

2005

The legitimacy of the establishment of the Iraqi Special Tribunal

Erin Page

Follow this and additional works at: https://scholarlycommons.law.case.edu/war_crimes_memos



Part of the [Criminal Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Page, Erin, "The legitimacy of the establishment of the Iraqi Special Tribunal" (2005). *War Crimes Memoranda*. 167.

https://scholarlycommons.law.case.edu/war_crimes_memos/167

This Memo is brought to you for free and open access by the War Crimes at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in War Crimes Memoranda by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
INTERNATIONAL WAR CRIMES RESEARCH LAB

A

MEMORANDUM
FOR THE
IRAQI SPECIAL TRIBUNAL

ISSUE: THE LEGITIMACY OF THE ESTABLISHMENT OF THE IRAQI SPECIAL
TRIBUNAL

Prepared by Erin Page
Spring 2005

TABLE OF CONTENTS

I.	<u>INTRODUCTION AND SUMMARY OF CONCLUSIONS</u>	
a.	Issues.....	1
b.	Summary of Conclusions.....	1
	i. The Iraqi Governing Council did not have Legal Authority to Establish the IST under U.N. Security Council Resolutions 1483, 1511, and 1546 but did Possess the Legal Authority to Establish the IST under the Laws and Usages of War.....	1
	ii. The Iraqi Interim Government had Legal Authority to Ratify the IST under both U.N. Security Council Resolutions 1483, 1511, and 1546 and the Laws and Usages of War.....	2
	iii. The Transitional Government Also has Legal Authority to Ratify the IST under Both U.N. Security Council Resolutions 1483, 1511, and 1546 and the Laws and Usages of War but Must Confirm the Creation of the IST for it to Continue its Legality.....	2
II.	<u>FACTUAL BACKGROUND</u>	3
III.	<u>IRAQI COALITION PROVISIONAL AUTHORITY AND GOVERNING COUNCIL</u>	6
	a. U.N. Security Council Resolutions.....	6
	b. Laws and Usages of War	11
IV.	<u>IRAQI INTERIM GOVERNMENT</u>	16
	a. U.N. Security Council Resolutions.....	16
	b. Laws and Usages of War	24
V.	<u>IRAQI TRANSITIONAL GOVERNMENT</u>	24
	a. U.N. Security Council Resolutions.....	25
	b. Laws and Usages of War	27
VI.	<u>FACTORS OF THE COURT WHICH MAKE IT LEGITIMATE</u>	29

a. Due Process.....	29
b. Competent Tribunal	31
c. Independent and Impartial	33
d. Established by Law	36
VII. <u>CONCLUSIONS</u>	37

INDEX OF AUTHORITIES

INTERNATIONAL INSTRUMENTS

1. Charter of the United Nations, 1945
2. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949
3. Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907
4. Pictet Commentaries to Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949
5. Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended 19 May 2003 by Resolution 1481)

NATIONAL INSTRUMENTS

6. Iraqi Penal Code with Amendments (1969)
7. Coalition Provisional Authority, An Historic Review of CPA Accomplishments, Baghdad, Iraq
8. Coalition Provisional Authority Order Number 48, Iraqi Coalition Provisional Authority, CPA/ORD/9 Dec 2003/48
9. Coalition Provisional Authority Regulation Number 1, Iraqi Coalition Provisional Authority, CPA/REG/16 May 2003/01
10. Coalition Provisional Authority Regulation Number 6, Iraqi Coalition Provisional Authority, CPA/Reg/13 July 2003/06
11. Iraqi Interim Government, Announcement Ceremony Press Packet

12. Law of Administration for the State of Iraq for the Transitional Period
13. Revised Version of Iraqi Special Tribunal Rules of Procedure and Evidence
14. Statute of the Iraqi Special Tribunal (2003)

UN RESOLUTIONS AND DOCUMENTS

15. S.C. Res. 1483, U.N. SCOR, 4761st mtg., U.N. Doc. S/RES/1483 (2003)
16. S.C. Res. 1500, U.N. SCOR, 4808th mtg., U.N. Doc. S/RES/1500 (2003)
17. S.C. Res. 1511, U.N. SCOR, 4844th mtg., U.N. Doc. S/RES/1511 (2003)
18. S.C. Res. 1546, U.N. SCOR, 4987th mtg., U.N. Doc. S/RES/1546 (2004)
19. U.N. SCOR, 4761st mtg., U.N. Doc. S/PV.4761 (2003)
20. U.N. SCOR, 4812th mtg., U.N. Doc. S/PV.4812 (2003)
21. U.N. SCOR, 4844th mtg., U.N. Doc. S/PV.4844 (2003)
22. U.N. SCOR, 4971st mtg., U.N. Doc. S/PV.4971 (2004)
23. U.N. SCOR, 4982nd mtg., U.N. Doc. S/PV.4982 (2004)
24. U.N. SCOR, 4984th mtg., U.N. Doc. S/PV.4984 (2004)
25. U.N. SCOR, 4987th mtg., U.N. Doc. S/PV.4987 (2004)
26. Press Release, U.N. SCOR, Security Council Lifts Sanctions on Iraq, Approves UN Role, Calls for Appointment of Secretary-General's Special Representative (May 22, 2003) (on file with UN)
27. Press Release, U.N. SCOR, Briefing Security Council, Iraqi Foreign Minister Calls for Resolution Endorsing Interim Government, Recognizing Continuing Need for Multinational Force (June 3, 2004) (on file with UN)

28. Press Release, U.N. SCOR, Security Council Endorses Formation of Sovereign Interim Government in Iraq; Welcomes End of Occupation by 30 June, Democratic Elections by January 2005 (June 8, 2004) (on file with UN)

COURT AND TRIBUNAL CASES

29. Findlay v United Kingdom, 1997 Eur. Ct. H.R. 22107/93
30. Naumenko v Ukraine, 2004 Eur. Ct. H.R. 41984/98
31. Prosecutor v Augustine Gbao, SCSL 2004-15-AR72(E) (May 25, 2004) Decision on the Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of the Sierra Leone on the Establishment of the Special Court
32. Prosecutor v. Morris Kallon, Sam Hinga Norman, and Brima Bazzy Kamara, SCSL-2004-15-AR72(E) (March 13, 2004) Decision on Constitutionality and Lack of Jurisdiction
33. Prosecutor v. Slobodan Milosevic, IT-99-37-PT (Nov. 8, 2001)
34. Prosecutor v. Sam Hinga Norman, SCSL-2004-14-AR72(E), (March 13, 2004) Decision of Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence)
35. Prosecutor v. Dusko Tadic, IT-95-1-AR72 (Oct. 2, 1995)
36. U.S. v. Alstötter et al, 3 T.W.C. 1 (1948)

BOOKS

37. EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (Princeton University Press 1993)
38. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (Oxford University Press 2003)
39. THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS (Dieter Fleck ed., Oxford University Press 2004) (1995)

JOURNALS AND LAW REVIEW ARTICLES

40. Michael P. Scharf, *Swapping Amnesty for Peace*, 31 TEX. INT'L L.J. 1 (1996)
41. David J. Scheffer, *Future Implications of the Iraq Conflict*, 97 A.J.I.L. 842 (2003)
42. Antonia Sherman, *Sympathy for the Devil: Examining a Defendant's Right to Confront Before the International War Crimes Tribunal*, 10 EMORY INT'L L. REV. 833 (1996)
43. Patricia McGowan Wald, *The Omarska Trial – a War Crimes Tribunal Close-up*, 57 SMU L. REV. 271 (2004)

NON GOVERNMENTAL ORGANIZATIONS REPORTS AND MEMORANDA

44. BBC Monitoring, Commentary Hails “Power of Democracy” in Iraq, Draws Parallels with Israel (Feb. 1, 2005)
45. Memorandum from Human Rights Watch to the Iraqi Governing Council on ‘The Statute of the Iraqi Special Tribunal’ (Dec. 2003) (on file with Human Rights Watch)
46. Human Rights Watch, Iraq: Law Creating War Crimes Tribunal Flawed (Dec. 11, 2003) (on file with Human Rights Watch)
47. Human Rights Watch, Iraq: Tribunal’s Flaws Raise Fair-Trial Concerns (Dec. 17, 2004) (on file with Human Rights Watch)
48. Human Rights Watch, The Trial of Saddam Hussein: Q-and-A (Nov. 24, 2004) (on file with Human Rights Watch)
49. Law and Bills Digest Group, Jacob Varghese, Digest, Feb. 10, 2004, Research Note no. 34 2003-04 Parliament of Australia

NEWS ARTICLES

50. Anne Barnard, *Iraq's Premier Vows Elections Despite Strife*, BOSTON GLOBE, Sept. 12, 2004 at A1
51. Gary Bass, *War Crimes and Punishment: Tribunals are Flawed, but not Futile*, WASH. POST, Nov. 26, 2000, at B3
52. Vanessa Blum, *A Slow Search for Justice in Iraq*, LEGAL TIMES, Jan. 24, 2005, at pg 1
53. John F. Burns, *U.S. Official Says Early Trials of Hussein and Others are Unlikely, Despite Allawi's Demand*, NY TIMES, Sept. 25, 2004, at A1
54. Rajiv Chandrasekaran, *Former Exiles Given Majority on Iraqi Council; U.S. and Britain Revise Plans in Choosing 25-Member Governing Body*, WASH. POST, July 13, 2003, at A23
55. Liam Christopher, *Saddam's Aides Set for War Trial; Iraqi PM Says Tribunals to Start Next Week*, DAILY POST (Liverpool) at pg. 14
56. John Daniszewski, *In Iraq, a Case Without Precedent*, L.A. TIMES, March 6, 2005, at A1
57. Kareem Fahim, *Saddam Hussein's Lawyer Aims for Bush*, VILLAGE VOICE, Dec. 28, 2004 at pg. 38
58. Abd al-Aziz al-Hakim, UN Office for the Coordination of Humanitarian Affairs, www.IRINnews.org
59. Rory McCarthy, *Shia Group Claims Sweeping Victory*, THE GUARDIAN (London), Feb. 2, 2005 at pg. 13
60. Michael A. Newton, *Justice Abandoned*, INT'L HERALD TRIBUNE, Nov. 25, 2004 at pg. 9
61. Michael P. Scharf, *Can This Man Get a Fair Trial?*, WASH. POST, Dec. 19, 2004, at B1
62. Marlise Simons, *Iraqis Not Ready for Trials; U.N. to Withhold Training*, NY TIMES, Oct. 22, 2004 at A1

63. Liz Sly, *Newly Elected Sunni Encouraged by Turnout*, CHICAGO TRIBUNE, Feb. 2, 2005 at C4

64. Paul West, *FIRST STRIKE; War Commences with Attack Aimed at Iraqi Leaders; President Bush Orders Missile Assault after White House Meeting with Advisers*, BALTIMORE SUN, March 20, 2003, at 1A

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issues

The creation of the Iraqi Special Tribunal (“IST”) raises many concerns about whether the Iraqi Governing Council (“Governing Council”) had the authority to create the tribunal and whether the Iraqi Interim Government (“Interim Government”) or Iraqi Transitional Government (“Transitional Government”) can lawfully ratify the establishment of the IST. Part II discusses the factual background in establishing the IST. Part III explores whether the Governing Council had the legal authority to create the IST under the laws and usages of war or United Nations Security Council Resolutions 1483, 1511, and 1546. Part IV analyzes whether the Interim Government has the power to ratify the IST’s work and how they may have done so. Part V examines the ways in which the Transitional Government may confirm the IST Statute. Part VI examines the legitimacy of the IST in terms of its independence and procedural protections.

B. Summary of Conclusions

1. The Iraqi Governing Council did have Legal Authority to Establish the IST under the Laws and Usages of War but Not under U.N. Security Council Resolutions 1483, 1511, and 1546.

The Iraqi Special Tribunal was established by the Iraqi Governing Council in accordance with the laws and usages of war. Under the laws and usages of war, an occupying power cannot create new laws or judicial institutions which will last past the time of conflict; however, there are exceptions to this limitation based on security and maintaining orderly government, which permit the Governing Council to establish the IST. The Governing Council did not, however, have separate authority under United Nations Security Council Resolutions 1483, 1511, and 1546 to establish the IST. Resolution 1546 does not apply to the actual creation of the IST by the Governing Council, as it was not adopted until six months after the IST was created.

Resolutions 1483 and 1511 do apply to the Coalition Provisional Authority (“CPA”) but repeatedly state that the powers of the CPA and Governing Council, as part of the CPA, only have temporary authority and reaffirm that Iraq was under a state of occupation.

2. The Iraqi Interim Government had Legal Authority to Ratify the IST under both the Laws and Usages of War and U.N. Security Council Resolutions 1483, 1511, and 1546.

The Interim Government possessed the legal authority to ratify the IST under the above UN Security Council Resolutions, and implicitly ratified the IST by continuing its work. Under Resolution 1546, the Interim Government was recognized as having full power and sovereignty of the State of Iraq. The Resolution and Security Council meetings leading up to the adoption of Resolution 1546 indicate that all Security Council members saw the transfer of power from the CPA to the Interim Government as marking the end of occupation. With the end of occupation, under both the laws and usages of war and the power given to the Interim Government in Resolution 1546, the Interim Government had the power to ratify and make legal, under both the laws and usages of war and Security Council Resolutions, the creation of the IST.

3. The Transitional Government Also has Legal Authority to Ratify the IST under Both the Laws and Usages of War and the U.N. Security Council Resolutions 1483, 1511, and 1546 and Must Confirm the Creation of the IST for it to Maintain its Legality.

While the Interim Government possessed the authority to ratify the creation of the IST, the Interim Government was still just a provisional authority. U.N. Security Council Resolutions 1483, 1511, and 1546 all indicate that an internationally recognized democratically elected government of Iraq would signal that the State of Iraq officially became fully sovereign. The best thing for the legitimacy of the IST and the continuance of its work would be ratification by the elected Transitional Government after the transition of power from the Interim Government. The strongest way for the Transitional Government to ratify and give the most legitimacy to the

IST is by passing legislation which explicitly and directly approves or confirms the IST Statute. However, other less direct steps could be taken in order to ratify the IST. The Transitional Government could also recognize and state the legitimacy of the IST by approving Rules of Procedure for the IST or specifically providing funding for the court. The Transitional Government will be an elected representative government, which will be internationally recognized; thus, giving it the complete powers of the sovereign State of Iraq.

II. FACTUAL BACKGROUND

On March 19, 2003,¹ the United States and a coalition of States invaded Iraq, claiming that Iraq possessed weapons of mass destruction. By April 2003, the war was considered to be over as the regime of Saddam Hussein was overthrown.² In its place, the U.S. set up a Coalition Provisional Authority that was to control the State of Iraq until a new government could be set up. In July of 2004, U.S. official L. Paul Bremer III (“Bremer”), Administrator of the Coalition Provisional Authority, decided to create the Governing Council, comprised of twenty five hand-picked members, including people who had lived in exile during Saddam Hussein’s rule, which would exercise broad executive powers in conjunction with the CPA.³ The Security Council did not formally recognize the Governing Council as sovereign power in Iraq, but instead welcomed

¹ Paul West, *FIRST STRIKE; War Commences with Attack Aimed at Iraqi Leaders; President Bush Orders Missile Assault after White House Meeting with Advisers*, BALTIMORE SUN, March 20, 2003, at 1A. [Reproduced in the accompanying notebook II at Tab 63].

² Coalition Provisional Authority, *An Historic Review of CPA Accomplishments* (on file with the Coalition Provisional Authority) [Reproduced in the accompanying notebook I at Tab 7].

³ Rajiv Chandrasekaran, *Former Exiles Given Majority on Iraqi Council; U.S. and Britain Revise Plans in Choosing 25-Member Governing Body*, WASH. POST, July 13, 2003, at A23. [Reproduced in the accompanying notebook II at Tab 54].

it as “an important step towards the formation by the people of Iraq of an internationally recognized representative government that will exercise the sovereignty of Iraq.”⁴

On December 10, 2003, Bremer gave full legislative authority to the Coalition Provisional Authority and Governing Council specifically for the purpose of giving them the power to create a special tribunal.⁵ The Order giving authority for the establishment of the IST was to remain in effect until either rescinded in writing by Bremer or the establishment of a representative, internationally recognized government of Iraq.⁶ Therefore, while the IST was actually created by the Governing Council, the Governing Council received the power to create it from Bremer.

While many countries encouraged the creation of a democratic, internationally recognized Iraqi government to which sovereignty could be passed,⁷ they soon learned that the C.P.A. could not just hand over power immediately to the Iraqis, such as the Governing Council, and have the State survive such a drastic change. Rather, some sort of transitional government was needed in order to facilitate a smooth change from Saddam Hussein’s regime to a democratically elected government. The U.S. realized, and other countries agreed, that a need existed to have some kind of interim Iraqi government in place so that the Iraqi sovereignty could be restored while the election process was created. On June 1, 2004, the Interim Iraqi Government was established as a major step toward achieving restoration of full sovereignty to

⁴ S.C. Res. 1500 U.N. SCOR, 4808th mtg., U.N. Doc. S/RES/1500 (2003), para. 2. [Reproduced in the accompanying notebook I at Tab 16].

⁵ Coalition Provisional Authority Order Number 48, Delegation of Authority Regarding an Iraqi Special Tribunal, CPA/ORD/9 Dec 2003/48 [Reproduced in the accompanying notebook I at Tab 8].

⁶ *Id.*

⁷ U.N. SCOR, 4761st mtg. at 3, U.N. Doc. S/PV.4761 (2003) (Statement by Mr. De La Sabliere of France “The Iraqi people must take control of its own future, both at home, where a representative and sovereign Government must be established as speedily as possibly by the Iraqis themselves, and within the international community, to which Iraq must soon return.”) [Reproduced in the accompanying notebook I at Tab 19].

the Iraqi people.⁸ On June 28, 2004, two days ahead of schedule, the C.P.A. and Governing Council transferred power to the Interim Government. Judges and prosecutors began to be appointed by the general director of the IST in the spring of 2004.⁹

<u>Government of Iraq</u>	<u>Date of Rule</u>	<u>Source of Authority</u>	<u>Actions Taken Regarding IST</u>
Coalition Provisional Authority and Governing Council	July 2003 – June 28, 2004	Laws and Usages of War	Governing Council created IST
Iraqi Interim Government	June 28, 2004 – March 16, 2005	UN Security Council Resolutions 1483, 1511, and 1546	Ratification and continuation of IST: <ul style="list-style-type: none"> - Appointment of IST judges and prosecutors - Training of IST judges and prosecutors - Erection of IST court house - Initiation of IST hearings
Iraqi Transitional Government	March 16, 2005 (date of National Assembly being sworn in) – Present	Laws and Usages of War UN Security Council Resolutions 1483, 1511, and 1546 Domestic laws - it is the democratically elected government of a sovereign nation	Ratification of IST: <ul style="list-style-type: none"> - Issuance of first indictments under the IST Statute - Approval of budget for IST - Will draft permanent constitution

⁸ Coalition Provisional Authority, An Historic Review of CPA Accomplishments, pg 2 [Reproduced in the accompanying notebook I at Tab 7].

⁹ Human Rights Watch, Trial of Saddam Hussein: Q-and-A (Nov. 24, 2004) (on file with Human Rights Watch) [Reproduced in the accompanying notebook II at Tab 48].

III. IRAQI COALITION PROVISIONAL AUTHORITY AND GOVERNING COUNCIL

“We have no tools in hand except legal ones with which to judge and pass sentence on something that cannot even be adequately represented either in legal terms or in political terms.”¹⁰

In order to determine whether the IST was legitimately established, it is necessary to look the authority of the various institutions that created and approved it. Each of the relevant governments was created in very different ways with different compositions of people. As the timing for each government was different, the laws and usages of war apply to each in a unique way. The UN Security Council Resolutions also have different interpretations based on whether one is discussing the Coalitional Government, Interim Government, or the Transitional Government.

A. U.N. Security Council Resolutions 1483, 1511, and 1546

While U.N. Security Council Resolutions 1483, 1511, and 1546 all deal with the government of the State of Iraq, they are very different resolutions with different goals and objectives. Though all three resolutions were passed while the Coalition Provisional Authority or Iraqi Governing Council were in power, Resolutions 1483 and 1511 dealt specifically with the occupation of Iraq and what could legally be done during that time. Resolution 1546 clarified what the status of Iraq would be after the handover of power from the CPA and the Governing Council to the Iraqi Interim Government. Resolutions 1483 and 1511 are the two resolutions that could possibly give power to create the IST to the CPA as both were passed before Bremer gave permission for the creation of the IST and the Statute for the IST was promulgated. Resolution 1546 did not occur until approximately six months after the Statute for the IST was statutorily

¹⁰ Patricia McGowan Wald, *The Omarska Trial – a War Crimes Tribunal Close-up*, 57 SMU L. REV. 271, 275 (2004) citing Hannah Arendt (Chronicler of Nazi oppression). [Reproduced in the accompanying notebook II at Tab 43].

created by the Governing Council¹¹ and represented “a clear departure from earlier Security Council resolutions 1483 and 1511.”¹² However, none of the above three Resolutions gave the Coalition Provisional Authority the power to create the IST.

Both Resolutions 1483 and 1511 determine that the situation in Iraq is a threat to international peace and security.¹³ As the Security Council did in the case of the former Yugoslavia, that declaration is enough for the Security Council to create an ad hoc international tribunal in order to help restore international peace and security.¹⁴ However, that is not what happened in this case. Here, the Security Council did not create an international tribunal. Rather, it was the domestic authorities of Iraq who created a national tribunal in which to try the atrocities of the former regime.

While Resolution 1483 affirms the “need for accountability for crimes and atrocities committed by the previous Iraqi regime,”¹⁵ it also refers to the occupying powers in Iraq at that time. Resolution 1483 supports the creation by the people of Iraq, with international help, of an Iraq interim administration as transitional government run by Iraqis, until such time as an

¹¹ Memorandum from Human Rights Watch to the Iraqi Governing Council on ‘The Statute of the Iraqi Special Tribunal,’ pg 2 (Dec. 2003) (on file with Human Rights Watch) [Reproduced in the accompanying notebook II at Tab 45].

¹² U.N. SCOR, 4987th mtg. at 14, U.N. Doc. S/PV.4987 (2004) Mr. Martins, Angola [Reproduced in the accompanying notebook II at Tab 18].

¹³ S.C. Res. 1483, U.N. SCOR, 4761st mtg. at para.2, U.N. Doc. S/RES/1483 (2003) [Reproduced in the accompanying notebook I at Tab 15]; S.C. Res. 1511, U.N. SCOR, 4844th mtg. at para.1, U.N. Doc. S/RES/1511 (2003) [Reproduced in the accompanying notebook I at Tab 17].

¹⁴ Prosecutor v. Dusko Tadic, IT-95-1-AR72 at para.33-34 (Oct. 2, 1995) (While the establishment of an international criminal tribunal is not expressly mentioned among the enforcement measures provided for in Chapter VII, it matches the description in Article 41 of measures not involving the use of force.); *Id.* at para. 36 (“The establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41.”) [Reproduced in the accompanying notebook II at Tab 35].

¹⁵ S.C. Res. 1483, U.N. SCOR, 4761st mtg. at pg 2, U.N. Doc. S/RES/1483 (2003) [Reproduced in the accompanying notebook I at Tab 15].

internationally recognized, representative government is established by the people of Iraq.¹⁶ This statement indicates that the then current authority, the CPA is not run by Iraqis. As the head administrator of that Authority was a U.S. citizen, the CPA certainly was not run by Iraqis. The Governing Council, while made up of Iraqis, was seen as “only an intermediate first step” on the path to restoring sovereignty.¹⁷ Therefore, Iraq was under the control and authority of an occupying power at the time of IST creation.

There is nothing else in the text of the Resolution that could be used to give the CPA the power to create a tribunal. In fact, at the Security Council meeting in which the Resolution was adopted, Mr. Aguilar Zinser, Mexican Representative, stated that in his explanation of vote “this resolution does not authorize the establishment of long-term commitments that would alienate the sovereignty of the people.”¹⁸ Mr. Lavrov, Russian Representative, also stated that the occupying powers should abide by international humanitarian law, should guarantee the sovereignty and territorial integrity of Iraq, and called for the speedy restoration of the right of the Iraqi people to control their own political future and natural resources.¹⁹

Resolution 1483 gave the support of the United Nations to the creation, by the CPA (the occupying powers under unified command) and a special representative, of an Iraqi interim administration that would serve as a transitional government run by Iraqis until an internationally

¹⁶ *Id.* at pg. 3-4.

¹⁷ U.N. SCOR, 4812th mtg. at pg. 8, U.N. Doc. S/PV.4812 (2003), Mr. Trautwein (Germany); *See also* comments by Mr. Tafrov (Bulgaria), pg. 9 (“[T]he creation of the interim Governing Council is an important step in the creation of an internationally recognized Iraqi Government.”); Mr. Arias (Spain), pg. 14 (“[W]e support the establishment of the Iraqi Governing Council as an important first step towards a democratically elected Government and the full exercise by the Iraqi people of their sovereignty as soon as possible.”) [Reproduced in the accompanying notebook I at Tab 20].

¹⁸ U.N. SCOR, 4761st mtg. at pg. 7, U.N. Doc. S/PV.4761 (2003) (stated with regards to Iraq’s petroleum resources) [Reproduced in the accompanying notebook I at Tab 19].

¹⁹ *Id.* at pg. 7-8.

recognized, representative government democratically established by the people of Iraq took control.²⁰ The Security Council understood the status of the foreign military powers in Iraq as occupying powers and gave the UK and US primary responsibility for upholding occupation laws.²¹ Resolution 1483 envisioned the creation of the Governing Council as helping guide Iraq through the steps to full democracy, including “naming ministers for an interim Government, drafting a constitution and holding elections that will lead to an internationally recognized representative Government.”²² Even if Resolution 1483 had given the power for the creation of the IST, anything established under Resolution 1483 would have come to an end on June 30, 2003 when the Interim Government was to assume the responsibility and authority for governing.²³

Resolution 1511 does reaffirm that the U.N. Security Council believes in the right of the Iraqi people freely to determine their own political future.²⁴ This could be read as to give some support for the creation of the IST because it is a step in the creation of a political future, but it was still created during a time of occupation when the governing council did not have full control or power over the State. This is explicitly stated in the Resolution which

²⁰ Press Release, U.N. SCOR, Security Council Lifts Sanctions on Iraq, Approves UN Role, Calls for Appointment of Secretary-General’s Special Representative (May 22, 2003) (on file with UN), pg 1 [Reproduced in the accompanying notebook I at Tab 26].

²¹ David J. Scheffer, *Future Implications of the Iraq Conflict*, 97 A.J.I.L. 842, 844 (2003) [Reproduced in the accompanying notebook II at Tab 41].

²² U.N. SCOR, 4812th mtg. at pg. 3, U.N. Doc. S/PV.4812 (2003) [Reproduced in the accompanying notebook I at Tab 20]; *See also* Coalition Provisional Authority, An Historic Review of CPA Accomplishments quoting Raja Habib al Khaza’l, member of the Governing Council of Iraq (“As a gynecologist, I have assisted millions of Iraqi women in giving birth. Now, I am participating in the birth of a new country and regime that is based on women’s rights, human rights, unity and freedom.”) [Reproduced in the accompanying notebook I at Tab 7].

²³ U.N. SCOR, 4971st mtg. at pg. 2, U.N. Doc. S/PV.4971 (2004), Mr. Cunningham (US) [Reproduced in the accompanying notebook I at Tab 22].

²⁴ S.C. Res. 1511 at para. 1, U.N. SCOR, 4844th mtg., U.N. Doc. S/RES/1511 (2003) [Reproduced in the accompanying notebook I at Tab 17].

“underscores...the temporary nature of the exercise by the Coalition Provisional Authority of the specific responsibilities, authorities, and obligations under applicable international law and set forth in resolution 1483.”²⁵ Resolution 1511 also states that the temporary authority of the CPA will cease when an internationally recognized, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the Authority.²⁶

Because the power of the CPA is only temporary and the authority of the occupying powers, comprising the Coalition Provisional Authority, completely end with the election of an internationally recognized government of Iraq,²⁷ those institutions and laws promulgated by the CPA will also cease unless ratified by the democratically elected government. Even Sir Emyr Jones Parry, UK Representative, acknowledges that Resolution 1511 confirms the temporary nature of the Coalition’s powers.²⁸ If the U.K., one of the primary occupying powers, takes the position that the power of the Coalition government is only temporary, then it is unlikely that all the acts and rules of the temporary government would be meant to be permanent even after the Coalition Provisional Authority has ceased to exist. The fundamental objective of Resolution 1511 was not to allow the CPA to create a judicial institution which would be binding on all future governments, but rather the objectives included “the restoration of sovereignty and the transfer of authority to the people of Iraq.”²⁹

²⁵ *Id.* at para. 2.

²⁶ *Id.*

²⁷ U.N. SCOR, 4844th mtg. at pg. 3, U.N. Doc. S/PV.4844 (2003) (This is still at a time when they thought that elections would be held before January of 2005) [Reproduced in the accompanying notebook I at Tab 21].

²⁸ *Id.* at pg. 5; *See also* Negroponte (US), pg. 10 (“The exercise of governmental authorities in Iraq by the Coalition Provisional Authority is temporary in nature.”).

²⁹ *Id.* at pg. 6, Mr. Akram (Pakistan).

Resolution 1546 was adopted June 8, 2004, twenty two days before the scheduled transition of power to the Iraqi Interim Government.³⁰ The IST had been created almost a full six months prior to the passing of Resolution 1546. Nowhere in any of the Security Council meetings leading up to Resolution 1546 is there mention of whether the Coalition Provisional Authority had the power to create the IST. Rather, Resolution 1546 and the meetings prior to it discuss only how much power the Interim Government will have, the transfer of power to the Interim Government, and the impending end to occupation.³¹

B. Laws and Usages of War

In determining what laws and usages of war apply to the situation in Iraq and the power of the various governments, it first has to be determined whether Iraq was under a state of occupation according to the laws and usages of war. Under the 1907 Hague Convention (IV), a “territory is considered occupied when it is actually placed under the authority of the hostile army.”³² While governments typically try to deny legal status as occupying powers on foreign territory,³³ the Security Council declared occupation status for Iraq and both the US and UK embraced it.³⁴

³⁰ S.C. Res. 1546, U.N. SCOR, 4987th mtg., U.N. Doc. S/RES/1546 (2004) [Reproduced in the accompanying notebook I at Tab 18].

³¹ U.N. SCOR, 4987th mtg. at pg. 10, U.N. Doc. S/PV.4987 (2004), Mr. Munoz (Resolution 1546 “marks the end of the occupation of [Iraq] and the beginning of a stage during which the Iraqis can once again take control of their political destiny, their natural resources, and their sovereignty.”) [Reproduced in the accompanying notebook I at Tab 25].

³² Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land, Art. 42, Oct. 18, 1907 [Reproduced in the accompanying notebook I at Tab 3].

³³ EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION*, pg 149 (Princeton University Press 1993) [Reproduced in the accompanying notebook II at Tab 37].

³⁴ David J. Scheffer, *Future Implications of the Iraq Conflict*, 97 A.J.I.L. 842, 846 (2003) [Reproduced in the accompanying notebook II at Tab 41].

While the occupying power is to take all measures to restore and ensure public order and safety, it is also supposed to respect the laws previously in force in the country.³⁵ The Security Council gave the CPA the authority to work within the laws of occupation, but also gave it permission to act outside of the laws of occupation in specific areas, such as the Development Fund for Iraq and food assistance tied to oil production.³⁶ However, the creation of the IST was not one of the areas in which the Security Council gave specific authority to the CPA.

In discussion of U.N. Security Council Resolution 1511, Mr. Akram (Pakistan) stated that the text of the resolution “reaffirms the temporary nature of the exercise by the Coalition Provisional Authority of its specific responsibilities and obligations under international law.”³⁷ Thus any action by the CPA has to be in accordance with international law. International law does not allow an occupying power to create a new judicial system. Under the 4th Geneva Convention, an occupying power cannot legally order measures which will remain effective beyond the end of the war.³⁸ This is because the “occupying power is not successor in right of

³⁵ Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land, Art. 43, Oct. 18, 1907 [Reproduced in the accompanying notebook I at Tab 3].

³⁶ David J. Scheffer, *Future Implications of the Iraq Conflict*, 97 A.J.I.L. 842, 845-846 (2003) [Reproduced in the accompanying notebook II at Tab 41].

³⁷ U.N. SCOR, 4844th mtg. at pg.7, U.N. Doc. S/PV.4844 (2003) [Reproduced in the accompanying notebook I at Tab 21].

³⁸ Gasser, Hans-Peter, *The Handbook of Humanitarian Law in Armed Conflicts*, pg 251 (Dieter Fleck ed., Oxford University Press 2004) (1995). Hans-Peter Gasser served as head of the International Committee of the Red Cross' Legal Division, was Senior Legal Advisor to the ICRC for twelve years, and responsible for promoting ratification of the 1977 Protocols additional to the Geneva Conventions. He also served as editor of the *International Review of the Red Cross* for five years. [Reproduced in the accompanying notebook II at Tab 39].

the temporarily suspended national authority.”³⁹ The CPA itself recognized that its governmental powers were temporary in Coalition Provisional Authority Regulation Number 1.⁴⁰

However, the 4th Geneva Convention does allow an occupying power to repeal or suspend the penal laws of the occupied territory in cases where they constitute a threat to the occupying power’s security or an obstacle to the application of the 4th Geneva Convention.⁴¹ According to the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the Special Court for Sierra Leone (“SCSL”), the Security Council has the power to create international tribunals as a measure to restore international peace and security.⁴² In the same way, the IST is a measure to restore peace and security to the State of Iraq. The IST “emphasize[s] Iraqi ownership and control as a necessary step toward unifying the war-torn nation and restoring the rule of law.”⁴³ Thus, the IST could be said to help enhance the security of the occupying powers of Iraq.

³⁹ *Id.* at pg 245.

⁴⁰ Coalition Provisional Authority Regulation Number 1, Sect. 1, Iraqi Coalition Provisional Authority, CPA/REG/16 May 2003/01 (also recognizing that it had governmental authority due to U.N. Security Council resolutions and the laws and usages of war.) [Reproduced in the accompanying notebook I at Tab 9]. *See also* Coalition Provisional Authority Regulation Number 6, Sect. 6, Iraqi Coalition Provisional Authority, CPA/Reg/13 July 2003/06 (“In accordance with Resolution 1483, the Governing Council and the CPA shall consult and coordinate on all matters involving the temporary governance of Iraq, including the authorities of the Governing Council.”) [Reproduced in the accompanying notebook I at Tab10].

⁴¹ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Art. 64, Aug. 12, 1949 [Reproduced in the accompanying notebook I at Tab 2].

⁴² Prosecutor v. Slobodan Milosevic, IT-99-37-PT, pg 3 (Nov. 8, 2001) [Reproduced in the accompanying notebook II at Tab 33]; Prosecutor against Augustine Gbao, SCSL-2004-15-AR72(E), May 25, 2004 Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, para. 5 [Reproduced in the accompanying notebook I at Tab 31].

⁴³ Vanessa Blum, *A Slow Search for Justice in Iraq*, LEGAL TIMES, Jan. 24, 2005, at pg 1 [Reproduced in the accompanying notebook II at Tab 52].

The second exception, allowing occupying powers to repeal or suspend the penal laws, is where such action is in the interests of the population of the occupied territory.⁴⁴ It is through this exception that an occupying power can abolish courts or tribunals that were instructed to apply inhumane or discriminatory laws as in Nazi Germany.⁴⁵ An occupying power could assume responsibility for penal jurisdiction⁴⁶ if the abolishment of courts was done for “the necessity of ensuring the effective administration of justice.”⁴⁷ In the case of Iraq, one of the main obstacles facing a sovereign Iraq is the continuing violence and terror attacks by insurgents. By bringing to justice those who committed heinous crimes under Saddam Hussein’s reign, the Iraqi people have the opportunity to distance themselves from Hussein’s regime which was rife with inequalities and discriminatory administrations of justice. “Any situation in which there is a need for a war crimes tribunal is a situation that has gone horribly wrong. After atrocity all options are awful. War crimes tribunals are simply—in both moral and political terms—the least awful option we have.”⁴⁸

If the courts are abolished, the occupying power “may call upon inhabitants of the occupied territory, or on former judges, or it may set up court composed of judges of its own

⁴⁴ Pictet Commentaries to Fourth Geneva Convention of 12 August 1949, Art. 64, pg 335 [Reproduced in the accompanying notebook I at Tab 4].

⁴⁵ U.S. v. Alstötter et al, 3 T.W.C. 1 (1948), <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/Alstoetter.htm> (The Judges Trial at Nuremberg was the prosecution of sixteen German jurists and lawyers who were held responsible for implementing and furthering the Nazi ‘racial purity’ program through the eugenic and racial laws.) [Reproduced in the accompanying notebook II at Tab 36].

⁴⁶ Pictet Commentaries to Fourth Geneva Convention of 12 August 1949, Art. 64, pg 336 [Reproduced in the accompanying notebook I at Tab 4].

⁴⁷ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Art. 64, Aug. 12, 1949 [Reproduced in the accompanying notebook I at Tab 2].

⁴⁸ Patricia McGowan Wald, *The Omarska Trial – a War Crimes Tribunal Close-up*, 57 SMU L. REV. 271, 275 (2004) [Reproduced in the accompanying notebook II at Tab 43] citing Gary Bass, *War Crimes and Punishment: Tribunals are Flawed, but not Futile*, WASH. POST, Nov. 26, 2000, at B3 [Reproduced in the accompanying notebook I at Tab 51].

nationality; but in any case the laws which must be applied are the penal laws in force in the territory.”⁴⁹ As the IST judges are all inhabitants of Iraq, they meet the first requirement. The application of penal laws in force is not a problem either because the statute of the IST states that the majority of the crimes come from the 4th Geneva Convention and others come from provisions of the 1969 Iraqi Penal Code.⁵⁰ As such, there is no conflict with Article 65 of the 4th Geneva Convention.⁵¹ Also, Article 70 of the 4th Geneva Convention permits the occupying powers to prosecute criminal offenses committed before the occupation if the offenses constitute violations of international humanitarian law.⁵² Therefore, no problem exists with the IST prosecuting crimes that occurred during the period of July 17, 1968 to May 1, 2003.⁵³

Many of the crimes listed as punishable under the IST are those that constitute grave breaches of the Geneva Conventions. Grave breaches include “wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly committed against individuals or property protected by the Geneva Conventions.”⁵⁴ Grave breaches can only occur during an

⁴⁹ Pictet Commentaries to Fourth Geneva Convention of 12 August 1949, Art. 64, pg 336. [Reproduced in the accompanying notebook I at Tab 4].

⁵⁰ Statute of the Iraqi Special Tribunal, Art. 10-14 [Reproduced in the accompanying notebook I at Tab 14].

⁵¹ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Art. 65, Aug. 12, 1949 (Stating that the effect of the penal provisions enacted by the occupying power shall not be retroactive.) [Reproduced in the accompanying notebook I at Tab 2].

⁵² *Id.* at Art. 70.

⁵³ Statute of the Iraqi Special Tribunal, Art. 1 [Reproduced in the accompanying notebook I at Tab 14].

⁵⁴ Antonia Sherman, *Sympathy for the Devil: Examining a Defendant’s Right to Confront before the International War Crimes Tribunal*, 10 Emory Int’l L. Rev. 833, 845 (1996) [Reproduced in the accompanying notebook II at Tab 42].

international armed conflict.⁵⁵ If a grave breach is suspected then the occupying power is obliged to prosecute.⁵⁶ Therefore, the CPA and Governing Council were required under international law to create a forum in which Hussein and others suspected of committing grave breaches could be tried.

IV. IRAQI INTERIM GOVERNMENT

A. U.N. Security Council Resolutions 1483, 1511, and 1546

As time for transferring power to the Iraqis, through the Iraqi Interim Government, approached, the amount of power the Interim Government would hold was discussed in the U.N. Security Council. The Interim Government was scheduled to take control of Iraq on June 30, 2004,⁵⁷ although power actually was handed over two days ahead of schedule, on June 28, 2004. Each of the above Security Council Resolutions, individually and in the aggregate, gave the Iraqi Interim Government, as the government of the sovereign Iraq, the power to ratify the creation of the IST.

Resolution 1483, under Chapter VII of the U.N. Charter,⁵⁸ supports the formation by Iraqis of an Iraqi interim administration until representative government is established and takes

⁵⁵ ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW, pg 55 (Oxford University Press 2003) [Reproduced in the accompanying notebook II at Tab 38].

⁵⁶ Hans-Peter Gasser, THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS (Dieter Fleck ed., Oxford University Press 2004) (1995), pg 273 [Reproduced in the accompanying notebook II at Tab 39]. Michael P. Scharf, *Swapping Amnesty for Peace*, 31 Tex. Int'l L.J. 1, 20 (1996) [Reproduced in the accompanying notebook II at Tab 40].

⁵⁷ Press Release, U.N. SCOR, Security Council Endorses Formation of Sovereign Interim Government in Iraq; Welcomes End of Occupation by 30 June, Democratic Elections by January 2005 (June 8, 2004) (on file with UN) [Reproduced in the accompanying notebook I at Tab 28].

⁵⁸ Charter of the United Nations, Art. 39, 41, June 26, 1945 (The Security Council may take measures not involving the use of armed force as it sees fit to maintain or restore international peace and security.) [Reproduced in the accompanying notebook I at Tab 1].

over responsibility from the Authority.⁵⁹ Many of the members of the Security Council, after voting to adopt Resolution 1483, stated that they supported the speedy creation of a representative and sovereign government of Iraq by the Iraqis themselves.⁶⁰ The Interim Government was formed through the help of U.N. Special Advisor Lakhdar Brahimi and a process of consultation with many different groups of Iraqis.⁶¹ Therefore, while the Interim Government is representative of the people of Iraq, it was not a democratically elected government. The Interim Government was fully sovereign but as envisioned by the Security Council, its power was limited in certain areas.⁶²

In meetings leading up to Resolution 1511, Security Council members stated their belief that the formula for helping Iraq restore its full sovereignty included recognizing the Interim Government's capacity to "promptly deal with the crimes and human rights violations committed by the regime of Saddam Hussain [sic] and on the capacity to establish machinery for national reconciliation, transitional justice and promotion of respect for human rights."⁶³ As the Interim Government had full sovereign power, the ratification of the IST fits within the future that the

⁵⁹ S.C. Res. 1483, U.N. SCOR, 4761st mtg., U.N. Doc. S/RES/1483 (2003) [Reproduced in the accompanying notebook I at Tab 15].

⁶⁰ U.N. SCOR, 4761st mtg., U.N. Doc. S/PV.4761 (2003) [Reproduced in the accompanying notebook I at Tab 19].

⁶¹ Iraqi Interim Government, Announcement Ceremony Press Packet [Reproduced in the accompanying notebook I at Tab 11].

⁶² *Id.* (The Interim Government will exercise full sovereign power for the State of Iraq – "the power to conclude international agreements in the areas of diplomatic relations and economic reconstruction, including Iraq's sovereign debt. However, it will not be able to amend the [Transitional Administrative Law] or to form agreements which permanently alter the destiny of Iraq.") Creation of the IST would not be considered something that permanently alters the destiny of Iraq as a democratically elected Iraqi government could alter or do away with the IST as it sees fit. Also, the IST is not meant to be a permanent structure, rather it is just meant for the punishment of crimes perpetrated during a set time frame.; U.N. SCOR, 4971st mtg. at pg. 4, U.N. Doc. S/PV.4971 (2004), Mr. Cunningham (US) ("Many Iraqis have expressed their desire to have limits on the authorities of this interim Government, reflecting their view that some issues are best left to an elected Iraqi Government for decision.") [Reproduced in the accompanying notebook I at Tab 22].

⁶³ U.N. SCOR, 4812th mtg. at pg. 7, U.N. Doc. S/PV.4812 (2003), Mr. Duclos (France) [Reproduced in the accompanying notebook I at Tab 20].

Security Council foresaw for Iraq. Resolution 1511 states that “the administration of Iraq will be progressively undertaken by the evolving structures of the Iraqi interim administration.”⁶⁴ The Interim Government was an evolution of the Governing Council as the Interim Government was not ruling in conjunction with the CPA. Rather, the CPA was dissolved on the day that the Interim Government took power. As stated earlier, the Interim Government was also comprised of representatives of a wide variety of Iraqi ethnic, religious and political groups, and so while it was not democratically elected, it was nonetheless much more representative than the Governing Council had been. Since the Governing Council and its ministers embodied the sovereignty of the State of Iraq during the transitional period,⁶⁵ all of the Governing Council’s and CPA’s rights and powers of sovereignty were transferred to the Interim Government; in addition, the Interim Government had more authority and credence as it was a representative government.

Resolution 1511 was viewed by many of the UN delegates as unambiguously stressing the rights of the Iraqi people to determine their own political future, including the adoption of an Iraqi constitution and the formation of a Government through democratic elections.⁶⁶ As stated by Mr. Akram of Pakistan, the two fundamental objectives of Resolution 1511 were “the restoration of sovereignty and the transfer of authority to the people of Iraq.”⁶⁷ Resolution 1511 confirmed the legitimacy of the role played by the Iraqi leadership in establishing “a political

⁶⁴ S.C. Res. 1511, U.N. SCOR, 4844th mtg. at pg. 2, para. 5, U.N. Doc. S/RES/1511 (2003)[Reproduced in the accompanying notebook I at Tab 17].

⁶⁵ *Id.* at pg. 2, para. 4.

⁶⁶ U.N. SCOR, 4844th mtg. at pg. 3, U.N. Doc. S/PV.4844 (2003), Mr. Lavrov (Russia); Sir Emyr Jones Parry (UK), pg 4-5 (“The resolution we have adopted is quite clearly about giving control of Iraq to its people as quickly as possible. ... It reaffirms Iraq’s sovereignty and territorial integrity and the temporary nature of the Coalition’s powers.”) [Reproduced in the accompanying notebook I at Tab 21].

⁶⁷ *Id.* at pg. 6, Mr. Akram (Pakistan).

horizon for the transfer of power” and made “clear that the interim Iraqi leadership embodies Iraqi sovereignty during that transition.”⁶⁸

Part of what the Iraqi people did, through the Governing Council, and with the power given by Resolution 1511 to keep the government evolving, was create the Transitional Administrative Law (“TAL”) in March of 2004.⁶⁹ The TAL is the effective law in Iraq starting June 30, 2004 and “lasting until the formation of an elected Iraqi government pursuant to a permanent constitution...no later than 31 December 2005.”⁷⁰ The TAL set forth a timeline for the transition of power in Iraq to a fully democratic representative government. While the work of the Governing Council and CPA was supposed to come to an end when the Iraqi Interim Government assumed full authority, in accordance with Article 2(B)(1) of the Law of Administration for the State of Iraq for the Transitional Period,⁷¹ the work of the IST continued because the IST Statute was confirmed in Article 48 of the TAL.⁷² Because the work of the IST continued without interruption or delay after the Interim Government came to power, consistent with this provision of the TAL, the Interim Government implicitly ratified the IST. Once the

⁶⁸ *Id.* at pg. 10, Mr. Negroponte (US).

⁶⁹ Iraqi Interim Government, Announcement Ceremony Press Packet [Reproduced in the accompanying notebook I at Tab 11].

⁷⁰ Law of Administration for the State of Iraq for the Transitional Period, Art.2 [Reproduced in the accompanying notebook I at Tab 12].

⁷¹ *Id.* at Art. 29;

The first phase [of the transitional period] shall begin with the formation of a fully sovereign Iraqi Interim Government that takes power on 30 June 2004. This government shall be constituted in accordance with a process of extensive deliberations and consultations with cross-sections of the Iraqi people conducted by the Governing Council and the Coalition Provisional Authority and possibly in consultation with the United Nations. This government shall exercise authority in accordance with this Law, including the fundamental principles and rights specified herein, and with an annex that shall be agreed upon and issued before the beginning of the transitional period and that shall be an integral part of this Law.

Id. at Art. 2(B)(1).

⁷² *Id.* at Art. 48(A) (“The statute establishing the Iraqi Special Tribunal issued on 10 December 2003 is confirmed.”).

Governing Council and CPA were dissolved, the Interim Government had full sovereign power in Iraq and could have dismantled and stopped the work of the IST if it so chose.

While the TAL did confirm the work of the IST, Mr. Zebari, Minister for Foreign Affairs of Iraq, also sought a new resolution from the UN Security Council that would “mark a clear departure from Security Council resolutions 1483 (2003) and 1511 (2003), which legitimized the occupation” of Iraq.⁷³ He wanted the new resolution to endorse a genuine and comprehensive transfer of power on June 30, 2004, meaning “investing full authority in the interim government to run Iraq’s affairs, make its own decisions,” and make all the decisions that a fully sovereign government could make.⁷⁴ In adopting Resolution 1546, the Security Council tried to keep with Mr. Zebari’s wishes and “prepare a good resolution that truly contributes to the full transfer of sovereignty to the interim Government, without ambiguity, with the greatest possible clarity.”⁷⁵ Equally important as transferring sovereignty to the Interim Government was making sure that the Iraqi people recognize the Interim Government as the country’s main political force⁷⁶ and ensuring that the Security Council was acting with Iraq and not imposing its will on the country.⁷⁷ The Interim Government needed to be viewed by the people of Iraq as having full

⁷³ U.N. SCOR, 4982nd mtg. at pg. 3, U.N. Doc. S/PV.4982 (2004) [Reproduced in the accompanying notebook I at Tab 23].

⁷⁴ Press Release, U.N. SCOR, Briefing Security Council, Iraqi Foreign Minister Calls for Resolution Endorsing Interim Government, Recognizing Continuing Need for Multinational Force (June 3, 2004) (on file with UN), pg 1 [Reproduced in the accompanying notebook I at Tab 27]; U.N. SCOR, 4982nd mtg. at pg. 3, U.N. Doc. S/PV.4982 (2004), Mr. Zebari [Reproduced in the accompanying notebook I at Tab 23].

⁷⁵ *Id.* at pg. 8, Mr. Munoz (Chile).

⁷⁶ *Id.* at pg. 10, Mr. Konuzin (Russia).

⁷⁷ Press Release, U.N. SCOR, Briefing Security Council, Iraqi Foreign Minister Calls for Resolution Endorsing Interim Government, Recognizing Continuing Need for Multinational Force (June 3, 2004) (on file with UN), pg 6 [Reproduced in the accompanying notebook I at Tab 27].

authority.⁷⁸ Recognition of the government by its people is a key part of being sovereign. Thus, Resolution 1546 helped gain the recognition of the Iraqi people that the Interim Government possessed fully sovereign power over the State.

Mr. Brahimi confirmed that full sovereignty would be given to the Interim Government in his statements to the Security Council on June 7, 2004. Resolution 1546 gives “undiluted” sovereignty back to Iraq.⁷⁹ A national conference was to be convened “once sovereignty had been restored in order to provide a forum for Iraqi men and women around the country to debate and hopefully to forge consensus on the challenges that they face for their immediate and long-term future.”⁸⁰ This national conference was held in July of 2004,⁸¹ thus confirming the full sovereignty of the Interim Government. As a fully sovereign government, the Interim government had the power to ratify and continue the work of the IST.

Resolution 1546 delivers on what was asked of it by different delegates at the Security Council. The Resolution clearly states that occupation will end and a fully sovereign and independent Interim Government of Iraq will take control by June 30, 2004.⁸² Resolution 1546 also expressly states that under the Interim Government there will be full respect for political and

⁷⁸ U.N. SCOR, 4982nd mtg. at pg. 13, U.N. Doc. S/PV.4982 (2004), Mr. Zebari [Reproduced in the accompanying notebook I at Tab 23].

⁷⁹ U.N. SCOR, 4987th mtg. at pg. 2, U.N. Doc. S/PV.4987 (2004), Mr. Negroponte (US); *Id.* Sir Emyr Jones-Parry (UK), pg 3 (“The Security Council has powerfully endorsed the formation of a sovereign interim Government, which by 30 June will assume full responsibility and authority for governing Iraq.”) [Reproduced in the accompanying notebook I at Tab 25].

⁸⁰ U.N. SCOR, 4984th mtg. at pg. 6, U.N. Doc. S/PV.4984 (2004), Mr. Brahimi [Reproduced in the accompanying notebook I at Tab 24].

⁸¹ Iraqi Interim Government, Announcement Ceremony Press Packet [Reproduced in the accompanying notebook I at Tab 11].

⁸² S.C. Res. 1546, U.N. SCOR, 4987th mtg. pg. 2, para. 2, U.N. Doc. S/RES/1546 (2004) [Reproduced in the accompanying notebook I at Tab 18].

human rights.⁸³ One of the ways in which the Interim Government could show that there is full respect for human rights is the continuation of the work of the IST. The Interim Government took no actions after gaining sovereignty over Iraq to harm or diminish the work and power of the IST in any way. In fact, the Interim Government maintained the IST through the continued training of the judges and prosecutors,⁸⁴ the continued erection of the IST court house,⁸⁵ and the initiation of hearings by the IST investigative judges⁸⁶ those accused of crimes within the IST's jurisdiction.

It is through Resolution 1546 that the world recognizes the Interim Government of Iraq as its own entity. The transition of power to the Interim Government allowed the Iraqi people to recover their independence, their sovereignty and their dignity.⁸⁷ Part of recovering dignity is allowing those who committed such heinous crimes as those the IST was given jurisdiction over to be brought to justice in front of a court run by Iraqis. The IST allows the Iraqi people to regain their dignity and distance themselves from the horrible acts of Saddam Hussein and others by using the full sovereignty given to the Interim Government to try those defendants how the Iraqi people saw fit. As the Interim Government has issued indictments under the IST, the Interim Government has ratified the creation of the IST. This also allows the people of Iraq to

⁸³ *Id.* at pg. 1.

⁸⁴ Marlise Simons, *Iraqis Not Ready for Trials; U.N. to Withhold Training*, NY TIMES, Oct. 22, 2004 at A1 [Reproduced in the accompanying notebook II at Tab 62].

⁸⁵ Vanessa Blum, *A Slow Search for Justice in Iraq*, LEGAL TIMES, Jan. 24, 2005, at pg 1 [Reproduced in the accompanying notebook II at Tab 52].

⁸⁶ John Daniszewski, *In Iraq, a Case Without Precedent*, LA TIMES, March 6, 2005, at A1 [Reproduced in the accompanying notebook II at Tab 56].

⁸⁷ U.N. SCOR, 4987th mtg. at pg. 4, U.N. Doc. S/PV.4987 (2004), Mr. Baali (Algeria) [Reproduced in the accompanying notebook I at Tab 25].

have control over their own destiny⁸⁸ and show that they disapproved of the acts of Hussein and his cronies. The IST allows the State of Iraq and its government to demonstrate to the world that they recognize the wrongs committed under the regime of Hussein and that they are willing to try and fix them.

Under Resolution 1546 respect for the primacy of the wishes and desires of the Iraqi people is also affirmed.⁸⁹ Through the Resolution, there is agreement by Security Council members that principles of international humanitarian law will be followed.⁹⁰ In following international humanitarian law and the precedents set up by the Nuremberg Tribunal, Tokyo trials, the ICTY, the International Criminal Tribunal for Rwanda (“ICTR”), and the SCSL, it is clear that some type of judicial forum is needed in order to bring perpetrators of heinous crimes such a genocide, crimes against humanity, and war crimes to justice. The Iraqi people, first through their Governing Council and then through their TAL and the Interim Government, have declared that they will adhere to international humanitarian law through the establishment and successful implementation of the IST. The Iraqi people do not require a solely international tribunal to help them bring to justice people who committed such horrible acts against them.⁹¹ The Iraqi people were strong enough to survive under Saddam Hussein’s regime and through the IST and the authority given and recognized by Resolution 1546, are given the chance to find peace and justice for themselves without having to defer to an international community.⁹²

⁸⁸ *Id.* at pg. 5, Mr. Akram (Pakistan) (Stating that Pakistan hopes that Resolution 1546 enables the Iraqis to fully regain their sovereignty and full control over their own destiny.).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Vanessa Blum, *A Slow Search for Justice in Iraq*, LEGAL TIMES, Jan. 24, 2005, at pg 1 [Reproduced in the accompanying notebook II at Tab 52].

⁹² *Id.*

B. Laws and Usages of War

While the Interim Government does have some limits placed upon its powers, those limitations are not a product of the laws and usages of war. The Iraqi Interim Government was recognized by many countries as having the full sovereign power of the State.⁹³ As such, the Interim Government marked the end of occupation and possessed the ability to ratify the creation of the IST. As the legitimate authority of a newly sovereign state, the Interim Government did not need authorization from the laws and usages of war or international law in order to ratify a domestic creation.⁹⁴ It was enough that the Interim Government was recognized as the sovereign power of Iraq under Security Council Resolutions 1483, 1511, and 1546.

V. IRAQI TRANSITIONAL GOVERNMENT

The Transitional Government is finally the fully democratic, elected representative government of Iraq. On January 30, 2005, more than sixty percent of Iraqis braved violence to make it to the polls⁹⁵ and vote for who they wanted to represent them in government⁹⁶ in their

⁹³ U.N. SCOR, 4987th mtg. at pg. 2, U.N. Doc. S/PV.4987 (2004), Mr. Negroponte (US); *Id.* at pg. 3, Sir Emyr Jones-Parry (UK) (“The Security Council has powerfully endorsed the formation of a sovereign interim Government, which by 30 June will assume full responsibility and authority for governing Iraq.”). [Reproduced in te accompanying notebook I at Tab 25].

⁹⁴ Rajiv Chandrasekaran, *Former Exiles Given Majority on Iraqi Council; U.S. and Britain Revise Plans in Choosing 25-Member Governing Body*, WASH. POST, July 13, 2003, at A23. [Reproduced in the accompanying notebook II at Tab 54].

⁹⁵ BBC Monitoring, *Commentary Hails “Power of Democracy” in Iraq, Draws Parallels with Israel* (Feb. 1, 2005) [Reproduced in the accompanying notebook II at Tab 44].

⁹⁶ Liz Sly, *Newly Elected Sunni Encouraged by Turnout*, CHICAGO TRIBUNE, Feb. 2, 2005 at C4 [Reproduced in the accompanying notebook II at Tab 63].

first parliamentary vote in fifty years.⁹⁷ They were voting for their representatives in the Transitional Government, which will govern Iraq in the final stage of transition.

A. U.N. Security Council Resolutions 1483, 1511, and 1546

The U.N. recognized the Interim Government of Iraq as having full sovereign power for a limited period of time. The power of the Interim Government came to a close when the newly elected representatives of the Transitional Government took office and selected an executive authority. U.N. Security Council Resolution 1483 expressed the support of the UN for working towards a democratically elected representative government.⁹⁸ Delegates to the UN have, from the beginning of the occupation, expressed a desire to see the Iraqi people in control of their own future.⁹⁹

The Transitional Government, in spite of logistical problems on election day, is a fully democratic government. Unlike the Interim Government which was chosen by the Governing Council and the CPA, the Iraqi people had a direct say in the election of the Transitional Government. On January 30, 2005, the Iraqi people voted for who would represent them in the new National Assembly. The National Assembly is now working together to form a government. Resolution 1546 directly supports the Transitional Government as a key step in Iraq's transition to democracy.¹⁰⁰

⁹⁷ Rory McCarthy, *Shia Group Claims Sweeping Victory*, THE GUARDIAN (London), Feb. 2, 2005 at pg 13. [Reproduced in the accompanying notebook II at Tab 59].

⁹⁸ S.C. Res. 1483, U.N. SCOR, 4761st mtg. at para. 8(c), U.N. Doc. S/RES/1483 (2003) (The Security Council was working with the CPA, the people of Iraq, and others to facilitate a process for representative governance, including working together to facilitate a process leading to an internationally recognized, representative government of Iraq.) [Reproduced in the accompanying notebook I at Tab 15].

⁹⁹ U.N. SCOR, 4761st mtg. at pg. 3, U.N. Doc. S/PV.4761 (2003), Mr. De La Sabliere (France); Sir Jeremy Greenstock (UK) pg 4; Mr. Arias (Spain), pg 6 [Reproduced in the accompanying notebook I at Tab 19].

¹⁰⁰ S.C. Res. 1546, U.N. SCOR, 4987th mtg. at para.4, U.N. Doc. S/RES/1546 (2004) ("Endorses the proposed timetable for Iraq's political transition to democratic government including: ...(c) holding of direct democratic elections ...in no case later than 31 January 2005, to a Transitional National Assembly, which will...have

Mr. Lakhdar Brahimi, U.N. Special Adviser to Iraq, stated that “only an elected Government and an elected legislature can legitimately claim to represent Iraq.”¹⁰¹ This comment was made while U.N. delegates debated Resolution 1546 and the progress that Iraq was making in its quest for democracy. The elections on January 30, 2005 did in fact create an elected legislature in the form of a National Assembly. The government officials appointed by the National Assembly were directly elected by the Iraqi people, as the President and Ministers will be made up of those who were elected to the National Assembly. The TAL states that the Transitional Government will in fact be an elected Iraqi government¹⁰² and have the ability to issue laws in the name of the people of Iraq.¹⁰³

Being able to issue new laws allows the Transitional Government to expressly ratify the IST. While it is not necessary for the Transitional Government to pass a law explicitly stating the validity and continuance of the IST, it is the strongest method for ratifying the Tribunal’s creation and putting to rest arguments that the IST was illegally created. As discussed below, other less direct ways to ratify the creation of the IST also exist and the Transitional Government does need to ratify the IST in some manner since it is now a fully elected democratic government (one of the last steps in Iraq becoming a full democracy).

responsibility for forming a Transitional Government of Iraq and drafting a permanent constitution for Iraq leading to a constitutionally elected government by 31 December 2005.”) [Reproduced in the accompanying notebook I at Tab 18].

¹⁰¹ U.N. SCOR, 4844th mtg. at pg. 9, U.N. Doc. S/PV.4844 (2003), Mr Brahimi [Reproduced in the accompanying notebook I at Tab 21].

¹⁰² Law of Administration for the State of Iraq for the Transitional Period, Art. 2 [Reproduced in the accompanying notebook I at Tab 12].

¹⁰³ *Id.* at Art. 30.

B. Laws and Usages of War

When discussing the primacy of the ICTY over national courts for matters such as crimes against humanity and genocide, the Appeals Chamber of the ICTY in the *Tadic* case stated that if the trials were held in a national court, there would be the danger of international crimes being characterized as “ordinary crimes.”¹⁰⁴ However, with the IST, there is no danger of the crimes committed by the regime of Saddam Hussein being characterized as ordinary. The IST is not part of the normal judiciary of Iraq but rather is a separate, special court created within the national system.¹⁰⁵ As such, even though the Tribunal is mainly national and not international, the IST only has jurisdiction over certain special crimes enumerated in the IST Statute. Those crimes listed under the IST cannot be confused with ordinary crimes because ordinary crimes, such as petty larceny or theft, are not included in the IST’s jurisdiction. The only crimes the IST has jurisdiction over are specifically listed in its Statute. Thus, the international crimes of the IST still remain separate from the “ordinary crimes” of the regular national courts.

One of the Transitional Government’s duties is to draft a permanent constitution for the State of Iraq, which will create the framework for establishing a permanent Iraqi government.¹⁰⁶ In drafting that constitution the Transitional Government could show ratification of the IST by mentioning it or including a passage about it. As the Transitional Government will be recognized by many countries as finally being the fully democratic representative government of

¹⁰⁴ Prosecutor v. Dusko Tadic, IT-95-1-AR72, pg 24, para. 58 (Oct. 2, 1995) [Reproduced in the accompanying notebook II at Tab 35].; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 10, para. 2 (“A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if: (a) the act for which he or she was tried was characterized as an ordinary crime...”) [Reproduced in the accompanying notebook I at Tab 5].

¹⁰⁵ Statute of the Iraqi Special Tribunal, Article 1(a) (“The Tribunal shall be an independent entity and not associated with any Iraqi government departments.”) [Reproduced in the accompanying notebook I at Tab 14].

¹⁰⁶ Iraqi Interim Government, Announcement Ceremony Press Packet [Reproduced in the accompanying notebook I at Tab 11].

Iraq, it will have complete rights and powers of a sovereign government without any way for critics to deny its power. As such, the Transitional Government will not need to have power to ratify the IST through the laws and usages of war. Rather, the Transitional Government will have that authority within its own domestic laws simply by being the government of a sovereign nation.

The Appeals Chamber in *Tadic* described some of the ways in which approval for a tribunal could be demonstrated. *Tadic* argued that for a tribunal to be “established by law” it must mean more than just that the international court was established by a body which has limited power to make binding decisions.¹⁰⁷ The Appeals Chamber of the ICTY replied that “the establishment of the International Tribunal has been repeatedly approved and endorsed by the ‘representative’ organ of the United Nations: the General Assembly.”¹⁰⁸ Some of the ways that the General Assembly was found to have approved and to have endorsed the creation of the ICTY were participation in its set up, the election of judges, approval of the budget and also showing satisfaction and encouragement of its activities in various resolutions.¹⁰⁹

By analogy to the ways the General Assembly manifested approval of the ICTY, there are several ways that the Transitional Government could manifest ratification of the IST other than specifically enacting a resolution or law. For example, the Statue of the IST calls for its funding to come from the regular budget of the Iraqi government. As the budget will be enacted by the Transitional Government and National Assembly that is one way in which the Transitional Government will ratify the IST. The National Assembly, as the most representative form of the

¹⁰⁷ Prosecutor v. Dusko Tadic, IT-95-1-AR72, para. 44 (Oct. 2, 1995) [Reproduced in the accompanying notebook II at Tab 35].

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

Transitional Government, could also pass various laws that are connected to the Tribunal which would show approval, such as ratification of the IST's rules of procedure.

VI. FACTORS OF THE COURT WHICH MAKE IT LEGITIMATE

In order to prove the legitimacy of a tribunal, it has to be demonstrated that the tribunal was legally established, but the legitimacy also depends on the procedural protections granted to defendants.¹¹⁰ Therefore, in determining the legitimacy of the IST, both of those factors have to be considered. "What makes a trial fair are fair procedures, judges who can make fair decisions and ... equality of arms, meaning that the caliber of the defense team measures up to the ability of the prosecutors."¹¹¹ It was important for the creators of the IST that the tribunal not be seen as for revenge but rather that the tribunal guarantees the rights of the accused as prescribed under international law.¹¹²

A. Due Process

The due process requirements to a fair tribunal include the defendant having the right to know the charges against him, the right to a speedy trial, and the ability of the defendant to choose his own lawyer. All of these are rights guaranteed by the Statute of the IST.

The Statute of the IST states that an accused is entitled to a fair hearing conducted impartially with certain minimum guarantees. These guarantees include the right to be informed promptly and in detail of the nature, cause and content of the charge against him and to have

¹¹⁰ Antonia Sherman, *Sympathy for the Devil: Examining a Defendant's Right to Confront Before the International War Crimes Tribunal*, 10 EMORY INT'L L. REV. 833, 850 (1996) [Reproduced in the accompanying notebook II at Tab 42].

¹¹¹ Michael P. Scharf, *Can This Man Get a Fair Trial?*, WASH. POST, Dec. 19, 2004, at B1 [Reproduced in the accompanying notebook II at Tab 61].

¹¹² Statement by Abd al-Aziz al-Hakim, rotating President of the Governing Council from IRINnews.org, UN Office for the Coordination of Humanitarian Affairs. [Reproduced in the accompanying notebook II at Tab 58].

adequate time and facilities to prepare his defense and to communicate freely with counsel of his own choosing.¹¹³ While it took some time when the Tribunal was first created to have the accused be informed of the charges, now that the Tribunal has been in existence for a longer time period the time lapse has been greatly shortened and indictments have begun to be handed out. The accused have also had the opportunity to begin to prepare their defense and in some instances the families of the accused have facilitated the choosing of counsel.¹¹⁴ While the attorneys for Saddam Hussein complained at first that they were having trouble having access to their client, he has now met with his attorney at least once and had a preliminary hearing.

The accused also has the right to be tried without undue delay.¹¹⁵ No trials have begun yet at the IST, but it is not yet to the point of undue delay. The delay at this time is trying to make sure the Tribunal is ready for hearings and trials to start. There are still security concerns with the Tribunal and the actual courtroom where trials will occur is still under construction. The IST is doing everything in its power to keep the process moving and get the trials started.

The accused also has the right to be tried in his presence and to defend himself, including the appointment of counsel if desired. If an accused does not possess sufficient means to pay for legal assistance, the Rules of Procedure provide that he shall have counsel from the Defense Office.¹¹⁶ He also has the right to examine or have examined the witnesses against him.¹¹⁷ The

¹¹³ Statute of the Iraqi Special Tribunal, Art. 20 [Reproduced in the accompanying notebook I at Tab 14].

¹¹⁴ Kareem Fahim, *Saddam Hussein's Lawyer Aims for Bush*, Village Voice, Dec. 28, 2004 at pg. 38 [Reproduced in the accompanying notebook II at Tab 57].

¹¹⁵ Statute of the Iraqi Special Tribunal, Art. 20 [Reproduced in the accompanying notebook I at Tab 14].

¹¹⁶ Revised Version of Iraqi Special Tribunal Rules of Procedure and Evidence, Rule 46(A)(i) and Rule 49 [Reproduced in the accompanying notebook I at Tab 13].

¹¹⁷ Statute of the Iraqi Special Tribunal, Art. 20 [Reproduced in the accompanying notebook I at Tab 14].

IST provides this due process right even though there is no right to confrontation in international law.¹¹⁸

The accused also is given the right to raise defenses and present evidence admissible under the Statute and Iraqi law, and cannot be compelled to testify against himself. An accused's silence will not be taken into account in determining guilt.¹¹⁹ The Rules of Procedure for the IST also gives a defendant the right to remain silent.¹²⁰ Therefore, an accused cannot be forced to speak if he does not wish.

The Rules of Procedure also outline several guarantees for the type of evidence that can be used against an accused. For example, in determining admissibility of evidence, the court will look at whether or not a statement was voluntary or if "circumstances that might verify or impugn the statement"¹²¹ existed. The IST will also look at whether "the means by which the evidence [was] obtained casts substantial doubt on its reliability."¹²² Thus, it is unlikely that any evidence obtained through torture or coercive means would be deemed admissible by the court.

B. Competent Tribunal

One concern for the IST is that the Iraqi judges do not have the knowledge or experience to preside over trials of this magnitude. Many human rights groups, including Human Rights Watch, are concerned that the Statute for the IST fails to require that judges and prosecutors have

¹¹⁸ Antonia Sherman, *Sympathy for the Devil: Examining a Defendant's Right to Confront Before the International War Crimes Tribunal*, 10 EMORY INT'L L. REV. 833, 852 (1996) (Although the right to confront is included in the ICCPR, article 14(3)(e), the "right to examine witnesses is general in nature and does not address the specific issue of whether that right incorporates the right to direct confrontation.") [Reproduced in the accompanying notebook II at Tab 42].

¹¹⁹ Statute of the Iraqi Special Tribunal, Art. 20 [Reproduced in the accompanying notebook I at Tab 14].

¹²⁰ Revised Version of Iraqi Special Tribunal Rules of Procedure and Evidence, Rule 46(A)(iii) [Reproduced in the accompanying notebook I at Tab 13].

¹²¹ *Id.* at Rule 79(E)(ii).

¹²² *Id.* at Rule 79(E)(iv).

relevant experience trying cases of genocide, war crimes, and crimes against humanity.¹²³

However, the members of the IST have undergone numerous trainings with experts in those subjects from all over the world.¹²⁴

While the judges for the IST may not have a lot of experience with trials of the nature of the IST, it was the same situation for the judges of the ICTY and the ICTR. With the creation of international tribunals, judges serving on them have had to “learn about conducting complex trials in accordance with the most modern nuances of international law.”¹²⁵ The judges for the IST will gain experience through their work on the tribunal just as judges for the ICTY have.¹²⁶

In addition to the judges gaining experience as they go, Article 6 of the Statute of the IST requires that non-Iraqi nations be appointed as advisors or observers to the Trial and Appeals Chambers.¹²⁷ The non-Iraqis that are appointed are required to have experience acting in judicial or prosecutorial capacity in their own country or have experience in international war crimes trials or tribunals.¹²⁸ Therefore, the IST judges are not left completely alone to figure out how to handle new and complex situations. If a situation arises where they are unsure about what to do or how a particular aspect of the law applies, there will be experts whom they can ask for help and

¹²³ Human Rights Watch, *Iraq: Tribunal’s Flaws Raise Fair-Trial Concerns* (Dec. 17, 2004) (on file with Human Rights Watch) [Reproduced in the accompanying notebook II at Tab 47].

¹²⁴ Marlise Simons, *Iraqis Not Ready for Trials; U.N. to Withhold Training*, NY TIMES, Oct. 22, 2004 at A1 [Reproduced in the accompanying notebook II at Tab 62]. See John Daniszewski, *In Iraq, a Case Without Precedent*, L.A. TIMES, March 6, 2005, at A1 [Reproduced in the accompanying notebook II at Tab 56].

¹²⁵ Michael A. Newton, *Justice Abandoned*, INT’L HERALD TRIBUNE, Nov. 25, 2004 at 9 [Reproduced in the accompanying notebook II at Tab 60].

¹²⁶ Vanessa Blum, *A Slow Search for Justice in Iraq*, LEGAL TIMES, Jan. 24, 2005, at pg 1 quoting Greg Kehoe (former war crimes prosecutor at the Hague who is now helping the prosecutors in Iraq) [Reproduced in the accompanying notebook II at Tab 52].

¹²⁷ Statute of the Iraqi Special Tribunal, Art. 6 [Reproduced in the accompanying notebook I at Tab 14].

¹²⁸ *Id.*

guidance. No where in the Statute are the judges required to follow the advice they are given from the advisors thus allowing them to preserve their independence.

C. Independent and Impartial

Because of the occupation at the time of the IST's creation, a large concern is that the tribunal would be seen as "a puppet court of the occupying power."¹²⁹ "Critics say the strong involvement of the US in both Hussein's capture and imprisonment, and in the training of prosecutors and judges for the tribunal, compromises the court's fairness."¹³⁰ Another concern that the US was controlling the IST is that while the Statute of the IST provides that expenses of the tribunal are to be included in the regular budget of Iraq,¹³¹ the 2004-2005 budget was funded by the US.¹³²

While the statute of the IST was promulgated at a time that the CPA and Governing Council were in power, there are various indicators that the text of the IST reflects what the Iraqis wanted, and not simply what the US dictated. The Iraqis insisted on including the crime of aggression into the statute,¹³³ which is a crime that the US had successfully kept out of the statutes of the ICTY, the ICTR, the SCSL, and the International Criminal Court.¹³⁴ Including something in the Statute that the US specifically did not want and had managed to keep out of

¹²⁹ Michael P. Scharf, *Can This Man Get a Fair Trial?*, WASH. POST, Dec 19, 2004, at B1. [Reproduced in the accompanying notebook II at Tab 61].

¹³⁰ Kareem Fahim, *Saddam Hussein's Lawyer Aims for Bush*, VILLAGE VOICE, Dec. 28, 2004 at pg 38 [Reproduced in the accompanying notebook II at Tab 57].

¹³¹ The Statute of the Iraqi Special Tribunal, Art. 35 [Reproduced in the accompanying notebook I at Tab 14].

¹³² Kareem Fahim, *Saddam Hussein's Lawyer Aims for Bush*, VILLAGE VOICE, Dec. 28, 2004 at pg 38 [Reproduced in the accompanying notebook II at Tab 57].

¹³³ Statute of the Iraqi Special Tribunal, Art. 14. [Reproduced in the accompanying notebook I at Tab 14].

¹³⁴ Michel P. Scharf, *Can This Man Get a Fair Trial?*, WASH. POST, Dec. 19, 2004, at B1 [Reproduced in the accompanying notebook II at Tab 61].

other tribunals, demonstrates that the Iraqis really were in control of the creation of the statute and were not just puppets being controlled by the US.

Another indication that the Iraqis really were in charge of the creation of the IST is in the inclusion of the death penalty. While including the death penalty precludes many human rights organizations and European countries from helping with the tribunal,¹³⁵ all of the tribunal judges agreed it was a necessary option.¹³⁶ It was necessary because the Iraqi Penal Code from 1969, included death as a penalty for certain crimes¹³⁷ and therefore, it was something that the Iraqis strongly felt should be included.

The IST has also shown itself to be independent in not bending to the whims of other branches of Iraqi government. In September of 2004, Interim Iraqi Prime Minister stated that the trials of the IST would begin by November.¹³⁸ However, the IST did not succumb to the political pressures to start trials before elections were held January 30, 2005,¹³⁹ as the trials have not yet started, even though cases have now been referred by the investigating judges to the trial

¹³⁵ Marlise Simons, *Iraqis Not Ready for Trials; U.N. to Withhold Training*, NY TIMES, Oct. 22, 2004 at A1 [Reproduced in the accompanying notebook II at Tab 62]. See also John Daniszewski, *In Iraq, a Case Without Precedent*, L.A. TIMES, March 6, 2005, at A1. [Reproduced in the accompanying notebook II at Tab 56] and Human Rights Watch, *Iraq: Law Creating War Crimes Tribunal Flawed* (Dec. 11, 2003) (on file with Human Rights Watch) [Reproduced in the accompanying notebook II at Tab 46] and Vanessa Blum, *A Slow Search for Justice in Iraq*, LEGAL TIMES, Jan. 24, 2005, at pg 1 [Reproduced in the accompanying notebook II at Tab 52].

¹³⁶ Michael P. Scharf, *Can This Man Get a Fair Trial?*, WASH. POST, Dec. 19, 2004 at B1 [Reproduced in the accompanying notebook II at Tab 61].

¹³⁷ Iraqi Penal Code with Amendments (1969) [Reproduced in the accompanying notebook I at Tab 6].

¹³⁸ John F. Burns, *U.S. Official Says Early Trials of Hussein and Others are Unlikely, Despite Allawi's Demand*, NY TIMES, Sept. 25, 2004, at A1 [Reproduced in the accompanying notebook II at Tab 53]. See Liam Christopher, *Saddam's Aides Set for War Trial; Iraqi PM Says Tribunals to Start Next Week*, DAILY POST (Liverpool) at pg 14, 15 (Prime Minister Allawi in December of 2004 stated that trials would hopefully begin in the following week.) [Reproduced in the accompanying notebook II at Tab 55].

¹³⁹ Anne Barnard, *Iraq's Premier Vows Elections Despite Strife*, BOSTON GLOBE, Sept. 12, 2004 at A1 [Reproduced in the accompanying notebook II at Tab 50].

The Transitional Government had also has the power under the laws and usages of war and UN Security Council Resolutions 1483, 1511, and 1546 to ratify the creation of the IST. There are many avenues in which it could do this. The Transitional Government is the democratically elected representative government of Iraq and can ratify the IST through a direct law, approving the budget of the IST, and showing satisfaction with the work of the IST in other ways.

While the establishment of a tribunal is the first thing to look at in determining its legitimacy, the characteristics associated with the tribunal are equally important. The IST has all the necessary attributes of a legitimate tribunal. It provides for due process of law, a competent tribunal, independent and impartial judges, and was established by law.