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Can The Iraqi Federal Judiciary Hear Issues On Appeal, That First Arise In An Iraqi Special Tribunal Proceeding? / Is The Denial Of The Right To Appeal To A Nation's Highest Federal Court A Violation Of Human Rights Norms?

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MEMORANDUM FOR THE
THE IRAQI SPECIAL TRIBUNAL

ISSUES:

1. CAN THE IRAQI FEDERAL JUDICIARY HEAR ISSUES ON APPEAL, THAT FIRST ARISE IN AN IRAQI SPECIAL TRIBUNAL PROCEEDING?

2. IS THE DENIAL OF THE RIGHT TO APPEAL TO A NATION'S HIGHEST FEDERAL COURT A VIOLATION OF HUMAN RIGHTS NORMS?

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I. INTRODUCTION AND SUMMARY OF CONCLUSION

A. Issues

The Law of Administration for the State of Iraq for the Transitional Period ("TAL") establishes two judiciary bodies within Iraq.[1] The first body, the Federal Judicial Authority,[2] was created to hear cases relating to Iraqi federal law. The second body, the Iraqi Special Tribunal[3] ("Tribunal" or "IST"), was created to hear genocide, war crimes, and crimes against humanity. The two judiciary bodies are independent and wholly separate from each other. This memorandum addresses two main issues regarding the possible overlap of these courts. The first concerns the legitimacy of the Tribunal, and whether a defendant can appeal an issue to an Iraqi federal court – including issues regarding the legitimacy of the Tribunal – if that issue was raised during a Tribunal proceeding. The second issue addresses whether the inability to petition to an Iraqi Federal Supreme Court is a violation of international human rights norms.

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[1] *See* Law of Administration for the State of Iraq, available at http://www.cpa-iraq.org/government/TAL.html [hereinafter TAL] [Reproduced in accompanying notebook I at Tab 7]. The Transitional Administrative Law (TAL) was signed on March 8, 2004 by the Interim Governing Council (GC) of Iraq and will be the Supreme Law of Iraq during the transitional period. The TAL sets out a path for the establishment of a representative and sovereign Iraqi government that protects fundamental rights and provides a stable political structure. The first phase of the transitional period began on 30 June 2004 when an Iraqi Interim Government was vested with full sovereignty, and the Coalition Provisional Authority was dissolved. The Iraqi government will govern according to the TAL and an annex issued before the beginning of the transitional period. The second phase begins when the Iraqi Transitional Government takes office after the elections of the National Assembly. The TAL was aimed to expire once a new permanent government is elected under a permanent constitution and takes office. *See* Iraqi Interim Government, GlobalPolicy.org, available at http://www.globalsecurity.org/military/world/iraq/ig.htm [Reproduced in accompanying notebook I at Tab 39].

[2] *Id.* at art. 43.

[3] *Id.* at art. 48.

C. Summary of Conclusions

1. A Cumulative Viewing of the IST Statute, the TAL, and Precedent from Various Other International Courts, in Light of Customary International Law, Indicates that the Federal Judiciary of Iraq Cannot Hear Cases or Issues Which Have Already Been Brought Before the Iraqi Special Tribunal.

The Tribunal's governing instruments are the TAL and the Statute of the Iraqi Special Tribunal ("IST Statute"). The TAL creates the special tribunal in Chapter 7 and specifically acknowledges that "[n]o other court shall have jurisdiction to examine the cases within the competence of the Iraqi Special Tribunal, except to the extent provided by its founding statute."[4] Article 48 of the TAL establishes the Tribunal's founding statute[5] and states that the IST Statute "exclusively defines its jurisdiction and procedures, notwithstanding the provisions of this Law."[6] The TAL also defines and limits the jurisdiction of the Iraqi Federal Supreme Court, including limiting "[o]rdinary appellate jurisdiction of the Federal Supreme Court" to that which is "defined by federal law."[7] The IST Statute, itself, never mentions the possibility of appealing to an outside court, nor does it include a provision allowing for collateral challenges. Further, Article 29 of the IST Statute states that the "Tribunal shall have primacy over all other Iraqi courts;"[8] implying that a final judgment by the Tribunal's Appeals Chamber may not be challenged by another Iraqi court. The IST Statute also gives the Tribunal the power to "overview the administrative and financial aspects of the Tribunal," removing administrative

[4] *Id.* at art. 48(B)

[5] "The statute establishing the Iraqi Special Tribunal issued on 10 December 2003 is confirmed. That statute exclusively defines its jurisdiction and procedures, notwithstanding the provisions of this Law." *Id.* at art. 48(A)

[6] *Id.*

[7] *Id.* at art. 44(b)

[8] Statute of the Iraqi Special Tribunal, art. 20, available at http://www.cpa-iraq.org/human_rights/Statute.htm [hereinafter IST Statute] [Reproduced in the accompanying notebook I at Tab 11]

issues of the Tribunal from outside determinations.[9] Finally, Article 30 of the IST Statute precludes the re-hearing of a case that has already been impartially and fully tried by the Tribunal or a federal court.[10]

Since neither of the Tribunal's constitutive instruments *expressly and clearly* deny the appeal of a Tribunal defendant to an outside court, an examination of customary international law and international precedent is required to settle the issue. However, because of the Tribunal's unique characteristics it cannot be compared literally to any of the established international courts and, instead, a constructed analogy must be made. Precedent for the IST and its interaction with the Iraqi Federal Judiciary can be procured via a collective gathering of rules from the International Criminal Court, ad hoc international war crimes tribunals, hybrid bodies, and regional courts. This body of precedent indicates that every international and hybrid war crimes tribunal had at least one constitutive instrument which defines it scope, nearly all had appellate bodies which review decisions within each respective court's jurisdiction, and the majority claimed primacy over subordinate or national courts as to issues that are within the tribunals' jurisdiction. The precedent does not conclusively show that the special war crimes jurisdiction always has primacy and the ability to be the final determinant on every issue it hears, but it does clearly show that such bodies *are legitimate* and *can issue binding and final judgments* on individuals.

Prior challenges to the legitimacy and ability to issue final judgments have been made against international tribunals and have been uniformly rejected. In defense of the legitimacy of the International Criminal Tribunal for the former Yugoslavia (ICTY), the Appeals Chamber of

[9] *Id* at art. 4(c)(iii).

[10] *Id.* at art. 30

the ICTY has held in the trials of Dusko Tadic[11] and Slovodan Milosovic[12] that it is a valid tribunal, established legally pursuant to UN Security Council Resolutions, and not in violation of international humanitarian law. Petitions by Milosevic to Dutch federal courts were rejected because the Dutch courts claimed to have transferred jurisdiction to the ICTY, and therefore no longer had the competence to hear matters which fall within ICTY jurisdiction. Similarly, the U.S. Supreme Court has held in *Hirota v. MacArthur,*[13] *In re Yamashita,*[14] and *Johnson v. Eisentrager,*[15] that it does not have jurisdiction to hear appeals from international military tribunals, even if the tribunals are dominated by the U.S. government. More recently, the U.S. Supreme Court has held in *Rasul*[16] *v. Bush* and *Hamdi v. Rumsfeld*[17] that *habeas* petitions will only be granted if the petitioners fall within federal court jurisdiction and have not already been brought before a competent tribunal. Since the Iraqi Special Tribunal is a competent court, with its jurisdiction established by the TAL and IST Statute, its ability to issue binding judgments is settled.

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[11] *See 4v. Dusko Tadic*, Case No. IT-95-AR72 "Decision on the application for leave to appeal" (Int'l Crim. Trib. For Former Yugoslavia Appeals Chamber Oct. 25 2000), available at http://www.un.org/icty/tadic/appeal/decision-e/01025AL315166.htm [Reproduced in accompanying notebook I at Tab 24]

[12] *See Prosecutor v. Slobodan Milosevic*, Case No. IT-99-37-PT, Decision on Preliminary Motions (Int'l Crim. Trib. For Former Yugoslavia Trial Chamber Nov. 8, 2001), available at http://www.un.org/icty/milutinovic/trialc/decision-e/1110873516829.htm [Reproduced in accompanying notebook I at Tab 25]

[13] *Hirota v. MacArthur*, 338 U.S. 197 (1948) (per curiam). [Reproduced in accompanying notebook I at Tab 19]

[14] *In re Yamashita*, 327 U.S. 1 (1946). [Reproduced in accompanying notebook I at Tab 21]

[15] *Johnson v. Eisentrage,r* 339 U.S. 763 (1950), [Reproduced in accompanying notebook I at Tab 22]

[16] *Rasul v. Bush*, 124 S. Ct. 2686 (2004), [Reproduced in accompanying notebook I at Tab 26] [Appellate/amicus briefs reproduced in accompanying notebook II]

[17] *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), [Reproduced in accompanying notebook I at Tab 17] [Appellate/amicus briefs reproduced in accompanying notebook II]

Finally, the fairly new "inherent powers of international courts"[18] doctrine maintains that an international or internationalized court has certain inherent powers which are not expressly included in their constitutive instruments but are nevertheless required for the proper administration of justice. Accordingly, the Iraqi Special Tribunal has the inherent power to make its judgments final and binding on its defendants. Thus, customary international law dictates that a decision made by a special tribunal's highest court (IST Appellate Chamber) is a final decision, which cannot be appealed to an outside court (Iraqi federal courts).

3. A Defendant's Inability to Petition to the Iraqi Federal Supreme Court does not Violate International Human Rights Norms.

There is no international right to review by a nation's highest court. Although the right to appeal a conviction in a criminal case does exist, this right is limited as a matter of customary international law. The human rights norm regarding the right to a review, codified under the International Covenant on Civil and Political Right (ICCPR), is that, "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."[19] The right to a review is discharged once a "higher court" (any higher court) has reviewed the conviction or sentence.

II. FACTUAL BACKGROUND

Because of the special circumstances surrounding the formation of Iraq's current government, Iraqi citizens created two separate and concurrent independent court systems in the TAL.[20] The first, the Federal Judicial Authority, established in Chapter Six of the TAL, was

[18] P. GAETA. 'INHERENT POWERS OF INTERNATIONAL COURTS AND TRIBUNALS', IN L.C. VOHRAH ET AL. (EDS). MAN'S INHUMANITY TO MAN (The Hague: Kluwer Law International. 2003) 353-372. [hereinafter Vohrah] [Reproduced in accompanying notebook at Tab 27]

[19] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 UNTS 171,art. 14(5). [hereinafter ICCPR] [Reproduced in accompanying notebook at Tab 6]

[20] *See* Tal, supra note 1, Chapter 6, 7

created to be the permanent federal court system of Iraq.[21] The Federal Judiciary is comprised of federal regional courts[22] which hear "matters that arise from the application of federal laws"[23] (analogous to U.S. federal district courts) and a Federal Supreme Court (analogous to the U.S Supreme Court), the highest court in the system. The federal courts are to be established by the federal government "in consultation with the presidents of the judicial councils in the regions,"[24] while the Federal Supreme Court is established by Article 44 of the TAL. Pursuant to Article 44(B), the Federal Supreme Court has jurisdiction over the following matter:

> *(1) Original and exclusive jurisdiction in legal proceedings between the Iraqi Transitional Government and the regional governments, governorate and municipal administrations, and local administrations.*
>
> *(2) Original and exclusive jurisdiction, on the basis of a complaint from a claimant or a referral from another court, to review claims that a law, regulation, or directive issued by the federal or regional governments, the governorate or municipal administrations, or local administrations is inconsistent with this Law.*
>
> *(3) Ordinary appellate jurisdiction of the Federal Supreme Court shall be defined by federal law.*

The second court system, the Iraqi Special Tribunal, established by Chapter Seven of the TAL,[25] was created as a temporary court system to hear war crimes, genocide cases, crimes

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[21] *Id.*at art. at 43(d)

[22] The initial federal courts "include existing courts outside the Kurdistan region, including courts of first instance; the Central Criminal Court of Iraq; Courts of Appeal; and the Court of Cassation, which shall be the court of last resort except as provided in Article 44 of this Law..." *Id.* at art. 46(a).

[23] *Id.* at 43(d)

[24] *Id.*

[25] *Id.* at art. 48

against humanity, and certain abuse of power cases.[26] The Tribunal is governed by its own constitutive statute ("IST Statute"), confirmed in Article 48(A) of the TAL, and derives its jurisdiction solely from the IST Statute.[27] The jurisdiction specified is narrowly prescribed by Article 10 of the Tribunal to the following:

> *The Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11 - 14, committed since July 17, 1968 and up and until May 1, 2003, in the territory of Iraq or elsewhere, namely:*
>
> *a) The crime of genocide;*
> *b) Crimes against humanity;*
> *c) War crimes; or*
> *d) Violations of certain Iraqi laws listed in Article 14 below.*[28]

Like the Federal Judiciary, the Tribunal consists of lower courts, the Trial Chambers, and a higher appeals court, the Appeals Chamber.[29] The scope of the Appeals Chambers jurisdiction, pursuant to Article 25, also has been very narrowly granted, in that it can only hear cases brought on appeal and *must* hear cases that fall within its appellate jurisdiction as described below:[30]

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[26] The offenses of 'genocide', 'crimes against humanity', and 'war crimes' are defined in Articles 11-13 of the IST Statute.

[27] *Id.*

[28] "The Tribunal shall have the power to prosecute persons who have committed the following crimes under Iraqi law:
a) For those outside the judiciary, the attempt to manipulate the judiciary or involvement in the functions of the judiciary, in violation, inter alia, of the Iraqi interim constitution of 1970, as amended;

b) The wastage of national resources and the squandering of public assets and funds, pursuant to, inter alia, Article 2(g) of Law Number 7 of 1958, as amended; and

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

Id. at art. 14

[29] *Id* at art. 3(a)

[30] *Id* at art. 25

a) The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

1. an error on a question of law invalidating any decision;
2. an error of procedure; or
3. an error of material fact which has occasioned a miscarriage of justice.

Finally, two unique aspects which set the Iraqi Special Tribunal apart from previous war crimes tribunals, is that the all judges of the IST must Iraqi nationals,[31] that the IST will apply a mixture of *both* domestic and international law.[32] These facts are significant in that they add a distinguishing feature to the IST which makes application of precedent from other war crimes tribunals somewhat tenuous.

II. JURISDICTION OF COURTS SITTING IN IRAQ

In any court system, the ability for a particular court to hear a case will be determined by both the constitutive instrument of the court system (e.g. U.S. Constitution , Article III)[33] and the constitutive instrument of the court itself (e.g. U.S. Code, Title 28).[34] In an international court system, a third instrument – customary international law – must also be considered in the determination. Further, when there is inconsistency, ambiguity, or incompatibility between any of the instruments, a resolution must be sought, first, from the constitutive instrument which has supremacy; second, from the interpretations of the highest court in the court system; and finally, from customary international law and precedent.

[31] "The judges, investigative judges, prosecutors and the Director of the Administration Department shall be Iraqi nationals, except as provided for in Article 4(d)." *Id* at art. 28

[32] *See Id* at § 3, 6

[33] *See* U.S. Const., Art. II [Reproduced in accompanying notebook I at Tab 12]

[34] *See* U.SC., Title 28, available at http://straylight.law.cornell.edu/uscode/html/uscode28/ [Reproduced in accompanying notebook I at Tab 13]

Despite indicia of an intent to confine all genocide, war crimes, and crimes against humanity cases to the Iraqi Special Tribunal,[35] whether or not a defendant before the Tribunal may bring a challenge concerning the Iraqi Special tribunal before the Iraqi federal courts was not expressly contemplated in either the IST Statute or the TAL. Accordingly, in order to settle the issue the highest court must make a determination; however, since there are two 'highest courts' in the present Iraqi court system (the Appeals Chamber of the Tribunal and the Federal Supreme Court) one court must concede jurisdiction to the other. Which court must concede will ultimately be determined by interpreting the constitutive instruments in light of customary international law and international precedent.

A. Key Provisions of the TAL and IST Statute

Although neither the TAL nor the IST Statute expressly address the issue of challenging the legitimacy of the Iraqi Special Tribunal or the validity of its rulings before an Iraqi federal court, several of their provisions, viewed in the aggregate, seem to indicate that the Appeals Chamber of the Tribunal and the Federal Supreme Court of the Federal Judiciary, were intended to be the final reviewing bodies of their respective court systems. Most notably, Article 30 of the IST Statute states that "[n]o person shall be tried before any other Iraqi court for acts for which he or she has already been tried by the Tribunal" and, conversely, that no person may be tried before the Tribunal if he or she has already received an independent and impartial trial by an Iraqi court.[36] Although Article 30 does not specify whether the prohibition to hear a case that has already been tried applies to entertaining collateral challenges or just to re-trials, it does show that the framers envisioned inter-court respect for judgments and finality of judgments within

[35] Any time a specialized court is established an intent that the court should be the primary court to hear what it was setup for can be assumed.

[36] *Id.* at art. 30.

each court system. Moreover, Article 48(A) of the TAL and Article 29 of the IST Statute, which respectively state "[n]o other court shall have jurisdiction to examine the cases within the competence of the Tribunal, except to the extent provided by its founding statute," and "[t]he Tribunal shall have primacy over all other Iraqi courts with respect to the crimes stipulated in Articles 11 to 13," indicate, when viewed together, that the framers intended for the most serious genocide, war crimes, and crimes against humanity cases (Article 11 to 13 cases) to be tried solely by the Iraqi Special Tribunal.[37] Also clear from a reading of the IST Statute is that administrative issues[38] of the Tribunal are not open for outside interpretation because the IST Statute expressly establishes an Administration Department in Article 9, "responsible for the administration and servicing of the Tribunal,"[39] and, further, in Article 4(c)(ii), states that "the president of the Appeals Chamber shall…overview the administrative and financial aspects of the Tribunal." Finally, the inclusion of the "errors of procedure" in Article 25 of the IST Statute as a basis for Appeals Chamber jurisdiction, supports an interpretation that the framers intended the Appeals Chamber of the Tribunal to be the final reviewing body of *all* issues that are heard within the Tribunal. Thus, when viewed in the aggregate, Article 30 – which precludes a person from being tried before a federal court if already tried by the Tribunal – and Article 25 – which grants the Appeals Chamber jurisdiction over errors of procedure – show an intent by the framers to fashion complete independence for the Tribunal. However, a reading of the IST Statute, alone,

[37] Article 29 of the IST Statute does not preclude Iraqi courts from hearing genocide, war crimes, and crimes against humanity cases, but it does give the Tribunal primacy over such cases. It may be possible that if the Tribunal is overloaded with cases or if Tribunal is not equipped to handle certain cases or defendants, the Iraqi Courts may be better suited to hear such cases. However, Article 29 ensures that the IST will hear all cases within its jurisdiction that it is capable and willing to hear by granting the Tribunal the power to "demand of any other Iraqi court to transfer any case being tried by it involving any crimes stipulated in Articles 11 to 14 to the Tribunal, and such court shall be required to transfer such case." *Id.* at art. 29.

[38] Administrative issues are entirely separate from procedural issues regarding the legitimacy and powers of the Tribunal. *Id.* at art. 9(b)

[39] *Id.*

is not sufficient to make conclusive inferences equating a re-trial with an appeal or collateral challenge in Article 30 and "an error of procedure" with "error of constitutional interpretation" in Article 25. A further probe into customary international law and precedent is required.

B. Customary International Law

As mentioned above, it is fairly clear that the Appeals Chamber of the Tribunal was intended to be the final reviewing body for issues pertaining to genocide, war crimes, and crimes against humanity, what it is slightly less clear is whether constitutional issues, including the issue of the overall legitimacy of the Tribunal, can be resolved with finality by the Tribunal itself. Despite the lack of binding precedent which can be applied to the Iraqi inter-court conflict, guidance from foreign courts that have confronted these issues in the past can help determine what outcome is customary and should be followed by Iraq. Accordingly, the subsequent sections of this memo will (1) compare the Iraqi court systems to other similar courts, (2) examine (non-binding) precedent from previous challenges to the legitimacy of internationalized tribunals, (3) consider the deficiencies that newly formed courts inherently possess, and (4) analyze the constitutional model of the TAL, in order to develop a standard which is in compliance with international norms and customary international law.

1. Other Court Systems

Traditionally, when determining the powers of a court, precedent from similar courts are examined and used as a basis. Unfortunately, such comparisons cannot be neatly made with the Iraqi Special Tribunal because it is a novel court system, different in composition and administration from the other existing international hybrid tribunals and different in purpose from most regional and domestic courts. Thus, a thorough analysis will encompass an examination of all courts that share qualities with the IST, in systems that echo the relationship

between the IST and the Iraqi Federal Judiciary, with the aim of finding applicable norms. By comparing and contrasting other similar court systems to the IST and to each other, inferences may be made as to what are the customary norms regarding appeals and collateral challenges and whether the IST has deviated from these norms. For the purposes of this memo only a brief summary and pertinent provisions of the most relevant or most notable courts will be provided. From an analysis of each respective provision, rules regarding the collateral challenges and the appeals process between special tribunals and federal courts can be constructed.

I. Ad Hoc Tribunals

Ad hoc international tribunals are temporary international courts established for the sole purpose of prosecuting genocide, crimes against humanity, and war crimes.[40] So far only a few such tribunals have existed including the post-World War II military tribunals in Nuremberg and Tokyo, as well as the recent International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR). Ad hoc tribunals are similar to the IST in that that they have jurisdiction over the same crimes, are temporary courts, and have primacy over national courts with concurrent jurisdiction.[41] Ad hoc tribunals are different from the IST in that the ad hoc tribunals are created by treaties or Security Council resolution, and are composed of international judges[42] while the IST is created by domestic law and composed of all Iraqi judges. With regards to the appeals process, both the ICTY and the ICTR state that the

[40] *See* Ad Hoc Tribunals: Nuremberg, Rwanada, Yugoslavia, at http://www.acuns.wlu.ca/programs/YOUTH/YWP_FWJ/ad_hoc_Tribunals/ad_hoc_tribunals.html (Last visited March 21, 2005) [Reproduced in accompanying notebook I at Tab 34]

[41] *See* Statute of the Int'l Criminal Trib. for the Former Yugoslavia, U.N.S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), amended by U.N.S.C. Res. 1166, U.N. SCOR, 53rd Sess., 3878th mtg., U.N. Doc. S/RES/1166 (1998) [hereinafter ICTY Statute] [Reproduced in accompanying notebook I at Tab 9]; *see also* Statute of the Int'l Criminal Trib. for Rwanda, U.N.S.C. Res. 955, U.N. SCOR, 49th Sess., 3453th mtg., at art. 3, U.N Doc. S/RES/955 (1994). [hereinafter ICTR Statute] [Reproduced in accompanying notebook I at Tab 10]

[42] *See* ICTR Statute, supra note 41, art. 11; ICTY Statute, supra note 41, art. 12.

appellate chambers hears appeals regarding error of fact and law,[43] and none of the ad hoc tribunals, like the IST, have provisions allowing for collateral challenges in their governing statutes. Nearly all of the other significant procedural provisions between the ad hoc tribunal statutes and the IST Statue are similar.

II. The International Criminal Court

The International Criminal Court (ICC) was established in 2002, pursuant to the Rome Statute of the International Criminal Court,[44] as the world's first permanent tribunal to prosecute individuals for genocide, crimes against humanity, and war crimes.[45] The Rome Statute is particularly helpful in interpreting the IST Statute because it is one of the most current codifications of customary international law. Further, the ICC is somewhat analogous to the Iraqi Special Tribunal in that they are both war crimes tribunals, established for the specific purpose of prosecuting genocide, crimes against humanity, and war crimes.[46] They differ in the fact that the ICC is a permanent court,[47] it has international judges,[48] and it will not take cases from nations that have the proper means to adjudicate such cases within their own federal court systems.[49] The IST, on the other hand, is temporary, has national judges only,[50] and has primacy over cases that concurrently fall within both Tribunal and federal jurisdiction.[51]

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[43] ICTR Statute, supra note 41, art. 24; ICTY Statute, supra note 41, art. 25. Notably, neither of the two statutes included error of procedure as grounds for appeal.

[44] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF,183/9, art. 126 at 87 (1998). [hereinafter Rome Statute] [Reproduced in accompanying notebook I at Tab 8]

[45] *See* Wikipedia, International Criminal Court, at http://en.wikipedia.org/wiki/International_Criminal_Court (last modified Mar. 13, 2005) [Reproduced in accompanying notebook I at Tab 46]

[46] Rome Statute, supra note 42, art. 5; IST Statute, supra note 8, art. 11, 12, 13.

[47] Rome Statute supra note 44, art. 1.

[48] *Id.* at art. 36(8)(a).

[49] *Id* at art. 17.

Because, pursuant to Article 17, the ICC is not allowed to hear a case for which a national court can, and is willing, to prosecute, the issue of whether a defendant can petition to his/her state's federal courts while before the ICC is, not present.[52] Yet, it is still helpful to employ the Rome Statute and the ICC as a basis for interpretation. Accordingly it is noted, the appeals process in ICC is substantially similar to that of the IST. Article 81(1) of the Rome Statute states that both the defendant and prosecutor may appeal a judgment based on error of fact, law, or procedure, exactly as allowed by the IST.[53] Different from the IST, however, is the notion that in the ICC "[e]ither party may appeal….a decision with respect to jurisdiction or admissibility."[54] Further, the most relevant provision of the Rome Statute to this memo, is Article 19 which states, "[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case…"[55] The fact that these provisions – which expressly state (1) a petition to challenge admissibility and jurisdiction of the ICC can and should be made *to the ICC, itself*, and (2) the ICC is self-determinate on its jurisdiction – are included in the Rome Statute and not included in the IST Statute is significant. The inclusion can mean one of two things, this is (1) evidence of customary international law and the IST also has the ability to determine its own jurisdiction and admissibility, or (2) the writers of the IST Statute did not envision the IST having the power to

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[50] IST Statute, supra note 8, art. 4.

[51] *Id* at 29(b).

[52] Because, presumably, if the ICC has taken the case then the national court did not want to or could not take the case, and therefore would not want to or could not handle an appeal. *See* Rome Statute supra note 44, art. 17.

[53] *Id.* at art. 81(1).

[54] *Id.* at art. 82(1)

[55] *Id* at art. 19.

determine its own jurisdiction. Even if the power to determine issues of its jurisdiction and admissibility is customary international law, the Rome Statute's inclusion of an express provision granting the ICC these powers could be argued as undercutting an argument that the IST has these powers, in light of the absence of a similar provision in the IST Statute.

III. Hybrid Criminal Bodies

Hybrid criminal bodies, existing in East Timor, Kosovo, Sierra Leone, and Cambodia are UN established temporary courts existing to prosecute grave international crimes. They are considered 'hybrid' because the courts have both international and national characteristics. For example, they have both local and international staff and apply a compound of international and national law.[56] Unlike the ad hoc tribunals, the hybrid courts are not uniform and are, rather, tailored to the nations they serve. In this sense, the Iraqi Special Tribunal is more like the hybrid criminal bodies than to any other prior war crimes tribunals.

The Special Court for Sierra Leone ("Special Court") may be the one court which is most similar in nature to the Iraqi Special Tribunal. Like the IST, the Special Court has specific jurisdiction over serious violations of international law, primacy over national courts, and may demand cases to be transferred to the Special Court from national courts.[57] The Special Court also shares the dual-chambered approach with the IST (Trial Chamber and Appeals Chamber).[58] Further, the appellate and review proceedings are nearly identical to that of the IST.[59] A significant difference in the Special Court for Sierra Leone is that it has a post-judicial

[56] *See* Hybrids Courts, Project on International Courts and Tribunals, at http://www.pict-pcti.org/courts/hybrid.html [Reproduced in accompanying notebook I at Tab 37]

[57] Statute of the Special Court for Sierra Leone, art. 8 [Reproduced in accompanying notebook I at Tab 42]

[58] *Id*. at art. 11.

[59] *Id*. at art. 21.

mechanism which allows pardons or commutations of sentences.[60] The inclusion of such a provision, allowing for an additionl review, weakens defendants' claims to seek collateral challenges or appeals in Sierra Leone Courts. Defendants may point to the Special Court's ability to correct issues post-judicially in arguing if the IST framers meant to preclude appeals to federal courts they would have included such a provision in the IST as a guideline for post-judicial measures.

2. Prior Challenges to the Legitimacy of International Tribunals

The legitimacy of specialized tribunals has been challenged throughout history from the first tribunal in Nuremberg, Germany to the most recent military tribunals in Guántanamo Bay, Cuba. The validity of such tribunals has been subject to attack by many defendants seeking to escape prosecution by challenging the legitimacy of the existence of the tribunals and their power to issue binding judgments.

I. Ad Hoc Tribunals – *Tadic and Milosevic*

A common argument amongst ad hoc tribunal defendants and critics is that their creation by the UN Security Council was *ultra vires*, and therefore, in violation of Article 14(1) of the ICCPR.[61] According to Article 14(1) "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal *established by law*."[62] Critics of the ad hoc tribunals have claimed that the tribunals have not been "established by law" because they were

[60] "If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Court accordingly. There shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law." *Id*. at art. 24.

[61] *See* Joshua Bevitz, *Flawed Foreign Policy: Hypocritical U.S. Attitudes Toward International Criminal Forums*, 53 HASTINGS L.J. 931 (2002). [hereinafter Flawed Policy] [Reproduced in accompanying notebook at Tab 30].

[62] ICCPR, supra note 19, art. 14(1)

not created by a legislative body.[63] This argument was put forth by Dusko Tadic, the first ICTY defendant on trial for a range of war crimes.[64] However, the argument was ultimately rejected by the Appeals Chamber of the ICTY when it decided that Article 14(1) only applied to national courts because there is no international legislature that can promulgate binding laws on individuals.[65] Likewise, the constitutionality of the ICTY was challenged by Slovodan Milosovic[66] on the basis that it had no authority to rule "because the Security Council lacked the power to establish it."[67] This argument was ultimately shot down, as the Trial Chamber held, "the establishment of the International Tribunal with power to prosecute persons responsible for serious violations of international humanitarian law in the former Yugoslavia, and with the obligation to guarantee fully the rights of the accused, is, in the context of the conflict in the country at that time, pre-eminently a measure to restore international peace and security."[68] Milosevic made an additional challenge to the legitimacy of the ICTY by attempting bring the case before the District Court of The Hague (a Dutch federal court), but was ultimately denied.[69]

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[63] *See* Flawed Policy, supra note 61, at 941.

[64] *See Prosecutor v. Dusko Tadic*, "Decision on the application for leave to appeal" (Int'l Crim. Trib. For Former Yugoslavia Appeals Chamber Oct. 25 2000), available at http://www.un.org/icty/tadic/appeal/decision-e/01025AL315166.htm [Reproduced in accompanying notebook I at Tab 24]

[65] *See* Joshua M. Koran, *An Analysis of the Jurisdiction of the International Criminal Tribunal for War Crimes in the Former Yugoslavia*, 5 ILSA J. INT'L & COMP. L. 43, 49, n.29 (1998[Reproduced in accompanying notebook at Tab 31]

[66] *See Prosecutor v. Slobodan Milosevic*, Case No. IT-99-37-PT, Decision on Preliminary Motions (Int'l Crim. Trib. For Former Yugoslavia Trial Chamber Nov. 8, 2001), available at http://www.un.org/icty/milutinovic/trialc/decision-e/1110873516829.htm [Reproduced in accompanying notebook I at Tab 25]

[67] *Id.*

[68] *Id.*

[69] *See* Dutch State Attorney's Brief, handed to the District Court of the Hague with respect to the Milosevic case, The Implications of Europe Member States of the Ratification of the Rome Statute of the International Criminal Court, Consult/ICC (2001) 45, available at http://www.legal.coe.int/criminal/icc/docs/Consult_ICC(2001)/ConsultICC(2001)45E.pdf [hereinafter Dutch Brief]

In rejecting judicial review of his arrest, transfer and surrender to the ICTY, the Dutch court held that it had transferred its jurisdiction to the ICTY on the basis of United Nations regulations,[70] and was, therefore, not competent to hear an appeal by Milosevic.[71] The court also reaffirmed the ICTY's competence to rule on its own jurisdiction, based on the *Tadic* case.[72] Finally, the Dutch court rejected Milosevic's claim that the ICTY is not an "impartial tribunal" guaranteed by the European Convention on Human Rights, by stating that European Court of Human Rights in *Mladen Naletilic v. Croatia*[73] had already decided the issue and declared that ICTY offered all necessary guarantees for a an independent and impartial trial.[74] Furthermore, the issue of access to Dutch courts by ICTY defendants was debated in the Dutch Parliament. The Parliament focused on rights granted by the Dutch Constitution regarding whether access to their courts should be available, and came to the conclusion that persons in The Netherlands must have access to a court, but not necessarily to a Dutch court.[75] Eventually, the same approach was taken with regards to the interaction between the International Criminal Court and Dutch courts. The Dutch Parliament has stated that the Netherlands has an obligation to transfer its jurisdiction

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[Reproduced in accompanying notebook I at Tab 36]; *see also* Konstantinos D. Magliveras, *The Interplay Between the Transfer of Slobodan Milosevic to the ICTY and Yugoslav Constitutional Law*, 13 EUR. J. INT'L L. 661, 676 (2002). [hereinafter Interplay] [Reproduced in accompanying notebook I at Tab 32]

[70] "The relationship between the Netherlands as host country and the Tribunal is laid down in the Headquarters Agreement dated July 29, 1994 between the Netherlands and the United Nations (Bulletin of Treaties, no. 189). This Agreement is a treaty…The State points out in particular article XX of the Headquarters Agreement, in which it is explicitly stipulated that the Netherlands, as host country, insofar as it involves criminal prosecution, does not exercise its jurisdiction over suspects of convicted persons that fin themselves in its territory with a view to or in connection with a request or an order of the Tribunal…" Dutch Brief, supra note 69, at 7.

[71] *Id.* at 13.

[72] *See* Interplay, supra note 69, at 670.

[73] European Court of Human Rights, decision of 4 May 2000, *Mladen Naletilic v. Croatia*; application number 51891/99, paragraph 1.b. The case concerned the surrender of the applicant to the International Criminal Tribunal for the former Yugoslavia.

[74] *See* Interplay, supra note 69, at 670.

[75] *See* Dutch Brief, supra note 69, at 7

to the ICC for serious crimes of international concern, and that there are no constitutional obstacles to such a transfer of jurisdiction.[76] Thus, if the precedent is applied to Iraq, a determination of whether the transfer of jurisdiction from the Iraqi federal courts to the IST was legitimate will be based on Iraq's constitution (the TAL) and international obligations. Since the TAL expressly states jurisdiction for war crimes, genocide, and crimes against humanity should be transferred from the Iraqi Federal Judiciary to the IST, the competence of the IST to hear such cases is established. As a result, the Iraqi courts do not have the competence to hear IST cases except as specified by the IST statute. This precedent is confirmed by the Dutch refusal to hear Milosevic's appeal from the ICTY.

II. World War II Tribunals

Additionally, the federal and non-federal interaction of the Iraqi Federal Judiciary and the IST can be analyzed by examining the U.S. Supreme Court in relation to U.S. military tribunals. For example, in *Yamashita*,[77] a Japanese military officer convicted of war crimes by a United States military commission petitioned the Supreme Court for leave to file a writ of *habeas corpus*. In denying General Yamashita's appeal, the Supreme Court held that a military tribunal (which does not provide trial by jury and does not apply exactly the same constitutional standards as an Article III court)[78] was "an appropriate tribunal for the trial and punishment of offenses against the law of war."[79] In *Johnson v. Eisentrager*,[80] German citizens attempted to obtain *habeas corpus* review of their convictions by a military commission for violating the laws

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[76] *Id.*

[77] *In re Yamasihita*, 327 U.S. 1 (1946). *See also Ex parte Quirin*, 317 U.S. 1 (1942).

[78] Article III courts are Congressionally established federal courts, which are inferior to the U.S. Supreme Court.

[79] *Id* at 7.

[80] *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

of war. The Supreme Court rejected the petitions and held that there was no basis "to invest these enemy aliens, resident, captured and imprisoned abroad, with standing to demand access to our courts."[81]

III. Guantanamo Bay Cases

In light of the new international and domestic policy regarding enemy combatants, the *Eisntrager* holding was revisited in June of 2004, in *Rasul v. Bush*.[82] The Supreme Court in *Rasul* expanded the decision in *Eisentrager* to hold that alien detainees who are being held by military tribunals within U.S. territory, may petition the U.S. Supreme Court, under certain circumstances, to rule on the legality of such detentions.[83] In *Rasul*, two British and two Australian citizens filed for *habeas corpus* relief, requesting their release from unlawful custody from the U.S. Naval Based at Guantanamo Bay, Cuba. The U.S. Supreme Court granted certiorari and held that defendants have a right to challenge the basis for their detention in a U.S. district court. The holding is, in large part, based on the fact that the Guantanamo Bay Naval Base, unlike the German prison in *Eisentrager*, falls within the territorial jurisdiction of the United States.[84] Therefore, since the IST and Iraqi prisons fall within territorial jurisdiction of the Iraq, the defendant may argue that, under *Rasul*, they should be allowed to petition to Iraqi federal courts. This contention, however, does not hold up against a complete reading of the *Rasul* holding. The *Rasul* Court qualified the granting of the *habeas* petition by pointing out that

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[81] *Id. at 777*.

[82] *Rasul*, supra note 16.

[83] *See* Captain Christopher M. Schumann, *Bring It On: The Supreme Court Opens the Floodgates with Rasul v. Bush*, 55 A.F.L. REV. 349 (2004). [Reproduced in accompanying notebook I at Tab 29]

[84] The Guantanamo Bay Naval Base falls within the territorial jurisdiction of the United States based on a 1903 Lease Agreement between the United States and Cuba. *See Id.* at 359.

detainees were not nationals of countries at war with the United States, had not engaged in or plotted acts of aggression against the United States, and, most importantly, *had not been afforded access to a military tribunal*.[85] Defendants before the IST do not meet the requirements of this standard because they will already have been afforded access to a tribunal (the IST), and therefore will not have been unlawfully deprived of their liberty.

A second case, *Hamdi v. Rumsfeld,*[86] held that U.S. citizens may challenge their detentions, based on enemy combatant status as classified by the government, in federal courts.[87] Under the *Hamdi* ruling, an IST defendant may attempt to argue that, as a citizen of Iraq, the defendant should be able to petition an Iraqi federal court to challenge his detention. However, *Hamdi*, as well as *Rasul*, apply only to *habeas* petitions relating to the deprivation of liberties; the major issue in *Hamdi* was the right for a citizen to be heard by a competent court regarding his detention. None of the defendants in *Hamdi* or *Rasul* were afforded the right to be heard by a "neutral decision maker"[88] before they petitioned to the U.S. Supreme Court. IST defendants, on the other hand, will have already faced neutral decision makers regarding their detentions prior to any petition to Iraqi federal courts, and therefore *Hamdi* and *Rasul* do not apply to them. In sum, precedent from U.S. Supreme Court cases allows federal courts of a State to hear petitions from detainees only if they fall within the jurisdiction of the State and have not already been brought before a competent tribunal. The Iraqi federal courts, therefore, cannot hear petitions from IST defendants because (1) IST defendants have already been brought before a competent

[85] *Rasul*, supra note 16, at 558.

[86] *Hamdi*, supra note 17, was decided by the U.S. Supreme Court prior to *Rasul.*

[87] Enemy combatants are persons who were part of or supporting forces hostile to the United States or coalition partners in Afghanistan, and had actually engaged in armed conflict against the U.S. People who are classified as enemy combatants may be detained indefinitely and without a hearing. *Id* at 783.

[88] *Hamdi*, supra note 17, at 2648.

tribunal (as established by the Dutch court rulings) and (2) jurisdiction over international crimes has been transferred from the Iraqi federal courts to the IST.

IV. Domestically Dominated Tribunals

Finally, maybe the most analogous case to the issue at hand is *Hirota v. MacAruthr*, in which the U.S. Supreme Court held that it has no power to review a judgment of a military tribunal set up as an agent of the Allied Powers because the tribunal was "not a tribunal of the United States"[89] even though the tribunal was, essentially, created by Americans.[90] To understand the relevance of the *Hirota* case, it is important to first recognize the similarities between the International Military Tribunal for the Far East[91] ("Far East Tribunal") and the IST. First, similar to the TAL's establishment of the IST for prosecution of war crimes, multi-lateral treaties, the Caroid Declaratoin, The Potsdam Declaration, and the Far Eastern Commission, give the power to the "Supreme Commander for the Allied Powers…to appoint special international military courts to try war criminals."[92] Second, as the Supreme Court recognized, though the military tribunal was "dominated by [national] influence, it is nonetheless international in character" very much similar to what the IST is being characterized as. With this in mind, the Supreme Court believed that the military tribunal was "solely an instrument of political power" which "took its law from its creator" and therefore was not sitting as judicial tribunal.[93] This

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[89] *Hirota v. MacArthur*, 38 U.S. 197 (1948) (per curiam).

[90] The International Military Tribunal for the Far East was established by Commanding General of the United States Army Douglas MacArthur, and tried by other members of the U.S. military. *Id.*

[91] Charter of the International Military Tribunal for the Far East April 26, 1946, Art. 2, in Institute for World Order, Crisis in World Order, War Criminals, War Victims 26-28 (1971). [hereinafter Tokyo Charter] [Reproduced in accompanying notebook I at Tab 4]

[92] *Hirota*, supra note 89, at 207.

[93] *Id.* at 199.

independence from the judiciary was the basis of the Supreme Court's decision not to hear an appeal on behalf of the defendants. Although the International Military Tribunal for the Far East is not wholly similar to the IST in that the Far East Tribunal was composed of international judges,[94] applied international law,[95] and had significantly different rules of procedure,[96] the IST is still analogous to the Far East Tribunal, with respect to the *Hirota* decision, because it is independent from the federal judiciary and does take its law from its creator (the IST Statute). Therefore, the Iraqi federal courts (which are analogous to U.S. federal courts) should follow the *Hirota* precedent[97] and refrain from hearing an appeal stemming from an IST case despite Iraq's dominance of the IST, in order to maintain the independence of both courts.[98]

3. Inherent Powers Doctrine

Another reason why federal Iraqi courts should not entertain challenges to the IST is because doing so would discourage respect for the judgments of the IST and dilute the finality of all decisions.[99] The international inherent powers doctrine, developed by ICTY President Judge Antonio Cassese, is a judicial gap-filling mechanism which allows international judges to compensate for the deficiencies which are inherent in newly created constitutive instruments.

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[94] Tokyo Charter, supra note 91, at art. 3.

[95] *See Id.*

[96] *Id.*

[97] This separation between military courts and federal courts was reaffirmed recently when President Bush stated that inviduals convcted in a military tribunal "shall not be privieleged to seek any rememdy or maintaitn any proceeding, directly or indirectly, or to have any such remedy or proceeding sough on the invididua's behalf, in…any court of the United States… ." Military Order – Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, *66 Fed. Reg. 57833* (Nov. 16, 2001). [Reproduced in accompanying notebook I at Tab 40]

[98] The *Hriota* argument is based on the checks-and-balances engraved in the U.S. Constitution. Although it is not completely clear, it seems as though the TAL has been modeled on a checks-and-balances system, and therefore the analogy to the U.S. Constitution can be made.

[99] Richard Nobles and David Schiff, *The Right to Appeal and Workable Systems of Justice*, 66 MODERN LAW REVIEW 676 (2002). [Reproduced in accompanying notebook I at Tab 33]

The inherent powers doctrine is based on the common law doctrine of "the inherent jurisdiction of the Court," whereby superior courts of law are deemed to possess all those powers necessary to maintain their authority, to control and regulate their own proceedings and to prevent their proceedings from being abused or obstructed;[100] and thus, will apply to the IST even though the Tribunal is not technically an international court.

Because of the complexities involved in establishing a new court, constitutive instruments will often fail to grant courts powers which may be necessary for the administration of justice but were unforeseen at the time of drafting. The inherent powers doctrine allows for these powers to be retained without needing new legislation or precedent. To prevent abuse of such a doctrine the powers available have been limited to "the power to establish their main jurisdiction (the so-called *competence de la competence*), the power to interpret or review their own judgments, to correct material errors in their judgments, to make judicial findings necessary for the exercise of their primary jurisdiction, to issue interim measures, to issue orders for the cessation or discontinuance of a wrongful act or omission, to evaluate the credibility of a witness, to sanction disorderly conduct in proceedings or pronounce and act upon contempt of the tribunal, to impose costs in the case of frivolous, vexatious or repeated complaints, to regulate their own procedure, [and] to ascertain *motu proprio* whether the conduct of the State could be held in breach of certain obligations different from those alleged in the original complaint… ."[101] The first instance in which the doctrine was acknowledged by a court was in the *Tadic* case,[102] in which the Trial Chamber II of the ICTY declared that the tribunal possessed all powers which

[100] *See* JACOB, 'THE INHERENT JURISDICTION OF THE COURT', IN CURRENT LEGAL PROBLEMS, 1970, p. 23 ff.; JACOB., THE FABRIC OF ENGLISH CIVIL JUSTICE, LONDON, 1987 pp. 60-62. See also HALSBURY'S LAWS OF ENGLAND, Vol. 37, pp. 22-23, para. 14. [Excerpted in part in accompanying notebook I at Tab 27]

[101] *See* Vohrah, supra note 18, at 363

[102] *Id* at 368

could be implied by its constitutive instrument, and used one such power to issue a subpoena upon a state entity.[103] Such a doctrine is necessary for newly formed courts to ensure they have the tools to administrate justice. This is true especially for courts that were created *ultra vires*, by a temporary, weak, or unstable legislature (such as the Coalitional Provisional Authority), or for courts that have very little precedent. Thus, in order for the proper administration of justice in Iraq, the Iraqi Special Tribunal must have the inherent power to determine its own competence and legitimacy, as well as ensure that a decision issued by its Appeal Chamber is final and binding on a defendant.

4. Constitutional Model

A final factor in determining whether the Federal Judiciary should be allowed to hear issues raised before the IST is whether the Iraqi Federal Supreme Court was meant to be the only court in Iraq that determines constitutional issues. As written in Chapter Six of the TAL, it is unclear whether the Iraqi Federal Supreme Court is a specialized Constitutional Court, based on the Austrian Constitutional Review Model,[104] or an ordinary Supreme Court, based on the American Judicial Review Model.[105] The difference is significant because specialized Constitutional Courts, such as those existing in Germany, Spain, Italy, South Africa, Egypt, and Thailand, are usually the sole judicial bodies in their respective nations, which may answer constitutional questions, whereas countries that use the American Judicial Review Model allow lower courts to answer constitutional questions as well. The old Iraqi system was based on the

[103] The Appeals Chamber acknowledged this right to inherent powers, but rejected this particular power because the subpoena was issued by threat of penalty. *Id.*

[104] *See* The "Austrian" (Continental - Constitutional Review) Model, concourts.com, available at http://www.concourts.net/tab/introen.html [Reproduced in accompanying notebook I at Tab 43]

[105] *See* The "American" - Judicial Review Model, concourts.com, available at http://www.concourts.net/tab/introen.html [Reproduced in accompanying notebook I at Tab 44]

Austrian Model and had a Constitutional Court called the Court of Cassation, which was to be the sole determinant of constitutional issues. Under the new Iraqi system, the Court of Cassation is still an available court pursuant to the new Iraqi Criminal Code,[106] but, in addition, the TAL has created the Iraqi Federal Supreme Court which is, by law, a higher court than the Court of Cassation.[107] According to Professor Nathan Brown,[108] "the Supreme Court is really more of a constitutional court (a specialized body with exclusive jurisdiction over constitutional cases) than a more general supreme court (which generally has appellate functions). While there is a provision for appellate functions, [Article 25] mentions a Court of Cassation; such a body is normally the highest appellate court for most cases…."[109] Further, "[Article 25] mentions a Court of Cassation that seems to be separate from the Supreme Court but that would presumably take the latter body's place as the supreme court of appeals."[110] Thus, the only thing clear is that the writers of the TAL have left open the issue regarding whether the Iraqi Federal Supreme Court is a Constitutional Court or an ordinary Supreme Court.[111] If it turns out that the Federal Supreme Court is, as Professor Brown suggests, the sole determinant of constitutional issues in

[106] *See* Iraq Judiciary, the United Nations Development Programme on Governance on in the Arab Region, available at http://www.pogar.org/countries/iraq/judiciary-pw.html [Reproduced in accompanying notebook I at Tab 38]

[107] TAL, supra note 1, art. 5.

[108] Nathan Brown is a professor of political Science and international affairs at George Washington University.

[109] Transitional Administrative Law, Commentary and Analysis at http://www.geocities.com/nathanbrown1/interimiraqiconstitution.html [Reproduced in accompanying notebook I at Tab 45]

[110] *Id.*

[111] It should be noted that Article 44 of the TAL, which states "[s]hould the Federal Supreme Court rule that a challenged law, regulation, directive, or measure is inconsistent with [the TAL], it shall be deemed null and void," does not imply that the Federal Supreme Court is a Constitutional Court because Supreme Courts also the power to void laws that are inconsistent with constitutions. *See* TAL, supra note 1, art. 44(c)

the Federal Judiciary, less credibility can be afforded to the argument that it cannot hear a challenge regarding IST procedural and constitutional issues.

C. The Constructed Rule

In summary, courts in the Federal Judiciary should not accept petitions for review from defendants that have already been brought before the Iraqi Special Tribunal. This conclusion is justified by the rules stated above. The IST Statute states that the "[t]ribunal shall have primacy over all other Iraqi courts."[112] The TAL echoes this statement by directing that "[n]o person shall be tried before any other Iraqi court for acts for which he or she has already been tried by the Tribunal."[113] Customary international law indicates that the non-federal judicial bodies can legitimately issue binding judgments on citizens of a state. Further support is found in precedent (non-binding) from (1) *Hirota*, which holds that even international tribunals dominated by nationals may still retain their independence from a federal judiciary and (2) *Rasul*, which declares that the right to petition to a court is exhausted once a person is granted a trial. Finally, the inherent powers doctrine of international courts provides deficient war crimes tribunals with judicial tools missing from their constitutive instruments; including the ability to determine their own competencies. Thus, the Iraqi Special Tribunal is a legitimate court that is competent to issue final and binding judgments in criminal proceedings.

III. RIGHT TO APPEAL TO THE FEDERAL SUPREME COURT OF IRAQ

The right to appeal an adverse judgment is a standard feature of most criminal court systems in the world, and is considered by most as a fundamental component of the right to a fair

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[112] IST Statute, supra note 8, art. 29(b).

[113] *Id.* at art. 30

trial. However, the denial of an appeal or collateral challenge from the Iraqi Special Tribunal to the Iraqi Federal Judicial Authority is not a violation of international human rights norms.

The right to appeal a conviction is present in many of the world's constitutions, is codified in several major human rights conventions including the International Covenant on Civil and Political Rights,[114] and it is recognized in all of the major international and regional instruments, including, Article 24 of the Statute of the ICTY; Article 23 of the Statute of the ICTR; Article 81(b) of the Rome Statute of the International Criminal Court; Section 14 of the UNTAET Regulations governing the Special Panels for East Timor and; and Article 20 of the Statute of the Special Court for Sierra Leone. This widespread acceptance[115] of the right to appeal a conviction has led many human rights advocates[116] to conclude that it constitutes customary international law. This right, however, is not unbounded. A defendant's right to appeal a conviction must be weighed against a nation's interest in justice, a court's interest in having judgments respected, and a collective interest in finality. Thus, the right to an appeal can and should be limited as a state deems necessary.[117] Accordingly, the denial of the right to appeal to a nation's highest court (or to any national court) is not a violation of international human rights norms when that denial is in the interest of justice.

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[114] *See* ICCPR, supra note 19.

[115] The ICCPR currently has 67 signatories, and 154 parties. To see an up to date list of countries that have ratified the ICCPR visit http://www.ohchr.org/english/countries/ratification/4.htm [Reproduced in accompanying notebook I at Tab 35]

[116] *See* Special Court for Sierra Leone: denial of right to appeal and prohibition of amnesties for crimes under international law, Amnesty International, available at http://web.amnesty.org/library/index/engafr510122003 [Reproduced in accompanying notebook I at Tab 42]

[117] A person does not have a right to a *de novo* review. *H.T.B. v. Canada,* Optional Protocol *(534/93).* [Reproduced in accompanying notebook I at 20] No right exists to appeal before a judgment has been rendered. *Lumley v. Jamaica,* Optional Protocol *(662/95).* [Reproduced in accompanying notebook I at Tab 23]

A. Right to Appeal Under the International Bill of Rights

The ICCPR was drafted as a result of intense lobbying by the UN General Assembly to have an instrument that would spell out the rights of man as recognized after World War II. [118] The Covenant was a means to anchor the rights that had just been agreed upon in the UN Declaration of Human Rights,[119] and is currently considered a codification of customary international law. The ICCPR places "legal duties on the contracting parties to bring their laws and practices into accord with the accepted international obligations and not to introduce new laws or practices which would be at variance with such obligations."[120] In other words, signatories to the ICCPR – including Iraq, which signed the ICCPR on February 18, 1969 and ratified it on January 25, 1971[121] with no reservations[122] – are bound by the rights and obligations created by the Covenant.[123]

Of primary importance to the case at hand is Article 14(5) of the ICCPR, which states that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."[124] This provision, binding on Iraq, ensures that its citizens have the right to appeal adverse judgments to 'a higher tribunal.' It should be noted,

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[118] *SEE* VRATISLAV PECHOTA, THE DEVELOPMENT OF THE COVENANT ON CIVIL AND POLITICAL RIGHTS, IN THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 31 (Louis Henkin ed., 1981). [hereinafter Pechota] [Reproduced in accompanying notebook I at Tab 28]

[119] *Id* at 32.

[120] *Id* at 35

[121] Ratification status of ICCPR, Office of the High Commission on Human Rights, available at http://www.ohchr.org/english/countries/ratification/4.htm [Reproduced in accompanying notebook I at Tab 35]

[122] Reservations for the ICCPR, Office of the High Commission on Human Rights , available at http://www.ohchr.org/english/countries/ratification/4_1.htm [hereinafter Reservations] [Reproduced in accompanying notebook I at Tab 41]

[123] *See* Pechota, supra note 118, at 33

[124] ICCPR, supra note 19, art. 14(5)

quite significantly, that the writers of the ICCPR carefully chose the words 'a higher' tribunal as opposed to 'the highest' or even 'a higher federal' tribunal. This distinction illustrates that the right to an appeal which was agreed upon in the Covenant is not unbounded, and *does not require a state to grant more than one appeal, or an appeal to a specific higher court.* According to the text of the Article, a singular review by *any* higher court will fulfill a state's obligation. This interpretation of Article 14(5) is supported by Luxembourg's declaration[125] regarding Article 14(5):

> *The Government of Luxembourg declares that it is implementing article 14, paragraph 5, since that paragraph does not conflict with the relevant Luxembourg legal statutes, which provide that, following an acquittal or a conviction by a court of first instance, a higher tribunal may deliver a sentence, confirm the sentence passed or impose a harsher penalty for the same crime. However, the tribunal's decision does not give the person declared guilty on appeal the right to appeal that conviction to a higher appellate jurisdiction.*[126]

In other words, Luxembourg has declared that it believes the ICCPR mirrors its judicial statutes, which state that a person does not have the right to appeal a conviction that has already been reviewed by a higher tribunal, and accepted Article 14(5)'s obligation based on that interpretation. Finally, maybe the most convincing evidence is that the UN Human Rights Committee in *Henry v. Jamaica* concluded "the Covenant does not require States to provide for several instances of appeal."[127] Thus, although Iraq is bound by every provision of the ICCPR, including Article 14(5), even the broadest of interpretation of the Article will lead to the conclusion that it is under no obligation to grant more than one appeal or an appeal to a specific

[125] Luxembourg was the only nation to interpret Article 14(5) in its ratification.

[126] *Id.*

[127] *Henry v. Jamaica*, Communication No. 230/l987, U.N. Doc. CCPR/C/43/D/230/l987 (1991). [Reproduced in accompanying notebook I at Tab 18]

higher court. More distinctly, a correct reading of the ICCPR holds that an appeal to the Appeals Chamber of the Iraqi Special Tribunal satisfies Iraq's obligations under 14(5) of the ICCPR.

B. Right to Appeal Under Customary International Law

Based on a survey of state constitutions, judicial codes, and state practice, the right to appeal to a criminal conviction or sentence to a nation's highest court or other specific court, is not customary international law. As noted above, the ICCPR, as to which 154 nations are a party,[128] impliedly states that obligations to grant a right to appeal a conviction is limited, specifically, to one appeal to *any* higher court or tribunal. Any greater appeal is subject to the state's discretion. This assertion is supported by examining both the American Convention on Human Rights[129] and the European Convention on Human Rights,[130] which qualifiedly declare the right to appeal is to '*a* higher court'[131] and '*a* higher tribunal'[132] respectively. Further, the European Convention on Human Rights acknowledges that states need not apply the right if the defendant was tried in the first instance by the nation's highest court or when an acquittal is overturned.[133] Finally, a complimentary document to the American Convention on Human

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[128] *Id.*

[129] American Convention on Human Rights: "Pact of San José," July 18, 1978, art. 4, 1144 U.N.T.S. 144 [hereinafter American Convention on Human Rights] [Reproduced in accompanying notebook I at Tab 2]; "During the proceedings, every person is entitled, with full equality…right to appeal the judgment to a higher court." *Id.* at art. 8(h).

[130] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 64, 213 U.N.T.S. 221, 252 (entered into force Sept. 3, 1953) [hereinafter European Convention on Human Rights] [Reproduced in accompanying notebook I at 5]; "(1) Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. (2) This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal." *Id.* at Protocol 7, Article 2.

[131] American Convention on Human Rights, supra note 129, art. 8(h).

[132] European Convention on Human Rights, supra note 130, Protocol 7 Art. 2

[133] *Id.*

Rights, the American Declaration of the Rights and Duties of Man,[134] reiterates in Article XVIII that the right to appeal is minimal by stating that the right entails only a *simple and brief review* of the judgment.[135]

Interestingly, there may even be more support for the contention that there is no customarily accepted international obligation for a state to grant any appeal *at all*, than for the opposite contention which is the subject of this memo. For example, fifteen of the signatories to the ICCPR including Austria,[136] Belgium,[137] Denmark, Norway, Korea, Netherlands,[138] Switzerland,[139] Ireland, Germany,[140] France,[141] Italy, Nicaragua,[142] Luxembourg,[143] Trinidad

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[134] *See* American Declaration of the Rights and Duties of Man, art. 1, O.A.S. Off. Rec. OEA/Ser. 11.23/Doc21.rev. 6 (1948) [Reproduced in accompanying notebook I at Tab 3]

[135] "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a *simple, brief procedure* whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." *Id* at art. XVIII.

[136] "Article 14 of the Covenant will be applied provided that …paragraph 5 is not in conflict with legal regulations which stipulate that after an acquittal or a lighter sentence passed by a court of the first instance, a higher tribunal may pronounce conviction or a heavier sentence for the same offense, while they exclude the convicted person's right to have such conviction or heavier sentence reviewed by a still higher tribunal." Reservations, supra note 122.

[137] "Paragraph 5 of the article shall not apply to persons who, under Belgian law, are convicted and sentenced at second instance following an appeal against their acquittal of first instance or who, under Belgian law, are brought directly before a higher tribunal such as the Court of Cassation, the Appeals Court of the Assize Court." *Id.*

[138] "The Kingdom of the Netherlands reserves the statutory power of the Supreme Court of the Netherlands to have sole jurisdiction to try certain categories of persons charged with serious offences committed in the discharge of a public office." *Id.*

[139] "The reservation applies to the federal laws on the organization of criminal justice, which provide for an exception to the right of anyone convicted of a crime to have his conviction and sentence reviewed by a higher tribunal, where the person concerned is tried in the first instance by the highest tribunal." *Id.*

[140] "Article 14 (5) of the Covenant shall be applied in such manner that:
(a) A further appeal does not have to be instituted in all cases solely on the grounds the accused person-having been acquitted by the lower court-was convicted for the first time in the proceedings concerned by the appellate court.
(b) In the case of criminal offences of minor gravity the review by a higher tribunal of a decision not imposing imprisonment does not have to be admitted in all cases." *Id.*

[141] "The Government of the Republic interprets article 14, paragraph 5, as stating a general principle to which the law may make limited exceptions, for example, in the case of certain offences subject to the initial and final adjudication of a police court and of criminal offences. However, an appeal against a final decision may be made to the Court of Cassation which rules on the legality of the decision concerned." *Id.*.

and Tobago, and Poland, included reservations[144] upon signing the Covenant, stating that they do not agree to be bound by Article 14(5). Such an extensive dissent may indicate that despite the ICCPR's acceptance as customary international law as a whole, Article 14(5) and the right to appeal is not as widely accepted and, thus, may not be customary international law. Most of the countries that included reservations did so because certain cases within their respective court systems are heard at first instance by their highest courts and if an appeal were allowed the convicted would be appealing to lower courts. Others have made more firm limits to right. The most telling reservation showing that an international right to appeal may not exist is Denmark's outright rejection of the right to appeal. In its reservation, Denmark states that "[a]rticle 14, paragraphs 5 and 7, shall not be binding on Denmark. The Danish Administration of Justice Act contains detailed provisions regulating the matters dealt with in these two paragraphs…Danish legislation is less restrictive than the Covenant (e.g. a verdict returned by a jury on the question of guilt cannot be reviewed by a higher tribunal)…"[145]

In addition to the individual dissensions, many international human rights instruments reveal a collective discord regarding the right to appeal to a higher tribunal. Several human rights instruments including the Charter of Civil Society,[146] the African Charter on Human and

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[142] Nicaragua's reservation is based not on its laws but rather its international relations. *Id.*

[143] "The Government of Luxembourg further declares that article 14, paragraph 5, shall not apply to persons who, under Luxembourg law, are remanded directly to a higher court." *Id.*

[144] 'Reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(1)(d) U.N. Doc. A/Conf.39/27, 1155 U.N.T.S. 321, 340 (1980). [Reproduced in accompanying notebook I at Tab 15]

[145] Reservations, supra note 122.

[146] Charter of Civil Society, available ate http://www.caricom.org/CHARTER.html#Equality%20before%20the%20Law

Peoples' Rights,[147] and surprisingly even the Universal Declaration of Human Rights, do not mention the right to appeal *at all*.

Thus, with so many countries not willing to accept the grounded obligation it is suspect whether *any* right to appeal actually exists as customary international law. Even so, whether or not the right to appeal is indeed customary international law, does not affect the outcome of a defendant's request to appeal from the IST to another court or tribunal. Because the IST already has a reviewing body in place, which *must* hear any appeal based on errors of law, fact or, procedure,[148] Iraq is in compliance with Article 14(5) of the ICCPR and the proposed customary rule, and therefore whether or not the rule truly is customary international law is not significant. The uncertainty regarding the rule does, however, weaken any claim by a defendant that he/she has the right to appeal to a court of their choice.

Finally, a third reason that denying a defendant from appealing to the Federal Judiciary from the IST is not a violation of human rights is based on a structural argument. There is no indication, in either the TAL or IST statute, that the Federal Judiciary is, in fact, a higher court that the IST. The current setup of Iraq's judicial system makes the IST and TAL parallel and concurrent court systems, in which neither is technically 'higher'. If anything, the IST would be the 'higher' of the two courts because it has express primacy over the federal courts regarding everything within its jurisdiction. Thus, a defendant could not correctly argue that he/she is being denied the right to appeal to a higher tribunal upon a rejection by a federal court to hear the case, because federal courts are not really 'higher' in relation to the IST.

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[147] African Charter on Human and Peoples' Rights, opened for signature June 27, 1981, 21 I.L.M. 9, entered into force Oct. 21, 1986, available at http://www1.umn.edu/humanrts/instree/z1afchar.htm [Reproduced in accompanying notebook I at Tab 1]

[148] *See* IST Statue, supra note 8, Art. 25.

C. Right to a Collateral Challenge

There is no international right to a collateral challenge. The inability to petition to an Iraqi federal court by an IST defendant before a judgment is issued, therefore, is not a violation of international human rights norms. The minimum international standards for a trial do not include the right for a defendant to choose the particular court he is to be tried in. Article 11 of the Universal Declaration of Human Rights merely states "[e]veryone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defense."[149] Likewise, Article 14(1) of the ICCPR states, "[i]n 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."[150] Neither instrument even slightly implies that collateral challenges must be available to defendants. Furthermore, the District Court of the Hague's rejection of Milosevic's collateral challenge (discussed above) from the ICTY to the Dutch court, and the international approval of the decision, indicates that customary international law does not include collateral challenges as a human right.

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[149] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. pt. 1, art. 11 at 71, U.N. Doc. A/810 (1948) [Reproduced in accompanying notebook I bn at Tab 14]

[150] ICCPR, supra note 19, art. 14(1)

III. CONCLUSION

Based on the TAL, the IST Statute, customary international law, and in the overall interest of justice and finality, the Federal Judiciary of Iraq, including the Federal Supreme Court of Iraq should refrain from hearing appeals or collateral challenges on issues that have already been brought before the Iraqi Special Tribunal. The confinement of a case to the IST will not violate customary international law because the inability to petition to the Federal Judiciary is not a violation of human rights norms including the International Covenant on Civil and Political Rights.