defense counsel wanted to visit every administrative building in the country seeking documents, then there would likely be less of an obligation upon the Iraqi Government to provide for their protection because there is no indication such an activity is expected to produce anything of importance to the defense. Therefore, defense counsel has no reasonable expectation that the Government should make the necessary expenditures and devote the necessary resources to guarantee their safety. If, however, Saddam's defense attorneys wanted to visit Dujail to collect physical evidence that would clearly be of great importance in preparing his defense for the case against him.

3. There must be no prima facie evidence that the fears expressed by defense counsel are for purposes of propaganda or delay.

The *Tadic* Court's third requirement was that there must be no prima facie evidence that the witness is untrustworthy.¹²⁸ The requirement applies to defense counsel as follows: there must be no prima facie evidence that the fears expressed by defense counsel are for purposes of propaganda or delay.

¹²⁷ Prosecutor v. Tadic, Prosecutor's Motion requesting Protective Measures for victims and Witnesses, *supra* note 115 at para. 63.

¹²⁸ *Id.* at para. 64.

The *Tadic* Court was primarily concerned with ensuring that there were no grounds for supposing the witness was not impartial or had “an axe to grind.”¹²⁹ The past assassinations of defense attorneys does show that real threats exist in some parts of the country. But a concern also exists that defense counsel may claim fear for purposes of delaying the trial or influencing public opinion of the process. Such abuses should not obligate the Iraqi Government to act.

However, given the importance of ensuring security of those involved in the trial, the Iraqi Government may not ignore such claims unless there is uncontradicted evidence that the claims are false on their face. It may be difficult to determine whether the defense counsel’s claim is made for ulterior motives, but any doubt should be resolved in favor of defense counsel.¹³⁰ The right to a fair trial is too important to be slighted and the security of defense counsel is key to ensuring that right.

4. There must be a balancing of the difficulty of providing security to defense counsel with the appearance of unfairness to the defendant.

The *Tadic* Court’s fourth requirement was that there must be an ineffective or non-existent witness protection program.¹³¹ The Court’s focus was on whether or not the ICTY was in a position to provide protection not only for the witnesses appearing before it, but also for the family members of the witnesses who remained in the territory where the conflict and alleged crimes occurred.¹³²

¹²⁹ *Id.*

¹³⁰ Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 125.

¹³¹ Prosecutor v. Tadic, Prosecutor’s Motion requesting Protective Measures for Victims and Witnesses, *supra* note 115 at para. 65.

¹³² *Id.* at para. 65.

This requirement does not translate well in the context of the Iraqi Government's obligation to provide security for defense counsel. There clearly is an effort by the IHT to provide security for the defense attorneys, as indicated by the agreement to provide funding for security personnel of the defense counsel's choice. What is not known by this writer is whether that agreement includes providing funding for security personnel to guard members of the defense counsel's family. This lack of information makes comparison to the *Tadic* standard on this element difficult.

The last two requirements found in the guidelines from *Taylor* provide a better framework for creating guidelines for defense counsel security. The IHT must balance the limitation of available security resources against the need to protect defense counsel's rights and the potential to infringe on the defendant's right to a fair trial. This is a catch-all requirement that requires the Iraqi Government to consider the appearance of unfairness to the defendant when deciding what security measures it will provide to defense counsel for any particular activity they wish to engage in.

For example, defense counsel may wish to travel to a particular location without being able to demonstrate that such a trip is important to the defense case. While that would fail to meet requirement (2) discussed above, the Iraqi Government should consider the request in the context of the appearance of fairness to the defendant. It may be that such a trip is totally irrelevant to the defense case, but to outsiders judging the fairness and legitimacy of the tribunal, not allowing defense counsel every opportunity to investigate and prepare a defense may create an appearance of unfairness.

5. Increased security measures are required only when strictly necessary.

That *Tadic* Court's fifth requirement was that any measures taken should be strictly necessary.¹³³ As applied to defense counsel, a requirement that security measures are required only when strictly necessary might seem redundant with the requirements that the activity defense counsel intends to engage in must be important to their case and that there be no prima facie evidence that defense counsel is simply making the claims for purposes of propaganda or delay.

The *Tadic* Court's focus was on whether less restrictive measures could secure the required protection. As applied to defense counsel, this means that the Iraqi Government's obligation to provide security is not indefinite in duration, location, or time. In establishing this requirement, the *Tadic* court expressly stated the Tribunal, "must be satisfied that the accused suffered no undue avoidable prejudice, although some prejudice was inevitable."¹³⁴

The fourth guideline from the *Taylor* case also states that some prejudice to the defendant is inevitable when a witness must remain anonymous. That case suggests considering other factors such as whether the defendants could see the witness on a video screen in order to avoid the appearance of unfairness.

In the context of the Iraqi Government, this means that those charged with providing security to defense counsel should be allowed to consider other factors in deciding whether security is needed for a particular activity at a particular location and a particular time. In judging this necessity requirement, the Iraqi Government should consider a variety of factors. Such factors would include but should not be limited to the stage of the proceedings, the trends

¹³³*Id.* at para. 66.

¹³⁴ *Id.*

in insurgent activity at the location, the effect of delaying defense counsel's activity until a later time, available security resources, and the goal defense counsel seeks to achieve by engaging in the activity.

The closer to the beginning of a trial or the presentation of the defendant's case the request is made, the more likely it would be that there is an urgent need to ensure the activity is accomplished in a timely fashion. If however, the activity is early in the pre-trial stage and could be delayed until overall security in the area is increased through other actions, then there might be less urgency and a legitimate reason to delay the activity.

This "stage of the proceedings" factor should be considered in the context of trends in insurgent activity in the area. If insurgent activity has shown an overall downward trend, then a legitimate reason would exist to delay the activity in hopes of creating a safer environment. If insurgent activity has remained at a steady level, then this factor would be of minimal use. If insurgent activity has shown an increasing trend in the area, then this factor would suggest it is necessary to complete the activity as soon as possible to avoid increasing the risk to defense counsel, and therefore the obligation would be greater to provide more security for defense counsel when they engage in that activity.

The effect of delaying defense counsel's activity should also be considered. The more likely it is that a delay will prejudice the defendant's ability to prepare his case, the higher is the necessity of engaging in the activity. If there is unlikely to be any effect on the preparation of the defendant's case, then there is less of a necessity to provide security for defense counsel to engage in the activity at that time.

The person charged with evaluating the Iraqi Government's obligations should consider the available security resources. If resources are currently limited, but more would be available a

short time later, then this factor indicates it might be better to delay the activity to ensure the best security possible. If resources are available, but are tasked or are likely to be tasked to other obligations in the near future, this factor indicates that the necessity of engaging in the activity at the time of request is much higher.

The Government should also consider the goal defense counsel seeks to achieve by engaging in the particular activity. If the goal is to interview eye witnesses to the alleged crime or to gather physical evidence that is subject to contamination or elimination, then the necessity of engaging in the activity as soon as possible is high. If the goal is simply to tour a site or conduct some general, undefined search, then the necessity of engaging in the activity immediately is much lower.

VII. CONCLUSION

The Iraq Government is obligated by international law to provide security for defense counsel under the ICCPR and the ICESCR. The ICCPR requires the Iraqi Government to protect defense counsel's right to freedom of movement and their right to protection of family members. In addition, the ICCPR requires the Iraqi Government to guarantee a fair and public hearing for defendants appearing before the IHT. The right to a fair and public hearing requires that the defendant have adequate time and facilities for the preparation of a defense, freedom to communicate with counsel of his choosing, and the right to be tried without undue delay. Continued insurgent attacks on defense counsel could infringe each of those rights.

The ICESCR requires the Iraqi Government to provide defense counsel with safe and healthy working conditions. If the Iraqi Government does not act to protect defense counsel from insurgent attacks, then they will infringe their right to safe working conditions. In addition, the ICESCR requires the Iraqi Government to protect defense counsel's children's right to

education. This obligation requires the Iraqi Government to ensure those children have safe access to education.

U.N. General Assembly resolutions, while not binding on Iraq, provide guidance on the obligations of the Iraqi Government to defense attorneys under the ICCPR and ICESCR. Such guidelines include ensuring that lawyers are able to perform their professional functions without intimidation, hindrance, harassment, or improper influence and that they are able to travel and consult with their clients freely. In addition, the Iraqi Government should: take effective legislative, administrative, or other measures to prevent violations; investigate violations effectively; take effective measures aimed at the cessation of continuing violations; and protect persons in the legal profession.

Multinational Forces-Iraq are obligated under the international laws governing occupying forces to protect defense counsel and their family from acts of violence by the insurgency. The creation of an independent Iraqi Government does not abrogate that obligation. The laws governing occupying forces also require Multinational Forces-Iraq to guarantee defendants appearing before the IHT a fair trial, including the right to assistance of counsel who may visit them freely and to provide facilities necessary for the preparation of defense.

When analyzing the specific responsibilities of the Iraqi Government and Multinational Forces-Iraq to provide security for defense counsel in any given circumstance, the decision should be made with five guidelines in mind. First, the defense counsel must have a real, objective, fear for his safety or the safety of his family. Second, the activity defense counsel seeks to engage in must be important to the defendant's case. Third, there must be no prima facie evidence that the fears expressed by defense counsel are for purposes of propaganda or delay. Fourth, there must be a balancing of the obligation to provide security to defense counsel

with the appearance of unfairness to the defendant. Fifth, increased security measures are required only when strictly necessary. While these guidelines should be considered in deciding whether to provide security for a particular activity, they in no way bear upon the overall responsibilities of the Iraqi Government and Multinational Forces-Iraq to guarantee rights to defense counsel which are required under international law.