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Did the Transitional Assembly have the Constitutional powers to revise the Statute of the Iraqi Special Tribunal without amending the Law of Administration for the State of Iraq for the Transitional Period (TAL)?

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CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
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**MEMORANDUM FOR THE
OFFICE OF THE PROSECUTOR OF
THE IRAQI SPECIAL TRIBUNAL**

ISSUE:

Did the Transitional Assembly have the Constitutional powers to revise the Statute of the Iraqi Special Tribunal without amending the Law of Administration for the State of Iraq for the Transitional Period (TAL)?

Prepared by James T. Tsai
Fall 2005

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issue[†]

Did the Transitional Assembly have the Constitutional powers to revise the Statute of the Iraqi Special Tribunal (the “Old Statute”)¹ without amending the Law of Administration for the State of Iraq for the Transitional Period (TAL)?² What are the consequences for the New Statute and does it enhance the Tribunal’s legitimacy?³ See Chart 1 for a summary of these events in a timeline format.

B. Summary of Conclusions

1. The IST is a legitimate court to provide justice for the Iraqis.

[†] ISSUE: The Iraqi Governing Council promulgated the Statute of the Iraqi Special Tribunal on December 10, 2003. On March 8, 2004 the Iraqi Governing Council promulgated the Law of Administration for the State of Iraq for the Transitional Period (TAL). The TAL is Iraq’s Interim Constitution. Article 48 of the TAL confirms the Statute of the Iraqi Special as “issued on 10 December 2003.” It also declares that the Statute issued on Dec. 10, 2003 “exclusively defines the [Tribunal’s] jurisdiction and procedures, notwithstanding the provisions of the [TAL.]” On August 11, 2005, the Transitional National Assembly promulgated a revised Statute for the Iraqi Special Tribunal which abrogated in full the previous Statute. Did the Transitional Assembly have the Constitutional powers to do this without amending the TAL itself? If not, what are the consequences of this decision? If so, does the passage of this new Statute enhance (from a legal standpoint) the Tribunal’s legitimacy?

¹ The Statute of the Iraqi Special Tribunal, Dec. 12, 2003, available at http://www.cpa-iraq.org/human_rights/Statute.htm [hereinafter IST Old Statute] [Reproduced in the accompanying notebook at Tab 13].

² Law of Administration for the State of Iraq for the Transitional Period, March 8, 2004, [hereinafter TAL] [Reproduced in the accompanying notebook at Tab 11].

³ The Iraqi Higher Criminal Court, August 11, 2005 [hereinafter IST New Statute]. Please note that Arabic is the only official language of the IST and the English translation has been provided as a courtesy for the international community. [Reproduced in the accompanying notebook at Tab 10].

The Transitional National Assembly draws its legitimacy from international occupying powers law, the direct-elections nature of the Assembly and the international recognition given to the Assembly by the international community.

The Hague Convention⁴ and Geneva Convention IV⁵ provide the background for occupying powers law. These conventions define the so-called “conservationist” theory of allowing the existing laws of the country to stay in place, unless any changes or new legislation become necessary because of emergencies or other exceptional reasons.⁶ Iraq retained its statehood; the coalition forces were an occupying force that transitioned power to it eventually through an agreed timeline.⁷

In the end, the Iraqi Special Tribunal (the “IST” and also known as the Iraqi High Criminal Court) is a legitimate court because it was established in accordance with proper methods and standards and it conforms with human rights standards.

2. The change of the Statute from the Old Statute to the New Statute was an amendment.

The changes between the Old and New Statutes were de minimis; they all dealt mostly with procedures. The most important substantive portions of the Statute that

⁴ Convention Respecting the Laws and Customs of War on Land, Oct 18, 1907, *Regulations Respecting the Laws and Customs of War on Land, Annex*, 36 Stat. 2277, 1 Bevans 631. [hereinafter Hague Regulations] [Reproduced in the accompanying notebook at Tab 7].

⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. [hereinafter Geneva Convention IV] [Reproduced in the accompanying notebook at Tab 8].

⁶ Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 199 (Winter 2005) [Reproduced in the accompanying notebook at Tab 45].

⁷ CPA, Agreement on Political Process, Nov. 15, 2003. [Reproduced in the accompanying notebook at Tab 1].

would affect the accused was the list of crimes, and that remained unchanged.⁸ This would suggest that the Statute was amended and not replaced.

3. The Assembly was constitutionally permitted to amend the Statute.

The Statutes emanate from the TAL. Though imperfect, they do have primacy over all other forms of legislation. There are also mechanisms to amend the TAL.⁹ This mechanism was introduced over the protests of the Coalition Provisional Authority (“CPA”). Even though these amending mechanisms are specific to the TAL, they are applicable to legislation, including the Old Statute.

There is explicit language in the TAL that the Old Statute exclusively defines its jurisdiction and procedures.¹⁰ But because the TAL is at times self-contradictory, that provision should not be considered permanent and unchangeable. Instead it is likely that the Assembly has the authority to amend legislation as part of its function as a law making body.

4. The Assembly was constitutionally permitted to replace the Statute.

The Assembly is authorized constitutionally to make changes to its statute because it is a legitimate body of government and a legitimate legislative body is able to self-determine aspects of its country’s domestic laws, including penal codes. This legitimacy comes from international recognition of the Assembly’s legitimacy and also

⁸ New Statute, *supra* note 3. [Reproduced in the accompanying notebook at Tab 10].

⁹ TAL, *supra* note 2, Art. 3. [Reproduced in the accompanying notebook at Tab 11].

¹⁰ *Id.* at Art. 48(A).

the fact that it is a democratically elected body. Furthermore, because the Assembly is one that works under a TAL that calls for respecting basic human rights; this also adds to the legitimacy of the organization.

In terms of state succession, the CPA was recognized by the U.N. as the legitimate occupying force in Iraq. The documents describing the CPA's dissolution then give all of its powers to the new Assembly.¹¹ Legitimacy is therefore transferred through this process.

Considering the above, the Assembly is authorized constitutionally to make changes to the Statute. This is because the changes to the Statute are minor, the sources of legitimacy for the Assembly are just and also because of the right to self-determination. Moreover, the Assembly may simply amend the TAL and achieve the same result; this is simply a procedural step that was neglected by the Assembly, which should not undermine its legitimacy or the legitimacy of the tribunal statute.

5. The directly elected Assembly lends credibility to the legitimacy of the Tribunal.

The directly elected Assembly is legitimate, and it lends its own legitimacy to the IST. Furthermore, the tribunal also gains credibility from the Assembly their minor changes to the Statute making the tribunal a more domestic one in nature. Though there has been substantial involvement from the U.S. with the IST (the promulgation of the Statute and the funding of the IST), the Assembly has tried to take ownership of the IST

¹¹ Coalition Provisional Authority Order No. 100, CPA/ORD/28 June 2004/100 (June 28, 2004), *available* at http://www.iraqcoalition.org/regulations/20040628_CPAORD_100_Transition_of_Laws__Regulations__Orders__and_Directives.pdf. [Reproduced in accompanying notebook at Tab 5].

by promulgating its own Statute and also making changes to conform more with the Iraqi expectations. This gives the IST credibility.

6. Iraq and its citizens will face difficulty in healing and preparing for the future if the Tribunal is found to be illegitimate.

There are three pillars to fight against possible impunity of the perpetrators of the atrocities under Saddam's rule: justice, truth and reparations. The retributive theory of punishment ties in the justice and reparations pillars and is symbolic of the push for the death penalty in Saddam's case. If the results of the trial are not achieved in a legitimate fashion, the future of Iraq is a dismal one, because such a failure will represent a new roadblock to healing and enflaming existing tension in Iraq.

Additionally, the nascent government of Iraq and the state itself may suffer a problem of legitimacy if not its stature on the international stage. A common requirement of international tribunals is that cases may not be brought before it unless all the domestic remedies are exhausted. In cases where the state is unable or unwilling to try the case, then it may be brought before the international tribunal. If this were to happen, then the Iraqi government itself would suffer a public relations problem that would also affect its attempt to regain any standing on the world stage.

II. FACTUAL BACKGROUND

A. History¹²

1. U.S.-invasion of Iraq

¹² See generally Chart 1, *infra*.

U.S. President George W. Bush announced on March 19, 2003 that a coalition of forces began striking military targets in Iraq to undermine Iraqi President Saddam Hussein's ability to wage war.¹³ The coalition forces were led by the United States¹⁴ and the United Kingdom.¹⁵ The attacks and strikes encountered little resistance and U.S. forces entered Baghdad less than three weeks after the commencement of hostilities on April 9, 2003. Five days later, the Pentagon declared that major hostilities were concluded.¹⁶

The CPA announced its own creation to the United Nations in a letter dated May 8, 2003.¹⁷ The letter states that “[t]he United States, the United Kingdom and Coalition partners recognize the urgent need to create an environment in which the Iraqi people may freely determine their own political future.” To achieve this end, a representative government was to be formed.¹⁸

Meanwhile, Coalition troops searched for Saddam Hussein. Finally, on Dec. 14, 2003, U.S. troops raided a small farm near Tikrit and captured the former-president of

¹³ Dept. of State, “Timeline of Iraq: 1932-2003,” available at http://usinfo.state.gov/mena/Archive_Index/Timeline_of_Iraq_19322003.html, (last accessed Oct. 16, 2005). [Reproduced in the accompanying notebook at Tab 61].

¹⁴ Fox *supra* note 6, 202. [Reproduced in the accompanying notebook at Tab 45].

¹⁵ See “Iraq Coalition Troops Non-U.S. Forces in Iraq - 16 August 2005”, available at http://www.globalsecurity.org/military/ops/iraq_orbat_coalition.htm (giving a complete list of non-U.S. forces in Iraq.) [Reproduced in the accompanying notebook at Tab 66].

¹⁶ *Id.*

¹⁷ Letter from the Permanent Representatives of the UK and the U.S. to the U.N. addressed to the President of the Security Council, May 8, 2003. [Reproduced in the accompanying notebook at Tab 29].

¹⁸ *Id.*

Iraq, who had been hiding in an eight-foot hole.¹⁹ Interestingly, only four days earlier, the Statute of the Iraqi Special Tribunal (the “Old Statute”) had been promulgated by the CPA,²⁰ and the beginnings of a transitional government were beginning to take shape.

2. Government creation and Statute change

On November 15, 2003 the CPA and the Iraqi Governing Council signed an agreement outlining the transition of power from the CPA to the Iraqi people.²¹ The Governing Council, the initial group of Iraqi citizens that worked with the CPA, would be replaced by a Transitional Assembly in accordance with the TAL, which was to be written prior to the transfer of sovereignty from the occupying forces to the Iraqi people.²²

The TAL was drafted and promulgated on March 8, 2004. It also specifies that the coalition government would dissolve upon the assumption of the new Iraqi transitional government.²³

On June 28, 2004 the U.S. formally transferred political authority to a transitional government. “You are ready now for sovereignty and we think it’s an important part of our obligation as temporary custodian to return the sovereignty to you,” U.S. administrator L. Paul Bremer said. “I have confidence that the Iraqi government is ready

¹⁹ Susan Sachs, K. S. (2003, Dec. 14, 2004). Ex-Leader, Found Hiding in Hole, Is Detained Without a Fight. New York Times. [Reproduced in the accompanying notebook at Tab 70].

²⁰ The Old Statute. [Reproduced in the accompanying notebook at Tab 13].

²¹ Agreement on Political Process, *supra* note 7. [Reproduced in the accompanying notebook at Tab 1].

²² *Id.*

²³ *Id.* “Article 29. Upon the assumption of full authority by the Iraqi Interim Government in accordance with Article 2(B)(1), above, the Coalition Provisional Authority shall be dissolved and the work of the Governing Council shall come to an end.”

to meet the challenges that lie ahead.”²⁴ U.S. relations were re-established with the arrival of newly minted ambassador John Negroponte.²⁵

Iraqi Ambassador Lakhdar Brahimi noted that the interim government should focus on the day-to-day administration of the country, the preparation of elections for the Transitional National Assembly, provide for the safety and security of the Iraqi people and to continue economic reconstruction and development.²⁶ This is a reflection of Iraq’s desire to limit the occupying forces’ authorities of this transitional government; let an elected Iraqi government decide those issues. Those limits were to be decided through a consultative process with Ambassador Brahimi.²⁷ The U.N. meanwhile also recognized the need for the Iraqi people to determine their own future in Security Council Resolution 1546.²⁸

On January 30, 2005, Iraqis cast ballots in their first free elections in more than 50 years.²⁹ The voters were to elect a 275-member national assembly charged with the task of writing the country’s permanent constitution.³⁰

²⁴ Rajiv Chandrasekaran, D. S., Mike Allen. (2004, June 28, 2004). U.S. Transfers Political Authority in Iraq. Washington Post. [Reproduced in the accompanying notebook at Tab 57].

²⁵ *Id.* The U.S. had severed diplomatic ties with Iraq after its invasion of Kuwait in 1990.

²⁶ Marc Grossman, The Imminent Transfer of Sovereignty in Iraq, House International Relations Comm. Washington, DC (May 13, 2004). [Reproduced in the accompanying notebook at Tab 64].

²⁷ *Id.*

²⁸ U.N. SC Resolution 1546 (2004) at ¶¶ 1, 3, (“endorses the formation of a sovereign Interim Government of Iraq ... Reaffirms the right of the Iraq people freely to determine their own political future.”). [Reproduced in the accompanying notebook at Tab 35].

²⁹ Dexter Filkins. Iraqis Vote Amid Tight Security and Scattered Attacks. N.Y. TIMES. (January 30, 2005). Reproduced in the accompanying notebook at Tab 62].

³⁰ *Id.*, See also TAL, *supra* at note 3, Arts. 60, 61. [Reproduced in the accompanying notebook at Tab 11].

B. Government transition

1. UNSC's resolutions recognize coalition government³¹

The series of U.N. Security Council resolutions defines the history of the occupation in Iraq. The U.S. and the U.K. proposed UNSC Resolution 1441 in 2002, calling for Iraqi cooperation in the face of what it called lack of cooperation regarding weapons disarmament.³² After the coalition forces attacked, the U.N. recognized the coalition forces as in control of Iraq and lifted its sanctions against Iraq in UNSC Resolution 1483, passed on May 22, 2003.³³ Additionally, the UNSC has recognized the legitimacy of the government.³⁴

A humanitarian mission to Iraq (UNAMI) was subsequently created in August of 2003 with UNSC Resolution 1500³⁵ and renewed yearly after that, with the most recent resolution extending the mission out to August 2006.³⁶

UNSC Resolution 1546 was passed in June 2004. It endorsed the interim government and noted that it would, “assume full responsibility and authority by 30 June 2004 for governing Iraq while refraining from taking any actions affecting Iraq’s destiny

³¹ See Chart 2 *infra* for a complete summary of the resolutions discussed in this section.

³² U.N. SC Resolution 1441 (2002). States that Iraq, “has been and remains in material breach of its obligations” for weapons inspections. Demands that “Iraq cooperate immediately, unconditionally, and actively with UNMOVIC and IAEA.” [Reproduced in the accompanying notebook at Tab 31].

³³ U.N. SC Resolution 1483 (2003). [Reproduced in the accompanying notebook at Tab 32].

³⁴ Conor McCarthy, The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq, 10 J. CONFLICT & SECURITY L. 43, 66. [Reproduced in the accompanying notebook at Tab 49].

³⁵ U.N. SC Resolution 1500 (2003). [Reproduced in the accompanying notebook at Tab 33].

³⁶ See U.N. SC Resolution 1557 (2004). [Reproduced in the accompanying notebook at Tab 36]; See also U.N. SC Resolution 1619 (2005). [Reproduced in the accompanying notebook at Tab 37].

beyond the limited interim period until an elected Transitional Government of Iraq assumes office”³⁷

2. U.S. assistance

Within the scope of discussion for this memorandum, the U.S. interceded in Iraq’s transition in three ways: the creation of the government and its laws, the creation of the tribunal and the capturing of war criminals.

The occupying forces issued its first decree in the form of Regulation No. 1.³⁸ This regulation gave the U.S. and its allies sweeping power to reform the country in all aspects from governmental to legal to social institutions. This social engineering project involved efforts in several different areas including De-Baathification, reform of security and military institutions, human rights, criminal law and law enforcement, domestic and foreign economic changes, and governmental culture reforms.³⁹

The CPA promulgated Order No. 48, which gave authority to the Governing Council to establish the Iraqi Special Tribunal (the “IST”).⁴⁰ The order had an Appendix A, which was offered as a set of “proposed provisions of which have been discussed

³⁷ U.N. SC Resolution 1546, *supra* note 37. [Reproduced in the accompanying notebook at Tab 35].

³⁸ Coalition Provisional Authority Regulation No. 1, CPA/REG/16 May 2003/01 (May 16, 2003), *available* at http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf. [Reproduced in the accompanying notebook at Tab 6]. Prof. Fox notes that, “the chronology at this point is rather unclear. CPA Regulation No. 1 bears a date of May 16, 2003, but it makes reference to Security Council Resolution 1483, which was passed almost one week later on May 22, 2003.” He suggests the regulation was back-dated. Fox, *supra* note 6, note 28. [Reproduced in the accompanying notebook at Tab 45].

³⁹ See Fox, *supra* note 6, 208-225. [Reproduced in the accompanying notebook at Tab 45].

⁴⁰ Coalition Provisional Authority Order No. 48, CPA/ORD/10 Dec. 2003/48 (Dec. 10, 2003), *available* at http://www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf. [Reproduced in the accompanying notebook at Tab 4].

extensively between the Governing Council and the CPA”⁴¹ This appendix was adopted completely without any change and became the Old Statute. The TAL confirmed the Old Statute in Art. 48:

- (A) 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.
- (B) No other court shall have jurisdiction to examine cases within the competence of the Iraqi Special Tribunal, except to the extent provided by its founding statute.⁴²

On August 11, 2005 the Transitional Assembly passed a public act that repealed the Old Statute and promulgated the New Statute.⁴³ At this point, there appears to have been U.S. involvement in the process was minimal.⁴⁴

3. Towards full sovereignty: Direct elections and constitutional referendum

On January 30, 2005, Iraq held its first elections in more 50 years. American and Iraqi troops provided security for the elections and also patrolled the streets on election day.⁴⁵

The job of the newly elected Transitional National Assembly was to create a new constitution and to offer it up to be adopted by the general citizenry of Iraq. On October

⁴¹ *Id* at §1 ¶1.

⁴² See TAL, *supra* at note 3. [Reproduced in the accompanying notebook at Tab 11].

⁴³ New Statute, *supra* at note 5. [Reproduced in the accompanying notebook at Tab 10].

⁴⁴ Cherif Bassiouni, Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal, 38 Cornell Int'l L.J. 327, 327 (2005). [Reproduced in accompanying notebook at Tab 41].

⁴⁵ Filkins, *supra* note 29. [Reproduced in the accompanying notebook at Tab 62].

15, 2005, the Iraqis went to the polls again and ratified the new constitution.⁴⁶ The new constitution addressed many of the conflicts between the Sunnis, Shiites and Kurds, in an attempt to give a new governmental framework for law and order to prevail over the conflicts of a nascent government.⁴⁷

III. LEGAL DISCUSSION

A. The law of government succession and the legitimacy and justice of the IST

The legal discussion begins by examining the existing law pertaining to governmental successions in military occupation situations. Specifically, the focus of this section is to determine whether the IST is a legitimate form of justice to adjudicate the matters before it. Initially, a background of occupying powers law is given, which includes the laws relevant to transitional justice. Various recognized general problems with transitional justice are then articulated.

1. Background of occupying powers law⁴⁸

a. Origins of the law

The origins of occupying power law developed as a necessary reaction to the laws of war.⁴⁹ This reflected the terminology of belligerent occupation. But there is an

⁴⁶ BBC News, Iraq voters back new constitution. (Oct. 25, 2005). [Reproduced in the accompanying notebook at Tab 56].

⁴⁷ Iraq's Draft Constitution, translated by the U.N. Office for Constitutional Support and edited by the New York Times. [Reproduced in the accompanying notebook at Tab 9].

⁴⁸ See generally EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (1993). [Reproduced in the accompanying notebook at Tab 20]; See also Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 202 (Winter 2005) [Reproduced in the accompanying notebook at Tab 45].

increasing number of situations of non-war occupations that may result from armistice agreements, conflicts in other territories or just cession of powers.⁵⁰ In addition to this, may be the public relations aspect of not wanting to acknowledge an armed conflict.⁵¹ Because of this shifting and ambiguous situation, there was a movement in the international community to try to better define occupation law by clarifying the situations it arises under and also the substantive law of what may or may not be done by the occupying forces.

Two instruments in particular have become accepted as the customary international law of occupying powers law, which are binding on any state, regardless of whether or not they have accepted it.⁵² These instruments are the 1907 Hague Regulations on Land Warfare⁵³ and the Fourth Geneva Convention of 1949.⁵⁴

Both of these instruments include notions of just treatment for the citizenry and more importantly for purposes of this memorandum, they discuss the parameters of the law during an occupation. Articles 42 and 43 of the Hague Conventions state that:

Art. 42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established, and in a position to assert itself.

⁴⁹ EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 3 (1993). [Reproduced in the accompanying notebook at Tab 20].

⁵⁰ *Id.*

⁵¹ *Id.* at 4.

⁵² Fox *supra* note 6, 230. [Reproduced in the accompanying notebook at Tab 42].

⁵³ Hague Regulations, *supra* note 4. [Reproduced in the accompanying notebook at Tab 7].

⁵⁴ Geneva Convention IV, *supra* note 5. [Reproduced in the accompanying notebook at Tab 8].

Art. 43. The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.⁵⁵

Article 64 of Geneva Convention IV then provides that:

Art. 64. The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.

Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.⁵⁶

The U.S. has incorporated this article wholesale in Section 360 of its Army Field Manual. Therefore, there is explicit acceptance of this convention in the practices of warfare for the U.S.⁵⁷ Noted in ¶ 3, there are exceptions in which the occupying force may pass laws. These are extremely limited, and the Commentaries call the list

⁵⁵ Hague Regulations, *supra* note 4. [Reproduced in the accompanying notebook at Tab 7].

⁵⁶ Geneva Convention IV, *supra* note 5, Art. 64. [Reproduced in the accompanying notebook at Tab 8].

⁵⁷ Army Field Manual. 27-10, Ch. 6 Occupation. [Reproduced in the accompanying notebook at Tab 72].

“limitative,” suggesting there are no additional exceptions to derogate from the article.⁵⁸ Because the occupying forces did not meet any of these listed exceptions, it was not able to create the IST on its own initiative; that is why the Interim Governing Council officially promulgated the Old Statute.⁵⁹

b. Statehood and the conservationist principle

There is a question of when Iraq became a new state subject to international laws. Scholars have discussed this question of statehood and there are two views on recognition and the real *politique* of statehood.⁶⁰ One camp says that in order for a state to exist, it must be recognized as a state by others; all other entities, even if they may be called a “state” do not have any legal status, so international law may not be applied to them.⁶¹ The other view is that a state may exist without being recognized formally by other states, and that international law applies such an entity regardless of whether it has been recognized or not.⁶²

In Iraq’s situation, there was immediate recognition of the U.S. as the occupying and legitimate authority in Iraq after the war. U.N. Security Resolution 1483 called the coalition forces “occupying powers” and recognized the corresponding “specific

⁵⁸ JEAN S. PICTET, *THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARIES*, Art. 64. [Relevant portion reproduced in the accompanying notebook at Tab 27].

⁵⁹ See CPA Order No. 48, *supra* note 40. [Reproduced in the accompanying notebook at Tab 4].

⁶⁰ See SHELDON M. COHEN, *ARMS AND JUDGMENT: LAW AND MORALITY AND THE CONDUCT OF WAR IN THE TWENTIETH CENTURY*. 1989. [Reproduced in the accompanying notebook at Tab 23].

⁶¹ *Id.* at 15-16.

⁶² *Id.*

authorities, responsibilities, and obligations under applicable international law,” that came with that status.⁶³

If the coalition troops are to be regarded as an occupying force, then they must take on a temporary custodial role in the territory they control. This means that they only exercise de facto power and have no legitimate general legislative authority to make laws, or promulgate any permanent changes to various instruments of the country.⁶⁴ This is called the “conservationist principle.”

Thus, ostensibly the status quo laws and governmental structures were in existence for the short time period after the invasion and the promulgation of the first order noting any change to the existing laws of Iraq. The first such order was in Order No. 7, making some changes to the Iraqi Penal Code.⁶⁵

It is therefore arguable that Iraq never lost its statehood. A completely new state will exist once it has adopted a new constitution, elected its own Assembly and displayed all the other normative elements that states have.⁶⁶ This had not occurred completely when the Transitional Assembly amended the Old Statute into the New Statute. So, there was a period of transitional government in question, which is examined next.

⁶³ U.N. SC Resolution 1483 (2003). [Reproduced in the accompanying notebook at Tab 32]; *See also* McCarthy, *supra* note 34, 45, (asserting that the coalition forces are in fact occupiers.) [Reproduced in the accompanying notebook at Tab 49].

⁶⁴ Fox *supra* note 6, 199. [Reproduced in the accompanying notebook at Tab 45].

⁶⁵ Coalition Provisional Authority Order No. 7, CPA/ORD/9 June 2003/07 (Dec. 10, 2003), available at http://www.iraqcoalition.org/regulations/20030610_CPAORD_7_Penal_Code.pdf. [Reproduced in the accompanying notebook at Tab 3].

⁶⁶ *See* Cohen, *supra* note 60, 15. [Reproduced in the accompanying notebook at Tab 23]. “[R]easonable probability of permanence, the essential characteristics of a state, namely an organized government, a defined territory, and such a degree of independence of control by any other state as to be capable of conducting its own international relations.”

c. Law's impact on transitional governments

In transitional administrations, there is a tension between restoration of justice and security in post-conflict situations.⁶⁷ This is representative of trying to have life in the country restored to law and order, but to still have the safety, to have a shield against the aftershocks of the previous conflict. The lower, more basic need of security and peace trumps the need for justice.⁶⁸ This is reflected by many scholar's belief that the primary purpose of international law is to preserve security and peace; the U.N. Charter's Preamble⁶⁹ for instance does not mention justice at all, but instead makes clear that the need to protect security and peace is paramount.⁷⁰

When an occupying force is involved, unique features of exercising law over foreign people must be considered. They include (1) consideration of the multiplicity of actors (from the military to police force to other peace-keepers),⁷¹ and (2) consideration of ambiguities in the law.⁷² The many different peoples involved with creating the tribunal represent an example of the first consideration – the court officials, the decisions of the nationalities of whom to hire for judges, prosecutors and investigators.⁷³

⁶⁷ Carsten Stahn, Justice Under Transitional Administration: Contours and Critique of a Paradigm, 27 HOUS. J. INT'L L. 311, 315.; [Reproduced in accompany notebook at Tab 52]; *See also* T. Grant, Iraq: How to reconcile conflicting obligations of occupation and reform. ASIL Insights (2003).[Reproduced in accompany notebook at Tab 63].

⁶⁸ YEHUDA MELZER, CONCEPTS OF JUST WAR 39, 45-46 (1975). [Reproduced in accompanying notebook at Tab 26].

⁶⁹ U.N. Charter (1945). [Reproduced in accompanying notebook at Tab 38].

⁷⁰ Melzer, *supra* note 68, 39-40. [Reproduced in accompanying notebook at Tab 26].

⁷¹ Stahn, *supra* note 67, at 316. [Reproduced in accompanying notebook at Tab 52]

⁷² *Id.* at 318.

⁷³ See later discussion regarding the nationalities of these actors, *infra* III.E.2.

With regard to the second feature, the post-conflict situation often is one hampered by a lack of judicial resources and a question of what applicable laws may be used; a report from the Panel on U.N. Peace Operations has suggested a uniform criminal code in such emergency situations.⁷⁴ Another source of ambiguity is the linguistic difficulties of translating between different languages. The Old Statute was promulgated in both English and Arabic, but it seems that the statute was written in English at first and the Arabic translation is poor;⁷⁵ additionally, the CPA Regulation 1 states that English is the controlling language.⁷⁶ Admittedly, the order refers only to CPA Regulations and Orders, which the Statute is not, but the Statute was adopted wholesale from the CPA Order, which yields some confusion. Furthermore, Art. 32 of the Old Statute (which is Art 35 of the New Statute) declares that Arabic is the official language for the Tribunal.

These factors manifest themselves if tribunals are created in post-conflict situations to address any crimes members of the previous government may have committed during their reign. Some of these problems involve a lack of resources for the occupying powers.⁷⁷ Tribunals are also politicized affairs and may end up becoming

⁷⁴ Stahn, *supra* note 67, 318. [Reproduced in accompanying notebook at Tab 52]

⁷⁵ Bassiouni, *supra* note 44, 366. [Reproduced in accompanying notebook at Tab 41].

⁷⁶ CPA Regulation No. 1, *supra* note 38, §3(2). “The Regulation or Order shall enter into force as specified therein, shall be promulgated in the relevant languages and shall be disseminated as widely as possible. In the case of divergence, the English text shall prevail.” . [Reproduced in the accompanying notebook at Tab 6].

⁷⁷ Charles Call, Is Transitional Justice Really Just?, XI BROWN J. WORLD AFF. 101, 102. [Reproduced in the accompanying notebook at Tab 42].

media battles.⁷⁸ And finally, it may just be a version of victor's justice, with a kangaroo court.⁷⁹

Thus, the inherent nature of post-conflict situations poses a problem for the creation and maintenance of the tribunals. In the case of the IST, these factors and manifestations have been pointed out by various critics of the IST.⁸⁰ This affects the perceived legitimacy of the IST, which the next subsection discusses.

2. Is the IST a legitimate court to provide justice?

Various organizations and entities have challenged the IST on the basis of questioning the legitimacy of the transitional administration and its inherent ability or lack thereof to provide justice to the Iraqis. Amnesty International for instance challenged the Old Statute on several areas from the basis of its independence and impartiality of judges and prosecutors to what it perceived as inadequate guarantees for a fair trial.⁸¹

Other challenges are based on the lawfulness of the origins that establish the tribunal itself. This question also arose before the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). In fact, defendant Dusko Tadic argued against the legitimacy of the ICTY in one of its cases.⁸² The Trial Chamber opined it had no authority to investigate its own legality, but the Appeals Chamber concluded that it had

⁷⁸ *Id.* at 105.

⁷⁹ *Id.* at 109.

⁸⁰ See generally AMNESTY INTERNATIONAL, IRAQI SPECIAL TRIBUNAL – FAIR TRIALS NOT GUARANTEED (2005). [Reproduced in the accompanying notebook at Tab 54].

⁸¹ *Id.*

⁸² Prosecutor v. Tadic, Case No.: IT-94-1, Decision on Defence Motion on Jurisdiction, Aug. 10, 1995. [Reproduced in accompanying notebook at Tab 15].

an inherent power to review the authority of the Security Council, its progenitor, in order to determine the legality of establishing the tribunal.⁸³

In its decision, the appeals chamber responded to Tadic's argument that the ICTY was not established by law, as required by Article 14 of the International Covenant on Civil and Political Rights ("ICCPR"),⁸⁴ saying this argument was erroneous.⁸⁵ The court said that the proper interpretation of that provision of the ICCPR was that "established by law" meant that the tribunal should be "established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and evenhandedness, in full conformity with internationally recognized human rights instruments."⁸⁶

Another reason why the IST is a legitimate court is its independence from the rest of the Iraqi judicial system. The Iraqi Federal Court system does not hear appeals from the IST, for instance.⁸⁷ This is because of a recognition that a separation and independence of both court systems is necessary to gain legitimacy.⁸⁸

⁸³ See Ahran Kang, The Key Lessons from the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL, Memorandum for the IST, Nov. 2004. [Reproduced in accompanying notebook at Tab 67].

⁸⁴ International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, entered into force March 23, 1976, G.A. Res 2200A (XXI), U.N. Doc. A/6316 (1966), 999 UNTS 171. Art. 14, ¶ 1 states, "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." (ICCPR, art. 14, para. 1.) [Reproduced in accompanying notebook at Tab 28].

⁸⁵ Kang, *supra* note 83, 4. [Reproduced in accompanying notebook at Tab 67].

⁸⁶ Prosecutor v. Tadic, Case No.: IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, Oct 2, 1995. [Reproduced in accompanying notebook at Tab 16].

⁸⁷ See Pratheep Sevanthinathan, Can the Iraqi Federal Judiciary hear Issues on Appeal, That First Arise in an Iraqi Special Tribunal Proceeding? AND Is the Denial of the Right to Appeal to a Nation's Highest Federal Court a Violation of Human Rights Norms?, Memorandum for the IST, Apr. 2005. [Reproduced in accompanying notebook at Tab 71].

⁸⁸ *Id.* at 23.

The IST is a lawful court, but arguably, the real *politique* situation is that it is not necessarily a legitimate one; respect and legitimacy must be earned from the international community.⁸⁹

B. Was the change from the Old Statute to the New Statute an amendment, or a replacement?

Using the compare document function of Microsoft Word between the two versions of the Statute, the following major changes were noted:⁹⁰

- The tribunal was renamed to the Iraqi Higher Criminal Court.⁹¹
- Article 1(2) of the New Statute: Expanded the jurisdiction of the court from exclusively crimes against peoples of Iraq to crimes against humanity.
- Article 7(2) of the New Statute (Article 7(b) of the Old Statute): Instead of requiring non-Iraqis to serve in the IST, there is a looser statement that they *may* serve with the IST.
- Article 8(2) of the New Statute: The number of investigative judges was changed from 20 to a “sufficient number.”
- Article 9 of the New Statute: The prosecutors were changed in numbers similarly to the investigative judges and also the requirements and disqualifying factors were changed to make it easier to qualify.
- Article 16 of the New Statute: A set of Rules of Procedure and Evidence were adopted.
- Article 19(4)(B) and (C) of the New Statute: For the rights of the accused, added the right to have non-Iraqi legal representation, as long as the principal lawyer is Iraqi and there is no undue delay in the prosecution.

⁸⁹ See Ilias Bantekas, *The Iraqi Special Tribunal for Crimes Against Humanity*, 54 ICLQ 237, 252 (2005). [Reproduced in accompanying notebook at Tab 40].

⁹⁰ Comparison of the Old and New Iraqi Special Tribunal Statutes. [Reproduced in the accompanying notebook at Tab 59].

⁹¹ Though the IST has been renamed to the Iraqi Higher Criminal Court (hereinafter the IHCC), we use IST interchangeably with IHCC as the media, officials and other documents continue to refer to it as the IST.

Ultimately, very little of substance was changed. The list of defined war crimes for instance remains the same, arguably the most substantive portion of the statute.⁹² Based on the minimal nature of these changes, therefore it can be argued that the statute was only amended and not replaced.

C. Is the Assembly permitted to amend the Statute?

An amendment is, “a legal invention not derivable from the existing body of accepted legal materials.”⁹³ This is contrasted with an interpretation, which twists the existing words on the page for a new effective application.⁹⁴

Art. 48(a) of the TAL states that the Statute issued on Dec. 10, 2003 “exclusively defines the [Tribunal’s] jurisdiction and procedures, notwithstanding the provisions of the [TAL.]”⁹⁵ Critics of the amendment to the Statute point to this Article, saying that any change to the Statute is in violation of this article. But, the TAL is not a perfect document. Art 15(I) states that, “special or exceptional courts may not be established.”

Regardless, a constitution has primacy over all other forms of legislation, and the Statute does originate in terms of its legitimacy from the TAL.⁹⁶ Therefore, it is possible to say that the amendment procedures of the TAL should be considered. Originally, there

⁹² Comparison of the Old and New Iraqi Special Tribunal Statutes, *supra* note 90, Arts. 12-15. . [Reproduced in the accompanying notebook at Tab 59].

⁹³ SANFORD LEVINSON. RESPONDING TO IMPERFECTION : THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 16 (1995). [Reproduced in the accompanying notebook at Tab 25].

⁹⁴ *Id.*

⁹⁵ TAL, *supra* note 2, at Art. 48(a). [Reproduced in the accompanying notebook at Tab 11].

⁹⁶ Bantekas, *supra* note 40, 239-240. The entire efficacy of the TAL itself would be in question, according to Bantekas, if the Statute is not deemed to originate from the TAL and instead from some other entity such as the CPA. . [Reproduced in the accompanying notebook at Tab 40].

were provisions to prevent any sort of amending of the TAL from taking place. The Nov. 15, 2003 transitional agreement states that the “Fundamental Law,” which would later be known as the Law of Administration for the State of Iraq for the Transitional Period (TAL), could not be amended.⁹⁷ But, the finalized TAL provides that it may be amended in Art. 3.⁹⁸ Though these are provisions for amending the TAL itself, it suggests that amending any other legislation would be permitted.

D. Alternatively, considering that the changes were a replacement, what are the consequences?

If the changes are considered a replacement, which is a possible interpretation of the amendment, we must consider if the Assembly has the authority to do so. To consider this, we must first take into account the Assembly’s sources of legitimacy and authority and determine whether or not it is in fact a legitimate body. From this, we can then determine whether or not it was authorized to replace the Statute.

⁹⁷ Agreement on Political Process, *supra* note 21. [Reproduced in the accompanying notebook at Tab 1].

⁹⁸ Article 3. (A) This Law is the Supreme Law of the land and shall be binding in all parts of Iraq without exception. No amendment to this Law may be made except by a three-fourths majority of the members of the National Assembly and the unanimous approval of the Presidency Council. Likewise, no amendment may be made that could abridge in any way the rights of the Iraqi people cited in Chapter Two; extend the transitional period beyond the timeframe cited in this Law; delay the holding of elections to a new assembly; reduce the powers of the regions or governorates; or affect Islam, or any other religions or sects and their rites.

(B) Any legal provision that conflicts with this Law is null and void.

(C) This Law shall cease to have effect upon the formation of an elected government pursuant to a permanent constitution.

1. What source of legitimacy does the Assembly have?

a. International recognition of legitimacy

The U.N. has recognized the legitimacy of the Iraqi government, and the U.S. as occupying force.⁹⁹ After the fall of Saddam Hussein's regime, Iraq opened up its diplomatic missions around the world; this was a key priority of the Interim Government's Ministry of Foreign Affairs.¹⁰⁰ By being recognized by the U.N. and attempting to re-establish diplomatic relations with foreign countries, the country of Iraq approaches recognition as legitimate.

b. Democratically elected Assembly by the people

Professor Buchanan notes that democracy is a necessary condition for legitimacy of a political entity.¹⁰¹ This notion is based on two premises: (1) democracy can do at least as well as alternative systems that can create legal systems that protect the citizens' basic interests and (2) participating as an equal in the political process to choose the political leaders that wield power is an important dimension of the culture of the state.¹⁰² These premises provide a backdrop to assess democracy as a source of legitimacy for the Assembly.

⁹⁹ U.N. SC Resolution 1546 (2004) at ¶ 2. (calling the situation in Iraq an "occupation"). [Reproduced in the accompanying notebook at Tab 35].

¹⁰⁰ CPA, AN HISTORIC REVIEW OF ACCOMPLISHMENTS 2003-2004 49 (2004). [Reproduced in the accompanying notebook at Tab 60].

¹⁰¹ ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION MORAL FOUNDATIONS FOR INTERNATIONAL LAW 251 (2003). [Reproduced in the accompanying notebook at Tab 22].

¹⁰² *Id.*

Since the Assembly was elected democratically by the people in its first elections in over 50 years, the people reflected the egalitarian principle that they were now able to choose their leaders in a fashion that they had not been able to do for a long time.

Additionally, the U.N. saw the importance of democracy in the formulation of its policies involving Iraq. After the U.S. invaded Afghanistan in 2001, the U.N. articulated an overarching principle for itself with regard to its policy of assistance and work with the country. It would rely on as limited an international presence as possible, and as many Afghan nationals for its staff as possible. This principle became known as the “light footprint” approach.¹⁰³ The U.N. found that this principle was even more critical in the case of Iraq, because of the need for the Iraqi’s to become masters of their own country’s future.¹⁰⁴

2. Is the Assembly a legitimate body of government?

Professor Buchanan defines an entity as having “political legitimacy . . . if and only if it is morally justified in exercising political power. The exercise of political power may be defined as the (credible) attempt to achieve supremacy in the making, application, and enforcement of laws within a jurisdiction.”¹⁰⁵ He goes on to argue that the political entity must exercise minimal standards of protection of human rights.¹⁰⁶

¹⁰³ Simon Chesterman, *Walking Softly in Afghanistan: the Future of U.N. State Building*, 44 SURVIVAL 37, 37 (2002). [Reproduced in accompanying notebook at Tab 42].

¹⁰⁴ Press Release, “‘Blue Flag’ Flying in Iraq, But Light Footprint Unavoidable in Current Security Situation, Security Council Told,” U.N. Doc. SC/8186 (Sept. 14, 2004). [Reproduced in accompanying notebook at Tab 30].

¹⁰⁵ *Id.* at 233.

¹⁰⁶ *Id.* at 234.

Using this definition, we can examine the TAL's language to determine whether its limitations and goals fulfill the human rights-attention requirement. In the preamble, this notion is apparent: "These people affirming today their respect for international law, especially having been amongst the founders of the United Nations, working to ... establish the mechanisms aiming, amongst other aims, to erase the effects of racist and sectarian policies and practices."¹⁰⁷

In practice, this is admittedly questionable. Government agents were accused for instance, recently for taking part in the killings of one of Saddam Hussein's fellow accused's defense lawyers.¹⁰⁸ The media attention given to this event has caused the Iraqi public to question the legitimacy of its government.

Arguably, CPA did not officially abrogate from the 1990 Iraqi Constitution; there was no explicit treaty or legal instrument that recognized the end of that Constitution. The occupying forces, in recognition of the Hague Conventions, had come into power as custodians of Iraq and technically, the 1990 Iraqi Constitution was still in force as they created the provision government.¹⁰⁹ Therefore, in the most academic sense, the reigning constitution in Iraq at the time of the amending of the Statute was the 1990 Iraqi Constitution, as amended in 1995.¹¹⁰

¹⁰⁷ TAL, *supra* note 2, Preamble. [Reproduced in the accompanying notebook at Tab 11]. *Cf.*, Agreement on Political Process, *supra* note 1, §1, The Fundamental Law. [Reproduced in the accompanying notebook at Tab 1].

¹⁰⁸ Another Saddam Co-Defendant's Lawyer Slain, The Washington Post, Nov. 8, 2005. [Reproduced in the accompanying notebook at Tab 55].

¹⁰⁹ McCarthy, *supra* note 34, 72. [Reproduced in the accompanying notebook at Tab 49].

¹¹⁰ *Id.*

One criticism of the occupying forces is that they were in violation of the Geneva Convention for promulgating laws even though they never formally abrogated the Constitution with its Regulations and Orders. It is possible to compare this situation with Israel's construction of a wall in occupied Palestinian Territory. The ICJ ruled that the wall violated international human rights law in an advisory opinion last year.¹¹¹ One line of reasoning from the court, was that there was a de facto violation of Geneva Convention Art. 49(6), which prohibits an occupying power from transporting any of its own population into those occupied territories via the construction of the wall.¹¹² Analogizing to the occupying forces in Iraq, the Regulations and Orders promulgated, including the Old Statute, which was taken completely wholesale, was a de facto change of the existing laws of Iraq, which is a violation of the Geneva Conventions.

That situation changed when those laws were no longer the de facto law of the land, because entire portions of that constitution were abrogated implicitly with the adoption of new governmental structures and TAL Art. 3 states that it is the supreme law of the land.¹¹³

Furthermore, the CPA provided for its own dissolution in Order No. 100.¹¹⁴ All “powers, authorities and responsibilities” for both the CPA and the Administrator were

¹¹¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (Int'l Ct. Justice July 9, 2004), 4. 3 ILM 1009 (2004) [Reproduced in accompanying notebook at Tab 14].

¹¹² David Kretzmer., *Agora: ICJ Advisory opinion on construction of a wall in the occupied Palestinian territory: the advisory opinion: the light treatment of international humanitarian law*, 99 AJIL 88, 93 (2005). [Reproduced in accompanying notebook at Tab 48].

¹¹³ *Id.*

¹¹⁴ Order No. 100, *supra* note 11. [Reproduced in accompanying notebook at Tab 5].

transferred to the Interim Government.¹¹⁵ Because the CPA was recognized as the legitimate occupying force beforehand, the new Transitional government, which the Assembly is a part of, should be recognized as legitimate.

3. Is the Assembly authorized constitutionally to make changes to the Statute?

Based on the discussion earlier in this section, the Assembly is constitutionally permitted to replace the Statute. Additionally, the power to replace the statute implies that there is an ability to amend it, supporting the discussion *supra*.

a. Minor changes to the statute

The first reason is because the changes to the Statute are minor, as discussed above. This is an argument taking into consideration the de minimis effect on the IST. Though it is possible to suggest that there are significant concerns for some stakeholders in these changes, they overall are not significant enough to have derailed the ongoing process that is taking place. If anything, the changes have merely served as an update and refinement to respond to the practical situation facing the IST. For instance, the changes in judge and prosecutor selection have been loosened, in response to the difficulty finding qualified candidates.

b. Sources of Assembly's power are legitimate

Another reason is to consider the sources of legitimacy of the Assembly. They are rooted as mentioned above, in the international recognition of the legitimacy of the entity and the democratically elected nature of its selection. Consequently, because of these

¹¹⁵ *Id.* at §2(1), (2).

sources, the Assembly is legitimate. On moral justification grounds, the TAL has specified a respect for human rights; this is another important factor to gain legitimacy for the Assembly.

What remains then, is to show that the right to self-determination, in the form of amendment is an inherent right for the legitimate body of the Assembly, specifically with regard to the change in the Statute. In the United States, Constitutional Convention delegate and one of the first members of the Supreme Court, James Wilson wrote, “[P]eople may change the constitutions whenever and however they please. This is a right of which no positive institution may deprive them.”¹¹⁶

This notion is of course, predicated on a political process that allows all citizens to take part in governance. Because the elections were free and open to everyone, yielding a legitimate Assembly, their actions are legitimate.¹¹⁷

Critics point to the occupying forces’ explicit delegation of authority to create the IST. They claim this is a violation of international humanitarian law and thus not legitimate; only by reconstituting the Tribunal they argue, will it gain legitimacy.¹¹⁸ The Assembly has done exactly that, and made minor changes to make it more like a domestic court.

¹¹⁶ Levinson, *supra* note 93, 98. [Reproduced in accompanying notebook at Tab 25].

¹¹⁷ In the U.S., this notion of political process is an important one. It protects minorities rights. *See Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) [Reproduced in accompanying notebook at Tab 19].; *See also U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938), note 4 (“whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”) [Reproduced in accompanying notebook at Tab 17].

¹¹⁸ Marco Sassoli, *Legislations and Maintenance of Public Order and Civil Life By Occupying Powers*, 16 *Eur. J. Int’l L.* 661, 675. [Reproduced in the accompanying notebook at Tab 50].

c. Explicit language of TAL is overridden by implicit rights of Assembly

Next, we turn to the explicit language of the TAL. As discussed earlier, Art. 48(a) of the TAL states that the Statute issued on Dec. 10, 2003 “exclusively defines the [Tribunal’s] jurisdiction and procedures, notwithstanding the provisions of the [TAL.]”¹¹⁹ So, the legal question is, is there a legal effect from this language that precludes any changes to the TAL? The obvious answer, as discussed earlier with respect to amendments,¹²⁰ is that the Statute is derived from the TAL, and not meant to be a separate legal entity by itself; the same arguments about the amendments are applicable here for the replacement.

It is also of arguable that this is a mere procedural matter; the Assembly may simply amend the TAL, since none of the restrictions under Art. 3 that do not allow amendments to the TAL are encountered. The changes made to the Old Statute are akin to an administrative step that is needed to achieve something. The legitimate Assembly considered the Statute in the light of the post-occupation government and decided to abrogate it and propose a Statute that was substantially the same as the old one; there is no real amending here, let alone unconstitutional modifications going on. This is just a refining administratively of the IST to achieve its mission of providing justice.

d. Due process concerns

With regard to due process concerns, the various stakeholders involved with the business of the IST are not affected.

¹¹⁹ TAL, *supra* note 2, at Art. 48(a). [Reproduced in the accompanying notebook at Tab 11].

¹²⁰ See *supra* III.C, earlier discussion regarding the inherent ability to amend the Old Statute.

In the time between the Old Statute's promulgation and the change with the New Statute (a period of 20 months), there have been a good number of accused that have entered the docket of the IST. The first group of accused did not formally become involved with the IST until June 29, 2004, which involved the transfer of a dozen of high-level officials of Saddam's regime from the custody of the U.S. forces.¹²¹ This still leaves a period of 13 months under the those in Old Statute. But again, the nature of changes is *de minimis*. The crimes that are mentioned in the New Statute are identical to the Old Statute, and a broadening of selection criteria for prosecutors and judges doesn't affect the accused in a negative manner. If anything, it may aid them.

Considering all these arguments, the Assembly had the constitutional powers to make the change to the Statute.

E. Does the newly elected Assembly lend credibility and legitimacy to the Tribunal?

1. Legitimacy

The Assembly itself is a legitimate political entity.¹²² Arguably, the act of changing the Statute for the Tribunal lent the Assembly's legitimacy to it also.¹²³ Additionally, because the people have access and a voice in the political process, there

¹²¹ Press Release, Agreement with MNF to assume control of individuals in custody, IST, June 28, 2004, available at <http://www.iraq-ist.org/en/press/releases/0007e.htm> . Reproduced in the accompanying notebook at Tab 68]. ;Press Release, Arrest warrants handed down, IST, June 29, 2004, available at <http://www.iraq-ist.org/en/press/releases/0008e.htm> .[Reproduced in the accompanying notebook at Tab 69].

¹²² See *supra* III.D.

¹²³ Bassiouni, *supra* note 44, 387-8. Prof. Bassiouni recommended in this article the repromulgation of the Statute. His article was presumably written before the repromulgation in August. [Reproduced in accompanying notebook at Tab 41].

was a democratic dimension in the decisions of the Assembly¹²⁴; the people in a sense have given their approval for the changes and operation of the Tribunal.

Also, principles of comity dictate that other nations should recognize the legislative, executive or judicial acts of another nation within its territory.¹²⁵ Because the Assembly has been recognized as the legitimate legislative branch of the Iraqi Transitional government, it deserves respect via comity from other nations.

2. Credibility

That leads the discussion to the more difficult question of credibility. One criticism of the IST has centered around the initial U.S. involvement. The Statute was promulgated wholesale from the CPA's Order No. 48.¹²⁶ The U.S. Congress appropriated U.S.\$75 million to pay for investigations and prosecutions of former government officials in Iraq.¹²⁷ This amount was subsequently expanded to U.S.\$128 million.¹²⁸ This heavy dependence on the U.S. undermines its credibility. How could a supposedly impartial tribunal be successful in apportioning justice, if it is viewed simply as victor's justice?¹²⁹

¹²⁴ See *supra* III.D.3.b for this discussion.

¹²⁵ 48 C.J.S. *International Law* § 9 (2005). [Reproduced in accompanying notebook at Tab 21].

¹²⁶ CPA, Order No. 48. [Reproduced in accompanying notebook at Tab 4].

¹²⁷ Human Rights Watch, *The Former Iraqi Government on Trial* (Oct. 16, 2005) 17, available at <http://hrw.org/backgrounders/mena/iraq1005/iraq1005.pdf>. [Reproduced in accompanying notebook at Tab 65].

¹²⁸ *Id.*, citing the Dept. of State for noting the lack of resources and expertise to perform the judicial, investigative needs to succeed.

¹²⁹ Compare this situation to the International Criminal Court's struggle for legitimacy. One scholar, talking about the importance of international organs, in the context of the Israeli-Palestinian wall says that skepticism is mainly grounded in the fear that the ICC's decisions will be dictated by politics rather than by law. In this atmosphere the credibility of international judicial organs involved in assessing compliance with International Humanitarian Law becomes more important than ever. This credibility rests largely on the professionalism of such organs and the soundness in law of their opinions. See Kretzmer, *supra* note

The answer lies in the actions of the Assembly. By abrogating in effect the Old Statute and replacing it with their own, they have tried to make the IST appear more like an Iraqi-owned process. The few changes in the statute serve this purpose. For instance, in the Old Statute, Art. 6(b) states that “[t]he President of the Tribunal shall be required to appoint non-Iraqi nationals to act in advisory capacities or as observers to the Trial Chambers and to the Appeals Chamber.”

In the New Statute, Art. 7(b), which is the corresponding article defining the responsibilities of the IST’s President, states that “[t]he President of the Court shall have the right to appoint non-Iraqi experts to the Criminal Court and the Cassation Commission. The role of the non-Iraqi nationals shall be to provide assistance with respect to international law and the experience of similar Courts (whether international or otherwise).”¹³⁰

Another example of a change is the use of the death penalty. Human Rights Watch and Amnesty International have both protested the allowance of the death penalty,¹³¹ which is peculiar to the IST and different from the other ad hoc tribunals, that all forbid the death penalty. The Iraqi’s have insisted on pursuing the death penalty, which is part of their culture, over the objections of the occupying forces’ suggestions.¹³²

112, 102. [Reproduced in accompanying notebook at Tab 48].

¹³⁰ Comparison of Old and New Iraqi Special Tribunal Statutes. [Reproduced in accompanying notebook at Tab 59].

¹³¹ Human Rights Watch, *supra* note 127. [Reproduced in accompanying notebook at Tab 65]; Amnesty International, *supra* note 80, 32 [Reproduced in accompanying notebook at Tab 54].

¹³² Debate between Dr. Curtis Doebbler and Prof. Michael Scharf, “Will Saddam Hussein Get a Fair Trial?” 37 CASE W. RES. J. INT’L L. 21 (2005). [Reproduced in the accompanying notebook at Tab 44].

Finally, perhaps the most innocuous, but certainly a most symbolic change in the Statute is the name. The original name of the Statute called it something that the English translation notes as “special.” Scholars have noted that the term “special” has a negative connotation in the Iraqi historical context; Saddam’s perverted courts that killed many people in farcical shows of justice were known as “special” courts.¹³³ When the New Statute was promulgated, a new name was used. It was now called the Higher Iraqi Criminal Court.¹³⁴ This is symbolic of the Iraqis taking control of their Tribunal.

Amnesty International states that there are three pillars to fight against the possible impunity of the criminals under Saddam’s regime. They are justice, truth and reparations, all necessary for lasting peace and reconciliation in Iraq.¹³⁵ These are basic, assumed elements of any court. If the IST is representative of these ideals, it will gain credibility. If it does not, the IST may face the situation that the ICTY faced when there questions of impartiality of that tribunal by the citizenry. A public opinion poll asked whether or not Milosevic was getting a fair trial; overwhelmingly, the public said he was not.¹³⁶

¹³³ David B. Hodgkinson, Preparations for a Precedent, Symposium Post-Conflict Justice: From Malmédy to Halabja University of Idaho College of Law 2nd Annual International Law Symposium, 13 Mich. St. J. Int’l L 79, 83 (2005). [Reproduced in accompanying notebook at Tab 47].

¹³⁴ The Old Statute named the Tribunal as the Iraqi Specialized Criminal Court for Crimes Against Humanity (المحكمة الجنائية العراقية المختصة بالجرائم ضد الانسانية). The New Statute renamed the Tribunal as the Higher Iraqi Criminal Court (المحكمة الجنائية العراقية الولى). Many thanks to fellow LLM students Bader Alfadliah and Sattam Alharbi for their assistance in this translation.

¹³⁵ Amnesty International, *supra* note 80, 8 [Reproduced in accompanying notebook at Tab 54].

¹³⁶ Call, *supra* note 77, 105. [Reproduced in accompanying notebook at Tab 42].

Consequently, the IST will gain credibility because of the Assembly's attempts to give the Tribunal more of a domestic nature and tone. Also, the legitimacy of the Assembly is imputed onto the Tribunal.

F. What possible problems may arise if the Tribunal is found to be not legitimate?

An illegitimate court obviously will not serve the goals of the court. The three pillars discussed above would not be achieved: justice, truth and reparations.¹³⁷

1. Considering theories of punishment

Theories of punishment deal with society asking what to do with their criminals. Court systems are recognized as the givers of punishment. If they are not perceived to be legitimate, then it affects the legitimacy of the punishment, which is a form of two of the pillars mentioned earlier – justice and reparations.

Philosophically, there are two main theories for why we punish: utilitarianism and retributivism.¹³⁸ Retributivism deals with an idea of just-deserts. People who commit crimes should answer for their actions. This is a retrospective approach that considers the past actions and seeks to justify the punishment solely on the crime that was committed.¹³⁹

Utilitarianism on the other hand seeks to please society as a whole. Legal philosopher Jeremy Bentham writes that human beings are creatures of pain and pleasure.

¹³⁷ See discussion in previous section regarding Amnesty International's three pillars.

¹³⁸ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 4 (1st ed. 1987). [Reproduced in accompanying notebook at Tab 24].

¹³⁹ *Id.* at 6.

Because of people's natural inclination to avoid pain and wanting to maximize pleasure, they normally will consider the potential punishment before to they commit a crime. In a sense, this is a prospective approach; the punishment should be greater than what they contemplated while meditating on the crime to deter them.¹⁴⁰

If Saddam Hussein, the undeniable star defendant of the IST receives the death penalty, this will satisfy the retributivist theory of punishment. He is getting his "just-desserts" so to speak for his past acts.¹⁴¹

But, considering a utilitarian point of view, if the tribunal is deemed to not be legitimate, this punishment achieve the deterring and utilitarian result of telling the world of how people who commit atrocities are dealt with. The result of retribution to Saddam's victims and their families is arguably achieved regardless of the legitimacy of the court, but the rest of society and the world suffers in other ways, discussed in the next section.

2. Healing and truth finding

Among the various goals of the tribunal, scholars have included truth finding and a creation of a historical record as important results for the Tribunal to achieve.¹⁴²

First, with regards to truth-finding, the extensive reign of Saddam's regime was known for its secrecy and clandestine human rights abuses. It is unclear even today what the exact acts were and the extent they took place. In order to heal and move on, a society

¹⁴⁰ See *id.* at 4-5.

¹⁴¹ See David Gersh, *Poor Judgment: Why the Iraqi Special Tribunal is the Wrong Mechanism For Trying Saddam Hussein on Charges of Genocide, Human Rights Abuses, and Other Violations of International Law* 33 Ga. J. Int'l & Comp. L. 273 (giving story of Saddam and Iraqi crimes against humanity.). [Reproduced in accompanying notebook at Tab 46].

¹⁴² Bassiouni, *supra* note 44, 346-7. [Reproduced in accompanying notebook at Tab 41].

should be able to have a chance to proclaim in public their stories and their accounts; this achieves a therapeutic result that allows the country to heal.

Since 1990, over two-dozen countries have created truth-commissions in post-conflict situations.¹⁴³ These commissions seek to create shared accounts, document who committed atrocities and to start the road to reconciliation, all which the tribunals are unable to do in the same way.¹⁴⁴

Secondly, the historical record that is created from this truth-finding process achieves a utilitarian result – the world has a chance to again be deterred from committing such atrocities, but it also is a chapter in mankind's history. This is necessary in assessing, making and promulgating future policies about governmental structures and war criminals such as Saddam.

3. The government and state's legitimacy

If the Tribunal is found to not be legitimate, then it may affect the Assembly and the new government of Iraq's own legitimacy.

International attention on the Tribunal is part of this. The incorporation of international law (the Hague Convention and the Geneva Convention) into the Statute represents the drafters' intent to have international law be used in its proceedings. Even after the repromulgation of the Statute, the revisers felt that it was important to leave the

¹⁴³ Call, *supra* note 77, 103. [Reproduced in accompanying notebook at Tab 42].

¹⁴⁴ *Id.*

references in, out of deference to the international community, which now has an interest on the affairs of Iraq and arguably the most important trial in its history.¹⁴⁵

If the Tribunal does not do a credible job or is not perceived to be legitimate, then the international community may impute that uncertainty onto the nascent government of Iraq.

The notion of exhaustion of domestic remedies exists in many international courts; this idea is that cases cannot be brought before the international court if the domestic courts are able to handle the cases. The American Convention on Human Rights¹⁴⁶ has this idea in Art. 46(1):

- a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
- b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;
- c. that the subject of the petition or communication is not pending in another international proceeding for settlement

In the Velasquez Rodriguez Case,¹⁴⁷ the Inter-American Court of Human Rights noted that the American Convention's domestic remedies exhaustion remedy could be circumvented if the remedies themselves were trivial or a "senseless formality."¹⁴⁸

¹⁴⁵ Hodgkinson, *supra* note 133, 87. [Reproduced in accompanying notebook at Tab 47].

¹⁴⁶ Organization of American States, The American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1970). [Reproduced in the accompanying notebook at Tab 2].

¹⁴⁷ Velasquez Rodriguez Case, Inter-American Court of Human Rights, 4 Inter-Am. T. H.R. (ser. C), 1988. [Reproduced in accompanying notebook at Tab 18].

¹⁴⁸ *Id.* at ¶¶ 67-68.

Certainly, the petitioner in that case was seeking redress for human rights abuses, but the principle of allowing a national court to deal with atrocities that took place mostly in Iraq with Iraqi victims is understandable and even appreciated.¹⁴⁹

This idea also exists in the newly formed International Criminal Court (the “ICC”) as the doctrine of complementarity. In Article 17 of the Rome Statute,¹⁵⁰ which establishes the ICC, this doctrine is provided for:

"[T]he Court shall determine that a case is inadmissible where: The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute."

Similarly, if somehow the legitimacy of the IST is called into question and a removal of the cases to the ICC takes place, it would be shameful upon Iraq; it would be indicative of a stigmatizing effect on the state as a whole for its debilitations. Consequently, the healing of Iraq and its attempts to regain any standing on the world stage would also be impeded.

IV. CONCLUSION

The scope of this memorandum concerns the revision of the Statute. Arguably, if the problem with the Statute is the legitimacy due to procedural amendment problems, the obvious solution is to use the old Statute. But then using the old statute would yield

¹⁴⁹ Hodgkinson, *supra* note 133, 85. [Reproduced in accompanying notebook at Tab 47].

¹⁵⁰ Rome Statute, Art. 17. [Reproduced in accompanying notebook at Tab 12].

the victor's justice problem the CPA has pointed to: using a statute promulgated by the occupying forces in the form of the CPA.

Using the New Statute exclusively encounters legitimacy problems also of course; these deal with the transfer of power, the fairness and credibility of the Tribunal.

Therefore, it seems that either forms of the Statute may be questioned for its legitimacy. This suggests that the question is simply subterfuge to get at the legitimacy of the IST itself, questioning transitional and war crimes justice again. This memorandum has dealt with these questions.

Overall, the Assembly was constitutionally empowered to make its changes to the Old Statute. The Assembly is a legitimate organization that made de minimis modifications to the Statute and re-promulgated it to take ownership of the judicial process and give legitimacy and credibility to the IST. Furthermore, whether or not the change to the statute was an amendment or a replacement, the results are the same – namely, a legitimate Statute. Finally, so long as the Tribunal can earn a place of legitimacy, as it likely has, then the easier it will be to secure a peaceful and just future for Iraq and its citizens.

V. CHARTS

A. Chart 1 – Timeline of events for Statute and Government transition

Statute	Date	Government
	15 Nov. 2003	CPA signs an “Agreement on Political Process,” outlining the creation and transition of power for Iraq.
First statute of IST is promulgated	10 Dec. 2003	
	8 March 2004	<ul style="list-style-type: none"> • Law of Administration for the State of Iraq for the Transitional Period (TAL) is promulgated. • Art 48 confirms Statute as issued from 10 Dec. 2003.
	28 June 2004	<ul style="list-style-type: none"> • Iraqi Interim Governing Council dissolves • U.S. hands over sovereignty to interim government (PM Allawi.)
	30 Jan. 2005	Iraq has elections for Assembly.
Assembly promulgates new statute	11 Aug. 2005	

B. Chart 2 – Timeline of U.N. Security Council Resolutions Regarding Iraq

Resolution	Date	Description
1441	8 Nov. 2002	States that Iraq, “has been and remains in material breach of its obligations” for weapons inspections. Demands that “Iraq cooperate immediately, unconditionally, and actively with UNMOVIC and IAEA.”
1483	22 May 2003	Gives the coalition forces control of Iraq and lifts sanctions against Iraq.
1500	14 Aug. 2003	Creates the U.N. Assistance Mission for Iraq (UNAMI).
1511	16 Oct. 2003	Sets timetable and framework for restoring sovereignty to Iraq.
1546	8 June 2004	Outlines and endorses terms for transfer of sovereignty to Iraq. Terms create an interim government. Also specifies UNAMI roles and powers.
1557	12 Aug. 2004	Extends the UNAMI for another year.
1619	11 Aug. 2005	Extends the UNAMI for another year.